

(2017) 05 CAL CK 0018
In the Calcutta High Court
Case No : 3895 of 2015

Chapa Ghosh (Roy) & ors.

APPELLANT

Vs

Cholamandalam MS General Insurance Co. Ltd. & anr.

RESPONDENT

Date of Decision : 12-05-2017

Acts Referred:

Constitution of India, Article 141 - Law declared by Supreme Court to be binding on all courts
Evidence Act, 1872, Section 3 - Interpretation clause
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Citation : (2017) 05 CAL CK 0018

Hon'ble Judges : Dipankar Datta, Sahidullah Munshi

Bench : DIVISION BENCH

Advocate : Uday Sankar Chattopadhyay,?Santanu Maji,?Snigdha Saha,?Souvik Dutta, Rajesh Singh

Judgement

1. The award dated January 4, 2014 passed by the Judge, Motor Accident Claims Tribunal, 3rd Court (Spl.), Jalpaiguri in M.A.C. Case No. 06/2012, arising out of an application under section 166 of the Motor Vehicles Act, 1988, is under challenge in this appeal under section 173 thereof at the instance of the claimants (hereafter the appellants).

2. The appellants are the widow and two minor children of deceased Achinta Ghosh. He died in a road accident on April 29, 2011 because of rash and negligent driving by a truck bearing registration no. WB 59A/4548 (hereafter the offending vehicle), owned and insured by the opposite parties 1 and 2 respectively before the tribunal. The appellants had claimed that the victim had an earning of Rs.6000/- per month, working as a conductor of a maxi bus bearing registration no. WB 71/3119. However, the evidence adduced in this behalf was disbelieved by the tribunal, which proceeded to determine loss of dependency bearing in mind the decision of the Supreme Court reported in (2008) 12 SCC 165 (Laxmi Devi v. Mohd. Tabbar) and selecting 15 as the

multiplier. Loss of dependency was worked out at Rs. 3,60,000/-. In addition thereto, the tribunal awarded Rs.2,000/- for funeral expenses, Rs.2,500/- for loss of estate and Rs.5,000/- to the appellant no.1 for loss of consortium, totaling to Rs.3,69,500/-. The amounts due and payable by the opposite party no.2 to the respective claimants were apportioned in the manner indicated in the award without any interest within 30 days, failing which the compensation awarded was directed to carry interest @ 6% p.a. till realisation in full.

3. Mr. Chattopadhyay, learned advocate appearing for the appellants assailed the award by raising the following points: i) the tribunal erred in rejecting the evidence led by the appellants in regard to the earning of the victim;

ii) the tribunal did not determine compensation payable to the appellants in the light of the decision of the Supreme Court reported in (2013) 9 SCC 54 [Rajesh and others v. Rajbir Singh and others], resulting in paltry amounts being awarded as compensation for loss of consortium and on account of funeral expenses;

iii) the tribunal also committed error in not awarding any amount towards loss of care and guidance of the victim to the minor children; and

iv) the tribunal erred in not exercising discretion by awarding interest to the appellants from the date of lodging of the claim application.

4. In support of his contention that the oral evidence of the appellant no.1 (deposing as PW-1) as well as the representative of the victim's employer (deposing as PW-3) were wrongly discarded by the tribunal and further that their oral evidence even in the absence of any documentary evidence to support the income of the victim ought to have been relied upon, Mr. Chattopadhyay referred to two decisions of coordinate benches of this Court reported in 2003 (3) ACC 137 [Smt. Bilasini Mondal v. National Insurance Company Limited and anr.] and 2005 (2) Cal LJ 136 [Gopal Chandra Dey v. Smt. Minakshi Sanyal & anr.]. Reliance was also placed by Mr. Chattopadhyay on a decision of recent origin of the Supreme Court reported in (2015) 2 SCC 771 [Kala Devi and others v. Bhagwan Das Chauhan and others] where the decision in Rajesh (supra) was followed and enhanced compensation was awarded.

