

(2007) 06 GUJ CK 0049
In the Gujarat High Court

Case No : F.A. No. 1295 of 2004 with Cross-objection No. 23 of 2007

National Insurance Co. Ltd.	Vs	APPELLANT
Yogeshbhai Ramanbhai Shah and Others		RESPONDENT

Date of Decision : 18-06-2007

Acts Referred:

Motor Vehicles Act, 1988 — Section 170

Citation : (2007) ACJ 2557

Hon'ble Judges : K.S. Jhaveri, J;Anil R. Dave, J

Bench : Division Bench

Advocate : Dakshesh Mehta, for the Appellant; Harshadray A. Dave, for the Respondent

Judgement

K.S. Jhaveri, J.—Mr. Harshadray A. Dave, learned advocate for the appellant-respondent seeks permission to withdraw the Cross-objection No. 23 of 2007. Accordingly Cross-objection No. 23 of 2007 stands disposed of as withdrawn before effective hearing.

2. This above First Appeal No. 1295 of 2004, at the instance of National Insurance Co. Ltd., is directed against the judgment and award dated 13.1.2004 passed by the Motor Accidents Claims Tribunal, Kheda at Nadiad in Motor Accident Claim Petition No. 1158 of 1994, whereby the said claim petition was partly allowed and the Claims Tribunal has awarded a sum of Rs. 1,14,75,000 to the original claimants with running interest at the rate of 9 per cent per annum from the date of claim petition till realisation.

3. The respondent Nos. 1 to 3 are the original claimants (hereinafter referred to as "the original claimants") and the present appellant is the original respondent No. 3 in the aforesaid claim petition.

4. Respondent No. 1 is husband of the deceased Harshaben. Respondent Nos. 2 and 3 respectively are daughter and son of respondent No. 1 and deceased Harshaben. On the day of the accident the respondent Nos. 1 and 3 and

Harshaben were travelling in Ambassador car No. GH-H 9401 from Vasad to Dahod. According to the claimants the car was being driven by the driver in a moderate speed. At that time the respondent No. 4 in a truck came from the opposite direction, on wrong side of the road in an excessive speed, lost control of the truck and dashed with Ambassador car of the claimants. In the accident Harshaben sustained serious injuries and she was taken to hospital at Umreth, but she succumbed to the injuries. At the time of her death she was 36 years of age. Claimants have, therefore, filed the aforesaid claim petition claiming compensation in the sum of Rs. 3,00,00,000.

5. Tribunal after hearing the parties, awarded a total sum of Rs. 1,14,75,000 to the original claimants with running interest at the rate of 9 per cent per annum from the date of claim petition till realisation. It is against the said judgment and award the present appeal has been preferred by the insurance company.

6. Mr. Dakshesh Mehta, learned advocate appearing for the appellant submitted that the Tribunal has materially erred in not appreciating the law laid down by the Apex Court while awarding the compensation and that the claim of the claimant is highly exaggerated. He submitted that there is so much disparity of the economic conditions and affluence of the country America to which the victim belongs and to India where compensation is to be paid and, therefore, a balance must be struck.

6.1. Mr. Mehta submitted that Claims Tribunal has not considered the submission of the appellant with regard not to take into consideration the prospective income. According to him, merely because the deceased was in America the claimants may not be overcompensated and it should be granted in the background of the country where most of the dependent beneficiaries reside. He submitted that the Tribunal failed to appreciate that common return for the deceased and her husband was filed wherein the income of the deceased was not shown separately. He further submitted that Tribunal has not considered the fact that the return for the assessment year 1993 was filed after the death of Harshaben.

6.2. Mr. Mehta, learned advocate for the appellant has relied upon the following decisions:

6.3. In the case of U.P. State Road Transport Corporation and Others Vs. Trilok Chandra and Others, , the Apex Court observed that the use of multiplier was excessive in that case but as loss of dependency benefit was very low the Apex Court upheld the said award.

6.4. In the case of United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, wherein the Supreme Court held that even though the Tribunal granted permission without recording reasons, the insurance company was justified in contesting the proceedings on grounds other than those enumerated in Section 149(2) as it became an "aggrieved person".

7. Mr. Harshadray A. Dave, learned advocate appearing for the respondents-original claimants submitted that appellant has not got any order in the application u/s 170 of the Act and in the absence of any such order the appeal cannot be heard on merits. In this connection learned advocate for the respondent has relied upon a decision of the Apex Court in the case of Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, wherein it is held that in absence of any order in an application u/s 170 of the Act the insurance company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal. Similar principle has been followed in the case of Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, ; R. Mannakatti v. M. Subramanian 2006 ACJ 862 (SC); Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, and National Insurance Co. Ltd. Vs. Kusum Rai and Others, Learned advocate for the respondents has also relied upon decisions of this Court and also other High Courts.

