

(2018) 07 GAU CK 0077

In the Gauhati High Court

Case No : Mac Appeal No. . 224 Of 2016

Oriental Insurance Company Ltd

APPELLANT

Vs

Mrs Afia Begum And 5 Ors

RESPONDENT

Date of Decision : 20-07-2018

Acts Referred:

Citation : (2018) 07 GAU CK 0077

Hon'ble Judges : MIR ALFAZ ALI, J

Bench : Single Bench

Advocate : R.D. Mozumdar, P. Hazarika , S K Sharm, C Mozumdar

Final Decision : Partly Allowed

Judgement

1. Heard Mrs. R.D. Mozumdar, learned counsel for the appellant and Mr. P. Hazarika, learned counsel for the respondent No. 1/claimant.

2. This appeal is by the Insurance Co. against the judgment and award dated 4-4-16 passed in MAC Case No. 841/2007 by MACT No. 1, Kamrup, Guwahati.

3. The brief facts of the case which may be necessary for disposal of this appeal are that one Moinul Hoque (since deceased) was driving the vehicle bearing registration No. AS-01/P-6845 (709 mini truck) and he was proceeding from

Tinsukia to Bhangra (Karimganj). When he reached a place near Dergaon Police Station on national highway 37, the bus bearing registration No. AS-01/Z-2174, which was coming from the opposite direction in a very high speed and driven in a

negligent manner, knocked the truck driven by the deceased from the front side causing injury to him. The victim was immediately shifted to hospital, where he succumbed to the injury. Appreciating the evidence adduced by the parties, the

learned tribunal granted a compensation of Rs. 13,82,000/- and the appellant/insurer of the bus was saddled with the responsibility to satisfy the award.

4. Aggrieved by the above award, the appellant, insurer of the bus preferred the instant appeal.Â Â

5. Learned counsel for the insurance co., Mrs. Rita Das Mozumdar submits that the accident occurred due to head-on collision and fault of drivers of both the vehicles. However, the learned tribunal held the vehicle insured with the appellant,

solely responsible for the accident, without considering the fact that the accident occurred due to head-on collision. In order to buttress the submission, Mrs. Mozumdar placed reliance on the decision of the Apex Court in T. O. Anthony

â?VS- Karvarnan & Ors., (2008) 3 SCC 748 and Bijoy Kumar Dugar-VS- Bidyadhar Dutta & Ors. reported in AIR 2006 SC 1255 and Andhra Pradesh State Road Transport Corporation & Anr.â?VS- K. Hemlatha & Ors., AIR 2008 SC

2851. Further contention of the learned counsel is that the income of the deceased was assumed as Rs. 6,000/- without any supporting evidence and the quantum of amount awarded on account of conventional heads, i.e., loss of consortium

was on higher side. The tribunal also awarded exorbitant amount for loss of care and guidance of minor children, which was not permissible as per the ratio laid down by the Apex Court in National Insurance Co. Ltd. -VS- Pronoy Sethi and

Ors. reported in (2017) 14 SCC 663, and as such, the quantum of award is required to be reduced to make it just and reasonable, submits Mrs. Mozumdar.

6. Refuting the submission of learned counsel for the appellant, Mr. P. Hazarika for the respondent/claimant submits, that the evidence brought on record clearly established that the accident occurred solely due to rash and negligent driving of

the bus and no evidence was brought on record to attribute contributory negligence to the driver of the truck, which was a smaller vehicle, and therefore, learned tribunal rightly held that owner/insurer of the bus solely responsible to satisfy the

award. So far the income of the deceased andÂ quantum of amount awarded on account of conventional heads are concerned, the contention of the learned counsel for the respondent/claimant is that, the income of the deceased was rightly

considered by the tribunal having regard to the occupation of the deceased, who was admittedly a professional driver and there was no material on record to show that his earning was less than Rs. 6,000/-. It is also contended that the quantum

of compensation awarded by the tribunal on the conventional heads were quite reasonable, requiring no interference by this Court. Learned counsel for the respondent placed reliance on the following decisions :-

