

(2016) 06 KAR CK 0222

In the Karnataka High Court

Case No : MFA. No. 23977/2011 (MV) C/w. MFA. CROB No. 792/2013 (MV) MFA. No. 23976/2011 (MV) C/w. MFA CROB No.747/2013 (MV)

IFFCO TOKIO General, Insurance Co. Ltd.

APPELLANT

Vs

Smt. Dundawwa

RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22
Motor Vehicles Act, 1988 — Section 149 (2), Section 173(1), Section 3

Citation : (2016) 2 AnWR 675

Hon'ble Judges : Mrs. Rathnakala, J.

Bench : Single Bench

Advocate : Mr. K.H. Bagi, Advocate, for the Respondent No. 5; Mr. Vitthal S. Teli, Advocate, for the Respondent Nos. 1 to 4; Mr. Ravindra R. Mane, Advocate, for the Appellant

Final Decision : Disposed Off

Judgement

Mrs. Rathnakala, J. - MFA. No, 23977/2011 by insurer, questioning non-apportionment of contributory negligence on the rider of the other vehicle involved in the vehicular accident dated 02.07.2009 involving two motorbikes, one of which is KA-23/W-6338 is insured by the appellant. The appellant is also challenging the liability fastened on it by the Tribunal to indemnify the risks of the owner of the vehicle. Whereas, MFA. Crob. No.792/2013 is filed by the family members/dependents of deceased Appasab Babu Chundhawad who died in the motor accident that occurred on 02.07.2009, seeking enhancement in the compensation awarded by the Tribunal MFA. No. 23976/2011 is also by the insurer, questioning non-apportionment of contributory negligence on the rider of opposite - vehicle, and liability in respect of the above said accident. Whereas, MFA. Crob. No.747/2013 is filed by the family members/dependents of deceased Alagonda Biradar who died in the above motor accident of 02.07.2009, seeking enhancement in the compensation awarded by the Tribunal.

2. Both these appeals and cross-objections, since directed against the common Judgment and Award dated 29.12.2010 passed in MVC. Nos. 2646/2009 and 190/2010 respectively on the file of the Presiding Officer, Fast Track Court-II Member, Additional MACT, Belgaum, for brevity ("Tribunal") are heard together and disposed of by this common judgment.

3. Briefly stated, the facts leading to above cases is that on 02 07.2009, Alagonda Giramalla Biradar and Appasab Babu Chunchawad were proceeding on motorcycle bearing No.KA-29/J-3641, Alagonda Giramalla Biradar was riding the motorcycle and Chunchawad was a pillion rider. At about 10.15 p.m, when they cat Rs. near the Koligudd village on Harugr Athani road, a motorcycle bearing No.K 23/W-6338 ridden by its rider came from opposite direction in very high speed at rash and negligent manner and dashed their motorcycle and caused the accident Due to the impact, Alagonda Giramalla Biradar died at the spot and Appasab Babu Chunchawad sustained grievous injuries but succumbed to the injuries on the next day. Both of them were hale and healthy at aged 40 years. They were agriculturists by profession and also working as Goggerymen. The claimants both the cases are widow, children and mother of the deceased persons respectively. The claim was contested the insurer of the offending vehicle. The Tribunal, on over all consideration of the evidence adduced by the respective parties and allowed the claim petitions filed by the claimants and awarded compensation of Rs. 5,25,000/- in respect of death of Babu Chunchawade (MVC. No. 2646/2009) an Rs. 5,36,000/- in respect of death of Alagonda Biradar (MVC. No. 190/2010) respectively.