7.1. Mr. Dave submitted that a contention has been raised on behalf of appellant that the Tribunal has permitted the advocate of the insurer to cross-examine the witnesses of the claimant and permitted to argue the case on merits and, therefore, the insurer be permitted to prefer an appeal on merits. However, in view of the decision of this Court in the case of United India Insurance Co. Ltd. Vs. Hetalbhai C. Bagadia and Others, , this contention cannot be accepted. He further submitted that there was no collusion between the owner and the claimant and even if it is held that there was collusion, then also the insurer can contest the claim only upon getting an order from the Tribunal in an application u/s 170 of the Act. In this connection he has relied upon a decision in the case of National Insurance Co. Ltd. Vs. Kusum Rai and Others,

7.2. As regards the decision in the case of United India Insurance Co. Ltd. Vs. Jyotsnaben Sudhirbhai Patel and Others, Mr. Dave submitted that the said decision will not be applicable to the facts of the present case as in the matter before the Apex Court the fact was that the owner and the driver did not contest and the Claims Tribunal passed a cryptic order allowing the application, while in the present case no order has been passed on the application.

7.3. Mr. Dave further submitted that the appellant has raised a contention that the Tribunal has committed an error in not passing an order on the application preferred by the appellant. However, according to him there is no lapse on the part of the Tribunal nor any error is committed by the Tribunal as the insurer has consciously given up the application and has not pressed the same nor the insurer tried to get the order from the Tribunal. He submitted that the insurer has preferred the said application only with a view to fill the lacuna and the insurer has not shown the diligence to get the matter decided and, therefore, now it cannot thrust the entire burden on the Tribunal.

7.4. Mr. Dave has submitted that looking to the age of the deceased the multiplier taken by the Tribunal is just and proper. He further submitted that in view of the documentary evidence placed on record, the income of the deceased

taken by the Tribunal is on the lower side and even on that count no interference is warranted.

8. At this stage it is required to be noted that the appellant insurance company had filed an application under the provisions of Section 170 of the Act by way of an application, Exh. 41. This application was preferred on 7.2.2000. However, the Tribunal has not passed any order in the aforesaid application and finally decided the matter on 13.1.2004. Under these circumstances learned advocates for the parties have addressed us on this particular point at length. At the end of the arguments this Court was inclined to remand the matter to Tribunal in view of the fact that there was no order u/s 170 of the Act even though an application was preferred by the appellant. Under these circumstances learned advocates for the parties jointly submitted that this Court may decide the appeal on merits as if the application u/s 170 has been granted by Claims Tribunal. Accordingly, the appeal has been heard on merits. The authorised representative of the claimants is present in court and the aforesaid concession was made in presence of the said representative by Mr. Dave.

8.1. It is required to be mentioned here that the original claimants have filed cross-objections, which have not been pressed while hearing the appeal.

9. According to claimants, Harshaben was residing in America. She held Master's Degree in Business Administration from Sardar Patel University, Vallabh Vidyanagar. After her graduation she had joined Rolcon Engineering Co., Vidyanagar and served for 3 years. Thereafter on her marriage with the original claimant No. 1, she had migrated to America. She continued her studies in the field of Accountancy and started working as Accounts Clerk. At the time of accident she was working as Chief Accountant with the Coast Radiator Warehouse and was earning a salary of \$ 2,500 per month. Harshaben had also worked as Income Tax Preparer with H&R Black Co. and she was holding Income Tax Preparer Licence from State of California, USA.

9.1. According to the claimants, the claimant No. 1 and Harshaben were able to hold two residential properties in California State amounting to \$ 2,40,000 with outstanding market value of \$ 2,58,00,000. It was also stated that the original claimant No. 1 and Harshaben were owners of two cars worth \$ 20,500. One car was sold by the original claimant No. 1 after the death of Harshaben and incurred loss of \$ 1,200. The claimants stated that considering the ability and achievement of Harshaben, she had bright and prospective future in her work. Claimants have therefore claimed Rs. 3,00,00,000 by way of compensation.

10. As regard the death of Harshaben is concerned, the Tribunal found that postmortem report showed that Harshaben had injuries on occipital region, fracture of the right shoulder, injury on right forearm and injury on chest of right side. The cause of death was due to shock and haemorrhage because of head injury. From the evidence on record the Tribunal found that it was proved that at the time of the accident the original opponent No. 1 drove his truck in a rash and

negligent manner and dashed with Ambassador car in which Harshaben sustained head injuries and succumbed to the injuries. The Tribunal has not believed the version of the insurance company that Harshaben has not died due to the vehicular accident. According to the Tribunal it is proved from the evidence that Harshaben died in the accident taken place due to rash and negligent driving on the part of the driver of the truck No. GJ 15-T 880 which was driven by the opponent No. 1 at the time of the accident. Learned advocate for the appellant is not able to controvert this finding in any manner whatsoever.

