
(2011) 07 OHC CK 0020
In the Orissa High Court
Case No : M.A.C.A. No. 104 of 2010

National Insurance Company Ltd.

APPELLANT

Vs

Babita Barik and Others

RESPONDENT

Date of Decision : 22-07-2011

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2011) 2 OLR 558

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—The Insurance Company has preferred this appeal against the judgment dated 18.07.2009 passed by the 1st. Motor Accident Claims Tribunal, Dhenkanal in M.A.C. Case No. 140 of 2002.

2. The claimants' case in a nut shell before the Tribunal is that on 31.10.2001 at about 10 P.M. while deceased-Ajaya Barik was going towards Dhenkanal on his scooter bearing Registration No. DL/35/J/1773, at Dhumabati Deity's temple located by the side of NH 42, a truck bearing Registration No. OAX 5859 being driven in a rash and negligent manner by its driver dashed against the scooter of the deceased from his back side. As a result of such accident, the deceased sustained serious injuries on his body and died at the spot. At the time of death, the deceased was 29 years old and was getting a sum of Rs. 6,000/- (rupees six thousand) per month towards his salary.

Before the Tribunal, opposite party No1-owner of the vehicle did not contest the case for which he was set ex parte. Opposite party No. 2-Insurance Company, in its written statement inter alia stated that due to negligence of the deceased, the accident took place and the driver of the offending truck had No. valid and effective Driving Licence at the time of such accident and therefore, the Insurer is not liable to indemnify the owner of the vehicle.

3. On the basis of the pleadings of the parties, the Tribunal has framed the following four issues:

(i) Whether due to the rash and negligent driving of the driver of the Truck, bearing Registration No. OAX 5859, the accident took place and in that accident, deceased Ajaya Barik succumbed to the injuries?

(ii) Whether the Petitioners are entitled to get any compensation? If so, what would be the extent?

(iii) Whether all the opposite parties or any one of them is/are liable to pay compensation?

(iv) To what relief, the Petitioners are entitled?

4. The claimants have examined one witness and produced fifteen documents which are marked as Exts.1 to 15.

2 The Insurance Company has examined one Gyanranjan Das as a witness and produced the report of the Investigator, which is marked as Ext.A.

5. Taking both oral and documentary evidence into consideration, the Tribunal came to the conclusion that the documents filed and proved by the Petitioners clearly supports their case and the driver of the offending vehicle is solely responsible for the accident resulting in death of the deceased.

Considering the age of the deceased, the Tribunal has applied multiplier 18. On the basis of the salary certificate (Ext.10), the Tribunal has determined the amount of compensation at Rs. 6,42,240/-.

The Tribunal further awarded Rs. 2,000/- towards funeral expenses, Rs. 2,500/- towards loss of estate and Rs. 5,000/- towards loss of consortium and directed the Insurance Company to pay a sum of Rs. 6,51,740/- along with interest "7% per annum from the date of filing of the claim application.

6. Mr. Goutam Mishra, learned Counsel appearing for the Insurance Company submitted that the impugned award is illegal and arbitrary. Placing reliance upon the judgment of the apex Court in the case of State of Haryana and Another Vs. Jasbir Kaur and Others, , Mr. Mishra submitted that the award of compensation should not be a bonanza. There was No. proper eyewitness in the present case and in absence of such evidence, application filed u/s 166 of the Motor Vehicles Act, 1988 was liable to be dismissed. In support of his contention, 3 Mr. Mishra relied upon a decision of Delhi High Court in the case of The New India Assurance Company Ltd. Vs. Smt. Bhupinder Kaur and Others, . In view of the decision of the Apex Court in the case of The Oriental Insurance Company v. Meena Variyal 2007 (5) JT 65, the Tribunal should have asked the claimants to produce the best possible evidence, which has not been done by the said Tribunal. Since the driver was not impleaded as a party, the claim petition was not maintainable before the Tribunal. Neither the police officer nor the MVI was examined. Therefore, the police paper/G.R. records should not have been taken into account by the

Tribunal for the purpose of determination of the compensation. In support of his contention, Mr. Mishra relied upon a decision of this Court in the case of National Insurance Company Ltd. v. Malati Sethi 106 (2008) CLT 488. Placing reliance on a decision of this Court in the case of Banawarilal Agarwalla and Another Vs. Jeevan Kumar Badu and Another, , it was contended by Mr. Mishra that the Tribunal should not have relied upon the charge sheet filed in the present case.

7. Mr. Mishra, further submitted that the award of interest "7% per annum is high and excessive. Since the accident took place in the year 2001, the interest should have been 6% per annum.

