(2018) 01 GAU CK 0086

In the Gauhati High Court

Case No : 54 of 2013

M/S NEW INDIA ASSURANCE CO LTD — APPELLANT

Vs

NARMADA KALITA and ORS — RESPONDENT

Date of Decision : 29-01-2018

Acts Referred:

Motor Vehicles Act, 1988, Section 173, Section 173, Section 166, Section 166 - Appeals - Application for compensation

Citation : (2018) 01 GAU CK 0086

Hon'ble Judges : Kalyan Rai Surana

Bench : Single Bench

Advocate : K.K. Bhatta, A. Talukdar, J. John, A. Ahmed, Y.S. Mannan, S. Singh, A. Bora, A. Saikia, G.K. Thakuria, N.S. Thakuria, P. Hujuri

Judgement

1. Heard Mr. K.K. Bhatta, learned counsel for the appellant as well as Mr. Y.S. Mannan, learned counsel appearing for the respondents No. 1 to

3/claimants. None appears on call for the respondent No. 4, although notices have been duly served. It may be recorded that the name of

respondent No. 5 had been struck off by order dated 23.05.2013 passed by this Court.

2. This appeal under Section 173 of the Motor Vehicles Act, 1988 is preferred against the judgment and award dated 19.10.2012, passed by the

learned Member, M.A.C. Tribunal No. 2, Kamrup at Guwahati in MAC Case No. 2554/2009.

3. The facts of the case is that the respondents No. 1 to 3/claimants filed a claim petition under Section 166 of the Motor Vehicles Act, claiming

compensation of Rs. 70,00,000/- from the appellant as well as the driver and owner of the offending vehicle on account of death of the deceased

Suren@ Surendra Nath Kalita. In the claim petition it was stated that on 15.11.2009, while the deceased was driving a Tata Sumo vehicle and

was going from Mirza side towards Rangia, a Cruiser vehicle bearing registration No. AS-01/AC-1523, while overtaking a truck had a head-on

collision with the Tata Sumo vehicle driven by the deceased. On the way of the hospital, the deceased had died due to injuries sustained by him. It

was alleged day of accident took place due to rash and negligent driving of the offending vehicle by its driver. The appellant entered appearance

and filed their written statement. By denying the averments made in the claim petition, the appellant had taken a plea of the non-maintainability of

the claim petition on the ground of non-joinder of necessary party. It was stated that the age certificate and documents showing occupation of the

deceased was not annexed to the claim petition, and the registration certificate, road permit, fitness certificate, pollution emission test certificate,

valid driving licence and other relevant documents were not produced and also that the claim amount was excessive, exorbitant, exaggerated and

without any basis and hence, prayer was made to dismiss the claim petition. The respondent No. 4 i.e. the owner of the offending vehicle filed his

written statement and disclosed that his vehicle was duly insured with the appellant and the insurance policy was valid up to 13.12.2009 and his

vehicle was driven by an authorized driver with coverage of fitness, road permit, etc. On the basis of the pleading, the learned Tribunal framed the

following issues for adjudication:

(i) Whether the victim Late Surendra Nath Kalita, died as a result of alleged accident dated 15.11.2009 involving vehicle No. AS-01/AC-1523

(cruiser), and whether the said accident took place due to rash and negligent driving of the driver of the offending vehicle?

(iii) Whether the claimants are entitled to receive any compensation and if yes, to what extent and by whom amongst the opposite parties, the said

compensation amount will be payable?

4. In support of the claim petition, the respondents No. 1 to 3/claimants, examined two witnesses including claimant No. 1 (CW.1) and one

Dhirendra Kalita (CW.2). In respect of issue No. 1, the learned Tribunal had recorded that the CW.1 who was not an eye witness, was not aware

which vehicle was responsible for the said accident. It was recorded that the

CW.2, in his evidence stated that he was an eye witness to the

accident and that the accident was caused due to rash and negligent driving of the offending vehicle by its driver and it was in a high speed.

