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(2016) 11 GUJ CK 0002

In the Gujarat High Court

Case No : First Appeal No. 2005 of 2015 With Civil Application No. 10787 of 2015

Oriental Insurance — APPELLANT

Vs

Heirs of Deceased Hitesh — RESPONDENT

Date of Decision : 07-11-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96

Citation : (2017) 1 GCD 235

Hon'ble Judges : Mr. R.P. Dholaria, J.

Bench : Single Bench

Advocate : Notice Served, for the Defendant No. 3; Mr. Rathin P Raval, Advocate, for the Appellant No. 1; Mr. Hiren M. Modi, Caveator, for the Defendant Nos. 1 and 2

Final Decision : Partly Allowed

Judgement

R.P. Dholaria, J. (Oral) - The present appeal is preferred by the appellant ? insurance company against the judgment and award dated 21.2.2011 passed by learned Motor Accident Claims Tribunal (Main), Ahmedabad (Rural) at Ahmedabad in Motor Accident Claim Petition No.1300 of 2006.

2. By way of preferring the present appeal, the appellant has, inter alia, contended that learned Tribunal has awarded the amount of compensation which is on higher side. It is contended that judgment and award passed by learned Tribunal in favour of the dead person is nullity. It is further contended that the deceased claimant himself was negligent in driving the vehicle and hence he cannot take advantage of his own wrong.

3. The short facts giving rise to the present appeal are that on 9.10.2006, the accident took place. The deceased applicant was driving qualis car No.GJ 4 D 5382. At that time, one cow came suddenly on the road. The deceased applicant had applied brakes and hence the vehicle was turned turtle wherein the deceased applicant sustained injuries. Therefore, the deceased applicant filed the claim

petition before learned Tribunal and learned Tribunal delivered the impugned judgment and award, as stated above.

4. Heard Mr.Rathin Raval, learned advocate for the appellant ? insurance company and Mr.Hiren Modi, learned advocate for the respondents - claimants. Though served, none appears for respondent No.3.

5. This Court has gone through the impugned judgment and award as well as material made available in the nature of paper book to this Court.

6. It is pertinent to note that this is a second round of litigation before this Court by way of preferring the above-mentioned First Appeal challenging the impugned judgment and award passed by learned Tribunal.

7. On going through the record, it appears that victim of the vehicular accident was paid driver working with the vehicle involved in the accident as such. So far as the coverage of risk of the paid driver is concerned, policy at Exh.28 clearly discloses that the appellant insurance company has already recovered Rs.25/- and, therefore, there is no dispute so far as coverage of risk of the paid driver is concerned. However, the peculiar facts and circumstances of the case are such that accident in question was occurred on 19.10.2006 and thereafter the matter was proceeded before learned Tribunal and while the matter was at the verge of conclusion of trial and hearing, sole victim - original claimant died on 21.9.2009 and then the judgment and award was passed on 21.2.2011.

8. It is also very surprising that neither the claimants nor the opponents noticed the sad demise of the sole claimant, but after challenging the aforesaid award by way of preferring First Appeal No.1740 of 2011 by the appellant insurance company and at the time of effecting service of notice upon the sole claimant, it was noticed that the sole claimant had died on 21.9.2009 and, therefore, the appellant insurance company sought permission to withdraw the aforesaid First Appeal with a liberty to approach learned Tribunal for getting appropriate declaration. Permission as prayed for was granted by this Court and the appeal came to be disposed of with the aforesaid liberty vide order dated 21.11.2011. Thereafter, the appellant insurance company filed Review Application No.1 of 2013 before learned Tribunal wherein learned Tribunal observed that the original claimant died on 21.9.2009 and on perusing the record of the claim petition, the death of the original claimant was between closing of hearing and before delivery the judgment and considering the legal position, learned Tribunal rejected the Review Application. Precisely, by way of preferring the present appeal, the appellant insurance company contended that the aforesaid order passed in the Review Application as well as original award came to be passed by learned Tribunal are nullity as the sole claimant died prior to passing of the award. It is further contended that once the sole claimant himself preferred the claim petition seeking compensation for the injuries sustained by him and he died thereafter by committing suicide which has no relevance with the accident in question and, therefore, learned Tribunal could not have awarded future loss of income as

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provided in the structure formula for granting multiplier of 15 years, but the compensation at the most could have been considered for the period during the survival of the original claimant i.e. for three years.

9. Mr.Rathin Raval, learned advocate for the appellant ? insurance company has strenuously argued that since the Record and Proceedings, more particularly, rojnama proceedings is disclosing that the original claimant died before conclusion of hearing and, therefore, the judgment and award renders nullity in view of the provisions of Order 22, Rule 3 of the CPC and learned Tribunal while considering the review application has not taken into consideration the aforesaid factual scenario. He further contended that even otherwise also, in view of sad demise of the sole claimant, the award passed by learned Tribunal is not sustainable so far as the quantum point is concerned as the death of the original claimant has no nexus with the accident in question and, therefore, the original claimant is only entitled for compensation at the most for the period till he survived i.e. from 9.10.2006 till his death on 21.9.2009 viz, for about three years only. In support of his submissions, Mr.Raval has placed reliance on the decisions i.e. (i) Oriental Insurance Company Limited v. Hansaben Khumansinh Padhiyar and others in First Appeal No.4469 of 2006 and allied matters dated 28.8.2009 of this Court, (II) Radhakrishan Biharilal v. Chatursingh Govindsingh Thakkar, reported in 1987 (1) GLH 226 and (III) Jiviben Lavji Raganath v. Jadavji Devshanker, reported in 1977 (0) GLHEL-HC 205731.

