

(2014) 02 CAL CK 0082
In the Calcutta High Court
Case No : F.M.A. No. 855 of 2008

Majera Bibi

APPELLANT

Vs

Oriental Insurance Co. Ltd.

RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 163A, 166, 171

Citation : (2014) 4 ACC 72 : (2015) ACJ 1606 : (2015) 2 AnWR 256

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

Bench : Division Bench

Advocate : Saibalendu Bhowmick and Santosh Kumar Das, Advocate for the Appellant; Sanjay Paul, Advocate for the Respondent

Judgement

1. The Court: The appellants are aggrieved by an award of the Motor Accident Claims Tribunal, Alipore dated January 9, 2007 granting them Rs. 1.6 lakh compensation without interest, but ordering the Insurance Company to pay 9% p.a. interest, if it failed to pay the amount within the time mentioned in the award. The appellants claimed compensation under Section 163A of the Motor Vehicles Act, 1988. They filed the requisite application on January 4, 1999. They claimed Rs. 2 lakh compensation (with costs) and 12% p.a. interest from the date of the application.

2. The case stated in the application filed before the claims Tribunal was this. The claimants were the wife mother and four children of one Golab Sk. who was killed in an accident caused by a truck No. WB-51-0696 on December 9, 1996. The victim was 28 and a potato seller. He used to earn Rs. 3,000 per month. The offending vehicle was covered by a valid insurance policy issued by Oriental Insurance Co. Ltd. They decided not to claim any compensation under Section 140.

3. The owner of the offending vehicle, a party to the case, chose not to contest the case. The Insurance Company contested the case by filing a written statement denying and disputing the correctness of all materials facts. The wife

of the victim examined herself as PW 1. Her evidence was as follows. The victim was travelling in the matador dashed by the offending vehicle with his potato bags. He died in hospital soon after admission. He was 28 and used to earn Rs. 3,000 per month.

4. The post-mortem report was marked Ex. 6 without objection. In it the victim's age was recorded as 28. Identity cards of PW 1 and the victim's mother issued by the Election Commission of India were marked Ex. 8 and Ex. 8/1 respectively. In Ex. 8 it was recorded that on January 1, 1995 PW 1 was 30. Cross-examination of PW 1 is quoted below:

"I have filed this case claiming compensation for the death of my husband. My husband died as result of accident caused by Matador. Two vehicles were involved in the accident. I knew about the accident from person who was with my husband at the relevant point of time.

Police has interrogated me. I reside at Kazipada within District Murshidabad. I reside there. My husband was 28 years old. At present I am 35 years old.

My husband was engaged in potato business. I have filed documents to show that my husband was engaged in potato business. I have daughters and three sons. My eldest daughter is aged about 18 years. My mother-in-law is alive. It is not a fact that the accident did not take place as alleged. It is not a fact that both the vehicles are liable for causing accident. It is not a fact that my husband was not 28 years old at the time of his accident. Not a fact that I am deposing falsely."

5. The claims Tribunal held as follows. It was proved that the accident caused by the offending vehicle that was covered by a valid policy issued by the Insurance Company killed the victim on December 9, 1996. In view of the age of PW 1 recorded in Ex. 8, at the date of the accident the victim could not be less than 36. Hence multiplier 16 would apply. Income was not proved. Hence the notional income provision would apply.

6. Mr. Bhowmick appearing for the appellants has submitted as follows. The application was filed under Section 163A, not under Section 166. The claims Tribunal ought to have accepted the victim's age recorded in Ex. 6. In view of evidence, it should not have applied the notional income provision, but held that the victim's monthly income was Rs. 3,000. Compensation, if found more than the amount claimed, could be granted. The schedule is to be strictly followed. Determination process under Section 163A is different from the one under Section 166. The claims Tribunal erred in law by not granting general damages and interest.

