
(2014) 04 OHC CK 0077

In the Orissa High Court

Case No : MACA Nos. 66 and 98 of 2013

Divisional Manager, National Insurance Co. Ltd.

APPELLANT

Vs

Nandi Munda
 Nandi Munda Vs Prahallad Khuntia

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2014) 4 ACC 971 : (2014) 118 CLT 797 : (2014) 2 OLR 312

Hon'ble Judges : Raghubir Dash, J

Bench : Single Bench

Judgement

Raghubir Dash, J.—In both the appeals the award dated 24.9.2012 made by the learned Additional District Judge-cum-3rd M.A.C.T., Rourkela in M.A.C. Case No. 444 of 2008 u/s 166 of the Motor Vehicles Act, 1988 (for short, the Act) awarding a sum of Rs. 3,89,000/- with interest at the rate of 6% per annum from the date of the application is under challenge. In M.A.C.A. No. 98 of 2013 claimant No. 1 before the Tribunal who is the widow of the deceased and in whose favour the award has been made is the appellant. In M.A.C.A. No. 66 of 2013 the Insurance Company who is asked to indemnify the insured owner is the appellant. Both the appeals, having arisen out of the same award, were heard analogously to be disposed of by a common order.

2. In the body of this order the parties would be referred to in the manner they are arrayed in the cause title of the claim petition in order to avoid confusion.

3. Facts in brief are that on 9.11.2008 at about 2.15 P.M. the deceased was returning from his place of work riding on a bicycle along the ring road of Rourkela town. The offending vehicle, a Hero Honda motorcycle bearing Registration No. OR 14 R 0436 coming from the deceased's behind hit him as a result of which he sustained severe injuries. Immediately, he was removed to Rourkela Government Hospital where he was declared dead. It is not disputed that the offending vehicle was insured with the National Insurance Company Limited (OP. No. 2 before the Tribunal). It is also not in dispute that Prahallad

Khuntia, O.P. No. 1 before the Tribunal, is the insured owner of the vehicle and that at the relevant time his son Ranjit Khuntia was driving the vehicle.

The deceased's widow and his brother jointly filed the application as P.1 and P.2, respectively, claiming for compensation. The learned Tribunal has held that the deceased's brother being not a legal heir of the deceased, the claim application made by him is not maintainable. Finally the impugned award has been made in favour of the deceased's widow only.

4. According to the claimants-petitioners the deceased was an employee of Odisha Power Transmission Corporation Limited (OPTCL) and was attached to the office of the Assistant General Manager (Electrical), E.H.T. (O & M) Division, OPTCL, Rourkela with monthly income of Rs. 11,235/- and that at the time of his death he was 53 years old. The claimants before the Tribunal alleged that because of rash and negligent driving on the part of the motorcyclist the accident took place. The vehicle owner filed written statement admitting the accident but claiming that it happened due to absolute negligence on the part of the deceased. The Insurance Company in its written statement denied in a routine manner each and every averment made in the claim petition. However, filing one additional written statement it admitted that the offending vehicle was under coverage of insurance policy issued by it. It is also admitted that the person who was driving the vehicle at the relevant time had no valid driving licence.

5. After recording of evidence and hearing the learned counsels for the parties, the learned Tribunal concluded that the accident occurred due to the negligence of both the motorcyclist and the deceased and that the responsibility for the collusion rests equally on each of them. The learned Tribunal further accepted the monthly income of the deceased to be Rs. 11,500/- at the time of his death by reduced the loss of dependency to the extent of 50% of that income. Applying the multiplier of 11, he worked out the total loss of dependency at Rs. 7,59,000/-, but since the deceased was found to be equally responsible for the accident, he awarded 50% of the total loss of income as just compensation. Other statutory benefits were awarded in the lump sum of Rs. 9,500/-. The Tribunal further directed that the compensation amount shall carry interest at the rate of 6% per annum from the date of the application till payment.