10. On the other-hand, Mr.Hiren Modi, learned advocate for the respondents claimants has urged that this is a second round of litigation before this Court and that the heirs and legal representatives of the deceased claimant are already brought on record after withdrawal of above referred First Appeal No.1740 of 2011 by way of filing the application at Exh.53 which has been granted by learned Tribunal on 12.12.2011. He further argued that parents of the deceased claimant are already brought on record before learned Tribunal and learned Tribunal while considering the review application has recorded the finding that death of the sole claimant occurred in between the date of closing of hearing and pronouncement of judgment and hence, the provisions of Order 22, Rule 3 of the CPC would not be applicable but the provisions of Order 22, Rule 6 of the CPC would be applicable to the facts of the present case and the said fact has already been considered by learned Tribunal and dismissed the review application of the present appellant and granted the application for bringing heirs of the deceased claimant on record. He further argued that provisions of awarding compensation to the victim of vehicular accident are welfare in nature wherein even strict principles of the CPC would not be applicable so far as it relates to the procedure before learned Tribunal in senso stricto and after all paramount consideration of the courts always remains to award just compensation to the victim of the vehicular accident. Lastly, Mr.Modi requested this Court to dismiss the present appeal.

11. This Court while considering the rival submissions made by learned

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advocates for both the sides also perused rojnama proceedings. However, whether the arguments of learned advocates for both the parties were concluded prior to the death of the original claimant or not is a crucial question. Learned Tribunal itself has recorded while considering the review application that hearing was concluded. In that peculiar facts and circumstances of the case, this Court is not inclined to enter into that vital dispute raised by the appellant insurance company. Even if that may be believed in favour of the appellant insurance company, in that case also, the appellant insurance company was aware that the sole claimant was died during the pendency of the claim petition and that fact itself was within the knowledge of the appellant insurance company and, therefore, the review application was filed and thereafter the heirs and legal representatives of the deceased claimant are already brought on record before learned Tribunal. In this view of the matter, this Court is of the considered opinion that let entire matter may be sorted out for ever before this Court so far as the dispute as regards to declaring the award nullity as well as quantum of compensation, on both the counts.

12. So far as the award being nullity is concerned, though Mr.Raval, learned advocate for the appellant insurance company has relied upon the aforesaid three decisions and argued that the judgment and award passed by learned Tribunal renders nullity, on going through the above referred judgments, it is true that if the sole claimant or sole defendant, as the case may be, died in between conclusion of hearing and pronouncement of judgment, there shall be no abatement by reason of the death of either party. Learned Tribunal in the review application itself has categorically recorded that the sole claimant has died in between the date of conclusion of hearing and pronouncement of judgment. Order 22, Rules 3 and 6 of the CPC read as under.

"Order 22, Rule 3 . Procedure in case of death of one of several plaintiffs or of sole plaintiff.-

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within the time limited by law no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff."

"Order 22, Rule 6 . No abatement by reason of death after hearing.-

Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the

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judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place."

In this view of the matter, as narrated above, this is what precisely coming out from the rules relied upon by learned advocates for both the sides. Therefore, this Court is not inclined to further dwell into the technicalities as well as factual inquiry as to whether the arguments of either the plaintiff or defendant were concluded or not. The finding of learned Tribunal is sufficient and this Court is inclined to accept that the original claimant died in between the conclusion of hearing and pronouncement of judgment and taking into consideration the said fact, the heirs and legal representatives of the deceased claimant were brought on record by way of preferring the application at Exh.53. Therefore, the contention of Mr.Raval regarding nullity of the award, though he has argued for the entire sitting, is rejected.

13. Alternative contention raised by Mr.Raval, learned advocate for the appellant ? insurance company as regards to award of compensation requires consideration as he has successfully pointed out to this Court that the death of the sole claimant has nothing to do with the accident in question as, admittedly, the original claimant has committed suicide. Therefore, the original claimant has lived only upot 21.9.2009 and, therefore, the heirs and legal representatives of the original claimant are entitled to future loss of income during the period of survival of the deceased claimant. Therefore, taking into consideration the said fact and considering the annual undisputed income of the original claimant to be Rs.40,000/-, 3 years multiplier would be applicable. Therefore, future loss of income can be awarded to the extent of Rs.1,20,000/- as well as the amount of compensation as provided under the structured formula to the extent of Rs.5000/- towards pain, shock and suffering, Rs.15,000/- towards medical charges and Rs.12000/- towards actual loss of income. Therefore, in all, the claimants are entitled to receive Rs.1,52,000/-.

14. In view of the aforesaid discussion, this appeal succeeds in part. The judgment and award dated 21.2.2011 passed by learned Motor Accident Claims Tribunal (Main), Ahmedabad (Rural) at Ahmedabad in Motor Accident Claim Petition No.1300 of 2006 awarding Rs.6,32,000/- is modified and the amount of compensation awarded by learned Tribunal is reduced to Rs.1,52,000/- with interest at the rate of 7.5% from the date of application till realization. The learned Tribunal shall disburse the aforesaid amount of compensation to the claimants as brought on record in terms of the application Exh.53 before it as per its own discretion. Learned Tribunal is also directed to refund excess amount of compensation, if any, paid by the appellant ? insurance company along with proportioned interest and cost. Registry is directed to send back the Record and Proceedings, if any, to the lower court forthwith. No costs.

In view of the above order, the Civil Application does not survive and stands disposed of accordingly.

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