However, it has been further recorded that as per the evidence of CW.2, ""the driver of the Tata Sumo was responsible for that"". The learned

Tribunal arrived at a finding that the deceased died due to injury sustained by him in the accident, which took place due to rash and negligent

driving of the offending vehicle and, as such, the issue No. 1 was decided in the affirmative and in favour of the respondents No. 1 to 3. In respect

of issue No. 2, it was held that at the time of the accident, the deceased was 48 years of age and as per the post mortem report (Exbt.2), the

deceased had died due to coma resulting from head injuries and all injuries were ante mortem and caused by the blunt force impact and consistent

with that of the vehicular accident. Relying on the accident information report (Exbt.1), it was held that the accident took place on 15.11.2009 at

about 4:00 AM at Saraighat Bridge and the vehicle bearing registration No. AS-01/AC-1523 (Cruiser) was involved and that the respondent No.

5 (name struck off) was the driver of the vehicle and the respondent No. 4 was the owner of the said vehicle. It was held that the deceased was a

service holder in the Railway Department and his gross salary was Rs.26,655/- per month. One third of his income was deducted towards

personal expenses and the monthly loss of dependency was calculated at Rs.17,770/- per month and annual pecuniary loss was Rs.2,13,240/.

Applying the multiplier of 13 and adding 30% of the income towards future prospects, the annual income of the deceased was held to be

Rs.4,12,573/-. Taking a ground that the deduction on account of taxes, the compensation was computed as follows:

Salary per month Rs.26,655/-

Less P/Tax - Rs.208/-

Rs.26,447/-

Add 30% as per Sarala Verma + Rs.7,934/-

Rs.34,381/-

Annual Salary of the deceased Rs.4,12,573/- (Rs.34,381X12)

Less Basic Exemption as on 2009-10 - Rs.1,60,000/-

Rs.2,52,573/-

10% income tax as on 2009-10

Rs.25,259/-

(Rs.1,60,000/- to Rs.3,00,000/-)

Annual salary of the deceased Rs.4,12,573/-

Less Income Tax - Rs.25,259/-

Rs.3,87,316/-

Less 1/3 deduction - Rs.1,29,105/-

Rs.2,58,211/-

Rs. 2,58,211/- X 13 = Rs.33,56,743/-

A sum of Rs.2,000/- was awarded on account of funeral expenses, Rs.5,000/- on account of loss of consortium, Rs.5,000/- being the loss of

estate was also awarded. The respondents No. 1 to 3 were held to be entitled of Rs.33,68,743/-. It was directed that the amount be paid within

60 days from the date of the order with interest @ 9% per annum from the date of the filing of the petition till its realization. Out of the awarded

sum, a sum of Rs.5,00,000/- each was held to be kept in the name of two minor children i.e. respondents No. 2 and 3 for a period of two years in

a nationalized bank of their home district.

5. Challenging the said award, the learned counsel for the appellant submits that as per the contents of the FIR as well as paragraph 2 of the

evidence on affidavit of the claimants No. 1 (CW.1), the accident that had occurred was a head-on collision between two vehicles, as such, the

deceased being the driver of the Tata Sumo vehicle is required to be held to have contributed towards the accident and on account of contributory

negligence, 50% of the awarded sum could only have been awarded against the appellant. The learned counsel for the appellant has placed the

issue of non-joinder of owner and insurer of the vehicle which was being driven by the deceased. In support of his contention of contributory

negligence, the learned counsel for the appellant has relied on the case of Bijoy Kumar Dugar Vs. Bidyadhar Dutta & Ors., (2006) 3 SCC 242 .