5. Mr. Chattopadhyay, accordingly, prayed that the award of the tribunal be modified and compensation be determined in accordance with the principles settled by the Supreme Court in the decisions in Rajesh (supra) and Kala Devi (supra).

6. Mr. Singh, learned advocate appearing for the insurer (respondent no.1 in the appeal) contended as follows: (i) the award having been satisfied by the insurer, the appeal should not be entertained;

(ii) the award of the tribunal under challenge does not suffer from any infirmity warranting interference; and

(iii) if a claimant is in a position to prove earning of the victim by producing documentary evidence and there be an omission to produce such documentary evidence, oral evidence of the witnesses in regard to the earning of the victim is not enough to claim compensation.

7. To counter the decision in *Rajesh* (supra), reliance was placed by Mr. Singh on the decision of a coordinate bench of this Court of recent origin reported in (2017) 1 CAL LT 684 (HC) [*National Insurance Co. Ltd. v. Mainak Ghosh & anr.*]. Mr. Singh submitted that we may not award more than Rs.10,000/-, Rs.20,000/- and Rs.10,000/- for funeral expenses, loss of consortium and loss of estate, respectively, in view of such decision. A submission was further made that in case we choose not to agree with the decision in *Mainak Ghosh* (supra), a reference to a larger Bench ought to be made.

8. Mr. Singh also contended that if at all we are inclined to re-assess the compensation awarded by the tribunal, the appropriate multiplier ought to be selected. It was pointed out that the victim in the present case was 41 years old and, therefore, the tribunal erred in selecting 15 as the multiplier; referring to the decision reported in (2009) 6 SCC 121 (*Sarla Verma v. Delhi Transport Corporation*), it was urged that the tribunal ought to have selected 14 instead.

9. We have heard Mr. Chattapadhyay and Mr. Singh at some length and are of the considered view that the tribunal erred in determining compensation payable to the appellants as well as in denying interest from the date of lodging of the claim application.

10. The first contention raised by Mr. Singh merits outright rejection. The mere fact of the award having been satisfied would not preclude the appellants from seeking a decision from this Court on the merits of this appeal, particularly when the process of determination of compensation is found to be flawed. An appeal being the continuation of the lis, we see no reason as to why we should refrain from embarking upon an exercise of re-assessment of just and reasonable compensation payable to the appellants.

11. Since Mr. Singh has placed for our consideration the decision in *Mainak Ghosh* (supra), where the coordinate bench in paragraph 36 formulated the quantum payable on account of funeral expenses, loss of consortium and loss of estate, we have no other option but to deal with the same in a manner that judicial propriety and discipline demands.

12. The learned judges comprising the coordinate bench in *Mainak Ghosh* (supra) did not have the benefit of considering the prior decision in *Rajesh* (supra) wherein the Supreme Court had the occasion to lay down as follows: "17. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in *Santosh Devi*, (2012) 6 SCC 421. We may therefore, revisit the practice of awarding

compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs 2500 to Rs 10,000 in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In *Sarla Verma case*, (2009) 6 SCC 121, it was held that compensation for loss of consortium should be in the range of Rs 5000 to Rs 10,000. In legal parlance, "consortium" is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English courts have also recognised the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium.

18. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of compensation under the head "funeral expenses". The "price index", it is a fact has gone up in that regard also. The head "funeral expenses" does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is a follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of "funeral expenses", in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs 25,000."

