(2015) 01 BOM CK 0161

In the Bombay High Court

Case No : First Appeal No. 410/2001 and Cross Objection Stamp No. 684/2002

New India Assurance Company — APPELLANT

Vs

Himmatrao and Others — RESPONDENT

Date of Decision : 22-01-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 169, 173

Citation : (2015) 6 ABR 495 : (2015) 2 ACC 555 : (2015) ACJ 2836 : (2015) 6 ALLMR 647 : (2015) 6 BomCR 339 : (2015) 4 MhLj 955

Hon'ble Judges : Z.A. Haq, J.

Bench : Single Bench

Advocate : A.J. Pophaly, for the Appellant; Monali Pathade, Advocates for the Respondent

Judgement

Z.A. Haq, J.—The first appeal is filed by the Insurance Company challenging the award passed by the Motor Accidents Claims Tribunal granting compensation of Rs.60,000/-to the respondents 1 and 2 -parents of the deceased.

The respondents 1 and 2 have filed the cross-objection.

The respondents 1 and 2 filed the Civil Application No. 52/2015 praying for grant of early hearing. When this application came up for consideration, it transpired that the first appeal is of the year 2001 and the appeal and the cross-objection can be taken up for final hearing. Accordingly, the civil application is allowed.

2. The appeal and cross-objection are taken up for final hearing.

3. It is undisputed that Sudam died in the accident in which the vehicle owned by the respondent no.3 was involved. It is undisputed that the vehicle which was involved in the accident was insured with the appellant -Insurance Company.

The respondents 1 and 2 (father and mother of deceased Sudam) filed the claim petition in which Rs.50,000/-were granted to them as compensation on account of ''no fault liability'' and this amount is withdrawn by the respondents 1 and 2. The Tribunal by the impugned award concluded that the respondents 1 and 2 -claimants were entitled for the compensation of Rs.60,000/-and after deducting the amount of Rs.50,000/-granted to the respondents 1 and 2 towards no fault liability, the balance amount of Rs.10,000/-along with interest at the rate of 9% per annum was granted.

The Insurance Company being aggrieved by the award passed by the Tribunal has filed this appeal. The challenge of the appellant -Insurance Company is that the matador in which the deceased Sudam was travelling along with some other passengers was hired for marriage party and, therefore, there was breach of condition of policy on the part of owner of the vehicle and the Insurance Company was not liable to pay the amount of compensation.

4. The respondents 1 and 2 have filed cross-objection which is admitted by this Court by the order dated 28th February, 2002. While admitting the cross-objection this Court has kept open the issue regarding the maintainability of the cross-objection.

5. Ms. M.H. Pathade, the learned advocate for the respondents 1 and 2/cross-objectors has submitted that the Tribunal has committed an error in considering the age of deceased Sudam as between 35 to 40 years overlooking the documentary evidence on the record i.e. postmortem report in which the age of deceased Sudam is shown as 25 years. It is submitted that in view of the above error, the Tribunal has applied wrong multiplier which has resulted in grant of lesser amount than the amount of just and fair compensation.

6. It is submitted that considering the age of deceased as 25 years, the just and fair compensation receivable by the respondents 1 and 2 will have to be calculated by applying the multiplier of 18 as laid down by the Hon''ble Supreme Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, . It is submitted that the Tribunal has also not considered the entitlement of the respondents 1 and 2 for the funeral expenses and the compensation for the loss of estate and for loss of love and affection. It is prayed that the cross-objection be allowed and the respondents 1 and 2 be granted the enhanced amount of compensation.

7. After hearing the learned advocates for the respective parties, the following points arise for consideration:-

(1) Whether the cross-objection filed by the respondents 1 and 2 is maintainable ?

(2) Whether the respondents 1 and 2 have proved that the age of deceased Sudam at the time of accident was around 25 years ?

(3) Whether the respondents 1 and 2 are entitled for the amount of compensation considering the age of deceased Sudam as 25 years ?

(4) Whether the respondents 1 and 2 are entitled for the funeral expenses and compensation for the loss of estate and for loss of love and affection ?

8. Shri Pophaly, the learned advocate for the appellant has submitted that there is no provision under the Motor Vehicles Act, 1988 which entitles the respondents 1 and 2 to file cross-objection. It is submitted that all the provisions of Civil Procedure Code are not applicable and, therefore, the cross-objection filed by the respondents 1 and 2 under Order 41 Rule 33 of the Civil Procedure Code is not maintainable. The learned advocate has relied on the provisions of Section 169 of the Motor Vehicles Act, 1988 in support of the submission that all the provisions of Civil Procedure Code are not applicable to the proceedings before the Tribunal.

9. Ms. Pathade, the learned advocate for the respondents 1 and 2 has submitted that the Tribunal while considering the claim petition is required to assess the just and fair compensation payable to the claimants. It is submitted that the Appellate Court while exercising its jurisdiction under Section 173 of the Motor Vehicles Act is also required to undertake the same exercise of assessing the amount of just and fair compensation payable to the claimants. In support of her submission the learned advocate has relied on the judgment given by the Delhi High Court in the case of Babu Lal and others V/s. D.T.C. and another reported at 2013 (1) T.A.C. 844 (Del.)

The Delhi High Court has extensively examined the legal proposition and after considering the various judgments, has concluded that the claim of the claimants for enhanced amount of compensation and interest can be considered without cross-objection being filed by them. Applying the same analogy, in my view, the respondents 1 and 2 are entitled to maintain the cross-objection for the enhanced amount of compensation. In any case, the respondents 1 and 2 could have filed the appeal making the claim for the enhanced amount of compensation, if the cross-objection would have been dismissed as not maintainable in 2002 itself. The respondents 1 and 2 might have filed the appeal at that time itself.

