
(2014) 02 CAL CK 0021
In the Calcutta High Court
Case No : F.M.A. No. 1567 of 2008

Haripada Routh and Others	Vs	APPELLANT
United India Insurance Co. Ltd. and Others		RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22 — Motor Vehicles Act, 1988 - Section 140

Citation : (2015) 2 ACC 441 : (2015) ACJ 1850

Hon'ble Judges : J.K. Biswas, J; Sahidullah Munshi, J.

Bench : Division Bench

Advocate : Amit Ranjan Roy, Advocate, for the Appellant; Arabinda Kundu, for the Respondent

Final Decision : Allowed

Judgement

1. The appellants are the parents of the victim. They are aggrieved by an award of the Motor Accident Claims Tribunal, Paschim Medinipur dated 20th November, 2007. They filed an application in the Claims Tribunal claiming fault liability compensation. The application was filed on 9th June, 2006. The appellants' case was this. The victim, twenty-one and an energetic young man, was killed in an accident happening on 15th March, 2006 due to rash and negligent driving of a Bus No. WB-31-1414, jointly owned by one Siddheswar Ghosal and one Samser All Shah and covered by a valid policy issued by the Insurance Company. He had been carrying on fish business at Belda daily market and used to earn Rs. 5,000 per month. His death entitled them to Rs. 5.3 lakh compensation.

2. The owners of the vehicle filed a joint written statement asserting that at the date of the accident there was in force a policy issued by the Insurance Company in relation to the use of the vehicle. The Insurance Company filed its written statement calling upon the appellants to prove that the victim had been carrying on fish business, and that his monthly income was Rs. 5,000.

3. In proof of the case the first appellant, the victim's father, testified as PW1;

and while one Atul Chandra Routh (PW2) testified as an eye-witness to the accident, one Binod Behari Routh (PW3) testified as one of the victim's customers. The appellants exhibited a copy of the FIR (Ex. 1), a copy of the charge-sheet dated 30th September, 2006 (Ex. 2) and three seizure lists (Ex. 3). The Insurance Company cross-examining all the three witnesses, however, did not give any evidence.

4. The Claims Tribunal held as follows:

"The evidence proved that the accident happened as claimed by the appellants; that the victim was killed in the accident; that at the date of death the victim was 22; that the accident happened due to rash and negligent driving of the offending vehicle; and that the vehicle was covered by a valid policy issued by the Insurance Company. The appellants, however, failed to prove that the victim was in any business, or that he was an earning person. Story of PW1's unemployment was not believable. As an able bodied man he was definitely earning. Hence, Rs. 15,000 should be fixed as the victim's notional annual income."

Saying that 1/3rd of the income should be deducted towards the victim's personal expenses, and that the multiplier 17 should be applied, the Claims Tribunal granted to the appellants Rs. 1,70,000 compensation, Rs. 5,000 for pain and sufferings, and Rs. 2,000 for funeral expenses. It directed the Insurance Company to pay after deducting Rs. 50,000 paid under Section 140 of the Motor Vehicles Act, 1988 and to pay 6% p.a. interest, if the payment was not made within the time granted.

5. Mr. Roy appearing for the appellants has submitted that evidence given by the appellants proved their case in the application for compensation that from his regular fish business the victim used to earn Rs. 5,000 per month.

6. Mr. Kundu appearing for the Insurance Company has submitted that in view of the principle stated in Syed Basheer Ahamed and Others Vs. Mohd. Jameel and Another, , the onus to prove the victim's income was on the appellants whose mere assertion in the application for compensation was not sufficient to discharge the onus; and that the appellants failed to prove that the victim was an earning person.

7. Mr. Kundu's further submission is that in view of Shri Ravinder Kumar Sharma Vs. The State of Assam and Others, , even without filing any appeal against the award or cross-objection, the Insurance Company is entitled to assail the award as to deduction and choice of multiplier, because the victim was a bachelor and hence 50%, not 1/3rd, ought to have been deducted, and the multiplier ought to have been chosen on the basis of the victim's mother's age.

8. The only issue involved in the appeal is whether the Claims Tribunal was justified in treating the victim as a non-earning person.

9. There can be no doubt that the onus to prove the income of the victim of a

motor vehicle accident is on the claimants who are to prove the facts giving reliable and cogent evidence in the Claims Tribunal; and that a mere assertion on the issue in the application for compensation is not sufficient to discharge the onus.

10. The appellants' case in the application for compensation was that from his fish business at Belda daily market the victim used to earn Rs. 1,000 per month. It was stated that the victim was an energetic young man regularly earning Rs. 150 to Rs. 200 per day, and that he was the appellants' only earning son. The Insurance Company did not state any specific case in its written statement. It only called upon the appellants to prove their case that the victim was in fish business, and that he used to earn Rs. 5,000 per month.