(underlining for emphasis by us)

13. A bare perusal of paragraph 19 of the decision in *Rajesh* (supra) would also reveal that for loss of care and guidance for the minor children of the deceased victim, an amount of Rs.1,00,000/- was considered just and reasonable. We hasten to add that loss of a father is akin to removing the umbrella over the heads of children. Except for stray cases where responsibilities are either not remembered or shouldered, it is an acknowledged fact that a father plays a pivotal role in shaping the character, moral fibres and career of his child. Immediately after suffering the irreparable loss of a father, the minor children, if

any, are exposed to the likely wrath of nature as well as mal-treatment at the hands of elders of their family/extended family, if they are considered a burden. The love, care and affection that they could have legitimately demanded from their father is lost forever. The knowledge that a father could impart to his children and guidelines of honesty, truth and the other values of life that they could have imbibed from him would always remain out of reach. In such circumstances, the head of loss of care and guidance for the minor children of the deceased victim and allocating a substantial sum therefor to assess compensation is a significant development in the law relating to assessment of compensation which every court/tribunal dealing with motor accident claims ought to apply.

14. Having read the decision in *Rajesh* (supra) we may not be incorrect to observe that the Supreme Court finally has taken care of the question of just and reasonable compensation payable to the heirs of a victim of a road accident arising out of use of a motor vehicle having found the legislature remiss in taking any meaningful step to amend the outdated laws despite clear message having been sent in the Court's previous decisions. The said decision in *Rajesh* (supra) has been followed in the subsequent decision reported in (2015) 2 SCC 764 [*Kalpanaraj & ors. v. Tamil Nadu State Transport Corporation*] where, apart from Rs.1,00,000/- each towards loss of consortium and loss of love and affection, Rs.1,00,000/- each was awarded towards loss of estate and loss of expectation of the life of the deceased. Also, Rs.50,000/- was awarded for funeral expenses and cost of litigation.

15. It requires no reiteration that all courts/tribunals in the country are bound to follow the said decisions in assessing compensation and not be guided by decisions which tread the path of assessment of compensation that is frugal.

16. In view of the guiding principles laid down in *Rajesh* (supra) and *Kalpanaraj* (supra), which were not considered in *Mainak Ghosh* (supra), we are left with no other option but to follow the binding precedents under Article 141 of the Constitution.

17. Insofar as reference to a larger bench is concerned, as urged by Mr. Singh, we are of the considered view that the same is an argument in desperation. A decision of a high court, be it by a single judge or a bench of two judges or more, has to be in conformity with binding decisions of the Supreme Court in view of Article 141 of the Constitution. Any decision rendered by a high court either in ignorance of or in disregard of a principle of law laid down by the Supreme Court, which is a "judicial precedent", would be binding inter partes but cannot legitimately be exalted to the status of a precedent binding on other benches of the high court or even the subordinate courts.

18. Since there are observations/directions made in *Mainak Ghosh* (supra) which the Motor Accident Claims Tribunals in the State may be called upon to follow in future cases, we wish to sound a note of caution. The first sentence in paragraph

24 is an observation, which is not consistent with the law laid down by the Supreme Court in numerous previous decisions. The other observation of the coordinate bench in paragraph 26 thereof that claimants under section 163-A of the Act are being treated differently from those claiming under section 166 thereof, in our opinion, cannot give rise to an occasion for the tribunals to assess "just" compensation for them as understood in the light of section 168 of the Act. To our mind, the observation in paragraph 27 that the Second Schedule has been held redundant, irrational and unworkable and, therefore, so long it is amended "just" compensation could be worked out and provided, be it a claim under section 163-A or section 166, seems also to overlook the provision in section 168 of the Act which applies only to section 166 thereof. It has to be remembered that section 163-A embodies the principle of "no-fault liability" and thus, there is no statutory requirement of the claimants proving fault of the driver and/or rash and negligent driving of the offending vehicle. A claim application under section 166 of the Act in order to succeed must stand the test of proof of the deceased/disabled being a victim of the fault/negligence of the driver and/or rash and reckless driving of the offending vehicle. In applications under section 163-A of the Act, we repeat, the tribunal is under no obligation to assess fair and just compensation, because that is necessarily to be determined on applications under section 166 of the Act having regard to the terms of section 168 thereof. On an application under section 163-A of the Act, the compensation should be determined bearing in mind the structured formula laid down by the Second Schedule appended thereto, as interpreted and modified by the decisions of the Supreme Court dealing with the relevant provision, and the tribunals ought not to venture to assess just compensation which is relatable to section 166 applications only.

