
(2013) 08 BOM CK 0040
In the Bombay High Court
Case No : F.A. No. 526 of 2012

National Insurance Company Ltd.

APPELLANT

Vs

Seema Ramdas Telhande and Others

RESPONDENT

Date of Decision : 22-08-2013

Acts Referred:

Citation : (2013) 08 BOM CK 0040

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : Shashikant Borkar, for the Appellant; G. Venkatraman or Respondent Nos. 1 to 5, for the Respondent

Judgement

A.P. Bhangale, J.—The appeal u/s 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as "Act") is directed against the Judgment and Award dated 22-8-2011 passed by the Motor Accidents Claims Tribunal at Wardha in MACP No. 70 of 2008, whereby the Tribunal had partly allowed the claim in the sum of Rs. 5,21,500/- inclusive of no fault liability together with interest @ 9% p.a. from the date of the petition till realization of the entire amount. The facts in brief are as under:

On 11-12-2007 Late Shri Ramdas Telhande, aged about 35 years was a victim of the motor vehicle accident while he was driving motorcycle bearing registration No. MH-32/K-4088 travelling with one Sadanand Sheshrao Londhe sitting behind him as pillion rider on the Chandrapur-Nagpur Highway. When the motorcycle came near village Rampur, Tahasil Warora, driver of the unknown vehicle in front of the motorcycle had suddenly applied brakes. In the result the motorcycle driven by the deceased Ramdas collided to that unknown vehicle and turned turtle. Ramdas sustained injuries to his face and skull and died on the spot of incident. Pillion rider Sadanand Londhe had also suffered from the injuries in the accident. Motorcycle was owned by Sheshrao Mahadeo Londhe (Original non-applicant No. 1 and it was comprehensively insured with the National Insurance Co. Ltd., Wardha branch covering the date of the accident (Photocopy of policy is

at Ex. 40 indicating the policy covering the period between 12-2-2007 to 11-2-2008). It is case of the claimants that the driver of the front vehicle was driving the unknown vehicle rashly and negligently and suddenly applied the brakes which caused the accident to the motorcycle driven by Ramdas Telhande (Victim) was in proper speed, but he lost control over the motorcycle because of sudden stoppage of the front unknown vehicle, motorcycle turn turtled. The motorcycle had dashed against the unknown vehicle from behind. Ramdas Telhande was seriously injured and died on the spot. The claimants-dependents Seema, aged about 32 years (Widow of victim) and Kumari Ruchita and Kumari Purva (Minor daughters) claimed compensation in the sum of Rs. 10,00,000/- (Ten Lakhs only). The insurer defended the claim on the ground that the driver of the motorcycle was rash and negligent. The insurer denied the liability.

2. I have heard submissions at the bar at length. On behalf of the appellant, it is contended that motorcycle driver was rash and negligent and met with the accident, therefore, tribunal ought to have dismissed the claim or at the most could have apportioned the liability between the driver of the unknown offending motor vehicle and the offending motorcycle driven by the deceased Ramdas, who was also contributory to his own accident. His motorcycle was found in the middle of the Road. It is also contended that the alleged victim was not holding the valid driving license and there was breach of the insurance policy.

3. If a breach of the insurance Contract is alleged, it is for the insurer to plead and prove the breach. Furthermore, it is also required that breach of insurance policy must be proved as the cause of accident. Mere allegation of the breach is not enough and insurer cannot escape from the liability to compensate the third party arising on the basis of the contract of insurance with the insured. Breach of policy conditions, for example, disqualification of the driver or invalid driving license of the driver has to be established or proved as breaches committed by the insured for avoiding liability of the Insurer. Mere absence or, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties to avoid its liability towards insured. The insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the manner of fulfilling the condition of the insurance policy contract regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time. Thus the Insurance Company must not only prove, as a part of its defence, that the person driving the vehicle was disqualified as driver or that he did not hold a valid driving licence, but is also required to establish that the insured i.e. the owner of the vehicle had made positive breach of the condition to allow such incapable driver. As a matter of fact, where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer company would not be allowed to avoid its liability towards insured unless the said breach or breaches of the condition of driving licence is/are so fundamental and bound to have contributed to the cause of the