11. In proof of the case the victim's father, the first appellant, testified as PW1. In his examination-in-chief he said that the victim was twenty-one and engaged in fish business at Belda market; that the victim used to earn Rs. 5,000 per month; that he (PW1) and his wife were dependent upon the victim's income; that he (PW1) was a high blood pressure patient; and that he (PW1) was unable to do any heavy work.

The cross-examination of PW1 is quoted below:

"Raju Routh was my son. I have not seen the accident. Not a fact that the vehicle as mentioned in my evidence was not involved in the accident. Not a fact that my statement to the fact that I am depending upon the income of my son is false. At the time of death my deceased son was 21 years old. At the time of death my deceased son was unmarried. My son died on 15th March, 2006. At the time of death age of my husband is 28 years-then says 36 years. In my possession, there is no document to prove the age of my deceased son. At present I am 43 years old. I am unemployed. In my possession there is no document to show that my deceased son had a business of fish selling. I have already received Rs. 50,000 under no fault scheme. Not a fact that I am deposing falsely. Not a fact that my husband is more than 45 years."

12. It is evident from the cross-examination that the Insurance Company did not cross-examine PW1 on anything testified by PW1 about the victim's fish business, earning Rs. 5,000 per month, his (PW1's) suffering from high blood pressure and inability to do any heavy work. A question was put only regarding documents to show that the victim was in fish business.

13. Testimony of PW2, a co-villager and also the eye-witness to the accident, is that the victim was running fish business at Belda daily market, and that he was the only earning member of his family. The cross-examination of PW2 is quoted below:

"The deceased was my neighbour. I have access in the house of the deceased. Today P.W.1 called me to depose. Not a fact that I have seen the accident in my own eyes. Not a fact that I reached the P.O. after the accident. After the accident

the vehicle was at the P.O. I did not inform the P.S. and I am not examined by the I.O. Not a fact that I am deposing falsely as deceased was known to me."

It is evident from PW2's cross-examination that he was not asked anything about his testimony that the victim was his co-villager; that the victim was running a fish business at Belda daily market; and that the victim was the only earning member of his family. Hence PW2's testimony of these facts remained completely unchallenged.

PW3 testified that the victim was personally known to him; that the victim was the only earning member of his family; and that the victim was running a fish business at Belda daily market.

The cross-examination of PW3 is quoted below:

"The deceased was known to me. I am a cultivator. I used to purchase fish from the deceased. I cannot say the daily sale of fishes of the deceased. I cannot say the income of the deceased. Not a fact that the deceased had no business for fish. Not a fact that I am deposing falsely as the deceased is known to me. Not a fact that the deceased was the only earning member of the family is false."

In cross-examination PW3 said that he used to purchase fish from the victim; but that he was not in a position to say anything about the victim's daily sale proceeds. PW3 denied the suggestion that the victim was not in fish business. He also denied the suggestion that the victim was not the only earning member of his family.

14. There is no reason to disbelieve PWs. 1, 2 and 3. The Claims Tribunal disbelieved them on the grounds that PW1 could not produce any document to show that the victim was in a fish business. This, in our opinion, is no ground to disbelieve them. Testimony of PW1 was corroborated by the testimonies of PWs. 2 and 3 and vice versa. Testimonies of PWs. 1, 2 and 3 clearly proved that the victim was in a fish business at Belda daily market.

15. It is evident that the Claims Tribunal also misdirected itself; for to strengthen its ground to disbelieve the evidence that the victim was in fish business, it recorded a finding of fact that PW1 being an able-bodied person was definitely an earning person. This finding the Claims Tribunal recorded for disbelieving the testimony of PW1 that he was an unemployed person. These facts, in our opinion, were not relevant for deciding whether the victim was an earning person.

16. Since the evidence given by the appellants proved that the victim was an earning person, in our opinion, the Claims Tribunal committed an error by treating him as a non-earning person and thus notionally fixing his annual income at Rs. 15,000. It is, however, true that the appellants could not produce anything in proof of the victim's actual income. Under the circumstances, in our opinion, the Claims Tribunal ought to have proceeded on the basis of *Laxmi Devi and Others Vs. Mohammad Tabbar and Another*, .

17. In that case the victim was killed in an accident on 12th April, 2004. The Claims Tribunal applied the Rs. 15,000 notional income provision on the grounds that no evidence of income was given. In appeal the High Court held that since at the date of the victim's death even an unskilled labourer could easily earn Rs. 100 per day, the victim's income at the date of his death could not be less than Rs. 3,000 per month; and the Supreme Court said that this view of the High Court was correct.