10. The learned advocate for the appellant has submitted that the age of deceased Sudam was around 35 to 40 years at the time of accident and this is admitted by the respondent no.1 - father of deceased Sudam in his cross-examination. It is submitted that the Tribunal has rightly relied on the evidence of the respondent no.1 for concluding that the age of deceased Sudam was around 35 to 40 years at the time of the accident.

11. Ms Pathade, the learned advocate for the respondents 1 and 2 has submitted that the respondents 1 and 2 are labourers and illiterate persons and they are not having any knowledge about all these matters. The learned advocate has relied on the postmortem report in which the age of deceased Sudam is shown as 25 years. It is submitted that the Tribunal should have taken into consideration the documentary evidence in the form of postmortem report, than relying on the stray admissions given by the respondent no.1 in the cross-

examination.

12. On examining the record, I find that in the cause title of the claim petition the age of the respondent no.1 -father of deceased Sudam is shown as 50 years and the age of the respondent no.2 -mother of deceased Sudam is shown as 45 years. Shri Pophaly, the learned advocate has pointed out from the evidence of the respondent no.1 that his age at the time of recording of evidence is shown as 65 years. I have seen the original record of the proceedings before the trial Court. The claim petition and the other applications which were filed on the record of the Tribunal show that the respondents 1 and 2 had put their thumb impressions. These facts show that the respondents 1 and 2 are illiterate persons. In these circumstances, the Tribunal has committed an error in relying on the stray admissions given by the respondent no.1 in his cross-examination that the age of deceased Sudam was around 35 to 40 years at the time of accident, overlooking the documentary evidence on the record i.e. postmortem report which shows that the age of deceased Sudam was around 25 years at the time of accident. The appellant has not disputed the age of deceased Sudam as recorded in the postmortem report. The learned advocate for the appellant has not been able to point out any challenge raised by the appellant to the recording of age of deceased Sudam as 25 years in the postmortem report. In view of the above mentioned facts, I come to the conclusion that the age of deceased at the time of accident was 25 years.

13. Accordingly, the multiplier of 18 is required to be applied in view of the judgment given by the Hon''ble Supreme Court in the case of Sarla Verma (SMT) and others V/s. Delhi Transport Corporation and another (cited supra). The Tribunal has come to the conclusion that the deceased Sudam was earning about Rs.50/-per day. The finding of fact as recorded by the Tribunal regarding the earnings of deceased Sudam cannot be said to be illegal or perverse. The appellant has also not pointed out that the findings of fact recorded by the Tribunal in this regards suffers from any infirmity or perversity. Considering the earnings of deceased Sudam as Rs.1,500/-per month and applying the multiplier of 18, the amount of loss of earning comes to Rs.3,24,000/-. The deceased Sudam was bachelor and, after deducting 50% of the amount which would have been spent by him for his personal needs had he been alive, the amount of compensation payable to the respondents 1 and 2 comes to Rs.1,62,000/-.

14. The respondents 1 and 2 are entitled for the amount of Rs.2,000/- towards the funeral expenses as per clause 3(i) of the II Schedule of the Motor Vehicles Act, 1988. The Tribunal has given a complete go-bye to the entitlement of the respondents 1 and 2 for this amount.

15. In addition, the respondents are entitled for an amount of Rs.10,000/- under clause 3(iii) of the II Schedule of the Motor Vehicles Act, 1988 for the loss of estate.

16. Thus, the respondents 1 and 2 are entitled for compensation of

Rs.1,74,000/-. The respondents 1 and 2 are granted compensation of Rs.60,000/- by the Tribunal. After deducting the amount of Rs.60,000/-, the respondents 1 and 2 are entitled for the compensation of Rs.1,14,000/-. The respondents 1 and 2 are entitled for interest at the rate of 7.5% per annum on the amount of Rs.1,14,000/-, the interest being chargeable from the date of filing of the claim petition i.e. 3rd January, 1997 till the amount is paid to the respondents 1 and 2.

17. Shri Pophaly, the learned advocate for the appellant has submitted that the deceased Sudam was travelling in the vehicle involved in the accident and, therefore, it cannot be said that he was a third party and, therefore, the appellant is not liable to pay the amount of compensation as per the terms of the insurance policy. It is undisputed that several passengers were travelling in the matador in which the deceased Sudam was also travelling when the accident took place. In the accident, along with deceased Sudam four other passengers died and some other passengers sustained injuries. The claim petitions were filed in the matter. The First Appeal No. 769/2004 and First Appeal No. 656/2004 were filed before this Court by the Insurance Company challenging the award passed by the Tribunal granting compensation to the claimants/legal representatives of other deceased passengers. In these matters, the judgments are given by the Tribunal/this Court concluding that the Insurance Company should pay the amount of compensation and recover it from the owner of the vehicle. I see no reason to take different view in this matter.

Hence the following order:

(1) It is held that the respondents 1 and 2 are entitled for enhanced amount of compensation of Rs.1,14,000/-along with interest at the rate of 7.5% per annum, the interest being chargeable from 3rd January, 1997 till the amount is paid to the respondents 1 and 2.

(2) The appellant - Insurance Company shall pay the amount to the respondents 1 and 2 till 15th April, 2015, failing which the appellant -Insurance Company shall be liable to pay the interest at the rate of 12% per annum from 16th April, 2015 till the amount is paid to the respondents 1 and 2.

(3) The appellant may recover the amount from the respondent no.3 -owner of the vehicle, if so advised.

(4) The First Appeal No. 410/2001 is partly allowed inasmuch as the order passed by the Tribunal is modified to the extent that the Insurance Company is entitled to recover the amount from the respondent no.3 -the owner of the vehicle.

(5) The cross-objection filed by the respondents 1 and 2 is allowed in the above terms.

(6) In the circumstances, the parties to bear their own costs.