4. Shri. Ravindra R. Mane, the learnt counsel for the appellant-Insurer in both the appeals vehemently submits that initially, the jurisdictional police had registered criminal case against the rider of the motorcycle bearing No.KA-29/J-3641 namely, Alagonda Biradar, on investigation, charge sheet was filed against the rider of another motorcycle bearing registration No.KA-23/W-6338, having found that riders of both the vehicles were equally responsible for the accident. Admittedly, it is an accident on account of head on collision, necessarily the rider of the two motor cycle are equally responsible for the accident. The Tribunal was not justified in holding that the rider of motorcycle bearing No. KA-23/W/6338 alone was responsible for the accident. The Tribunal ought to have apportioned the contributory negligence on both the vehicles at the ratio of 50% each. The finding of the Tribunal fastening liability on the appellant-insurer is contrary to the principles laid down by the Apex Court in *Blloy Kumar Digar v. Bidyadhar Datta and others*, reported in (ii) 2006 ACC-36 SC and also the judgment of this Court rendered in *New India Assurance Co. Ltd., v. Venkataramana and others* (ii) 2006 ACC 798 KAR. In the circumstances, the insurer is not liable to indemnify the risk of the owner to its full extent. Further, the rider of the motorcycle No, KA-23/W-6338 did not possess the valid and effective driving licence. Sri. Ravindra R. Mane, contends that even the quantum of compensation awarded by the Tribunal in both the appeals are on higher side. In the absence of any documentary proof, the Tribunal would not have accepted

the evidence of the claimants that the deceased in both the cases were earning Rs. 125/ - per day. That apart, out of the entire compensation capitalised, a sum equivalent to the percentage of contributory negligence of the rider of the motorcycle bearing No. KA- 23/W-6338 has to be deducted. Accordingly, the judgment and award in both the cases requires to be modified.

5. In reply Shri. Vitthal S. Teli, learned counsel for the Cross-objectors/claimants-dependents of the deceased in both the appeals submits that though the contention of the insurer that the rider of the motorcycle bearing No.KA-23/W-6338 did not possess the driving licence, the same was not proved during the enquiry before the Tribunal by adducing the cogent evidence and the driver not possessing the valid licence cannot be a ground open to be urged at the appeal stage, that too when they have not disputed the documents produced during the enquiry. There was no contributory negligence on the part of the rider of the motorcycle bearing No. KA-23/W-6338. On the contra, the claimants have examined one eyewitness to establish that the accident was solely due to rash and negligent driving of the rider of the motorcycle bearing No.KA-29/J-3641. The Tribunal has overlooked the evidence adduced by the claimants regarding agricultural income derived from agriculture. The amount awarded towards "Loss of consortium" and "Loss of love and affection" is too meager and the same has substantially reduced the compensation payable to the claimants and prays for enhancement of compensation by modifying the judgment and award of the Tribunal.

6. In the light of the above rival submissions, the point that arise for my consideration is:

(i) Whether the rider of the motorcycle bearing registration No.KA-29/J-3641 is guilty of contributory negligence? If so what is the ratio amongst the two offending motorcycles?

(ii) Whether the owner of the motorcycle bearing registration No.KA-23/W-6338 committed breach of conditions of policy? If so, whether the insurer shall be absolved from its liability to indemnify the owner/insured?

(iii) Whether the compensation awarded by the Tribunal in both the cases is inadequate?

7. Re. Point No (i) & (ii): It is the submission at the Bar that subsequent to the accident, the rider of the motorcycle bearing registration No. KA-23/W-6338 also died. The pillion rider of the said motorcycle has preferred a claim petition before the jurisdictional Tribunal and the same is pending adjudication before the Tribunal. Be that as it may, it emerges from the evidence on record that the rider of the motorcycle bearing No. KA-23/W-6338 was not its owner and the owner of the said motorcycle namely, Joteppa Sadashi Teradal did not contest the claim petition, he remained ex parte despite service of notice. The insurance policy, Ex.P.1 covering the risk of the owner of the vehicle was in existence/valid, as on the date of the accident. The insurer has not led any rebuttal evidence to

establish that the motorcycle bearing No. KA-29/J 3641 was not involved in the accident. Initially, the complaint was given involving the motorcycle No. KA-23/W-6358 and the said motorcycle has not been seized by the investigation officer.

