
(2010) 02 GAU CK 0059

In the Gauhati High Court

Case No : MAC Appeal No's. 260 of 2005 and 42 of 2006

Kabita Devi and Others

APPELLANT

Vs

Oriental Insurance Company Ltd. and Others

RESPONDENT

Date of Decision : 03-02-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 166, 170, 173
Penal Code, 1860 (IPC) — Section 279, 304A, 337, 338, 427

Citation : (2011) ACJ 1934 : (2010) 4 GLR 72 : (2010) 3 GLT 9

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Advocate : D. Mazumdar, A.J. Sarma, R. Sarma, in MAC Appeal No. 260 of 2005 and S. Dutta, M. Choudhury and R. Kaur, in MAC Appeal No. 42 of 2006, for the Appellant; S. Dutta, M. Choudhury, R. Kaur and D. Baruah, in MAC Appeal No. 260 of 2005 and D. Mazumdar, A.J. Sarma and R. Sarma, in MAC Appeal No. 42 of 2006, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—These two appeals u/s 173 of the Motor Vehicles Act, 1988 ("the Act") arise out of the order dated 8.7.2005 passed in MAC (DJK) No. 1914/2003 (old No. 1671/2003) by the learned Member, Motor Accident Claims Tribunal, Guwahati, assessing the compensation of Rs. 12,85,600 payable for the death of the claimants' predecessor in interest in a motor vehicular accident occurred on 26.5.2003 and directing the insurance company, namely, the Oriental Insurance Company Ltd. to pay 50% of such amount, there being no dispute relating to the contract of insurance between the owner of one of the offending vehicles and the insurance company, by holding that there was "composite negligence" in respect of both the vehicles bearing Registration Nos. AS-25/B-9625 (Truck) and AS-02/B-3031 (Maruti Car), where the deceased being the owner was traveling.

2. MAC Appeal No. 260/2005 has been filed by the claimants for enhancement of the amount of compensation awarded by the learned Tribunal and also

challenging the finding relating to the "composite negligence" recorded by the learned Tribunal in the said order. MAC Appeal No. 42/2006 has been filed by the Oriental Insurance Company Ltd. challenging the quantum of compensation awarded by the learned Tribunal by the said order, who has obtained the permission u/s 170 of the Act from the learned Tribunal to contest the proceeding before it on all the grounds available to the owner of the vehicle apart from the grounds available to it u/s 149(2) of the Act. The challenge made to the quantum of compensation assessed by the learned Tribunal in the said appeal is basically on the ground that a wrong multiplier has been applied to work out the amount of compensation payable, which according to the insurance company ought to have been "3", instead of "8" as applied by the learned Tribunal.

3. Since both the appeals arise out of the same order passed by the learned Tribunal, as indicated above, those are taken up for hearing and disposal together.

4. An application u/s 166 of the Act was filed by the appellants in MAC Appeal No. 260/2005, ("the claimants") before the learned Tribunal impleading the insurance company (appellant in MAC Appeal No. 42/2006) as well as the owner and the driver of the motor vehicle bearing Registration No. AS-25/B-9625 (Truck), claiming compensation of Rs. 33,00,000, contending inter alia that on 26.5.2003 while the vehicle bearing Registration No. AS-02/B-3031 (Maruti Car), belonging to Dr. Baladev Sarma, was proceeding from Guwahati to Nagaon by the National Highway 37, driven by a duly licensed driver, the vehicle met with an accident near Jagiroad, as the Maruti Car, in which the deceased along with the claimant No. 1 with the driver was traveling, collided against the stationary Truck bearing Registration No. AS-25/B-9625. It has further been contended that the said Truck was parked on the National Highway without having the rear wheels and by putting it on a jack without taking any precautionary measures and also without having any parking light. According to the claimants as a result of the accident Dr. Baladev Sarma received serious injuries on his person and he was declared dead in the hospital at Jagiroad, where he was taken. The said proceeding has not been contested by the owner and the driver of the Truck though the notices were served on them. The insurance company, who at the relevant point of time had a contract of insurance with the owner of the Truck, however, contested the proceeding by filing written statement denying the claim of the claimants and putting them to prove the facts and also by filing additional written statement contending that the accident occurred due to the negligence on the part of the driver of the Maruti Car.