6. In the appeal preferred by the deceased's widow, the impugned award has been challenged on the following grounds:

- (1) While computing the loss of dependency the "allowances" that the deceased used to get from his employer were not taken into account.
- (2) There is absolutely no evidence showing that the deceased was in any way responsible for the accident.
- (3) Deduction at the rate of 50% while computing loss of dependency is illegal and arbitrary.
- (4) No compensation has been awarded towards loss of consortium.

The Insurance Company in its appeal has challenged the impugned award on the following grounds:

(1) In the absence of satisfactory evidence to prove the salary as well as the employment as claimed by the claimant, the learned Tribunal committed illegality in accepting the claimant's assertion.

(2) Though the claim application was filed in 2008, the Insurance Company was served with notice only on 23.6.2011. Therefore, interest should not have been awarded from the date of application.

(3) The deceased being solely responsible for the accident, learned Tribunal ought to have refused to make any award in favour of the claimant.

(4) The multiplier applied by the Tribunal is not the correct one.

7. Learned counsels appearing on behalf of the appellants in both the appeals have reiterated their respective stand.

8. Since the negligence on the part of the deceased is in dispute, it is to be decided at the threshold as to whether he contributed to the cause of accident to any extent. Learned Tribunal has observed that the deceased cyclist while going along the one-way road suddenly crossed the road to move over the divider of the four-lane road to go to the other side of the one-way road and while the deceased was trying to pass over the divider, the accident occurred. He has observed that since the deceased was crossing a one-way road it was incumbent upon him to be very much careful. Similarly, it is observed, the motorcyclist was also required to be careful while driving on a one-way road to guard against people suddenly crossing the road or coming in front. Therefore, the learned Tribunal fixed equal responsibility on the deceased as well as the motorcyclist. In this regard the evidence of Artabandhu Mohanty who was going with the deceased riding another bicycle at the relevant time may be taken into consideration. In his cross-examination he has stated that both himself and the deceased while riding on their respective bicycle crossed the road turning to their right in order to go to the other side of the four-way lane. According to him the accident occurred while the deceased was trying to cross the road. It is on record, the motorcyclist was also proceeding in the same direction along the same one-way road. However, nowhere in his testimony the witness Artabandhu Mohanty has stated that the deceased took a sudden turn to cross the road. The accident occurred at about 2.15 P.M. Since there is no evidence on record showing that there was any traffic obstruction in between the deceased and the motorcyclist for which the latter could not have noticed the former from the minimum safe distance, it cannot be presumed that the motorcyclist could not notice the movement of the deceased. The driver of the offending vehicle could have adduced evidence as to under what circumstances the accident occurred. He is none other than the son of the vehicle owner. Either of the O.Ps. before the learned Tribunal could have examined him as a witness. Due to non-examination, adverse inference can be drawn to the extent that the accident occurred due to

the rash and negligent driving on his part. Under such circumstances, it cannot be said that the deceased being at fault to any extent contributed to the cause of accident. This is not a case of contributory negligence and, accordingly, the deduction of 50% of the compensation amount on the basis that the deceased was equally responsible for the accident is not sustainable.

