
(2019) 03 GAU CK 0028
In the Gauhati High Court
Case No : MACApp. 317 Of 2013

New India Assurance Co. Ltd

APPELLANT

Vs

Sangeeta Gogoi And 2 Ors

RESPONDENT

Date of Decision : 08-03-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173
Indian Penal Code, 1860 — Section 279, 304A, 427

Citation : (2019) 03 GAU CK 0028

Hon'ble Judges : Manish Choudhury, J

Bench : Single Bench

Advocate : R. K. Bhatra, A. Saikia, A. Borah, P. Hujuri, A. Kalita

Final Decision : Disposed Off

Judgement

Manish Choudhury, J

1. This statutory appeal under Section 173 of the Motor Vehicles Act, 1988, as amended, (the Act, in short) is preferred against the judgment and award dated 09.10.2012 passed by the learned Member, Motor Accident Claims Tribunal, Golaghat in MAC Case No. 95/2006. By the judgment and award dated 09.10.2012, the Motor Accident Claims Tribunal, Golaghat (the Claims Tribunal, in short) had awarded an amount of Rs. 16,41,000/- as compensation along with simple interest @ 6% per annum from the date of filing of the claim application i.e. 27.04.2006 till realization of the entire amount.

2. The factual matrix leading to the institution of the claim application is that on 16.02.2006, at around 2-45 p.m., the vehicle bearing registration No. AS-02/A-0477 (bus) was coming from Nagaon side to Jorhat side on the National Highway No. 37 with passengers on board. While so proceeding, it knocked down a two wheeler vehicle bearing registration No. AS-05/6371 (LML Vespa Scooter) at a place on the National Highway No. 37 near Rangamati Tea Estate Factory. The accident had occurred when the two vehicles were coming from the opposite

directions. As a result, the rider and the pillion-rider who were on the said scooter viz. Bishnu Pd. Gogoi and Probin Bora sustained serious injuries and the scooter was also badly damaged. Both the injured persons were immediately taken to Jorhat Civil Hospital for treatment. However, both the injured persons succumbed to their injuries at Jorhat Civil Hospital on 16.02.2006 itself. In respect of the said accident, a police case was registered at Dergaon Police Station being Dergaon Police Case No. 21/2006 under Sections 279/304A/427, Indian Penal Code, (IPC, in short) against the driver of the vehicle bearing registration No. AS-02/A-0477 (bus).

3. It was subsequent to the death of the deceased, Bishnu Pd. Gogoi, a claim application under Section 166 of the Act was instituted before the Claims Tribunal seeking compensation for the death of the deceased arising out of the use of motor vehicle. The two claimants in the said claim application were the wife and the mother respectively of the deceased. The claim application was registered and numbered as MAC Case No. 95/2006. The insurer, the owner and the driver of the said alleged offending vehicle bearing registration No. AS-02/A-0477 (bus) were impleaded as opposite party No. 1, opposite party No. 2 and opposite party No. 3 respectively.

4. On institution of MAC Case No. 95/2006, notices were issued to all the opposite parties and on receipt of notices, all the opposite parties appeared before the Claims Tribunal and contested the case by submitting their written statements. The opposite party No. 1-insurer had contended that the accident had happened due to head-on collision between the scooter and the bus. It was also contended that the accident had happened due to rash and negligent manner of driving on the part of the deceased also who was riding the scooter at the time of the accident. The owner of the bus, as the opposite party No. 2, by filing his written statement had contended that the vehicle was duly insured with the opposite party No. 1-insurer and the alleged accident never took place for the fault of the driver of the bus. In any view of the matter, the bus was driven by a driver who had a valid and effective professional driving license to drive such a vehicle at the relevant point of time and as the vehicle was duly insured with the opposite party No. 1-insurer, there was no violation of policy condition and in case any compensation was awarded by the Claims Tribunal, he would be entitled to be indemnified by the opposite party No. 1-insurer because of the coverage extended by a subsisting policy of insurance. The opposite party No. 3-driver also, in his written statement, denied all the averments.