accident. The Motor Vehicles Act has socioeconomic objective to compensate the third party, who may have become the victims of the road accident as a result of the extensive use of the motor vehicles on the roads and highways. For these reasons, the insurer company cannot avoid its liability to compensate the third party victim. Breach must be specifically pleaded and proved. No evidence was led by the insurer in this case. It is not the case of the insurer-appellants that the vehicle motorcycle was used for different purpose other than permitted by its registration certificate. Thus, really it cannot be said to be a "breach" and, cannot be a ground for avoiding liability to compensate third party. Sections 145 to 164 of the Act provides for mandatory third party insurance, which is compulsory for any motor vehicle owner. For a Motor vehicle to be used and to move it in public places, an insurance policy is mandatory. Section 146(1) of the Act prohibits a vehicle owner from using the vehicle in a public place without undertaking an insurance policy in compliance with the Act. Furthermore, the Act provides for unlimited liability and limited defence for the insurance companies. Principles of tortious liability stood specifically excluded u/s 163-A(2) of the Act as held in Para 34 in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . Where the application is u/s 163-A of the Act, it is possible to calculate the compensation on the structured formula basis even in cases where the compensation is not specified with reference to the annual income of the deceased or even when annual income of the deceased exceeded Rs. 40,000/- by applying the formula of two-third of annual income multiplied by the multiplier applicable to the age of the deceased. (2/3 of annual income of the victim X applicable multiplier)

4. Learned Advocate for the Appellant placed reliance upon the ruling in National Insurance Company Ltd. Vs. Sinitha and Others, . Two Judge Bench of the Apex Court held that it is open for the Insurer to defeat the claim u/s 163-A of the Act by pleading and establishing a "fault" ground. But in the present case the appellants chose not to adduce any evidence in the Tribunal by tiling the closure pursis (Ex. 56), hence the appellant having failed to discharge onus upon it's shoulders at the trial stage in the Tribunal, cannot press into service the aforesaid ruling. It must be noted that the Apex Court had in Sinitha's case dismissed the SLP on the ground of failure by the insurer to discharge onus to prove "fault". At this stage, it is necessary to examine special provision u/s 163-A of the Act.

163-A. Special provisions as to payment of compensation on structured formula basis.--(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be. Explanation-For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

Section 163-A of the Act providing the table prescribing predetermined structured formula in Second Schedule of the Act is legislative policy aiming at the social security for benefit of the accident victims-disabled or dead which ought not to be denied to them or their dependents, one can find galaxy of judgments passed by various Courts with reference to the said provision which have restricted the legal defence strategies put forward by various insurance companies. Also, laying down principle that the liability to prove the limited defences does rests on the insurance companies. Section 163-A(2) exempted specifically the claimant/s from pleading and proving that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person. It must be noted that the executive authority of the Central Government do have requisite jurisdiction to amend the Second Schedule from time to time considering the trends of rising inflation and changes in rate of interest. It is always desirable that the Central Government ought to use the power in the interest of unfortunate victims of the motor vehicle accidents to adequately and reasonably compensate them by issuing broad based guidelines in all cases of motor vehicle accidents lodged u/s 163-A. It is fervidly desirable that Central Government shall be cognizant of the changes and make conscious efforts do the needful in this regard i.e. to have amendments at short intervals in the table of the Second Schedule to keep the Tribunals constituted under the Motor Vehicles Act, 1988 well informed with regular frequency to adjudicate with reference to growing inflation, and changes in the interest rates. Awareness on the part of the Central Government would help just, fair, hassle free and expedient adjudication in all such cases.

5. Learned Advocate for the Appellant submitted with reference to the police papers in the case that they were improperly received and wrongly admitted in evidence. He strenuously argued with particular reference to the observations made in the post-mortem notes in respect of the dead body of the deceased Ramdas to argue that the nature of injuries mentioned therein ought to have been considered by entering in details of their description to infer that the deceased Ramdas himself was rash and negligent in driving the motorcycle and was responsible for his own death. According to learned Advocate for the appellant, the improper rejection of the details as to description of injuries mentioned in the post-mortem notes is sufficient for setting aside the impugned Judgment and Award and to order remand of the case to the Tribunal to

reconsider the evidence after hearing the parties afresh in the claim application. In my opinion, this submission deserves to be rejected in view of section 167 of the Indian Evidence Act. Let us examine the scope of section 167 of the Indian Evidence Act, 1872.

