(2014) 02 CAL CK 0014

In the Calcutta High Court

Case No : F.M.A. No. 1105 of 2009

National Insurance Co. Ltd. APPELLANT

Vs

Sarbani Chatterjee RESPONDENT

Date of Decision : 14-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 22, Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 134, 134(2)

Citation : (2014) 3 ACC 854

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

Bench : Division Bench

Advocate : S.C. Karar, Advocate for the Appellant; H.K. Guha Roy, Sujay Guha Roy and Sunandita Ghosh, Advocate for the Respondent

Judgement

1. The Insurance Company is the appellant. It is aggrieved by an award of the Motor Accident Claims Tribunal, Kolkata dated 12th September, 2008 granting the first two respondents, the claimants, Rs. 1,92,000 fault liability compensation with 6% p.a. interest from 17th April, 2006 till the date of payment. The claimants were the wife and son of one Kalipada Chatterjee of 5, Mahendra Chatterjee Lane, Kolkata - 700046. Their case was that Kalipada (60) doing consumer goods supply business and earning about Rs. 4,500 per month was killed in an accident happening on 25th May, 2005 at about 5 p.m.; and that the offending motor vehicle, an auto-rickshaw No. WB-04-5109, driven rashly and negligently knocked Kalipada down from behind and injured him seriously.

2. In the application it was stated that Kalipada was taken to a hospital where he died on 6th June, 2005; that for his treatment Rs. 7,000 was spent; that there was in force an insurance policy issued by the Insurance Company in relation to the use of the vehicle; and that Kalipada was the main earning member of the family "consisting of his widow and only son." The claimants claimed Rs. 2,97,500, interest and costs. The owner of the vehicle was a party to the case.

3. The Insurance Company contested the case by filing a written statement. It

took, inter alia, the plea that the insured did not comply with the provisions of Section 134 of the Motor Vehicles Act, 1988. It, however, did not give any evidence.

4. In proof of their case the claimants examined four witnesses:-PW 1-the victim''s wife; PW 2-an eyewitness to the accident; and PWs 3 and 4-two customers of the victim. They exhibited the following documents:-Ext. 1-FIR; Ext. 2-chargesheet; Ext. 3-insurance policy; Ext. 4-medical certificate of cause of death; Ext. 5-injury report; Ext. 6-death certificate; Ext. 7-post-mortem report; Ext. 8-elector''s cards.

5. The Claims Tribunal held as follows:

Evidence proved that rash and negligent driving of the offending vehicle caused the accident in which Kalipada was injured on 25th May, 2005; that the injuries caused Kalipada''s death in hospital on 6th June, 2005; that at the date of accident Kalipada might he more than 60; that his monthly income was Rs. 4,000. One-third of the income should be deducted towards personal expenses. Multiplier of 5 would be appropriate for the case. Funeral expenses, loss of consortium and loss of estate should be Rs. 2,000, Rs. 5,000 and Rs. 4,500 respectively. Treatment expense should be Rs. 4,500. Interest should be 6% p.a.

6. Mr. Karar appearing for the Insurance Company has submitted as follows:

The claimants failed to prove the victim''s income and age. In view of the principles stated in Anil Rishi Vs. Gurbaksh Singh, , the onus to prove income and age was on the claimants. The Claims Tribunal held that one-third of the income should be deducted. But only Rs. 12,000 was deducted from Rs. 48,000. Provisions of Section 134(2) of the Motor Vehicles Act, 1988 were not complied with, and the claimants did not comply with the provisions of Rule 3(31) of the Rules.

7. Mr. Guha Roy appearing for the claimants has submitted as follows:

Though the claimants did not file any appeal or cross-objection, in view of Mahant Dhangir and Another Vs. Madan Mohan and Others, , they are entitled to seek exercise of power under Order XLI Rule 33, CPC for enhancement following Sanobanu Nazirbhai Mirza and Others Vs. Ahmedabad Municipal Transport Service, , because the Claims Tribunal granted a small amount. It was held by the Supreme Court in Budhwanti @ Budho Rani Vs. Nidhan Singh @ Kapoor and Others, , that in the absence of any other evidence of age of the victim, age recorded in the post-mortem report should be accepted.

8. Age of the victim recorded in the FIR, the charge-sheet, the injury report, the medical certificate of cause of death and the post-mortem report was 60. In the claimants'' elector''s cards their ages on 1st January, 1995 were recorded as 42 and 23. In the application for compensation it was stated that at the date of the accident the victim was about 60, and that on 13th April, 2006 when the application was verified the claimants were 55 and 35 respectively.

9. The victim''s wife is PW 1 and her testimony is that at the date of the accident her husband was about 60; that he was 3 years older than her; and that she was unable to say whether her husband was more than 65 on the date of his death. The Claims Tribunal held that at the date of the accident it was possible that the victim was more than 60. It accordingly chose the multiplier of 5.

10. We are of the opinion that the finding of the Claims Tribunal on the victim''s age and its choice of the multiplier do not call for any interference. There is no evidence to show that the victim was above 65.

11. Regarding income, the case in the application for compensation was that from his consumer goods supply business the victim used to earn Rs. 4,500 per month. In proof of the claim the claimants examined PWs 1, 3 and 4.