5. On consideration of the pleadings, the Claims Tribunal framed the following 3 (three) Nos. of issues :-

1. Whether the accident due to rash and negligent driving on the part of the driver of the offending vehicle No. No. AS-02-A/0477 (bus)?
2. Whether the claimants are entitled to get the compensation? If so, to what extent and payable by whom?

3. To what other relief/reliefs, the claimants are entitled to get?

6. During the course of proceedings before the Claims Tribunal, the claimants' side adduced evidence of 3 (three) witnesses viz. C.W.1, Smt. Sangeeta Gogoi, the claimant No. 1 and the wife of the deceased; C.W.2, Sri Sanjeeb Charangia; and C.W.3, Sri Uma Saikia, Havildar who appeared on behalf of Lt. Col. Officer Commanding, 706 MSS/1253 MSU C/O 99 APO. Though the opposite parties did not adduce any evidence, they cross-examined the witnesses, C.W.1 and C.W.2 while declining to cross-examine C.W.3.

7. The Claims Tribunal upon closer scrutiny of evidence, by the judgment and award dated 09.10.2012, allowed the claim application made on behalf of the claimants by awarding an amount of Rs. 16,41,000/- as compensation with simple interest @ 6% per annum from the date of filing of the claim application i.e. 27.04.2006 till realization of the entire amount. The said judgment and award has been put to challenge by the opposite party No. 1-insurer as the appellant in the instant appeal.

8. I have heard Mr. R. K. Bhatra, learned counsel for the appellant. It is found that on the previous occasions of listing of this appeal for hearing, none had appeared on behalf of the respondents-claimants though initially they entered appearance through learned engaged counsels. In view of non-representation on behalf of the respondents-claimants, this Court requested Mr. A. Kalita, learned counsel to assist the Court and to present the case on behalf of the respondents-claimants.

9. Mr. Bhatra, learned counsel referring to the memorandum of appeal has confined his submissions mainly on 3 (three) grounds :-

Firstly, as two vehicles were involved in the accident, the Claims Tribunal ought to have apportioned the liability between the two vehicles and the deceased having contributed to the accident by his rash and negligent Act, the award of compensation warrants modification;

Secondly, there should be reconsideration on the issue on adoption of multiplier having regard to the age of the deceased; and

Thirdly, there should be reconsideration in respect of monthly salary of the deceased having regard the documents exhibited in the course of proceedings before the Claims Tribunal.

Mr. Kalita, learned counsel referring to the evidence on record, has submitted that none of the grounds urged on behalf of the appellant has any merit to deserve any consideration as there was no rebuttal evidence by the appellant to bring in any kind of evidence as regards contributory negligence on the part of the deceased. Further, absence of driving license does not alter the situation when there was prima-facie evidence of rash and negligent act only on the part of the driver of the bus.

10. It is an admitted position that the accident had happened on 16.02.2006 at about 2-45 p.m. on the National Highway No. 37 near Rangamati Tea Estate Factory under Dergaon Police Station in the district of Golaghat, Assam due to the collision between the two vehicles - a bus bearing registration No. AS-02/A-0477 (bus) and a two-wheeler bearing registration No. AS-05/6371 (LML Vespa Scooter) coming from the opposite directions and as a result of the said accident, the two persons riding on the scooter i.e. Bishnu Prashad Gogoi, the deceased, and Probin Bora sustained serious injuries on their persons. They were immediately taken to Jorhat Civil Hospital for treatment but both of them succumbed to their injuries on 16.02.2006 at Jorhat Civil Hospital. The bus, at the relevant point of time, was driven by the driver viz. Haren Bora, who was impleaded as opposite party No. 3 in MAC Case No. 95/2004. In connection with the said accident, a case being Dergaon Police Case No. 21/2006 was registered under Sections 279/304A/427, IPC against the said driver of the bus. The bus at the relevant point of time was under insurance coverage by a valid and effective policy of insurance issued by the opposite party No. 1-insurer who is the appellant in the present appeal.

