
(2018) 08 SHI CK 0006

In the High Court Of Himachal Pradesh

Case No : First Appeal from Order No. 260 of 2017

Future Generali India Insurance Company Ltd.

APPELLANT

Vs

Pooja Sharma & Others

RESPONDENT

Date of Decision : 08-08-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A, 166

Citation : (2018) 08 SHI CK 0006

Hon'ble Judges : SURESHWAR THAKUR, J

Bench : Single Bench

Advocate : Chandan Goel, Ashok Kumar Verma, Hemant Thakur, Jai Prakash Sharma

Final Decision : Disposed Off

Judgement

Sureshwar Thakur, J.

1. The instant appeal, stand, directed against the award pronounced by the Learned Motor Accident Claims Tribunal, Hamirpur, upon, claim petition

bearing MAC Petition No. 49 of 2015, whereby, the learned Tribunal adjudged compensation, vis-a-vis, the LRs of deceased Banke Bihari, borne in a

sum of Rs.70,50,920/-, and, interest at the rate of 6% per annum, is, levied thereon, accrual thereof is ordered to commence, from, the date of petition,

uptill, its deposit. The compensation amount has been apportioned, amongst, the claimants in the hereafter extracted manner:-

â??Petitioner No.1 being entitled to Rs.30,00,000/-, petitioner No.2 being entitled to Rs.30,00,000/- and petitioner NO.3 being entitled to Rs.10,50,920/-

amount along with proportionate interest and the amount falling to the share of minor claimant/petitioner No.2 is ordered to be invested in a fixed

dposit in his name in any nationalized bank till he attains the age of majority .â??

Obviously indemnificatory liability thereof, has been fastened, upon the insurer/ appellant herein.

2. The deceased Banke Bihari, at the relevant time was driving vehicle bearing No. HP- 22B-5473. The aforesaid vehicle, is, reflected, in, the apposite

R.C., borne in Ex. R-2, to stand registered as LMV/car, and, its being owned by one Rattan Chand, arrayed as respondent No.1, in, the claim petition.

The deceased apparently, hence, appears to borrow the vehicle, from, respondent No.1, namely, one Rattan Chand, and, the relevant accident, as

unfolded by PW-2/A, proven by PW-2, occurred in sequel to the vehicle whereon he was atop, as its driver, hence standing entailed with a mechanical

defect,(a) defect whereof, is, unfolded therein to stand comprised in the tie rod end getting removed, from, the steering rod, leading to non functioning,

of, the steering system of the vehicle. The deceased was subjected to postmortem, and, in the apt postmortem report, borne in Ex.PW1/C, an opinion

is embodied therein, qua, the demise of the deceased being, a, sequel to blunt field cervical trauma. The aforesaid ascription, vis-a-vis, the cause of the

demise of the deceased, is not, contested by the respondents, to be, a, sequel of the apt vehicle, whereon, the deceased was atop as its driver, hence

preeminently, for the afore reason, borne in Ex.PW2/A, rather developing the apt non functioning, of, the steering of the vehicle, and, thereafter, its

taking off, from, the road and falling into a gorge.

3. The learned counsel appearing for the insurer, has, contended with vigour that the trite factum, of, the deceased, apparently borrowing the apt

vehicle, from, the owner, impleaded as respondent No.1, hence, he stepped into the shoes of owner of the apt vehicle, and, was debarred to claim

compensation, (a) given, hence, the apt liability qua thereof, rather being fastenable upon him. In formulating the aforesaid legal proposition, he has

depended, upon, a judgment of the Hon'ble Apex Court, rendered in a case titled, as, Ningamma and another vs. United India Insurance Company Ltd.,

reported in (2009)13 SCC 710, the relevant paragraph No.22 whereof is extracted hereinafter:-

â??22. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that

event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163-

A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163-A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163-A of the MVA.â??

However, the dependence made thereon, by the learned counsel for the insurer, is, grossly inapt, (a) as, his submission, emanates from his fragmentarily, hence reading the aforesaid paragraph No.22, borne in the judgment supra, whereas, he stood enjoined to also read paragraph No.34 of the judgment supra, paragraph where stand extracted hereinafter:--

â??34. Undoubtedly, Section 166 of the MVA deals with ""Just Compensation"" and even if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting ""Just Compensation"" in case the claimant is able to make out a case under any provision of law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty bound and entitled to award Just Compensation"" irrespective of the fact whether any plea in that behalf was raised by the claimant or not.â??