5. On the basis of the pleadings of the parties, the learned Tribunal formulated the following issues for decisions:

1. Whether the alleged accident took place on 26.5.2003 near Jagiroad P.S. on the N.H. 37 caused due to rash and negligent driving of the driver(s) of vehicles No. AS-25/B-9625 or AS-01/B-3031 ?

2. Whether Dr. Baldev Sarma died/as a result of the said motor accident?

3. Whether the claimants are entitled to get any compensation for the death caused to Late Dr. Baldev Sarma in the said accident, if yes, what will be the just and reasonable amount of compensation?

4. Who amongst the O.P. is liable to pay compensation to the claimants ?

6. The claimants in order to prove their case, examined 3(three) witnesses, namely, Shri Matiur Rahaman, the driver of the Maruti Car as PW-1; the claimant No. 1 herself, widow of Dr. Baladev Sarma, namely, Mrs. Kabita Devi as PW-2 and Shri Balin Chandra Saikia as PW-3. The claimants have also proved 17 (seventeen) documents, i.e., the police report (Ext.-1), the photographs taken in respect of the said accident (Exts.-2, 3 and 4), driving licence of the driver of the Maruti Car (Ext.-5), post mortem examination report (Ext.-6), the service book to prove the age of the deceased (Ext.-7), the salary certificate to prove the income from the salary of the deceased (Ext.-8), certificate of dependency issued by the competent authority (Ext.-9) and the copies of the books authored by the deceased (Exts.-10 to 17). The insurance company, as noticed above, in view of not contesting the proceeding by the owner and the driver, obtained the permission u/s 170 of the Act and had examined its Investigator Shri Goutam Patowari as DW-1, through whom 5(five) documents were proved and marked as exhibits, namely, summon issued to witness as Ext.-A, the order of appointment of the DW-1 as Investigator as Ext.-B, statement of the claimant No. 1 recorded by the Investigator during the investigation as Ext.-C, the first information report lodged by the claimant No. 1 with the jurisdictional police station as Ext.-D and the certified copy of the charge sheet filed by the Investigating Officer against the driver of the Maruti Car as Ext.-E. All the witnesses examined were duly cross-examined by the respective parties.

7. The learned Tribunal upon appreciation of the evidences on record has come to the finding that the accident occurred on 26.5.2003, as a result of which Dr. Baladev Sarma died. The amount of compensation payable to the dependants, namely, the claimants was ascertained as Rs. 12,85,600. The learned Tribunal, however, has recorded the finding that there was "composite negligence" in respect of both the vehicles, namely, the Truck as well as the Maruti Car and, hence, apportioned the amount of compensation payable on 50-50 basis and as such directed payment of 50% of such amount of compensation to the claimants. Since there was a contract of insurance between the owner of the Truck and the Insurance Company, the said amount was directed to be paid by the insurance company. Hence, the present appeals.

8. I have heard Mr. D. Mazumdar, the Learned Counsel for the claimants and Mr. S. Dutta, the Learned Counsel appearing on behalf of the respondent insurance company. None appears for the owner and the driver of the Truck despite service of notice.

9. Mr. Mazumdar, the Learned Counsel for the claimants referring to the

deposition of the witnesses examined in the proceeding has submitted that since the deceased was traveling in the Maruti Car, which dashed against a stationary vehicle, namely, the Truck parked almost on the National Highway, there is no question of "composite negligence" as has been found by the learned Tribunal in the order impugned and consequently there is no question of apportionment of the amount of compensation between the owners of the two vehicles involved in the accident on the ground of "composite negligence". It has further been submitted that it is not a case of contributory negligence since the deceased was traveling in one of the vehicles involved in the accident. According to Mr. Mazumdar, the evidences adduced by the parties reveal that the accident occurred due to the parking of the Truck on the tarred portion of the National Highway in such a manner that 70% to 80% of the Truck was on the Highway and had that vehicle not been parked in that manner on the National Highway, there would not have any accident resulting the death of the predecessor in interest of the claimants. It has further been submitted that it is evident from the evidences adduced that no precaution has been taken by the Truck to indicate its parking during the night and had those precautions, i.e., the lighting of the parking light had been taken, the accident would not have occurred at all. Mr. Mazumdar, therefore, submits that there was absolutely no negligence on the part of the driver of the Maruti Car and as such there cannot be any deduction of amount on the ground of contributory negligence.