19. Turning attention to the merits of the rival claims, we are unhesitatingly of the view that the tribunal in the present case has made a mess.

20. The coordinate bench in *Smt. Bilasini Mondal (supra)* has clearly laid down the law that oral evidence is also a piece of evidence and merely because no documentary evidence could be produced in support of the earning of the victim, such oral evidence cannot be rejected outright unless it is found unreliable for any other reason. The said decision was followed by the subsequent coordinate bench in *Gopal Chandra Dey (supra)*.

21. We see no reason to take a different view. Evidence, defined in section 3 of the Indian Evidence Act, 1872, is of two kinds, - oral and documentary. All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, are oral evidence. The term "proved" in the same section, reads as follows: "Proved." - A fact is said to be proved when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

Section 5 ordains that evidence may be given in any suit or proceedings, inter alia, of existence of every fact in issue and other relevant facts. In terms of section 59, all facts, except the contents of documents or electronic records, may be proved by oral evidence. The requirement of section 60 is that oral evidence must in all cases whatever, be direct.

22. Should oral evidence on a fact in issue be not corroborated by documentary evidence, the tribunal may in its wisdom look for corroboration. However, it has to be remembered that corroboration is not a rule of law but one of caution as an assurance. It is not a rule to be rigidly followed. After all, it is not the quantum of evidence but the quality and credibility of the witness that ought to lend assurance to the tribunal for its acceptance.

23. At this stage, we may usefully refer to the decision of the Supreme Court reported in (1975) 2 SCC 326 [N. G. Dastane (Dr.) v. S. Dastane] on the standard of proof applicable in a civil case. It has been held there as follows: "24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies.***"

24. We are of the considered view that appellants' claim viewed in the light of section 3 of the Evidence Act and tested on preponderance of probability, is not improbable. The versions of the appellant no.1, PW-1, and the representative of the victim's employer, PW-3, were in conformity with the requirements of law and trustworthy, and did not suffer from inconsistency, contradiction, exaggeration or embellishment. The burden of proof having been discharged by the appellants, the onus shifted on the insurer. The insurer did not adduce any evidence to disprove that the victim was a bus conductor. Working as a conductor, the victim could have drawn Rs.6,000/- per month as monthly income, which is quite reasonable. We are, thus, unable to agree with the tribunal on this score.

25. In that view of the matter, the amount of compensation payable to the appellants warrants modification in the manner as follows :

Sl. No. Heads Calculation

i) Income Rs.6,000/- per month

ii) 1/3rd of (i) deducted as personal expenses of the deceased 2/3rd of Rs.6000/-
= Rs.4,000/-

iii) Compensation after multiplier of 14 is applied (Rs.4,000/- x 12 x 14) =
Rs.6,72,000/-

iv) Loss of estate Rs.1,00,000/-

v) Loss of consortium Rs.1,00,000/-

vi) Funeral expenses and litigation costs Rs.50,000/-

vii) Loss of care and guidance of the minor children Rs.1,00,000/-

Total Compensation Rs.10,22,000/-

26. Having regard to the terms of Section 171 of the Act and there being no evidence on record that the appellants unnecessarily delayed disposal of the claim application, we are also of the clear view that the appellants are entitled to claim interest as of right on the compensation awarded from the date of lodging of the claim application till realisation.

27. The aforesaid compensation amount shall carry interest @ 7.5% per annum from date of lodging of the claim application till payment is effected. Let a cheque for the said amount, minus whatever has been paid to the appellants, be drawn by the insurer in favour of the appellant no.1 and submitted before the Registrar General of this Court within a month from date of communication of this judgment and order, whereupon the appellant no.1 shall be entitled to collect it from the registrar general upon proving her identity and in accordance with law.

28. With the aforesaid modification of the impugned award, the appeal stands allowed. Parties shall bear their own costs. Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.