Moreover, upon, a, conjoint reading of both the paragraphs, aforesaid, and, making applications thereof, vis-a-vis, the extant petition, (a) thereupon, with, in the judgment (supra), the Hon'ble Apex Court, casting an expostulation, in paragraph No.22 qua the borrower of the vehicle stepping into the shoes of the owner, hence holding the concomitant effect, of, his being barred to receive compensation in a petition cast, under, Section 163-A of the Motor Vehicles Act, (hereinafter referred to as the Act), (b) does obviously restrict, the, aforesaid expostulation of law, vis-a-vis, a petition cast under Section 163 of the Motor Vehicles Act and concomitant effect thereof, is, qua the extant petition cast under Section 166 of the Act, not, attracting either the vigour nor rigor of the mandate borne, in, the earlier therewith paragraph No.22 of the judgment (supra), (c) moreso, when in para 34 thereof, it stands expostulated, qua, it being convertible into a petition cast, under, Section 166 of the Act, hence rather enjoining the tribunal concerned, to, assess just, and, fair compensation qua the apt claimants.

4. Furthermore, the learned counsel appearing for the insurer in his making the afore referred espousal, for non suiting, the claimants/successors- in-interest, of deceased Banke Bihari, has omitted to mete the apt proper focus, upon, the concluding paragraph of the verdict relied upon by him, (I) wherein, the Hon'ble Apex Court, had even proceeded, to, after making a conclusion, that, despite non existence, of, apt pleadings in the petition cast under Section 163-A of the Act, and, qua apt petition whereof it stands expostulated qua even the borrower thereof, rather, hence stepping into the shoes of the owner, thereupon, his being enjoined to be non suited, rather pronounce a direction qua dehors, non casting, of, pleadings bearing consonance, with, Section 166, of the Act, the claimants hence per se not standing deprived, to receive benefits thereof, (ii) besides therein, it proceeded to make a direction, upon, remand, of, the matter to the High Court concerned, for its hence determining the imperative fact, qua the relevant accident, being a sequel of rash, and, negligent manner of driving, of, the apt vehicle, by its driver, for thereupon compensation within the provisions, of, Section 166 of the Act, being determined qua the apt claimants. The effect of the aforesaid concluding paragraph, of, the judgment supra relied, upon, by the learned counsel appearing for the appellant, is, that even, vis-a-vis, the demise of the borrower of the apt vehicle, his successors-in-interest, being entitled to maintain, a petition under Section 166 of the Motor Vehicles Act, (iii) and, also being entitled to seek determination of just, fair, adequate compensation, arising, from the demise of their predecessor-in-interest. Consequently, the verdict of the Hon'ble Apex Court rendered in Ningamma's case (supra), does not support, the, espousal reared by the counsel for the appellant, and, is strictly confined, within, the domain of the facts constituted therein.

5. Be that as it may, the learned counsel appearing for the insurer has also proceeded to canvass with much vigour before this Court, that, with the claimants not proving qua their predecessor-in-interest, deceased Banke Bihari, while, driving the apt vehicle, his being proven to drive it rashly and negligent, (i) rather with the apt mechanical report, making, a, pronouncement qua the vehicle, whereon he was atop as its driver, rolling into a gorge, in sequel to its developing a mechanical defect, (ii) whereas, for fastening the apt indemnificatory liability upon the insurer, rather, enjoined adduction

of proof qua the rolling of the vehicle into the gorge, being a sequel to the rash and negligent driving of the apt driver, (iii) reiteratedly, when proof in

respect thereof, is, amiss hereat, thereupon, it is inapt for the learned trial Court, to fasten, the apposite indemnificatory liability, upon, the insurer.

6. However, the aforesaid submission is grossly beyond the domain and scope, of, a catena of pronouncements, made by the Hon'ble Apex Court, (i)

wherein even after attraction of the principle, of, *res ipsa loquitur*, and, also after Courts of law validating, the, preeminent proven factum, of, the

apposite fatality, of, the proven mechanical defect, hence, abruptly occurring in the vehicle, (ii) besides, both aforesaid mishap causing phenomena

rather also therein standing postulated, to be comprising, the, apt parameter(s), for, validating, the fastening, of, the, apt indemnificatory liability, upon,

the insurer. Conspicuously, the aforesaid view is pointedly pronounced, in, a verdict of the Hon'ble Apex Court rendered in a case titled as *Minu B.*

Mehta and another vs. Balkrishana Ramchandra Nayan and another, reported in 1977 ACJ 118, the relevant paragraph No.14 and 15 whereof stand

extracted hereinafter:-

¶14. In order to sustain a plea that the accident was due to the mechanical defect the owners must raise a plea that the defect was latent and not

discoverable by the use of reasonable care. The owner is not liable if the accident is due to a latent defect which is not discoverable by reasonable

care. The law on this subject has been laid down in *Henderson v. Henry E. Jenkins & Sons*.{1970 ACJ 198}. In that case the lorry driver applied the

brakes of the lorry on a steep hill but they failed to operate. As a result the lorry struck and killed a man who was emerging from a parked vehicle.