11. The original claimants had produced certificate issued by Coast Radiator Warehouse at Exh. 34. The income tax returns for the years 1992 and 1993 of the deceased were produced on record at Exhs. 35 and 36 respectively. From the certificate it is established that Harshaben was serving in that company since 1990. Income tax return also support the fact that Harshaben was working and also earning. As regards the income is concerned, according to the claimants at the time of her death Harshaben was earning \$ 3,000 per month. It was claimed that at the time of accident in the year 1994 the salary of Harshaben in Coast Radiator Warehouse was \$ 2,500. According to the claimants the certificate produced at Exh. 34 showed that income of Harshaben increased by \$ 1,000 per month in 3 years. Harshaben was 35 years old at the time of the accident and she would have worked up to the age of retirement. In America retirement age is 65. Therefore, it was argued that Harshaben could have served further 35 years and considering raise of \$ 1,000 per month at every three years, she could have earned 10 raises of \$ 1,000 per month.

12. On the basis of certificate at Exh. 34 and from the income tax returns, Exhs. 34 and 36 the Tribunal has assumed income of \$ 2,000 per month. The Tribunal has doubled that income, added the monthly income and total amount was divided by one-half. Therefore, the monthly income was taken as: $\$ 2,000 \div 2 = \$ 4,000$ + $\$ 2,000 = \$ 6,000 \div 2 = \$ 3,000$. From this amount 1/3rd income was deducted for personal expenses. Therefore, the net income came to \$ 2,000 (i.e., $\$ 3,000 - \$ 1,000 = \$ 2,000$) which comes to \$ 24,000 per annum. Looking to the evidence on record, we are of the opinion that the Tribunal was fully justified in taking the income at \$ 2,000 per month especially when the certificate of income has been produced on record. The certificate, Exh. 34, issued by Coast Radiator Warehouse shows that in July 1990 the deceased was appointed and at that time her salary was \$ 1,500 per month. This certificate shows that the deceased was promoted several times and her salary was raised and it further shows that in 1994 her salary was \$ 2,500. The income tax return for the year 1992 is produced at Exh. 35. In this income tax return the income of the original claimant No. 1 and the deceased Harshaben both have been mentioned jointly. The total income shown is \$ 27,077. No separate income of the deceased and the original claimant No. 1 is mentioned in the certificate. Income tax return for the year 1993 was produced at Exh. 36. In this document also the total income is shown \$ 33,971. In that return the income of the deceased is separately shown as \$ 23,237 per year. Therefore, the yearly income

of Harshaben is \$ 23,237, divided by 12 comes to \$ 1,936. Thus according to this return wherein the separate income of the deceased is shown, income of Harshaben is \$ 1,936 per month. We are, therefore, of the view that the income of the deceased assessed by the Tribunal is just and proper and no interference is called for in the said finding.

13. As regards the multiplier is concerned, at the time of the accident the age of Harshaben was 36 years. This finding was supported by the marriage certificate produced at Exh. 24. Therefore, there was no dispute about the age of the deceased. Though it was argued that since the age of the deceased was between 35 and 40 the multiplier should be 16 as per Schedule and since the retirement age is 65 the multiplier should have been 18, the Tribunal has taken the multiplier of 15.

14. This is a peculiar case where the original claimant No. 1 husband was not solely dependent upon the income of the deceased and the two children also would not have been dependent on the deceased for more than 10 years. In that view of the matter, looking to the fact that the age of the original claimant was between 35 and 40 and looking to the fact that the original claimant Nos. 2 and 3 were minors at the relevant time, we are of the view that the interest of justice would be met by taking a multiplier of 13 without reducing the dependency factor and balancing the amount accordingly. Taking the income at \$ 2,000 after deducting 1/3rd income for personal expenses, total dependency benefit would come to \$ 2,08,000 ($\$ 2,000 \times 12 \times 13 = \$ 3,12,000$).

15. There was no dispute regarding the conversion rate taken at Rs. 31.75 at the relevant time. Learned advocates for the parties also do not dispute the same. Therefore the total dependency benefits would come to Rs. 66,04,000.

16. As regards the compensation awarded under the heads of conventional amount of Rs. 20,000, amount under funeral and transportation at Rs. 10,000 and Rs. 15,000 under the head of pain, shock and suffering are concerned, we are of the opinion that they are just and proper and no requirement is warranted.

17. We also find that the interest awarded at the rate of 9 per cent per annum is also just and proper and no interference is called for.

18. Thus in the premises aforesaid, this appeal is partly allowed. It is held that the opponent Nos. 1, 2 and 3 are jointly and severally liable to pay compensation in the sum of Rs. 66,49,000 to the original claimants with running interest at the rate of 9 per cent per annum from the date of claim petition till realisation. The award of the Claims Tribunal is modified to the aforesaid extent. Decree shall be drawn accordingly. The amount deposited by way of FDR shall be paid to the appellant along with interest if it is not already paid to the claimants. If the original claimants have withdrawn excess amount, the insurance company will be entitled to recover the same from the owner of the vehicle.