(2012) 05 DEL CK 0558

In the Delhi High Court

Case No : MAC. APP. 662 of 2010 and MAC. APP. 115 of 2012

Oriental Insurance Co Ltd — APPELLANT

Vs

Sabita Devi and Ors
 Sabita Devi and Ors Vs Oriental Insurance Co Ltd — RESPONDENT

Date of Decision : 25-05-2012

Acts Referred:
Motor Vehicles Act, 1988 — Section 163A

Citation : (2012) 05 DEL CK 0558

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Pradeep Gaur in MAC. app. 662/2010 and Mr. Peeush Sharma in MAC. app. 115/2012, for the Appellant; Peeush Sharma, Advocate for the Respondents No. 1 to 6, Ms. Aarti Mahajan with Mr. Gaurav Bisht, Advocate for the Respondent No. 7 in MAC. App. 662/2010 and Pradeep Gaur, Advocates in MAC. App. 115/2012, for the Respondent

Judgement

G. P. Mittal, J.—These two Appeals arise out of a judgment dated 22.07.2010 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) in Suit No. 172/2008 preferred u/s 163A of the Motor Vehicles Act by Respondents No.1 to 6 for the death of Gyan Kumar Mandal, who died in a motor accident which occurred on 21.02.2007. During inquiry before the Claims Tribunal, it was claimed that the deceased was a self employed person. At the time of the accident, he (the deceased) was driving TSR No. DL-1RG-8259 which met with an accident resulting in fatal injuries to the deceased.

2. The deceased''s income was claimed to be Rs. 3,300/- per month. The Claims Tribunal deducted one-fourth towards the personal and living expenses on the basis of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, adopted the multiplier of ''17'' to compute the loss of dependency as Rs. 5,04,900/-.

3. The Claims Tribunal awarded a sum of Rs. 10,000/- each towards loss of

consortium, loss of love and affection, loss to estate and funeral expenses to award the overall compensation of Rs. 5,44,900/-.

4. MAC APP.662/2010 has been preferred by the Oriental Insurance Company (hereinafter referred to as ''the Insurer'') and the Cross Objections being MAC APP. 115/2012 has been filed by the Respondents No. 1 to 6 (hereinafter referred to as ''the Claimants'').

5. The contentions raised on behalf of the Insurer are:-

(i) The deceased Gyan Kumar Mandal was not an employee of the insured and as third party risk was not covered under the policy of insurance issued by the Insurer, it could not have been fastened with the liability.

(ii) The Claim Petition was filed u/s 163A of the Act. There should have been deduction of one-third towards the personal and living expenses instead of one-fourth as in a Petition u/s 163A of the Act, as compensation can be awarded only on the basis of structured formula.

(iii) The compensation awarded towards the non-pecuniary heads was more than what is provided under the Second Schedule to the Act.

6. On the other hand, it is urged by the learned counsel for the Claimants that a premium of Rs. 25/- was charged for the driver for covering the risk of the hirer or the driver or of any person hiring the TSR and as such the Insurer is liable to pay the compensation for the death of the driver in this case.

7. It is urged that the compensation awarded towards loss of consortium, loss of love and affection and loss to estate was very meager and needs to be enhanced.

8. Before adverting to the respective contentions raised on behalf of the parties, it would be appropriate to refer to the facts. In the Claim Petition u/s 163A of the Act preferred by the Claimants, it was mentioned that the deceased was a self-employed person. His monthly income was Rs. 3,300/-. In Para 23 (Annexure-A), the Claimants averred that the deceased being driver of the TSR used to earn a sum of Rs. 3,300/- per month. Thus, it was no where alleged that the deceased was an employee of the Seventh Respondent.

9. The Seventh Respondent (the First Respondent before the Claims Tribunal) filed a written statement and took up the plea that the deceased was not an employee under the Seventh Respondent. No replication was filed by the Claimants disputing this fact.

10. In the Affidavit Ex.PW-1/A there was not even a whisper that the deceased was an employee of the Seventh Respondent.

11. The Seventh Respondent entered the witness box as R2W1 and her testimony that the deceased was paying her Rs. 150/- per day as hire charges for hiring the TSR was not challenged by the Claimants. In cross-examination, the Seventh Respondent deposed that the TSR was given to the deceased by

Vipin Kumar (Seventh Respondent''s representative) and not by her personally.