11. Situated thus, it is required, in order to appreciate the submissions so made, to examine the evidence led before the Claims Tribunal. CW-1, the wife of the deceased in her deposition stated that her deceased husband was proceeding from Dergaon side along with Probin Bora (since deceased) on the scooter observing all traffic rules and regulations on the National Highway No. 37. She deposed that the bus being driven in a very rash and negligent manner by its driver and coming from Nagaon side, dashed the scooter at a place near Rangamati Tea Estate Factory. It was deposed that the deceased was serving in the rank of Sepoy in the Indian Army vide Army No. 13996040-M and at the time of his death, he was 29 years old. The deceased left behind 3 (three) persons as his legal representatives, (i) the wife, (ii) a daughter, aged about 5 years, and (iii) the mother, who were all dependents on the earning of the deceased. C.W.1 exhibited a number of documents :- Ext.-1 : Accident Information Report in Form 54, Ext.-2 : First Information Report, Ext.-3 : Police Report, Ext.-4 : Discharge Slip of Jorhat Civil Hospital, Ext.-5 : Pass Certificate of All India Secondary School Examination, 1992 issued by Central Board of Secondary Education, Ext.-6 : Relationship Certificate, Ext.-7 : Certificate showing particulars of the deceased soldier and Ext.-8 : Post-Mortem Examination Report. In her cross-examination, she stated that she did not witness the accident. She admitted that her husband was not having a driving license at the time of accident. She categorically denied the suggestion of rash and negligent act on the part of the deceased.

12. C.W.2 deposed that he witnessed the accident which caused the death of Bishnu Pd. Gogoi on 16.02.2006 on the National Highway No. 37 near Rangamati Tea Estate factory. He testified that the deceased was coming from Dergaon side along with Probin Bora on the scooter at a very slow speed by the left side of the road on the National Highway No. 37. The bus, driven in a very rash and negligent manner by its driver and coming from Nagaon side, hit the scooter and

completely damaged the scooter. As a result of the impact, both the persons on the scooter sustained serious and grievous injuries and they were immediately taken to the Civil Hospital, Jorhat where both of them succumbed to their injuries on the same day. C.W.2 categorically stated that the said accident occurred due to fault of the driver of the bus. In his cross-examination, C.W.2 deposed that he had a business of tent house at Bongaon. He denied the suggestions that he did not witness the accident and that he deposed falsely on behalf of the wife of the deceased.

13. C.W.3, Sri Uma Saikia was an Havildar who deposed on behalf of Lt. Col. Officer Commanding. C.W.3 stated that Ex. No. 13996040-M Sepoy, Bishnu Prashad Gogoi was employed in the Army Medical Corps as Nursing Assistant and he was appointed on 28.08.1996. As per the service particulars available on the records of the employer, his date of birth was 21.11.1976 and his pay and allowances were Rs. 8,014/- wherefrom deduction of an amount of Rs. 2,250/- was made monthly. He exhibited 2 (two) Nos. of documents which were exhibited as Ext.-9 : Service Certificate of the deceased containing date of appointment, date of birth and the pay and allowances at the time of his death and Ext.-10 : Statement of Accounts of the deceased. The appellant herein i.e. the opposite party No. 3-insurer declined to cross-examine this witness.

14. On the basis of the aforesaid evidence on record, the Claims Tribunal had decided the Issue No. 1 in the affirmative holding that the bus was driven by the driver in a very rash and negligent manner causing the accident, notwithstanding the fact that no driving license in respect of the deceased was produced before the Claims Tribunal. While deciding the Issue No. 2, the Claims Tribunal rightly considered the age of the deceased, at the time of his death, as 29 years. As an employee in the Army Medical Corps as Nursing Assistance, the deceased used to draw an amount of Rs. 8,014/- as his salary. It was observed that the deceased left behind 3 (three) dependents viz. (i) the wife, (ii) a daughter, aged about 5 years, and (iii) the mother. Accordingly, 1/3rd of his income was deducted towards personal and living expenses of the deceased. Addition to the extent of 50% to the actual salary was made towards the future prospects to the deceased. Thereafter, the Claims Tribunal proceeded to determine the compensation in the following manner :-

"(i)

Monthly income of the deceased is

Rs.

12,021/-

(ii)

After deduction of 1/3rd on account of personal & living expenses, then the amount comes to Rs. 8,014/- (say)

Rs.

8,000/-

(iii)

Annual income of the deceased is (Rs. 8000/- X 12=)

Rs.