The defence was that brake failure was due to a latent defect not discoverable by reasonable care on driver's part. It was found that the lorry was

five years old and had done at least 150,000 miles. The brakes were hydraulically operated. It was also found after the accident that the brake failure

was due to a steel pipe bursting from .7mm. to . 1mm. The corrosion had occurred where it could not be seen except by removing the pipe completely

from the vehicle and this had never been done. Expert evidence showed' that it was not a normal precaution to do this if, as was the case, the visible

parts of the pipe were not corroded. The corrosion was unusual and unexplained. An expert witness said it must have been due to chemical action of

some kind such as exposure to salt from the roads in winter or on journeys near the sea. The House of Lords held that the burden of proof which lay on the defendants to show that they had taken all reasonable care had been discharged. The defect remained undiscovered despite due care As the evidence had shown that something unusual had happened to cause this corrosion it was necessary for the defendants to show that they neither know nor ought to have known of any unusual occurrence to cause the breakdown. (See Bingham's Motor Claims Cases Seventh Ed., p. 219).

15. The burden of proving that the accident was due to a mechanical defect is on the owners and it is their duty to show that they had taken all reasonable care and that despite such care the defect remained hidden. In this case in the written statement all that is pleaded is that the axle brake ring of the lorry came out and the driver lost control of the motor lorry and that the defect can develop in a running vehicle resulting in the driver's losing control of the steering wheel. Though it was stated that all precautions were taken to keep the lorry in a road worthy condition it was not specifically pleaded that the defect i.e. the axle brake ring coming out, is a latent defect and could not have been discovered by the use of reasonable care. This lack of plea is in addition to the lack of evidence and the fact that the defence set up has been rightly rejected by the Tribunal.â??

Nowat, for determining the efficacy, of, evidence appertaining to the apt vehicle, hence, developing a sudden mechanical snag, also, the snag being not earlier detectable, rather, it being latent, and, undiscoverable, enjoins, an allusion being made, to the statement of PW-2, who proved Ex.PW2/A, wherein, he rendered echoings qua the mechanical defect hence begetting, the, sequel of the vehicle rolling down into a gorge. The aforesaid echoings borne in Ex.PW2/A, and, proven by PW-2, upon, his stepping into the witness box remained uncontested by the respondents. The effects thereof are qua the counsel for the insurer also hence failing to hence disprove qua the defect being latent rather it being patent, and, hence there being evident non adherence, to, the standards of due care and caution, by the deceased Banke Bihari. The further effect thereof, is, that the apt mechanical defect occurring in the vehicle, is, construable to be a latent defect, and, hence no apt breaches of the terms and conditions of the insurance policy rather stand committed by the deceased or by its owner.

7. Furthermore, the learned tribunal has not committed any error in assessing the monthly income, of, the deceased to be Rs.32,480/-. However, it has erroneously given an increase of 50%, vis-a-vis, his apt salary, towards future prospects. The deceased, is, in the postmortem report, reflected to be aged 28 years, at the relevant time. With the Hon'ble Apex Court, in case titled as National Insurance Co. Ltd. vs. Pranay Sethi and others, reported in 2017 ACJ 2700, the relevant paragraph No.59 extracted hereinafter:

â??59.Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no

rationale not to apply the said principle to the self-employed or a person who is on a fixed salary. To follow the doctrine of actual income at the time of

death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be unjust. The

determination of income while computing compensation has to include future prospects so that the method will come within the ambit and sweep of

just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt grant of annual

increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary would not be entitled to

the benefit of future prospects for the purpose of computation of compensation would be inapposite.

It is because the criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may

perceive that the comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the

price rise does affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The

purchasing capacity of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change

in service conditions, there is always a competing attitude in the private sector to enhance the salary to get better efficiency from the employees.

Similarly, a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have

the perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which

always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really deserve acceptance.