12. Thus, it may be noticed that it was not the specific case of the Claimants that he was an employee driving the TSR either on salary basis or on commission basis. The owner''s (Seventh Respondent''s) testimony that the deceased used to get TSR on hire basis at the rate of Rs. 150/- per day being not challenged either by the Claimants or by the Insurer, it cannot be said that there was any relationship of Master and Servant or that the deceased was an employee under the Seventh Respondent.

13. The Insurance Policy Ex.R2W3/1 was proved on record by the Seventh Respondent. It is true that the deceased was not an employee under the Seventh Respondent. A perusal of the Insurance Policy Ex.R2W3/1 however, shows that the policy was issued "Subject to IMT Endorsement Printed herein/attached to : IMT-36, IMT-20, IMT-40."

14. Although, under IMT-29 risk of only an employee is covered. But, under IMT-36, the risk to the hirer is also covered. IMT-36 is extracted hereunder:-

IMT 36 Indemnity to Hirer - Package Policy - Negligence of the insured or Hirer.

It is hereby declared and agreed that the company will indemnify any hirer of the vehicle insured against loss, damage and liability as defined in this Policy arising in connection with the vehicle insured by reason of the negligence of the within named insured or of any employee of such insured while the vehicle insured is let on hire.

Provided that any such hirer shall as though he/she were the insured observed fulfill and be subject to the terms, exceptions, conditions and limitations of this policy in so far as they apply.

15. In the circumstances, the Insurer was not entitled to avoid the liability on the ground that the deceased was neither covered as a third party nor as an employee, the deceased being hirer was covered by the contract of Insurance and the insurer was under obligation to indemnify the insured.

16. To be entitled to compensation u/s 163A of the Act, the Claimants are simply required to prove that the accident arose out of use of the motor vehicle in question which has been duly proved. The only defence available to the owner and Insurer is that the accident was caused because of the wrongful act, neglect or default of the victim himself National Insurance Company Ltd. Vs. Sinitha and Others, . The same has not been done by the Insurer.

17. As far as payment of compensation in a Petition u/s 163A of the Act is concerned, the compensation has to be awarded as per the structured formula given in second schedule to the Motor Vehicles Act. The compensation towards non pecuniary heads has also to be in conformity with the Second Schedule to the Act. (See The Oriental Insurance Co. Ltd. etc. Vs. Hansrajbhai V.Kodala and Others etc. etc., Deepal Girishbhai Soni and Others Vs. United India Insurance

Co. Ltd., Baroda, and judgment of this Court in Anarkali & Anr. v. Raj Kumar & Anr. MAC APP. 341/2012 decided on 11.04.2012).

18. The loss of dependency thus comes to Rs. 4,48,800/- (3,300/- x 12 x 2/3 x 17).

19. Compensation of Rs. 40,000/- awarded towards non-pecuniary heads was on the higher side. I would award a sum of Rs. 5,000/- towards loss of consortium, Rs. 2,000/- towards loss to estate and Rs. 2,500/- towards funeral expenses as per the second Schedule to the Act. The overall compensation comes to Rs. 4,58,300/-.

20. Thus the compensation stands reduced from Rs. 5,44,900/- to Rs. 4,58,300/-.

21. By an order dated 04.10.2010, the execution of the impugned judgment was ordered to be stayed subject to deposit of 50% of the award amount. By an order dated 25.08.2011, 25% of the amount deposited was ordered to be released in favour of the Claimants.

22. The balance amount payable along with interest @ 7.5% per annum from the date of the filing of the Petition till its payment shall be deposited in the name of the Claimants. 10% of the compensation awarded along with proportionate interest shall be payable to the Respondents No. 2 to 6. Rest of the amount shall be payable to the First Respondent.

23. The Appellant Insurance Company is directed to deposit the amount in the UCO Bank, Delhi High Court Branch in the name of the Respondents No. 1 to 6 (Claimants) within six weeks.

24. The statutory amount of Rs. 25,000/- shall also be refunded to the Insurance Company.

25. MAC App. 662/2010 is allowed in above terms. MAC App. 115/2012 stands dismissed. No costs. Pending applications stand disposed of.