8. The Tribunal, while appreciating the evidence on record has stressed upon the fact that the rider of the offending vehicle was not charge-sheeted for the offence punishable under Section-3 of the Act and the insurance company, though had independently investigated the matter has not placed any rebuttal material in support of their. That led the Tribunal to return its conclusion that the defence set up by the insurer was not acceptable. As per Section 149 (2) of the Act, the defence that is available to the insurer against insured is that (1) the vehicle was not driven by a named person (2) it was driven by a person who was not having duly granted licence and (3) or a person driving the vehicle was disqualified for holding or obtaining a driving licence. The insurance company since failed to prove any one of the above defence; more particularly, the second one, the finding arrived at by the Tribunal cannot be attributed as perverse as regards the composite/contributory negligence on the part of the two motorcycles the Tribunal considered the contents of 4 spot mahazar wherein it reflected that the offending vehicle was coming from south north direction and the offended vehicle was heading toward south. Stressing on the brake mark that appeared on the road and having found that the offending vehicle dragged the victim's vehicle to a further distance of 14-15 feet towards backside from the spot, the Tribunal has come to the conclusion that the offended vehicle alone was responsible for occurrence of the accident. On careful perusal of the contents of the mahazar it ensures that the accident did occur in the middle of the road and there was about 9 feet space available towards eastern side up to the edge of either side of the road. The Tribunal has taken into sight of this fact, while considering as to whether there was any contributory negligence on the part of the rider of the motorcycle-No.KA-29/J-3641. The Tribunal ought to have read/considered the entire contents of the spot mahazar before drawing such an inference. On a careful scrutiny of the contents of the spot mahazar in its entirety, it clearly indicates that either of the vehicles were not maintaining the safety rules cautiously. However, having regard to the fact that the vehicle on which the victims were riders was pushed back by Motorcycle bearing No. KA-23-W-6338, it can be safely inferred that the contributory negligence on the part of the rider of the offended vehicle (KA-29/J-3641) is lesser, when compared to that of the offending vehicle KA-23/W-6338). The claimants have examined a witness to support their case that the rider of the offending vehicle was alone responsible for the accident. Looking to the fact that the accident had occurred at 10.15 p.m in the night, it is highly improbable for this witness who was a relative to one of the claimants to be present at the spot and witnessing the accident. Under such circumstances, an adverse inference would be drawn that this witness was brought before the Tribunal only to create evidence in support of the claimants. Added to this, the appellant-insurer had raised the contention, that the rider of the offending vehicle is also equally responsible for the accident, but the insurer has neither examined any

witness nor produced any documents to substantiate the same. As discussed above, the document i.e., spot panchanama produced by the claimants themselves is sufficient to hold that the accident was due to head-on-collision between two vehicles in the middle of the road. However, having regard to the fact that the victims' vehicle was dragged back to a considerable distance, higher composite/contributory negligence needs to be fixed on the part of the offending vehicle i.e., rider of the motorcycle bearing No.KA-23/W-6338 rather than the offending vehicle i.e., No. KA- 29/J-3641. For the reasons stated above, I am of the considered opinion that it is just and proper to apportion the composite/contributory negligence on the part of the offended and offending vehicle in the ratio of 25% and 75% respectively. However, as regards the cross-objectors in MFA. Crob. No. 792/2013 who are the family members/dependents of the deceased-pillion rider (Appasab Babe Chundhawad) is concerned, question of attributing any contributory negligence on his part does not arise, inasmuch as, he was a pillion rider of the offending vehicle. They are entitled to seek compensation even without arraigning the rider and owner of the vehicle of the offending vehicle and they can claim the entire compensation from the insurer of the offending vehicle, in the light of the Judgment of the Apex Court in the case of Khenyei v. New India Assurance Company Limited and another 2015 (2) An.W.R. 880 (SC) = (2015) 9 SCC-273). The claim arising out of death of Alagonda Biradar who was riding motorcycle No. KA/29-J-3641, since his indulgence in the accident is by 25% of contributory negligence, the compensation amount worked out shall be by reducing 25% proportionately from the total compensation payable to the claimants. Point Nos (i) & (ii) are answered accordingly. Consequently, for the reasons narrated above, to that extent, both the appeals filed by the appellant-insurer is liable to be allowed in part, insofar as it relates to apportionment of contributory negligence.