7. Mr. Bhowmick has relied on the decisions in The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc., : Deepal Girishbhai Soni and Others Vs. United India Insurance Co. Ltd., Baroda, ; New India Assurance Company Ltd. Vs. Smt. Shanti Pathak and Others, : New India Assurance

Company Ltd. Vs. Smt. Shanti Pathak and Others, ; S.G. Pandu Vs. United India Insurance Company Ltd., ; Nagappa Vs. Gurudayal Singh and Others, , National Insurance Co. Ltd. Vs. Gurumallamma and Another, ; Reshma Kumari and Others Vs. Madan Mohan and Another, ; and Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, .

8. Mr. Pal appearing for the Insurance Company has defended the award of the claims Tribunal. He has relied on U.P. State Road Transport Corporation and Others Vs. Trilok Chandra and Others, and Dharampal and Others Vs. U.P. State Road Transport Corpn., .

9. The issue whether the claimants filed the application under Section 166 or Section 163A is an unnecessary issue; for every application claiming compensation is to be filed before the Motor Accident Claims Tribunal under Section 166 of the Motor Vehicles Act, 1988. Section 163A only declares the right of a claimant to claim structured formula compensation without proving the fault. Hence we do not find any need to deal with the decisions in Kodala and Deepal.

10. The first issue that requires decision is the victim's age. PW 1, the victim's wife, deposed that at the date of accident the victim was 28. In her affidavit dated September 7, 2006 she stated that she was 36. In cross-examination on September 8, 2006 she, however, said that she was 35. She denied the suggestion that at the date of accident her husband was not 28. Except the suggestion, she was not asked anything about the victim's age. The post-mortem report recording the victim's age 28 was marked Ex. 6 without objection.

11. Evidence of PW 1 that the victim (her husband) was 28 at the date of the accident was corroborated by the victim's age recorded in his post-mortem report, Ex. 6. The report is dated December 10, 1996. The application for compensation was filed only on January 4, 1999. There is no reason to say that a lower age of the victim was given to the doctor doing the post-mortem on the victim on December 10, 1996 with the bad intention of extracting a higher amount of compensation in future by the victim's illiterate wife, old mother and four minor children.

12. During her cross-examination attention of PW 1 was not called to the identity card, Ex. 8. She was not contradicted by the card containing her previously declared age. Even then the claims Tribunal referring to the discrepancy between the victim's age recorded in Ex. 6 and age of PW 1 in Ex. 8 held that it was possible that at the date of accident the victim was not less than 36.

13. There is no evidence that on December 9, 1996 when the accident caused by the offending vehicle killed the victim he was 36 or above. There was no occasion for PW 1 to explain why the post-mortem report revealed that her husband was younger than her. There is no reason to say that a wife cannot be older than her husband.

14. In our considered opinion, the claims Tribunal recording the conclusion,

evidently, on the basis of surmises and conjectures committed an error in that in the process it ignored the unchallenged specific evidence given by PW 1 of the victim's age. It also overlooked the fact that evidence given by PW 1 was fully corroborated by Ex. 6, the post-mortem report, about which she was not asked anything in cross-examination.

15. The decisions of the Supreme Court in *Shanti Pathak* and of this Court in *Rasaball* lend support to the contention that in a case before the claims Tribunal age of the victim can be determined on the basis of the age recorded in the post-mortem report concerned. We are of the view that, on the facts, the claims Tribunal ought to have accepted the appellants' case that at the date of death the victim was 28.

16. As to the victim's monthly income, the appellants' case was that from his potato business the victim used to earn Rs. 3,000 per month. PW 1 gave this evidence and also the evidence that the victim was killed in the accident, while he was travelling with his potato bags in the *Matador* dashed by the offending vehicle driven rashly and negligently. In cross-examination she was not asked anything about this. She remained firm that her husband was in potato business. As to the amount of her husband's income no question was put.

17. It is true that she did not produce any document in proof of her claim that the victim was in potato business, and that he used to earn Rs. 3,000 per month. The claims Tribunal disbelieved the evidence of PW 1 on the grounds that there was no proof of income. It, however, did not disbelieve her evidence that her husband was in the potato business. This means that the claims Tribunal believed the case of the appellants that the victim was a person earning from his potato business.