167. No new, trial for improper admission or rejection of evidence.--The improper admission or rejection of evidence shall not be ground of itself for a new trial or, reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision or that, if the rejected evidence had been received, it ought not to have varied the decision.

In *Abdul Rahim vs. King. Emperor*, 48 BLR 473 (Four Judge Bench) Bombay High Court observed thus:

13. The first question submitted relates to the effect of the misperception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances? It was contended for the appellant that the evidence improperly admitted might have so seriously prejudiced the minds of the jury as to have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission section 167 of the Indian Evidence Act in their Lordship's opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict, then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the appellate Court, if satisfied that there is sufficient admissible evidence to justify the verdict, is plainly entitled to uphold it.

Improper admission or rejection of evidence is not by itself a ground for reversal of a decision, if there is other evidence to support it. Where admissible evidence has been improperly rejected or inadmissible evidence has been admitted by the Judge, such improper reception or rejection of evidence shall not of itself be a ground for new trial or reversal of any decision in any case, unless substantial wrong or miscarriage of justice has been thereby occasioned; or, in other words, if the Court considers that after leaving aside the evidence that has been improperly admitted, there was enough evidence on the record to justify the decision of the lower Court, or that if the rejected evidence were admitted the decision ought not have been affected thereby, no Court of appeal should set it aside. The Appellate Court can effectively decide the appeal following section 167 of the Indian Evidence Act. Moreover, the appellant insurer had filed Pursis closing the evidence at Ex. 56 on 5-1-2011 stating that it did not want to examine any witness in the claim proceedings in the Tribunal and therefore

cannot be allowed leeway to go before the Tribunal again merely by motivation to defeat the claim anyhow.

6. The next question is about the quantum of the compensation. The ruling in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, is required to be followed, as held in Reshma Kumari and Others Vs. Madan Mohan and Another, . Three Judge Bench of Hon"ble Supreme Court concluded with guidelines as follows:

40. In what we have discussed above, we sum up our conclusions as follows:

(i) In the applications for compensation made u/s 166 of the 1988 Act in death cases where the age of the deceased is 15 years and above, the Claims Tribunals shall select the multiplier as indicated in Column (4) of the table prepared in Sarla Verma read with para 42 of that judgment.

(ii) In cases where the age of the deceased is upto 15 years, irrespective of the section 166 or section 163-A under which the claim for compensation has been made, multiplier of 15 and the assessment as indicated in the Second Schedule subject to correction as pointed out in Column (6) of the table in Sarla Verma should be followed.

(iii) As a result of the above, while considering the claim applications made u/s 166 in death cases where the age of the deceased is above 15 years, there is no necessity for the Claims Tribunals to seek guidance or for placing reliance on the Second Schedule in the 1988 Act.

(iv) The Claims Tribunals shall follow the steps and guidelines stated in para 19 of Sarla Verma for determination of compensation in cases of death.

(v) While making addition to income for future prospects, the Tribunals shall follow paragraph 24 of the Judgment in Sarla Verma.

(vi) Insofar as deduction for personal and living expenses is concerned, it is directed that the Tribunals shall ordinarily follow the standards prescribed in paragraphs 30, 31 and 32 of the judgment in Sarla Verma subject to the observations made by us in Para 38 above.

(vii) The above propositions mutatis mutandis shall apply to all pending matters where above aspects are under consideration. 41. The reference is answered accordingly...

It is in evidence that victim Ramdas Telhande, aged 35 years. He had suffered the fracture to skull bones and the face described as crushed injuries to face and skull in P.M. notes with cause of death mentioned as multiple dangerous injuries and internal haemorrhage. Shri Amol Pusdekar (Witness No. 3 for the claimants deposed that Ramdas Telhande was running shop "Rama Automobile" at Nandori Chowk of Hinganghat of automobiles spare parts and was also repairing the vehicles, earning Rs. 7000/- to Rs. 8000/- per month. Ex. 41 is copy of the licence issued under the Shops and Establishment Act. This evidence was