8. Mr. P.Mishra, learned Counsel appearing for Respondent Nos. 1 to 3 submitted that in view of the admission of the Appellant-Insurance Company in its written statement filed before the learned Tribunal that the driver of the offending vehicle had No. valid driving licence and accident occurred due to contributory negligence of the driver of the offending vehicle and the deceased, it is not permitted to take a contrary stand before this Court. The fact of occurrence of the accident has been admitted by both the Insurance Company and the owner of the vehicle in their written statements filed before the Tribunal. Appellant No. 1, the wife of the deceased examined herself as P.W. 1 and stated about the fact of the accident and relied on various documents to support her contention which were marked as Exts. 1 to 15 as public documents. On the other hand, opposite party No. 2, the insurance company has not adduced any evidence to establish its plea of contributory negligence. Therefore, Mr. Mishra, learned Counsel for the Respondents contended that there is No. infirmity in the order of the Tribunal. In support of his contention, he relied upon the decisions of the Supreme Court in the case of Pushpabai Purshottam Udeshi and Others Vs. Ranjit Ginning and Pressing Co. (P) Ltd. and Another, and Bimla Devi and others. v. Himachal Road Transport Corporation and Ors. 2009 (2) T.A.C. 693 SC. It was further contended that since the documents produced before the learned Tribunal were admitted without objection and marked as Exts. 1 to 15, the Appellant is not permitted to raise any objection at a later stage. In support of his contention, he relied upon the decision in R.E.V. Venkatachala Gounder v. Arulmigu Viswesaraswami and V.P. Temple and Anr. AIR 2003 SCW 5316. The provision of Motor Vehicles Act being a benevolent social legislation enacted with a view to giving relief to the victims of a vehicular accident, the claimant is not required to prove its case beyond all reasonable doubts. The claim can be decided on the basis of strong reasonable probability and preponderance of evidence. It is further contended that there is No. illegality committed by the learned Tribunal while assessing the compensation, rather the compensation awarded is liable to be enhanced as the future prospects of the deceased who died at the age of 29 years and doing a stable work, was not taken into consideration by the learned Tribunal. In support of his contention, Mr. P. Mishra relied upon the decision of the Supreme Court in the case of Sarala Verma v. Delhi Transport Corporation 2009 (2) T.A.C. SC 677.

9. On the rival contentions the questions that fall for consideration by this Court

are as follows:

(i) Whether the Tribunal is justified to hold that the offending vehicle bearing Regn. No. OAX-5859 is involved in the accident and the accident occurred due to negligence of the driver of the offending vehicle in absence of eyewitness and without impleading the driver of the alleged offending vehicle as a party and also without examining the police officials or the M.V.I.?

(ii) Whether the amount of compensation awarded by the Tribunal is just and proper?

10. To deal with the first question, it is necessary to know the stand taken by the Appellant-Insurance Company before the Tribunal. Mr. G. Mishra, learned Counsel for the Appellant fairly submitted that before the Tribunal the Appellant-Insurance Company has not raised any objection for not impleading the driver as a party. No stand has been taken in the written statement regarding maintainability of the claim petition for non-impletion of driver as a party. On the contrary, paragraph of the written statement filed by opposite party No. 2-Insurance Company reveals that opposite party No. 2 has taken a stand that the driver of the offending vehicle had No. valid driving licence while driving the vehicle at the time of the accident. Further, in paragraph 8, it is stated that the alleged accident might have caused due to contributory negligence of the owner of the offending truck and the deceased. Thus, it is found that the Appellant is taking a plea before this Court which runs contrary to its own admission made in the written statement. Since in the written statement filed before the Tribunal, the Insurance Company took a stand that the driver of the offending vehicle had No. valid driving licence at the time of accident and there was contributory negligence on the part of the owner and the deceased, he is not permitted to take contrary plea that the alleged vehicle was not involved in the accident and the driver was not negligent. Driving of the offending vehicle and negligence on the part of the driver are admitted and accepted in the written statement filed before the Tribunal. Otherwise, there would not have been question of contributory negligence. Since involvement of the alleged vehicle and negligence of the driver is not in dispute, the driver is not a necessary party to be impleaded.

11. For the above reasons, the report of the investigator that the vehicle was not involved in the accident is also not acceptable and more so when the Insurance Company has not produced the Investigating Officer before the Tribunal for examination. No other evidence was also adduced by the Insurance Company either before the Tribunal or this Court in support of its contention. It may be noted that in its written statement, opposite party No. 1-owner of the offending vehicle admitted that an accident occurred vis-a-vis the vehicle belonged to him on the date, time and place as mentioned in the claim petition. It is further found from the L.C.R. that the Petitioner No. 1 examined herself as P.W.1 and in her statement, inter alia, stated that on the relevant date, i.e., on 31.10.2001 at about 10 P.M. while her husband was proceeding on NH 42 on a Scooter towards Dhenkanal side keeping to his left, at Dhumabati Deity's temple the offending

truck came in high speed being driven rashly and negligently by its driver and dashed against her husband, as a result, he was thrown out of the scooter and died at the spot. She further stated that the accident occurred due to rash and negligent driving by the driver of the offending truck and there was No. fault of her husband. She also filed certified copies of F.I.R., chargesheet, seizure list, Zimanama, inquest report, dead body challan, P.M. Report, 161 statement, and true copy of the last pay certificate of her deceased-husband issued by the Deputy Commandant, OSAP 1st Bn. Charbatia in support of her claim and those documents were admitted without objection and marked as Exts.1 to 15. In cross-examination, nothing contrary was elucidated from the mouth of P.W.1.