The relevant paragraph is quoted below:

Adverting to the next contention of the claimants, no doubt the High Court has not dealt with the point in issue. However, we have noticed the

reasoning and finding of the MACT recorded under Issue No.2. It is the evidence of Rajesh Kumar Gupta-P.W.2 who was travelling in the Maruti

car along with the deceased Raj Kumar Dugar on the day of the accident that he also suffered some injuries in the said accident. He stated that

while coming from Digboi, the Maruti car being driven by the deceased met with an accident at a place near Kharjan Pol. Before the accident, Raj

Kumar Dugar noticed a passenger bus coming from the opposite direction and the movement of the bus was not normal as it was coming in a

zigzag manner. The Maruti car being driven by the deceased Raj Kumar Dugar and the offending bus had a head- on collision. The MACT has not

accepted the evidence of P.W. 2 to prove that the driver of the offending bus was driving the vehicle in abnormal speed. If the bus was being

driven by the driver abnormally in a zigzag manner, as P.W. 2 wanted to believe the Court, it was, but natural, as a prudent man for the deceased

to have taken due care and precaution to avoid head-on collision when he had already seen the bus from a long distance coming from the opposite

direction. It was headon collision in which both the vehicles were damaged and unfortunately, Raj Kumar Dugar died on the spot. The MACT, in

our view, has rightly observed that had it been the knocking on one side of the car, the negligence or rashness could have been wholly fastened or

attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to

have contributed equally to the accident. The finding on this issue is a finding of fact and we do not find any cogent and convincing reason to

disagree with the well-reasoned order of the MACT on this point. The MACT has awarded interest at the rate of 10% per annum on the amount

of compensation from the date of filing of the claim application till the date of payment. It is a discretionary relief granted by the MACT and, in our

view, the discretion exercised by the MACT cannot be said to be inadequate and inappropriate.

6. Per-contra, the learned counsel for the respondents No. 1 to 3 has referred to the cross-examination of PW.2 and it is submitted that as per the

evidence on affidavit as well as the cross-examination of PW.2, the entire negligence resulting in this accident was attributed to the driver of the offending vehicle. Relying on the same, it is submitted that in paragraph 9 of the impugned judgment, while deciding issue No. 1, the learned

Tribunal had wrongly recorded that the driver of the Tata Sumo vehicle i.e. the deceased was responsible for that accident. It is submitted that as

the offending vehicle was at high speed of 60 KMPH for driving on a bridge and the accident took place while overtaking a truck by coming on

the wrong track, and therefore, this is not a case to hold that the deceased had contributed to the accident. Hence, there was no scope to reduce

the award by 50% on account of contributory negligence of the deceased.

7. Having heard the learned counsel for the parties, this Court had perused the materials available on record. In view of the finding recorded by the

learned Tribunal at paragraph 9 in respect of issue No. 1 that the driver of the Tata Sumo Vehicle (i.e. deceased) was responsible for the accident,

the relevant paragraph 1 of the evidence of the PW.2 as well as cross-examination of the said witness is extracted below:

Evidence on Affidavit by CW.1

1. That I saw the accident that occurred on 15.11.2009 at about 4:00 AM on Saraighat Bridge. On that day and at that relevant time I was

proceeding along with Surendra Nath Kalita who was driving a Tata Sumo on the left side of the road from Mirza side towards Rangia side. As

said Tata Sumo reached on Sariaghat Bridge, I saw a Cruiser bearing registration No. AS-01/AC-1523, coming from the opposite direction in a

very high speed, suddenly overtaking another vehicle (truck) and come on the wrong track and knocked the said Tata Sumo from the front side.

The said accident occurred due to the rash and negligent driving of the driver of the said Cruiser. After the said accident I become unconscious.

Cross-Examination of CW.2

2. I was traveling in the Tata Sumo at the time of accident. I also sustained minor injury. I have not filed any claim case. Police took my statement.

Sumo was not in speed. Cruiser was in very high speed. Cruiser was in a speed of about 60 KM/PH. It is not a fact that I could not notice the

speed of cruiser.

8. On a perusal of the same, no negligence is attributed to the deceased. Therefore, it appears that fixing of responsibility on the deceased for the

said accident by the learned Tribunal in respect of issue No.1 is not sustainable.