9. With regard to the dispute as to what should be taken as the monthly income of the deceased, it is to be stated at the outset that while the claimant exhibited one last pay certificate (Ext. 6) to show the monthly income of the deceased, the Insurance Company has exhibited the deceased's pay particulars for the month of October 2008 marked as Exts. E/1. As already stated, the deceased died in the month of November 2008. Both Ext. 6 and E/1 have been marked without objection and there is no cross-examination as to either the genuineness or the correctness of both the documents. However, it is seen that the figures shown in the salary certificate do not tally with that in the pay particulars. In Ext. 6, the pay, Grade Pay and D.A. for October 2008 is shown as Rs. 9,600/- Rs. 1,900/- and Rs. 1,840/- respectively. In addition to that the deceased is shown to have received medical allowance, night-shift allowance, shift allowance, conveyance allowance and washing allowance. On the other hand, Ext. E/1 shows the Basic Pay, D.P. and D.A. as Rs. 4,792/-, Rs. 2,396/- and Rs. 3,378/- respectively. In both the exhibits the column with regard to "house rent allowance" is left blank implying that the deceased was not getting house rent allowance. While determining the monthly income of the deceased, the entire of the deceased's entitlement towards basic pay, D.P. and D.A. has to be taken into account and any deduction towards deceased's contribution to E.P.F., L.I.C. etc. should not be excluded. On the other hand, allowances like travelling allowance, newspaper allowance, night shift allowance, washing allowance, and the like, which the deceased used to get by virtue of his volition need not be included in his salary while computing the net earnings of the deceased. In this regard, the observation made by the Apex Court in *National Insurance Company Ltd. Vs. Indira Srivastava and Others*, may be referred to. Therefore, while computing the net income of the deceased, his pay/basic pay, D.P./Grade Pay and D.A., are to be taken into account and all other allowances that the deceased used to get and all other deduction from his salary have to be ignored. While calculating the net income of the deceased on the basis of Ext. 6 and Ext. E/1, it is found that the figures shown in one document do not tally with that of the other. The total of the pay, Grade Pay and D.A. shown in Ext. 6 comes to Rs. 13,340/-. But the total of basic pay, D.P. and D.A. shown in Ext. E/1 comes to Rs. 10,566/-. The last pay certificate marked Ext. 6 does not reflect the deductions made in the month of October 2008. The other document marked Ext. E/1 seems to be a complete statement of deceased's pay particulars of October 2008. So Ext. E/1 should be preferred to Ext. 6 for determination of the net income of the deceased. Thus, relying on Ext. E/1, the deceased's net monthly income at the time of his death is worked out at Rs. 10,566/-.

10. On the claimant's objection that no compensation has been awarded towards

loss of consortium, the learned counsel for the Insurance Company submits that Rs. 9,500/- has been awarded towards other statutory benefits which includes loss of consortium. This submission appears to be quite tenable. But the amount of Rs. 9,500/- towards all other statutory benefits appears to be very low. This should be enhanced to Rs. 15,000/-. The submission that the deduction towards the deceased's personal expenses should be 1/3rd of his net income is also justified in as much as it is in accordance with the observation made in *Smt. Sarla Verma v. Delhi Transport Corporation*, AIR 2009 SC 3104. Thus, the deduction of 50% of the income while determining the loss of dependency made by the learned Tribunal is not sustainable.

11. The multiplier of 11 adopted by the learned Tribunal is in accordance with the principles laid down in *Smt. Sarla Verma's* case (supra). The interest made payable from the date of the application also does not appear to be unreasonable merely on the ground that notice was served on the Insurance Company in June 2011. Without showing that there were unreasonable delay in service of notice due to the fault of the claimant, it cannot be said that the interest should have been made payable with effect from the date of service of notice.

12. On the basis of the observations made above, the loss of dependency is determined at Rs. 7,044/- (Rupees Seven thousand forty-four) per month and the total loss of dependency comes to Rs. 9,29,808/- (Rupees nine lakhs twenty-nine thousand eight hundred eight) (Rs. 7,044/- x 12 x 11). Adding Rs. 15,000/- (Rupees fifteen thousand) towards other statutory benefits, the compensation amount comes to Rs. 9,44,808/- which is rounded off to Rs. 9,45,000/- (Rupees nine lakhs forty-five thousand).

13. Accordingly, the appeal preferred by the claimant (MACA No. 98 of 2013) is allowed and the appeal preferred by the Insurance Company (MACA No. 66 of 2013) is dismissed. The award stands modified to the above extent. The amount of compensation is enhanced from Rs. 3,89,000/- to Rs. 9,45,000/- (Rupees nine lakhs forty-five thousand). Rest part of the ordering portion of the impugned award stands confirmed. As regards investment of part of the amount payable under the award in long term deposit, the learned Tribunal would pass appropriate order. The Insurance Company shall deposit the amount payable under the award within a period of two months hence. The learned Tribunal shall not release the amount without being satisfied that the claimant-appellant in MACA No. 98 of 2013, namely, Nandi Munda has deposited the Court fee payable on the appeal memo. On deposit of the entire awarded amount, the statutory deposit made with this Court along with the interest accrued thereon be released in favour of the Insurance Company.