12. At this juncture, it would be profitable to refer the judgment of the apex Court in the present context. In the case of *Bimla Devi and Ors.* (supra) the Supreme Court held as follows:

In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.

13. In the case of *Pushpabai Parshottam Udeshi* (supra) the apex Court held as under:

The normal rule is that it is for the Plaintiff to prove negligence but as in some cases considerable hardship is caused to the Plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the Defendant who caused it, the Plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the Defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident "speaks for itself" or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the Plaintiff to prove the accident and nothing more. It will then be for the Defendant to establish that the accident happened due to some other cause than his own negligence. *Salmond on the Law of Torts* (15th Ed.) at P.306 states: "The maxim *res ipsa loquitur* applies whenever it is so improbable that such an accident would have happened without the negligence of the Defendant that a reasonable jury could find without further evidenced that it was so caused". In *Halsbury's Laws of England*, 3rd Ed., Vol. 28, at page 77, the position is stated thus: "An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the Plaintiff occurs wherever the facts already established are such that the proper and natural inference arising from them is that the injury complained of was caused by the Defendant's negligence, or where the event charged as negligence "tells its own

story" of negligence on the part of the Defendant, the story so told being clear and unambiguous". Where the maxim is applied the burden is on the Defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part.

14. It is No. more res integra that in a road accident claim case, the strict principle of proof in a criminal case are not attracted. The apex court in the case of Parmeshwari Vs. Amir Chand and Others, , held as follows:

The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted. The following observations of this Court in Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others, are very pertinent.

In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied.

15. For the reasons stated in preceding paragraphs, this Court is of the opinion that the learned Tribunal has not committed any error in holding that the offending vehicle bearing Regn. No. OAX-5859 is involved in the accident and the accident occurred due to negligence of the driver of the said vehicle.

For the said reasons, the various judicial pronouncements relied upon by Mr. G. Mishra, learned Counsel for the Insurance Company are of No. help to the Appellant.

16. Now coming to the 2nd question, whether the amount of compensation awarded by the Tribunal is just and proper, this Court finds that admittedly, in the present case the deceased was in a stable service as he was serving as a barber in the 1st Bn. Charbatia. The case of the Appellant is that as per the decision of the apex Court in Jasbir Kaur (supra), the amount of compensation should not be a bonanza for claimants. According to Mr. Mishra, in the instant case, the amount of compensation awarded by the Tribunal is high and excessive. Though learned Counsel relied upon the above case law, he has not stated how the amount of compensation awarded by the Tribunal is a bonanza for the claimants. On the other hand, learned Counsel appearing for the Respondent-claimants submitted that the compensation awarded by the learned Tribunal requires to be enhanced in terms of the judgment of the apex Court in Sarala Verma (supra) because while computing the amount of compensation, the learned Tribunal has not taken into consideration the future prospects of the deceased, who died at the age of 29 years and was doing a stable job.

17. Learned Tribunal while determining the amount of compensation has taken

into consideration the salary certificate and identity card produced by the Respondent-claimants before the Tribunal which are marked as Exts. 10 & 12 respectively. The salary certificate (Ext.10) indicates that the deceased was getting Rs. 4680/- as gross salary. After deducting Rs. 158/- which is not recoverable by the claimants, the Tribunal has taken the monthly income of the deceased as Rs. 4460/- and annual income at Rs. 53,520/-. Applying multiplier 15 and deducting 1/3rd towards personal expenses of the deceased, the amount of compensation was computed by the Tribunal at Rs. 6,42,240/-. Besides, Rs. 2000/-, Rs. 2,500/- and Rs. 5000/- was awarded towards funeral expenses, loss of estate and loss of consortium respectively. Thus, the total amount of compensation was determined at Rs. 6,51,740/-. It is true that though the deceased was 29 years old at the time of death and was in a stable service, the Tribunal has not awarded any compensation towards his future prospect. In my view, the Tribunal has made a holistic approach to the facts and circumstances of the case and determined the amount of compensation at Rs. 6,51,740/- in terms of second Schedule to Act. Therefore, I am not inclined to interfere with the same. For the said reason, I am also not inclined to interfere with the rate of interest awarded by the Tribunal.

18. In view of the above, the Insurance Company (O.P. No. 2) is directed to pay Rs. 6,51,740/- as compensation along with interest " 7; per annum from the date of filing of the claim petition, i.e., 24.06.2002 till the date of deposit of the same in favour of the claimant-Respondents. The said amount shall be deposited before the Tribunal within a period of two months from today. On deposit of the amount of compensation along with interest as indicated above, the Tribunal shall disburse the same to the claimants in the manner as it has directed in its order.

19. On production of a receipt showing deposit of the above amount of compensation as directed above before the Registrar (Judicial) of this Court, the statutory amount of Rs. 25,000/- deposited with the Registry of this Court along with interest accrued thereon be refunded to the Appellant-Insurance Company.

20. In the result, the MACA is dismissed.