countered by a bare suggestion that witness was deposing falsely. In the absence of further concrete evidence of the monthly income of the victim, the Tribunal judiciously considered the monthly income of the victim as Rs. 4,000/- per month and annual income at Rs. 48,000/- only. In Para 26 of Sarla Verma's case, it is held that percentage of deduction (one-third) prescribed under the Second Schedule with reference to section 163-A of the Act is not an inflexible rule and offers merely a guideline. Here in the present case I have to consider that number of dependents-claimants were five hence in view of the para 30 in Sarla Verma's case after deducting the one fourth amount towards the self-expenses, the sum of Rs. 12,000/- the net loss of dependency was computed at Rs. 36,000/- for the dependents. Since claim was restricted below Rs. 40,000/- per annum by the claimants themselves in this case the computation with reference to section 163-A of the Act in view of the pre-structured formula was permissible as held by this Court in New India Assurance Company Ltd. vs. Shamrao S/o. Balaji Chaudhari, reported in 2011(2) All M.R. 724 and considering the age of the victim as 35 years in this case at the time of his death the multiplier was applied at 16. (36,000 x 16 = 5,76,000) sum of Rs. 5,76,000/- need to be awarded as just and fair compensation. As the deceased Ramdas was self-employed, I have not considered probable increases in his income due to future potential or prospects. Thus, taking his income found at the time of his death as final multiplicand to compute the amount of just compensation. Under the conventional heads, the Tribunal erred to award only sum of Rs. 9,500/- (Loss of consortium Rs. 5,000/- + Loss of estate Rs. 2,500/- + Funeral Expenses Rs. 2,000/-) was awarded by the Tribunal. According to the respondent's Advocate, this Award was inadequate despite evidence on behalf of the claimants which was not at all countered by the insurer-Appellants by any evidence to the contrary before the Tribunal. According to the learned Advocate for the respondent-claimants, the amounts granted as compensation towards the loss of consortium for the widow, and loss of estate was computed very low and contrary to guidelines in para 19 of the leading ruling in Sarla Verma's case and no any compensation was awarded for the loss of love and affection suffered by all the five claimants. While on behalf of the appellant, it is fervently contended that the compensation awarded was excessive and unreasonable.

7. Thus, question to be determined with reference to the submissions is as to what is just and fair compensation in the facts and circumstances of the case, since it is duty of the Court to award as such as held in Rajesh and Others Vs. Rajbir Singh and Others, (Three Judge Bench). It is true that the business of selling the spare parts and repairing the vehicles is not the continuing business fetching regular income every month, therefore, I do not propose to interfere with the finding of the Tribunal to hold the income of the deceased Ramdas on an average limited to the sum of Rs. 4,000/- per month on an average basis though the deceased might have been sometimes earning sum of Rs. 7,000/- to Rs. 8,000/- per month (or may be less) from repairs of the vehicles as stated in the evidence of Amol Pusdekar (Witness No. 3 for the claimants).

8. The claimants-dependents are entitled to the reasonable and fair compensation under the conventional heads as well, since they have lost their near and dear and only earning member of the family. It can be fairly computed as follows:

The steps taken for computation of the monthly income, yearly income of the deceased and then considering the number of dependents (five) for deducting the one-fourth amount towards self expenses to arrive at the multiplicand 16 and applying the same as multiplier considering the age of the victim and the ages of the dependents. If sums under the conventional heads are awarded as aforesaid the total compensation following the rulings in Sarla Verma as well as Reshma Kumari (supra) cases, would be just, appropriate and reasonable in the facts and circumstances of the present case because the impugned award has to be just, reasonable and proper, hence, stands modified accordingly. No interference is warranted otherwise by this Court in exercise of the appellate jurisdiction.

ORDER

1) The appeal is without merits. Hence dismissed with costs. The just and fair compensation amount must be paid to the claimants as ordered by this Court in the sum of Rs. 6,63,000/- interest at the rate of 9% per annum from the date of the claim application till realization thereof, the amount deposited in this court with accrued interest shall be transferred to the Tribunal to disburse the payment of Compensation proportionately to the claimants-dependents subject to conditions and the time frame as the learned Tribunal may deem it fit according to law. The amount which has already been paid to the claimants shall be adjusted and balance of the amount with interest as ordered above be paid within three months. There shall be separate order as to costs of this appeal payable to the respondents-claimants. Amounts deposited in this Court with interest accrued be transferred to the Tribunal for disbursement to the claimants pursuant to Award.

2) Copy of this Judgment be sent to the Principal Secretary, Law and Judiciary, State of Maharashtra to send the needful request as requisitioned by this Court in view of Para 5 of this Judgment, to the executive authority of the Central Government.