2024:BHC-AUG:1249

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 3649 OF 2018
WITH X-OBJECTION NO. 101 OF 2022
IN FA/3649/2018 WITH CIVIL APPLICATION NO. 14879 OF 2018

NEW INDIA INSURANCE CO. LTD., THR ITS DIV. MANAGER, AURANGABAD
VERSUS
RANJANA BAJIRAO KAKAD AND ORS

Mr. A. B. Kadethankar, Advocate for the appellant
Mr. Umain Sayyed h/f Mr. K. N. Shermale, Advocate respondent Nos.1 and 2.

CORAM : R. M. JOSHI, J.
DATE : 16th JANUARY, 2024

P.C. :-

1. Being aggrieved by the judgment and award dated 04/07/2018 passed by the Member, Motor Accident Claim Tribunal, Sangamner in MACP No. 145/2012, insurer has preferred appeal bearing No. 3649 of 2018 and the claimants filed Cross-Objection bearing No. 101/2022 under Section 173 of Motor Vehicle Act (for short 'MV Act').

2. Parties are referred to as claimants, insurer and owner for the sake convenience.

3. The facts which led to the filing of present appeal as well as Cross-Objection can be narrated in short as under:

(i) Claimants are parents of deceased Shrihari who died on 03/05/2012 in motor vehicular accident occurred on 02/05/2012 involving motorcycle bearing No. MH-12 HM 6055 driven by the deceased himself and truck bearing No. RJ-11 GA-5008. The accident occurred at Bopodi signal chowk on Mumbai Pune express Highway within the jurisdiction of village Khadaki, Taluka and District Pune. On the faithful day the deceased was going on motorcycle and when he reached to the spot of the accident the offending truck came from behind in high speed and gave dash to the motorcycle resulting into cause of death on the spot. It is alleged that the accident has occurred due to the negligence on the part of the driver of the truck, offence came to be registered against the driver of the truck with concerned Police Station. Deceased was software engineer and working in private company drawing salary of Rs.36000/- per month. It is also claimed that he was also earning from the agriculture. A total compensation of Rs.80 lakhs was sought under different heads.

(ii) Owner of the offending vehicle though was served with the summons failed to remain present before Tribunal and hence the petition proceeded ex-parte against him. The insurer filed written statement at Exhibit 15 claiming that the deceased was riding motorcycle in the middle of the road carelessly and was responsible for the occurrence of the accident. The insurer denied all contentions of the claimants including income and compensation claim. It is a case of insurer that the driver of the offending truck had no valid and effective license at the relevant time and therefore there is a breach of terms and conditions of the policy which absolves the liability of the insurer to pay the compensation to the claimants.

(iii) After framing of the issue at Exhibit 17 claimants led evidence and relied upon police papers including first information report (Exhibit 23), spot panchanama (Exhibit 25), postmortem note (Exhibit 29) etc. For the purpose of proving income of the deceased form No.16 (Exhibit 53) submitted by MNC Amdocs Development Center India Pvt. Ltd., Pune was relied upon. The said document is proved by examining Mr. Khristi PW-2. He also proved salary breakup (Exhibit 52).

(iv) Learned Tribunal by passing impugned judgment and award granted compensation of Rs.22,76,114/- with interest at the rate of 8% per annum. The insurer and claimants being aggrieved by the said judgment and award have preferred appeal and cross-objection.

4. Learned counsel for the insurer submits that the Tribunal has committed error in restricting the contributory negligence of the

deceased to the extent of 20%. By referring to the statement of the cleaner of the truck it is submitted that from his statement it is abundantly clear that the deceased suddenly came in front of the truck at signal which has resulted into occurrence of the accident and hence his contributory negligence cannot be less than 50%. It is submitted that since the said statement of the cleaner was placed on record by the claimant himself, the Tribunal has rightly taken the same into consideration, but failed to appreciate and hold the contributory negligence of the deceased in the occurrence of accident adequately. He further submits that the driver of the offending truck was not made party to the claim petition and as such the claim petition is not maintainable for non joinder of necessary parties. It is also sought to be argued that under personal accident scheme some benefits are received by the heirs of the deceased and hence the said amount ought to have been deducted from the compensation.