12. Mr. Karar has pointed out that PW 4 was an interested witness. PW 4 testified that the victim was her brother-in-law (sister''s husband). PWs 3 and 4 testified that the victim was in the consumer goods supply business. This is also the testimony of PW 1. PW 3 is an independent witness. Cross-examination of these witnesses did not reveal anything to impeach their credit and trustworthiness. Hence it can be concluded that the victim was in the consumer goods supply business.

13. Testimony of PW 1 is that from the business the victim used to earn Rs. 4,500 per month. She, however, could not produce any document in support of her oral evidence. Her testimony is that the victim was hale and hearty. In cross-examination no attempt was made to ascertain whether the claimants had any other source of income.

14. The Claims Tribunal held that on the facts it would be appropriate to conclude that the victim''s monthly income was Rs. 4,000. We are of the opinion that the finding is not perverse. In the absence of anything revealed by the cross-examination to disbelieve PW 1, we think the Claims Tribunal was justified in concluding that the victim''s monthly income was Rs. 4,000.

15. Though in its written statement the Insurance Company took the plea that the insured did not comply with the provisions of Section 134 of the Motor Vehicles Act, 1988, it did not take any step to prove the case. We are, therefore, unable to see how it can invite us to examine the question whether the insured had failed to comply with the provisions of Section 134 of the Act.

16. Insofar as the question of compliance with the provisions of Rule 3(31) of the rules is concerned, we are unable to see how the Insurance Company is affected by the non-compliance, if any. Mr. Guha Roy has rightly pointed out that the Claims Tribunal permitted the claimants to pay the Court fees within 30 days from the date the Insurance Company paid them pursuant to the award. He has submitted that the stage for complying with the direction has not yet come.

17. We do not find any merit in Mr. Guha Roy''s argument that the claimants, though have not filed any cross-objection, are entitled to ask this Court to

exercise the power under Order XLI Rule 33 of CPC for examining the question of enhancement of the amount of compensation following Sanubanu.

18. Mahanta Dhangir does not give any principle that a respondent in an appeal not filing any cross-objection is entitled to seek such a relief as the claimants are seeking. In that case the respondent concerned filed the cross-objection; but it was found that though the respondent was entitled to file the cross-objection, the cross-objection filed was not maintainable, because the issue raised therein had no relation to the question raised in the appeal.

19. On such facts the Supreme Court held that the respondent filing not maintainable cross-objection would not be without any remedy; for the provisions of Order XLI Rule 33 of CPC empowered the Court to determine all questions arising but of the judgment under appeal for doing complete justice to the parties.

20. A complete answer to the contention of the claimants in this appeal, it seems to us, is available in the decision of the Supreme Court in Ranjana Prakash and Others Vs. Divisional Manager and Another, . Mr. Rajesh Singh, who appears for the Insurance Companies as a Senior Counsel, but is not appearing in this appeal has drawn our attention to the decision.

21. The principles emerging from Ranjana Prakash are that the Order XLI, Rule 33 of CPC power can be invoked to make an award of a Claims Tribunal more effective, or to maintain the award on other grounds, or to make the other parties to the litigation share the benefits or liability, but not to get a larger or higher relief; and that a claimant, who is a respondent in an appeal of the owner or insurer cannot seek an enhancement of the compensation without filing a cross-objection.

22. The proposition that without filing a cross-objection a respondent in an appeal cannot seek a relief larger or higher than the one making the appellant aggrieved is also supported by Budhwanti that, however, has been cited by Mr. Guha Roy in support of the contention that in the absence of any other evidence, a victim''s age recorded in the post-report report is to be accepted. The decision, however, does not say anything regarding this age principle.

23. A respondent in an appeal cannot seek a relief larger or higher than the one questioning which the appellant has filed the appeal, unless the respondent has filed a cross-objection. If such a respondent is permitted to seek a larger or higher relief through the provisions of Order XLI Rule 33 of CPC, then the provisions of Order XLI Rule 22 will become redundant; for it will not be necessary for any respondent in any appeal to file any cross-objection. Such an interpretation of a provision of law is not permissible.

24. We are, therefore, of the view that the claimants, not filing any appeal against the award or cross-objection after receipt of notice of the appeal of the Insurance Company, are not entitled to seek an enhancement of the amount of

compensation.

25. As to the calculation, we find that the Insurance Company is right in saying that the Claims Tribunal committed an error while deducting one-third from the victim''s determined annual income. It was to deduct Rs. 16,000, not Rs. 12,000. It is an arithmetical error. The Insurance Company could ask the Claims Tribunal to correct the error. No step was taken. We think it will be appropriate to correct the evident error. For these reasons, we dismiss the appeal on merits, but order the following corrections in the award. The loss of dependency was Rs. 48,000 - Rs. 16,000 = Rs. 32,000 x 5 = Rs. 1,60,000. The award shall stand modified accordingly.

The Registrar General is directed to pay the claimants from the deposit and pay the Insurance Company the balance, if any, with accrued interest, within four weeks from the date the records are sent to the department. No costs. Certified xerox.