96,000/-

(iv)

Now, annual income X multiplier 17, i.e. Rs. 96,000/- X 17 =

Rs.

16,32,000/-

(v)

Funeral expenses

Rs.

3,000/-

(vi)

Loss of consortium

Rs.

3,000/-

(vii)

Loss of estate

Rs.

3,000/-

Rs. 16,41,000/-"

15. In so far as the contention regarding contributory negligence on the part of the deceased is concerned, it is found that no evidence was led by the appellant during the course of proceeding before the Claims Tribunal. As regards the plea that the deceased did not have a driving license, there was no evidence that the deceased was driving the two wheeler scooter in a rash and negligent manner. The evidence of C.W.2 who was an eye-witness to the accident, was not dislodged by the opposite party-insurer in any manner. Nothing was elicited from his cross-examination to infer that there was any rash and negligent act on the part of the deceased. In his evidence, C.W.2 stated that the scooter was coming from Dergaon side at the time of accident. His presence at the place of accident

in view of his assertion of having a business of tent House at Bongaon, cannot be termed as doubtful and as unnatural. In presence of such evidence and in absence of any rebuttal evidence from the side of the opposite party-insurer, it is not acceptable that the deceased was driving rashly and negligently to have contributed to the accident. If he was not driving rashly and negligently and did not contribute to the accident he could not be held to be guilty of contributory negligence only because he was not having a valid driving license.

16. Admittedly, there was a collision between the scooter and the bus coming from opposite directions. Mr. Bhatra, to substantiate his submission placed reliance on the decision of the Supreme Court in *Bijoy Kumar Dugar vs. Bidya Dhar Dutta and Ors.*, reported in (2006) 3 SCC 242. In *Bijoy Kumar Dugar vs. Bidya Dhar Dutta, and others* (supra), the Supreme Court had noticed the reasoning and finding of the Claims Tribunal on the issue regarding contributory negligence. The evidence of the eye-witness therein (P.W.2) who was travelling in the Maruti Car along with the deceased on the day of the incident and who also suffered some injuries in the said accident, was to the effect that the deceased, before the accident, noticed the passenger bus coming from the opposite direction the movement of which was not normal as it was coming in a zig-zag manner. It was thereafter, the car being driven by the deceased and the offending bus had a head-on collision. The Claims Tribunal did not accept the said evidence of P.W.2 to prove that the driver of the offending bus was driving the vehicle at abnormal speed. If the bus was being driven by the driver abnormally in a zig-zag manner, it was but natural for the deceased to have taken due care and precaution to avoid the head-on collision when he had already seen the bus coming from the opposite direction from a long distance. It was on the basis of such evidence, the Supreme Court had accepted that the Claims Tribunal had rightly reached the finding of fact to the effect that the drivers of both the vehicles should be held responsible to have contributed equally to the accident. In the instant case, the evidence available does not reflect that there was lack of due care on the part of the deceased at the time of accident. As has been stated above, from the evidence of C.W.2, it is established that the accident had occurred due to rash and negligent act solely on the part of the driver of the bus. In absence of rebuttal evidence from the side of the opposite party-insurer, the plea of contributory negligence on the part of the deceased, taken in this appeal, cannot be accepted purely on the basis of conjectures and surmises without any rebuttal evidence.

17. The facts involved in the case of *Dinesh Kumar J @ Dinesh J vs. National Insurance Company Limited*, reported in (2018) 1 SCC 750, were that the appellant while riding a motor cycle, received injuries in an accident he met with a mini lorry. The Claims Tribunal held that the appellant was guilty of contributory negligence to the extent of 40%. Both the Claims Tribunal and the High Court found fault with the appellant for having not produced his driving licence. The award of the Claims Tribunal indicated that absolutely no evidence was produced by the insurer to support the plea that there was contributory

negligence on the part of the appellant. It was submitted on behalf of the appellant that both the Claims Tribunal and the High Court were manifestly in error in holding the appellant to be guilty of contributory negligence to the extent of 40% on the erroneous premise that since the appellant had failed to produce the driving licence, an adverse inference on the aspect of contributory negligence would have to be drawn. The Supreme Court accepted the submission that the plea on contributory negligence could not be accepted purely on the basis of conjectures and without any evidence. It has further observed that once the finding that there was contributory negligence on the part of the appellant was held to be without any basis, the second aspect which weighed with the Claims Tribunal and the High Court, that the appellant had not produced the driving licence, would be of no relevance.