10. On the quantum of compensation assessed by the learned Tribunal, referring to the decision of the Apex Court in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , it has been submitted by the Learned Counsel that the age of the victim being 57 years 5 months, the appropriate multiplier ought to have been "9" instead of "8" as applied by the learned Tribunal while assessing the compensation awardable. Mr. Mazumdar, therefore, submits that the amount of compensation may accordingly be enhanced, which may directed to be paid by the insurance company, in view of the contract of insurance between the owner of the offending vehicle, i.e., the Truck and the insurance company at the relevant point of time.

11. Mr. Dutta, the Learned Counsel for the insurance company, on the other hand, has submitted that it is evident from the evidence on record that the deceased had 3 (three) years of more service, he being a Lecturer of a college and the retirement age being 60 and as such the appropriate multiplier would be "3" and not "8" as applied by the learned Tribunal. It has further been submitted by Mr. Dutta that it is evident from the evidences adduced by the parties that there was negligence on the part of the driver of the Maruti Car also, which has contributed towards the accident and, hence, the learned Tribunal has rightly directed payment of 50% of the compensation assessed, taking in view the percentage of the negligence on the part of the driver of the Maruti Car. Mr. Dutta, however, submits that the learned Tribunal was not right in apportioning the amount on the ground that it is a case of "composite negligence" though in fact it is a case of contributory negligence.

12. I have considered the submissions of the Learned Counsel for the parties and also perused the materials on record, including the impugned order passed by the learned Tribunal.

13. The factum of accident and involvement of both the vehicles being the Truck and the Maruti Car in such accident, the death of Dr. Baladev Sarma, driver of the Maruti Car having a valid driving licence as well as issuance of the insurance coverage in respect of the liability of the owner of the Truck, are not in dispute and have, therefore, need not be gone into in these appeals. In these appeals the questions which arise for consideration is (i) whether the just compensation has been awarded under the Act and (ii) whether there was any negligence on the part of the driver of the Maruti Car contributing towards the accident and if so, what would be the percentage of such negligence.

14. It appears from the evidences on record that the deceased was 57 years 5 months at the time of accident, who was a Senior Lecturer in Nagaon College working in a regular post, and was drawing a sum of Rs. 26,618. The income from the salary of the deceased was proved by the salary certificate (Ext.-8).

15. The Apex Court in *Sarla Verma (supra)*, keeping in view the lack of uniformity and consistency in awarding compensation and with a view to make objective assessment of just compensation awardable under the provisions of the Act to the claimants, has held that the Tribunal should determine the compensation in cases of death by following 3 (three) steps, namely, (i) by ascertaining the multiplicand, (ii) by ascertaining the multiplier and (iii) by making the actual calculation. It has further been held that after making such calculation, further amount towards the loss of estate, loss of consortium and funeral expenses are also required to be added. In the said case it has further been held that while ascertaining the loss of dependency, 1/3rd has to be deducted from the income of the deceased towards the personal and living expenses where the number of dependant family members are 2 to 3, in case the deceased was married. In paragraph 24 of the said judgment, it has further been held that there should not be any addition to the actual salary income for future prospects when the age of the deceased is more than 50 years. The Apex Court with a view to select the appropriate multiplier, has worked out a chart fixing the multiplier to be applied depending on the age of the victim. As discussed above, the age of the victim was 57 years 5 months. Applying the chart, as worked out in paragraph 40 of the said judgment, the appropriate multiplier, in this case, therefore, would be "9", though the learned Tribunal has applied "8" as the multiplier. The contention of the insurance company that the appropriate multiplier would be "3" in view the number of years service left, cannot be accepted in view of the aforesaid judgment of the Apex Court.