9. Re. Point No (iii): Indisputably, both the rider and pillion rider of the motorcycle bearing No.KA-29/J-3641 namely, Alagonda Giramalla Bitadar and Appasab Babu Chundhawad succumbed to the injuries sustained in the accident. The Tribunal on meticulous examination of the documentary proof has found both of them were aged 45 years and apart from agricultural work, both of them were working in Jaggery manufacturing unit apart from their agricultural work. The loss to the family on account of death of the deceased was their physical involvement in the agricultural operations and also supervision of the estate. The Tribunal has assessed the income of the deceased persons at Rs. 125/-per day and after deducting 1/5 and 1/5th respectively towards their personal and living expenses, rightly the multiplier-14 to assess the compensation payable towards "loss of dependency" in both the cases. However, having regard to the totality of facts and circumstances of the case, though there was no documentary proof, as regards the income of the deceased persons, having regard to the fact that the accident is of the year 2009 (02.07.2009), it is just and proper to take the notional income of the deceased in both the cross-objections at Rs. 6000/- per month. Thus, the Cross Objectors in MFA. Crob. No. 792/2013 in MFA. No.

23977/2011 (claimants in MVC. No.2646/2009) are entitled to compensation of i.g. Rs. 7,56,000/- towards "loss of dependency", $(Rs. 6000-1500 (1/4) = 4500 \times 12 \times 14 = 7,56,000/-)$ as against Rs. 4,72,500/- awarded by the Tribunal.

The deceased Appasab Chunchawade, left behind him his widow who lost her husband, under midway of her life, aged mother and two minor children. Under such circumstances, the compensation awarded by the Tribunal towards "loss of consortium" and "loss of love and affection" is slightly on the lower side and the Tribunal is not justified in not awarding any compensation towards "loss to the estate". Hence, it is just and proper to award a sum of Rs. 50,000/- towards "loss of consortium", as against Rs. 15,000/- and Rs. 50,000/- towards "loss love and affection" as against "Rs. 10,000/- and another sum of Rs. 10,000/- towards "loss of estate". However, the compensation awarded by the Tribunal towards "funeral expenses", "transportation of dead body & incidental expenses" and "medical expense are just and reasonable and does not a for interference. Thus, in all, the Cross Objector in MFA. Crob. No.792/2013 (the dependents-claimants in MVC. No.264 2009) are entitled for total compensation of Rs. 8,93,500/- (Rupees eight lakhs nine1 three thousand five hundred only) as against Rs. 5,25,000/- awarded by the Tribunal. The enhanced compensation would come Rs. 3,68,500/-.

10. Applying the same analogy, the Cross Objectors in MFA. Crob. No. 747/ 2013 in MFA. No.23976/2011 (claimants MVC. No. 190/2010) are entitled for compensation of Rs. 8,06,400/- towards "loss of dependency", $*(Rs. 6,000-1500(1/4) = 4500 \times 12 \times 14 = 7,56,000/-) / (Rs. 6,000-1200 (1/5) = 4800 \times 12 \times 14 = 8,06,400/-)$ as again Rs. 5,04,000/- awarded by the Tribunal. The deceased Alagonda Biradar, left behind his the widow who lost her husband under midway of her life, aged mother and fa minor children. Under such circumstance the compensation awarded by the Tribunal towards "loss of consortium" and "loss of love and affection" is slightly on the low side and the Tribunal is not justified in not awarding any compensation towards "loss to the estate". Hence, it is just and prop to award a sum of Rs. 50,000/- towards "loss of consortium", as against Rs. 10,000,-/- and Rs. 50,000/- towards "loss love and affection as against Rs. 10,000/- and another sum of Rs. 10,000/- towards "loss of estate". However, the compensation awarded by the Tribunal towards "funeral expenses", "transportation of dead body & incidental expenses" are just and reasonable and does not call for interference. Thus, in all, the Cross-Objector in MFA. Crob. No.747/2013 (the dependents-claimants in MVC. No. 190/20101 are entitled for total compensation of Rs. 8,78,400/- (Rupees eight lakhs seventy eight thousand only) /Rs. 9,28,4000/- [(Rupees nine lakhs twenty eight thousand four hundred only)] as against Rs. 5,36,000/- awarded by the Tribunal. The enhanced compensation would come to Rs. 3,42,000/- . However, in view of my finding on point No (i) & (ii), there was a composite/ contributory negligence of 25%. on the part of the deceased Alagonda Biradar, being the rider of motorcycle No.KA-29/J-3641. Hence, 25% of the compensation payable, to the claimants in MFA. Crob. No.747/ 2013 shall be deducted from out of the total

compensation payable to them. Point No (iii) is answered accordingly. For the foregoing reasons, I pass the following order:

(i) MFA. No.23977/2011 arising out of MVC. No.2646/2009 and MFA. No. 23976/2011 arising out of MVC. No. 190/2010, filed by the appellant-insurer are allowed in part. The Contributory negligence in respect of the vehicular accident dated 02.07.2009 is apportioned at 75% against the rider of Motorcycle bearing No. KA23/W-6338, and at 25% against the rider of motorcycle No.KA-29/J-3641 respectively.

(ii) MFA. Grob. No.792/2013 in MFA. No.23977/2011 arising out of MVC. No.2646/2009, filed by the family members-dependents of deceased Babu Chundhawade is allowed in part. In modification of the impugned judgment and award dated 29.12.2010 passed by the Fast Track Court-II and Additional MACT., Belgaum in MFA. No. 2646/2009, the compensation payable to the claimants-cross objectors is enhanced from Rs. 5,25,000/- to Rs. 8,93,500/- (Rupees eight lakhs ninety three thousand five hundred only). The enhanced amount would come to Rs. 3,68,500/-. It is made clear that the Judgment and award of the Tribunal, insofar as it relates to the rate of interest, apportionment of compensation amongst the claimants shall remain un-altered.

(iii) MFA. Crob. No.747/2013 in MFA. No.23976/2011 arising out of MVC. No. 190/2010, filed by the family members-dependents of deceased Alagonda Biradar is allowed in part. In modification of the impugned judgment and award dated 29.12.2010, passed by the Fast Track Court-II and Additional MACT., Belgaum in MFA. No. 190/2010, the compensation payable to the claimants-cross-objectors is enhanced from Rs. 8,78,000 (Rupees eight lakhs seventy eight thousand only) Rs. 5,36,000/ to Rs. 8,78,000/ [Rs. 9,28,400/-] [(Rupees nine lakhs twenty eight thousand four hundred only)]. However, claimants are entitled to receive only Rs. 6,58,500 (Rupees Six lakhs fifty eight thousand five Hundred only) \ [Rs. 6,96,000/-] [(Rupees six lakhs ninety six thousand three hundred only)] i.e., after giving deduction of 25% of the total compensation towards contributory negligence on the part of the deceased 8,78,000-2,19,500/- [(Rs. 9,28,400 - 2,32,100] (25%) = 6,58,500/[6,96,300] with interest at the rate of 6% per annum from the date of petition till the date of deposit.

(iv) The appellant-insurer shall deposit the enhanced compensation amount with accrued interest before the Tribunal, within four weeks from the date of receipt of a certified copy of the judgment.

(v) In view of the order passed on IA-1/2013, the claimants in MFA. Crob. No. 747/2013 are not entitled to claim interest on the enhanced compensation for the delayed period of 425 days.

(vi) The Registry is directed to transmit the statutory deposit if any, made by the appellant-insurer along with the lower court records to the Tribunal forthwith.

(vii) Draw up the award accordingly.

Order on "Being Spoken to

Heard both sides.

There is an arithmetical error in para-10 of the judgment while calculating the loss of dependency that instead of deducting 1/4th of the income towards personal expenses of the deceased (since the claimants are 4 in numbers), 1/4th has been deducted. It must be Rs. 4,500/- (Rs. 6,000-1,500(1/4)) Accordingly, the loss of dependency works out to Rs. 7,56,000/- (Rs. 4,500/- x 12 x 14 = Rs. 7,56,000/-. Consequently, in the operative portion of the judgment in para-3, amendment is carried out to the quantum of compensation in MFA No.23976/2011. Consequently, The compensation is enhanced from Rs. 5,36,000/-to Rs. 8,78,000/-. Accordingly, the claimants will be entitled to receive Rs. 6,58,500/-instead of Rs. 6,96,300/-;-. Consequently, last two lines of para-24 has to be corrected as Rs. 8,78,000-2,19,500 = Rs. 6,58,500/-.

Registry to carry out necessary corrections and issue fresh copy to the counsel.