9. No doubt that in the case of Bijoy Kr. Dugar (supra), the Hon''ble Supreme Court has held that as a prudent man, the deceased having seen the

offending bus being driven by the driver abnormally in a zigzag manner could have taken due care and precaution to avoid head-on collision and

therefore, the Hon''ble Apex Court had held that the learned Tribunal had rightly observed that had it been the knocking on one side of the car, the

negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head on collision, the

drivers of both the vehicles should be held responsible to have contributed equally to the accident when he had already seen the bus from a long

distance coming from the opposite direction. In the considered opinion of this Court, the said ratio is not squarely applicable to the distinguishable

fact of this case. In the case of Bijoy Kr. Dugar (supra), the accident had taken place on a main road and the PW.2 had deposed to the effect that

the passenger bus coming from the opposite side was coming in a zigzag manner and therefore, although the evidence of PW.2 therein was

disbelieved, yet it was held that the offending vehicle was within the eye sight of the deceased.

10. However, the distinguishable facts in the present case in hand is that the accident had taken place on Saraighat Bridge over the river

Brahamputra and the judicial notice can be taken on the fact that the span of the said bridge is narrow and made for a two way lane and, as such,

as per the evidence of PW.2, the offending vehicle was trying to overtake a truck and by suddenly coming on the wrong side, hit the vehicle which

was driven by the deceased. In the opinion of this Court, in such a situation even if the vehicle being driven by the deceased was brought to a

stand-still by applying immediate brake, yet the accident could not have been averted as the vehicle driven by the deceased could not have

escaped because of the span of the bridge and it had to face the head-on collision and in such a place and/or situation, it is not at all possible to so

that it may be hit on the side as was envisaged in the case of Bijoy Kr. Dugar (supra). In course of cross-examination, the PW.2 had stated that

the offending vehicle was being driven at about 60 KM per hour, which is on quite a higher side while driving on a bridge and the evidence of

PW.2 could not be demolished to so as to attribute any negligence on part of the deceased. Therefore, in the opinion of this Court, the ratio laid down in the case of Bijoy Kr. Dugar (supra) is not applicable in view of the distinguishable facts referred above.

11. Accordingly, in view of the discussion above, this Court is of the considered opinion that the finding recorded in respect of issue No. 1 at

paragraph 9 of the impugned judgment that the driver of the Tata Sumo vehicle was responsible for the accident appears to be inconsistent with the

evidence on record and, as such, it is held that the driver of the offending vehicle i.e. cruiser being registration No. AS-01/AC-1523 was

responsible for the accident.

12. Therefore, the present appeal fails. Accordingly, the impugned judgment and award dated 19.10.2012, passed by the learned Member,

M.A.C. Tribunal No. 2, Kamrup at Guwahati in MAC Case No. 2554/2009 is upheld.

13. It is submitted that pursuant to the interim orders passed by this Court, 50% of the awarded sum has been deposited before the Registry of this

Court, which has been permitted to be withdrawn. Insofar as the balance amount is concerned, the amount shall be deposited before the Registry

of this Court within a period of two months from today. Out of balance deposit, a sum of Rs.3,00,000/- each may be kept in a fixed deposit

account in the name of the respondents No. 1 to 3 (i.e. claimants) in a nationalized bank of their home district for a period of two years and the

balance amount may be released to the respondents No. 1 to 3 on being duly identified by Mr. Y.S. Mannan, the learned counsel appearing for

the said respondents. While depositing the balance amount, the appellant is permitted to adjustment of statutory deposit of Rs.25,000/-. It is made

clear that if the appellant is required to make any deduction on account of Income Tax deducted at source, it will collect Income Tax PAN

particulars from the respondents No. 1, 2 and 3, if available, and the TDS certificate shall also be promptly handed over to the said respondents so

as to enable them to avail benefits, if any, failing which the appellant shall remain liable for paying such amount to the respondents No. 1, 2 and 3

(i.e. claimants).

14. Let the LCR be returned back.