18. In the instant case, the driver and the owner of the bus after filing of their written statements had chosen not to give any evidence. Furthermore, the insurer did not choose to examine either the owner or the driver on the bus or any other independent witness. The driver of the bus or any other independent witness who was present at the time and place of accident, would have been the best persons to depose as regards extent of negligence on the part of the drivers of the two vehicles. No evidence has been brought on record that the deceased prior to the accident, had got any kind of opportunity to avert the accident. There appears to be no evidence from which it can be inferred that the deceased had contributed in any manner to cause the accident.

19. In *Sudhir Kumar Rana vs. Surinder Singh and others*, reported in (2008) 12 SCC 436, it was held as follows :-

"9. If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini-truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence.

10. The matter might have been different if by reason of his rash and negligent driving, the accident had taken place."

20. Thus, the mere assertion that just because the deceased did not have a driving licence at the time of accident he should be deemed to have contributed to the accident by his rash and negligent act would not succeed in absence of any evidence on record to reach a finding that the deceased, like in the instant case, was riding the motor cycle in a rash and negligent manner and that some part of the fault for the accident was also attributed to him. In the absence of such evidence and finding of fact, the plea of contributory negligence in the

instant case does not merit acceptance. Consequently, the fact that the deceased did not have any driving licence would be of no relevance.

21. It is pertinent to mention that on the date of the admission of the instant appeal, this Court had passed an order on 08.10.2013 in the connected Misc. Case No. 3276/2013 to the following effect :-

"The connected appeal has already been admitted today by a separate order passed. The grounds of appeal are that though the multiplier 16 ought to have been applied, the learned Member, MACT, Golaghat, has applied the multiplier 17, and that the learned Member has taken the gross salary of the deceased for ascertaining the loss of dependency instead of the net salary. It is also the contention of the appellant that there was contributory negligence on the part of the deceased i.e. the husband of the claimant/respondent No. 1.

Even if the applicant/insurance company's contention that the multiplier 16 ought to have been applied and also that the net salary and not the gross salary ought to have been taken into consideration for ascertaining the loss of dependency, having regard to the net salary received by the deceased and also the multiplier as 16, an amount of Rs. 11,13,600/- is required to be paid as compensation, even if the claim of the insurance company is accepted. The said amount would carry interest @6% per annum as awarded by the Tribunal from the date of filing the claim application till 27.04.2006, which roughly comes about Rs. 5,00,000/-.

In view of the above, the insurance company is directed to deposit an amount of Rs. 16,00,000/- before the learned Member, MACT, Golaghat, within 2(two) months from today.

On such deposit the learned Member shall release an amount of Rs. 8,00,000/- and Rs. 2,00,000/- in favour of the claimant/respondent No. 1 Smt. Sangeeta Gogoi and the mother of the deceased, namely, Smt. Sabitri Gogoi, respectively, by account payee cheques and on being duly identified to the satisfaction of the learned Member, MACT. Remaining amount of Rs. 6,00,000/- shall be invested in the name of minor daughter of the deceased, namely, Anushka (Diya) Gogoi, who is a minor, in the State Bank of India, Golaghat Branch, in an interest bearing fixed deposit account with the condition that the said amount shall not be allowed to be encumbered in any manner and also shall not be allowed to be encashed till the minor."

22. In compliance of the said order dated 08.10.2013, the appellant had deposited an amount of Rs. 16,00,000/- before the Claims Tribunal by a cheque No. 82740 with a communication dated 22.01.2014 which was acknowledged by the Claims Tribunal under its seal and signature, a copy of which was produced by the learned counsel for the appellant during the course of hearing today.