18. In this case the victim was killed in the accident concerned on 15th March, 2006. Evidence given by the appellants proved that he was running a fish business from a daily market. Hence, we are unable to see why he could not easily earn at least Rs. 3,000 per month. He could not be treated as a non-earning person. In Laxmi Devi the victim was around 35 and in this case 21. We are, therefore, of the opinion that Laxmi Devi principle was fully applicable to the case.

19. We, accordingly, hold that the Claims Tribunal committed an error by notionally determining the victim's annual income at Rs. 15,000. His annual income ought to have been fixed at Rs. 3,000 x 12 = Rs. 36,000.

20. The next question that arises for decision is when feeling aggrieved by the award of the Claims Tribunal the appellants have filed this appeal raising only the victim's income issue, whether the Insurance Company accepting the award, paying compensation, and not filing any cross-objection is entitled to assail the Claims Tribunal's decisions on deduction from the victim's monthly income towards his personal expenses and choice of multiplier on the basis of his age.

21. In Ravinder Kumar, Ravinder filed a suit for damages for malicious prosecution. He claimed pecuniary and non-pecuniary damages. The Trial Court dismissed the suit. The High Court holding that the defendants were guilty of malicious prosecution, abuse of power and unauthorised action granted pecuniary damages, but refused non-pecuniary damages. Ravinder filed the appeal for non-pecuniary damages. The defendants did not file any appeal challenging the decree for pecuniary damages.

22. The Supreme Court was considering whether in view of the provisions of Order 41 Rule 22 of CPC the defendants not filing any cross-objection were entitled to question the High Court's findings on malicious prosecution, abuse of power and unauthorised action, on the basis whereof it granted Ravinder pecuniary damages.

The Supreme Court holding that the defendants were entitled to question the findings of the High Court for supporting its decree of dismissal of the suit as to non-pecuniary damages said as follows :

"We hold that the respondent-defendant in an appeal can, without filing cross-objections attack an adverse finding upon which a decree in part has been passed against the respondent, for the purpose sustaining the decree to the

extent the lower Court had dismissed the suit against the defendants-respondents. The filing of cross-objection, after the 1976 Amendment is purely optional and not mandatory."

Therefore, the principle that emerges from Ravinder Kumar is this. A defendant in a suit suffering a decree granting the plaintiff a part of the relief, can, in an appeal by the plaintiff against refusal of the other relief or reliefs, assail the findings of the Court on the basis whereof the decree granting the relief was passed, for sustaining the Court's decision to refuse the relief; and that for this the defendant may or may not file a cross-objection.

Application of the above noted principle entitling a defendant to question an adverse finding of the Court below against him and his success in the appeal Court, however, cannot entitle him to setting aside of the decree granting the relief, unless he files an appeal or cross-objection against the decree granting the relief. His success, if any, will remain limited to the issue involved in the appeal.

23. We are, therefore, of the view that neither the principle stated in Ravinder Kumar, nor the one in Anamika Mondal Vs. United India Insurance Co. Ltd. and Another, , also cited by Mr. Kundu, entitles the Insurance" Company to contend in appeal that even without filing any cross-objection it can question the decisions of the Claims Tribunal to deduct 1/3rd for personal expenses and to choose the multiplier on the basis of the victim's age.

Decisions of the Claims Tribunal on these two issues (deduction towards the victim's personal expenses and choice of multiplier) could be questioned by the Insurance Company only if it filed a cross-objection on receipt of notice of this appeal.

24. In view of the foregoing discussion we hold that the appellants are entitled to the following compensation: Rs. 36,000 - Rs. 12,000 = Rs. 24,000 x 17 = Rs. 4,08,000 + Rs. 7,000 (Rs. 5,000 pain suffering + Rs. 2,000 funeral expense) = Rs. 4,15,000. The appellants are also entitled to interest, and in view of the decision of this Court dated 29th January, 2014 in FMA No. 1346 of 2013 (Niva Devi v. New India Assurance Co. Ltd. and Anr., they are entitled to 8% p.a. interest. For these reasons, we allow the appeal and order as follows. The award of the Claims Tribunal is modified substituting Rs. 4.15 lakh for Rs. 1.77 lakh and ordering the Insurance Company to pay 8% p.a. interest on Rs. 4.15 lakh from the date of filing of the application till the respective payment dates (of Rs. 1.77 lakh and Rs. 2.38 lakh), within four weeks from the date, this order is served. The department shall send the Tribunal records at once. No costs. Certified xerox.