We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal

representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to

apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of

ground reality. And, therefore, degree-test is imperative. Unless the degree- test is applied and left to the parties to adduce evidence to establish, it

would be unfair and inequitable. The degree - test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors,

namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of

life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an

addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.â? expostulating (i) that where the deceased

concerned, is rendering employment, in non government organization(s), as is the employer of the deceased, (a) thereupon, hikes or accretions, on

anvil of future incremental prospects vis-a-vis the salary drawn by him, at the time contemporaneous to the ill fated mishap, from his employer, being

also meteable thereto.

However, before applying the mandate of the aforesaid relevant paragraph, borne in the judgment supra, it is significant to also bear in mind, the age

of the deceased, (ii) since the postmortem report reflects, the deceased being aged 28 years, at the relevant time, hence with the afore extracted

paragraph, mandating, of, accretions towards future incremental prospects, vis-a-vis, the salary drawn by the deceased, being pegged upto 40%

thereof, besides being tenably meteable vis-a-vis the apposite last drawn salary. Consequently, after meteing 40% increase(s) vis-a-vis the apposite

last drawn salary, thereupon, the relevant last drawn salary of the deceased is

recognizable to be Rs.45,472/-, [Rs.32480(last drawn salary of the deceased)+Rs.12,992/-(40% of the last drawn salary). Significantly, the number of dependents, of, the deceased, are, two, hence, 1/3rd deduction is to be visited upon a sum of Rs.45472/-. Consequently, the per mensem dependency, including the future hikes towards future prospects, after meeting the 1/3rd deduction, is, worked out, now at Rs.45472/- â€" Rs.15,157= Rs.30,315/-. In sequel whereunto, the annual dependency, of the dependents, upon, the income of the deceased is computed, at Rs.30,315/-x12= Rs.3,63,780/-. After applying the apposite multiplier of 17, the total compensation amount, is assessed in a sum of Rs.61,84,260/- (Rs.sixty one lacs, eighty four thousand, two hundred and sixty only).

5. However, the quantification, of damages, by the learned Tribunal in a sum of Rs.1 lacs vis-a-vis, the widow of deceased, (i) under the head, loss of consortium, (ii)and quantification, of compensation vis-a-vis, claimants under the head, loss of love and affection, is (a) in, conflict with the mandate of the Hon'ble Apex Court rendered in Pranay Sethi's case (supra), (b) wherein, it has been expostulated, that reasonable figures, under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses being quantified only upto Rs.15,000/-, Rs.40,000/-, and Rs.15,000/- respectively, (iii) and, with no expostulation occurring therein vis-a-vis the compensation amount(s), being awardable, to the off springs of the deceased, especially under the head, loss of love and affection, hence reliefs in respect thereto being impermissibly granted. Consequently, the award of the learned tribunal is also interfered, to the extent aforesaid, of, its determining compensation, under, the aforesaid heads vis-a-vis the widow of the deceased, as also, vis-a-vis the off springs,of, the deceased. Accordingly, in addition to the aforesaid amount of Rs.61,84,260/-, the petitioners, are, entitled under conventional heads, namely, loss to estate, loss of consortium, and, funeral expenses, sums of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively, as such, the total compensation to which the petitioners are entitled comes to Rs.61,84,260/-+15,000/- +40,000/- 15,000/-= Rs.62,54,260/- (Rs. Sixty two lakhs, fifty four thousand and two hundred sixty only).

6. For the foregoing reasons, the appeal filed by the insurer is partly allowed, and, the impugned award, is, in the aforesaid manner, hence modified.

Accordingly, the petitioners, are, held entitled to a total compensation of Rs.62,54,260/--, along with pending and future interest @7.5 %, from, the date of petition till the date, of, deposit, of the compensation amount. The amount of interim compensation, if awarded, be adjusted in the aforesaid

compensation amount, at the time of final payment. Compensation amount be apportioned, amongst the claimants in the hereinafter extracted manner:-

â??Petitioner No.1 (wife): Rs.26,27,130/-Petitioner No.2 (minor son):Rs.26,27,130/-Petitioner No.3 (mother): Rs.10,00,000/-â??

The share of the minor child, shall remain invested, in FDRs, upto, the stage of his attaining majority. However, interest accrued thereon, shall be

releasable, vis-a-vis, his mother, only when she explains, of, its being required, for, the upkeep and benefit of the minor children. All pending

applications also stand disposed of. Records be sent back forthwith.