16. The deceased's income from the salary as it appears from Ext.-8, salary certificate, was Rs. 26,618. It also appears from the said salary certificate that the deceased was required to pay professional tax of Rs. 205 per month. It is not in dispute that the income of the deceased from salary was taxable under the

provisions of the Income Tax Act. No evidence, however, has been led by the claimants about the amount of tax paid/payable by the deceased, for which the learned Tribunal has deducted the income tax payable at minimum rate of 25%. In the absence of any proof relating to the income tax paid or payable, such deduction has rightly been made by the learned Tribunal, as the amount of "actual salary" to be taken into consideration for the purpose of ascertaining the compensation payable has to be worked out after deduction of the income tax as well as the professional tax payable.

17. The income of the deceased from the salary, which is proved by Ext.-8, being Rs. 26,618, Rs. 205 towards the professional tax and 25% from such salary towards the income tax has to be deducted to ascertain the "actual salary" of the deceased for the purpose of ascertaining the compensation payable, which would be Rs. 19,758. The said amount is to be multiplied by the appropriate multiplier, i.e., "9". The deceased being more than 50 years old, there cannot be any addition for future prospects. Further 173rd of such amount is to be deducted towards the personal and living expenses of the deceased, he being married and there being 3 (three) dependants, namely, the claimants. The monthly loss of dependency, therefore, would be Rs. 13,172, by deducting Rs. 6,586, from Rs. 19,758, being 1/3rd towards the personal and living expenses of the deceased and, thus, the annual loss of dependency would be Rs. 1,58,064. By multiplying the said amount by the appropriate multiplier, i.e., "9", the compensation payable to the claimants comes to Rs. 14,22,576.

18. Having worked out the amount of compensation payable, the next question which requires consideration is whether there was "composite negligence" or "contributory negligence" on the part of the driver of the. Maruti Car, in which the deceased was traveling. The learned Tribunal, as noticed above, has directed payment of 50% of Rs. 12,85,600 on the ground that it was a case of "composite negligence". It is not in dispute that the deceased was traveling in one of the vehicles, namely, the Maruti Car being its" owner, driven by a driver having a valid driving licence. The deceased being an occupier of one of the vehicles involved in the accident the principle of "composite negligence" does not apply, at the most it may be a case of contributory negligence. The learned Tribunal, therefore, was not correct in directing payment of 50% of the amount as assessed by it, by holding that it was a case of "composite negligence".

19. It is the case of the insurance company and held by the learned Tribunal that the driver of the Maruti Car, where the deceased was traveling being the owner, was negligent and had contributed towards the accident. On the other hand, the case of the claimants is that there is absolutely no negligence on the part of the driver of the Maruti Car and the accident occurred due to the negligence of the driver of the Truck only, as the said vehicle was parked almost on the National Highway without the parking light on and without placing any indication about such parking, so that it can be noticed by other vehicles plying on the National Highway.

20. To appreciate the rival contentions of the Counsel for the parties, the evidences as adduced before the learned Tribunal are perused. PW-1, the driver of the Maruti Car in his deposition has stated that he drove the Car at the speed of about 30 to 40 Km/hour and since the Truck was parked on the National Highway without the parking light on, though the branches of trees were put on the Truck, the Maruti Car dashed against the stationary Truck and as a result of which the Truck, which was on a jack, fell on the left side of the Car causing severe injuries on the person of Dr. Baladev Sarma, who subsequently died. PW-2, the claimant No. 1 has also in her deposition supported the version of PW-1 by stating that the vehicle was parked almost on the middle of the National Highway without the parking light on and the accident occurred because of the negligence on the part of the driver of the Truck in parking the said Truck on the National Highway without the parking light and since there was no street light, the Maruti Car dashed against the Truck though some branches of trees were tied on the backside of the Truck. DW-1, Shri Goutam Patowari, the Investigator appointed by the insurance company has proved the statement of the claimant No. 1 recorded by him during the investigation as Ext.-C and also her signatures as well as the first information report and the certified copy of the charge sheet filed by the police as Exts.-D and E. This witness has further stated that the claimant No. 1 during the investigation had told him that the Truck was parked on the left side of the road and the Maruti Car dashed against the Truck. During cross-examination, DW-1, however, has stated that from the photographs, which are proved by the claimants, it appears that 70-80% of the Truck was on the tarred portion of the road and the accident appears to have occurred on the road itself. In the first information report (Ext.-D) lodged by the claimant No. 1 it has been stated that "we were coming in our Maruti Car No. AS-02/B-3031. On way to Nagaon, at a short distance from Jagiroad police station at Jagiroad we met with a severe and fatal accident due to negligence of the driver. This happened owing to a Truck which stood stranded on the way." The charge sheet filed by the police upon investigation also reveals that the same was filed against the driver of the Maruti Car u/s 279/337/338/304A/427, IPC.