23. It is settled that Section 166 of the Act deals with "just compensation" and even if in the pleadings no specific claim was made under section 166 of the Act, a party should not be deprived from getting "just compensation" in case the

claimant is able to make out a case under any provision of law. The Act being a beneficial and welfare legislation, the Court is duty bound and entitled to award "just compensation" irrespective of the fact whether any plea in that behalf was raised by the claimant or not. In *Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another*, reported in (2009) 9 SCC 121, it is held that only three facts need to be established by the claimants for assessing compensation in the case of death : (a) age of the deceased; (b) income of the deceased; and (c) the number of dependents. The issues to be determined by the Claims Tribunal to arrive at the loss of dependency are (i) additions/ deductions to be made for arriving at the income; (ii) the deduction to be made towards the personal living expenses of the deceased; and (iii) the multiplier to be applied with reference of the age of the deceased.

24. In so far as the age of the deceased is concerned, Ext.-5 : Pass Certificate of All India Secondary Examination, 1992 issued by the Secondary Board of Education reflects that on his date of birth was 21.11.1976. The same date of birth is also reflected in the service records for the employer, as is apparent from the Ext.-9 : Salary Certificate issued under the hand of the Lt. Col. Officer Commanding. In view of such clear evidence as regards the date of birth of the deceased, there is no reason available not to accept the same. The Claims Tribunal has rightly accepted the age of the deceased below 30 years on the date of the accident and rightly applied the multiplier of 17, in terms of the decision of the Supreme Court in *Sarla Verma (supra)*. From the evidence on record, C.W.1 as well as Ext.-7 : Certificate showing particulars of the deceased soldier, deceased had 3 (three) numbers of dependents at the time of his death, as has already been mentioned herein above, and the deduction of 1/3rd of the income of the deceased towards his personal and living expenses was rightly applied by the Claims Tribunal while assessing the compensation. In the Constitution Bench decision of the Supreme Court in the case of *National Insurance Company Limited vs. Pranay Sethi and ors.*, reported in (2017) 16 SCC 680, it is held that while determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects where the deceased had a permanent job and was below the age of 40 years, should be made. In view of such settled position of law, addition of 50% to the actual salary for future prospects of the deceased who had a permanent job in Indian Army Corps as Nursing Assistance and below the age of 40 years, was rightly added by the Claims Tribunal. The Claims Tribunals on the basis of Ext.-9 -:Service Certificate issued by the employer through Lt. Col. Officer Commanding had accepted the actual salary of the deceased at Rs. 8,014/- and arrived at the figure of assessment of Rs. 16,41,000/-, as extracted above. Accordingly, after assessing the total compensation payable at Rs. 16,41,000/-, the Claims Tribunal had awarded interest @ 6% per annum on the said amount w.e.f. 27.04.2006 i.e. the date of filing Claim petition till realization of entire amount.

25. The Claims Tribunal had awarded a total amount of Rs. 9,000/- under the conventional heads of loss of estate, loss of consortium and funeral expenses. In

National Insurance Company Limited vs. Pranay Sethi and ors. (supra), it is observed that the reasonable figures on conventional heads viz. loss of estate, loss of consortium and funeral expenses should be Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively. Thus, there should be addition of an amount of Rs. 59,000/- against those conventional heads to the already awarded amount of Rs. 16,41,000/-. By adding the said amount of Rs. 59,000/- to Rs. 16,41,000/-, the total compensation is quantified at Rs. 17,00,000/- on which the claimants would be entitled to interest @ 6% per annum from the date of filing of the claim application i.e. 27.04.2006 till the realization of the entire amount. The amount already deposited by the appellant-insurer in terms of the order dated 08.10.2013 before the Claims Tribunal and disbursed to the claimants shall be adjusted towards calculating the final amount payable along with the interest component. After such calculation, the balance amount is to be deposited by the appellant-insurer with the Claims Tribunal within a period of 3 (three) months from today. On such deposit, the Claims Tribunal will notify the claimants and while disbursing the amount to the claimants, the Claims Tribunal would follow the same direction as had already been directed by this Court by its Order dated 08.10.2013, as has been quoted hereinabove.

26. In the result, the impugned judgment and award dated 09.10.2012 passed by the Claims Tribunal in MAC Case No. 95/2006 is modified and the appeal is disposed of with the above directions. The record is to be transmitted to the Claims Tribunal forthwith. No order as to costs.