18. In the absence of anything to impeach PW 1's credit and trustworthiness, we are unable to see why her evidence that from his potato business her husband used to earn Rs. 3,000 per month should be disbelieved. We do not think simply because PW 1 could not produce any proof of the victim's income her evidence of income remaining virtually unchallenged should be disbelieved. The principle emerging from *Laxmi Devi* is that in today's world even an unskilled labourer can very easily earn Rs. 100 per day.

19. The victim is survived by his wife, his mother, one daughter and three sons. PW 1's cross-examination did not reveal that the family had additional sources of income. This being the position, we are of the view that the claims Tribunal was not justified in disbelieving the evidence of PW 1 that from his potato business her deceased husband used to earn Rs. 3,000 per month.

20. The claims Tribunal committed an error by applying the notional income provision; for it accepted the appellants' case that the victim was an earning person and the notional income provision would have been applicable only if the victim was a non-earning person. It converted an earning person into a non-earning person, an impermissible act.

21. We are, therefore, of the view that evidence given by the appellants leads to the conclusion that the victim doing potato business used to earn Rs. 3000 per month.

22. The appellants claimed compensation under Section 163A. Hence the claims Tribunal finding that they were entitled to compensation was under a statutory obligation to follow the provisions of the second schedule strictly. The decisions in Gurumallamma and Reshma Kumari are also to that effect.

23. It is not the law that the claimants could not get more than Rs. 2 lakh mentioned in the application, if they were found entitled to a higher amount; for what they were to be paid was a compensation according to the provisions of the second schedule. As to entitlement to higher amount, the decision in Nagappa supports the proposition. The amount payable under Section 163A is not dependent on the amount claimed by the claimant.

24. Although the claims Tribunal found that the appellants were entitled to compensation, for undisclosed reasons it did not grant them general damages. They were entitled to general damages on account of funeral expenses loss of consortium (the victim's wife was one of the claimants), loss of estate and medical expenses (actual expenses). But nothing was granted.

25. As to interest, there can be no doubt that the claims Tribunal committed an error by not granting it from the date the application for compensation was filed till the date of payment. It ordered that the Insurance Company would be liable to pay 9% p.a. interest on the amount of compensation from the date of the award till the date of payment, only if it failed to pay the amount within the time mentioned in the award.

26. It is not disputed that in view of the position of law repeatedly explained by the Supreme Court the appellants were entitled to interest under Section 171 from the date of filing of the application for compensation till the date of payment.

27. As to rate of interest, it is not necessary to decide the question applying the principles stated in Dharampal; for considering the decision and several other decisions this Court has closely examined the question of rate of interest.

28. In view of the decision of this Court dated January 29, 2014 in FMA No. 1346 of 2013, Niva Devi v. New India Assurance Company Limited & Anr., we hold that in this case the appellants should be granted 8% p.a. interest on the grounds that the award was passed by the claims Tribunal on January 9, 2007. In Niva Devi this Court held that 8% interest should be granted in cases in which awards were passed from 2006.

29. Our conclusions are these: at the date of accident the victim was 28; multiplier 18 should apply; the victim's monthly income was Rs. 3,000; 1/3rd of this was to be deducted; total loss of dependency was Rs. 24,000 x 18 - Rs. 4,32,000; general damages: Rs. 2,000 (funeral expenses), Rs. 5,000 (loss of consortium of the first appellant, the wife) and Rs. 2,500 for loss of estate should

be added; this takes the total to Rs. 4,41,500; no evidence of any medical expenses; and 8% p.a. interest from January 4, 1999. For these reasons, we allow the appeal and order as follows. The award of the claims Tribunal is modified substituting of Rs. 4,41,500 for Rs. 1,60,000. The Insurance Company shall pay 8% p.a. interest on Rs. 4,41,500 from January 4, 1999 till the respective dates of payment. The distribution proportion shall stand modified accordingly. The records shall be sent to the claims Tribunal immediately. No costs. Certified xerox.