5. Learned counsel for the claimants submits that the Tribunal has committed error in relying upon the statement of cleaner of the the offending truck without examining him and giving opportunity of cross-examination of this witness to the claimants. It is submitted that in absence of any evidence led by the insurer, it was improper on the part of the Tribunal to hold the contributory negligence of the deceased and

hence the said finding deserves interference. He also sought enhancement of the claim on the ground that the Tribunal has committed error in considering the form No.16 in respect of assessment year 2012-2013 when admittedly the deceased died on 03/05/2012. Thus, according to him on the basis of salary proved by the claimants the amount of compensation ought to have been determined.

6. On the basis of oral and documentary evidence placed on record claimants have proved that on 02/05/2012 and accident occurred involving motorcycle driven by the deceased and offending truck. Claimants relied upon police papers indicating registration of crime against the driver of the offending vehicle claimant (PW-1) (Exhibit 20) This witness was duly cross-examined by the insurer wherein suggestion was given which was consistent to the written statement, to the effect that the deceased was riding the motorcycle in the middle of the road and as he did not take his motorcycle to the side of the road accident occurred. Considering the written statement as well as suggestion of the insurer, this is the case sought to be made out by the insurer before the Tribunal. As against this the statement of the cleaner recorded under Section 161 of Cr.P.C. relied upon by the Tribunal seeks to give all together different version of the occurrence of the accident. The said statement is completely inconsistent to the stand taken by the insurer

before the Tribunal. In such circumstances, in absence of examination of the said witness, the Tribunal ought not to have relied upon it and recorded any finding holding deceased having contributed to the occurrence of the accident. The findings recorded by the learned Tribunal in this regard are inconsistent to the evidence on record hence deserve interference. Once the claimants have discharged their burden of proving the negligence on the part of the driver of the offending vehicle, the onus has shifted on owner and insurer to prove otherwise. In the instant case owner has remain absent and hence all his defences were taken over by the insurer. Admittedly, insurer did not examine any witness and nor led any other evidence to prove its contention about the negligence on the part of the deceased in causing of the said accident. Having regard to these facts the findings recorded by the Tribunal holding deceased responsible to the extent of 20% in causing of the said accident deserves to be set aside.

7. It is sought to be argued on behalf of the insurer that the claimants had received the compensation under personal accident scheme. Apart from the fact that any such compensation received would not disentitle the claimants for receiving compensation under M.V. Act from the tortfeasor, there is absolutely no evidence in order to show that any such compensation was ever received by the claimants. The cross-

examination of claimant No.1 is also silent on this aspect. Thus, this Court finds no substance in the said contention raised by learned counsel for the insurer.

8. Objection is also sought to be raised about non joinder of driver as party to the claim petition. In this regard it is pertinent to note that it is within the right of the claimants to raise claim against all or any of the joint tortfeasors. The consequence of non joinder of driver would be only to the effect that no compensation can be directed to be paid by the driver of the offending vehicle. This would not affect the maintainability of the claim. In any case it was open for the insurer to call the driver or any other person including cleaner of truck as witness to prove the the negligence of the deceased in the occurrence of the accident. Insurer having failed to examine him, now cannot make any grievance in this regard.

9. The claimants are seeking enhancement of the compensation on the ground that the Tribunal has committed error in considering form No. 16 for the assessment year 2012-2013 by contending that the deceased died on 02/05/2012. The assessment year is always next year of the financial year meaning thereby the form 16 for the assessment year 2012-2013 was indicating income of the year 2011-2012. This Court

therefore finds no error committed by learned Tribunal in taking into consideration form No. 16 which indicates the income of the deceased. In such circumstances, no substance is found in the contention of the claimants in this regard.

10. There is no challenge to rest of the judgment and award from either side. Having regard to the above discussion, hence following order:

ORDER

(i) First Appeal No. 3649 of 2018 stands dismissed.

(ii) Cross-Objection No. 101 of 2022 is partly allowed.

(iii) The findings of the Tribunal about 20% contributory negligence of the deceased to the extent of 20% is hereby set aside. It is held that the driver of offending vehicle was solely responsible for the occurrence of the accident and as such the owner and insurer are liable to pay the entire compensation jointly and severally to the claimants.

(iv) The balance amount of compensation be deposited in this Court within six weeks from today.

(v) The claimants are permitted to withdraw the same.

11. Pending application, if any, stands disposed of.

(R. M. JOSHI, J.)

ssp