21. From the above discussion of the evidences on record, it, therefore, appears that the Truck was parked almost on the National Highway, 70% to 80% of its being on the tarred portion of the road, without the parking light on. Therefore, the driver of the Truck was no doubt negligent, who ought not to have left the vehicle stranded in that manner and ought to have immediately took steps so that it is parked beyond the tarred portion of the National Highway, with the parking light on indicating such parking. However, it is also in evidence of PW-2, who was also traveling in the Car as well as of PW-1, who was driving the Maruti Car that the branches of some trees were fixed on the backside of the Truck to give some indication about such parking. According to the PW-1, i.e., the driver of the Maruti Car, he drove the car at the very nominal speed of 30 to 40 Km/hour on the National Highway with the car's headlight on. The driver of the Maruti Car, therefore, also ought to have been careful having noticed the

branches of the trees fixed on the backside of the Truck, when admittedly Car was driven at a very low speed on the National Highway. The negligence on the part of the driver also cannot at all be ruled out and rather it has been substantiated on the evidences on record as discussed above. However, the negligence on the part of the driver of the Truck, in leaving the vehicle almost on the tarred portion of the National Highway, is much higher than the negligence on the part of the driver of the Maruti Car. Under the Assam Motor Vehicle Rules the driver of the Truck cannot park the vehicle without the parking light on and without giving sufficient indication about such parking. The accident occurred at about 9.30 p.m. in the night. Keeping in view the aforesaid discussion, the percentage of negligence of the driver of the Truck and the driver of the Maruti Car can reasonably fixed at 75 and 25 respectively. The contention of the Learned Counsel appearing for the insurance company for fixing the percentage of negligence on the part of both the vehicles on 50: 50 basis, in view of the aforesaid discussions, cannot be accepted.

22. The claimants, therefore, would be entitled to 75% of the aforesaid amount of compensation ascertained, i.e., Rs. 14,22,576, after deducting Rs. 3,55,644 being 25% of the said amount, towards the percentage of negligence of the driver of the Maruti Car, which comes to Rs. 10,66,932. The claimants shall also be entitled to Rs. 5,000 towards the loss of estate and a further some of Rs. 10,000 towards the funeral expenses as awarded by the learned Tribunal. Apart from that a further sum of Rs. 5,000 towards the loss of consortium is payable to the claimant No. 1, she being the widow of the deceased. The claimants, thus, would be entitled to the total sum of Rs. 10,86,932 (Rs. 10,66,932 + Rs. 5,000 + Rs. 10,000 + Rs. 5,000). The said amount shall carry interest @ 6% p.a. from the date of filing of the claim petition till the date of payment. There being no dispute relating to the contract of insurance between the owner of the Truck and the insurance company, the said amount of compensation as awarded together with the interest is directed to be paid by the insurance company, which shall be deposited by it before the learned Tribunal within 2 (two) months from today, less the amount already paid/deposited. The Tribunal shall release the amount, except the amount of Rs. 5,000 awarded towards loss of consortium, to all the three claimants in equal proportion by account payee cheques. The claimant No. 1 shall be entitled to the said amount of Rs. 5,000 for loss of consortium.

23. The MAC Appeal No. 260/2005 is accordingly allowed. The award passed by the learned Tribunal stands accordingly modified to the extent indicated above. The MAC Appeal No. 42/2006 filed by the insurance company stands dismissed. No cost.