1. Mangla Ram vs Oriental Insurance Co. Ltd. & Ors., AIR 2018 (SC) 1900
2. Promod Kumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak & Ors., (2002) 6 SCC 445

7. In Bijoy Kumar Dugar's case, the accident occurred due to head-on collision of a car and a truck. The tribunal held that the accident occurred due to head-on collision and as such, both the vehicles were equally responsible for the

accident. In the said case, evidence was brought on record to show, that the occupants of the car, noticed the bus, coming in a zigzag manner, and the accident took place due to head-on collision. On the above circumstances, the tribunal held,

that when the occupants of the car noticed the vehicle coming in a negligent manner, they could have avoided the accident, by taking appropriate precaution. However, the damage caused on the front side of both the vehicles suggested that no

such precaution was taken. It was also observed that had the truck hit the car from the side and not directly from the front, in that case, of course, liability could be attributed solely to the bus. But when the evidence showed that there was a

head-on collision and the car was not hit from the side, both the vehicles were held liable for the accident.

8. In T.O. Anthony's case also, having considered the evidence brought on record, the Apex Court held that the deceased was not diligent and as such, he also contributed to the accident. In APSRTC & Anr. vs K. Hemlata & Ors.

(supra), the Apex Court held that the accident took place due to head-on collision and the claimants themselves adduced evidence stating that the deceased was also partially responsible for the accident. However, ignoring such admission in

evidence, learned tribunal attributed the liability solely to the offending vehicle and in that circumstances, the Apex Court observed, that when there was evidence adduced by the claimants themselves, indicating that the deceased himself was

responsible, the offending vehicle could not have been held solely responsible and contributory negligence should have been attributed to the deceased.

9. In Mangla Ram vs Oriental Insurance Co. Ltd. & Ors. (supra) relied by the respondent, the Apex Court held that though there was head-on collision, there was no evidence with regard to contributory negligence and therefore,

contributory negligence could not be assumed in absence of evidence. In Promod Kumar Rasikbhai Jhaveri vs Karmasey Kunvargi Tak & Ors., (2002) 6 SCC 445, the Apex Court observed, that the question of contributory negligence arises

when there is some act or omission on the part of the claimant or the deceased, which materially contributed to the accident.

10. What therefore, follows from the above authorities is that contributory negligence is an act or omission on the part of the deceased or the claimant and such act or omission or negligence on the part of the deceased is required to be proved

by adducing evidence. It may not be necessary to adduce direct evidence to prove contributory negligence and the same can also be proved by the circumstantial evidence. In any case, there cannot be a presumption of contributory negligence,

merely because of the fact, that the accident took place due to head-on collision in absence of evidence showing any act or omission on the part of the deceased/claimant contributing to the accident.

11. In the instant case, the pleadings of the claimant was that the accident occurred solely due to rash and negligent driving of the truck. In support of his plea, the claimant examined PW 2, an eye witness to the occurrence. PW 2 stated on

oath that when the truck was proceeding, the offending bus coming from opposite direction was driven in a very rash and negligent manner and the driver having lost control over the vehicle hit the truck. He also stated categorically, that the

accident occurred due to rash and negligent driving of the bus. It was further elicited during his cross-examination that the bus hit the truck on the side of driver of the truck and such candid evidence of the PW 2 remained unshaken. Evidently,

the mini truck was a smaller vehicle, compared to the bus which was a heavy vehicle. The evidence of PW 2 that the bus hit on the driver's side of the truck, clearly suggested that the last opportunity taken by the driver of the truck failed

and the bus struck on the right side front of the truck. The seizure list also shows that the truck was totally damaged. Besides, the oral evidence of PW 2, the claimant also proved the charge sheet as Ext. 3, which was submitted by police after

due investigation of the case holding that the accident occurred solely due to rash and negligent driving of the truck. The oral evidence of the eye witness (PW 2), that the bus hit the driver's side of the truck, because of rash and negligent

driving by the driver of the bus and the extent of damages caused to the truck, coupled with the Ext. 4 the charge-sheet, clearly established, that the accident occurred solely due to rash and negligent driving of the offending bus. As against the

above evidence, the owner or driver of the offending bus or the insurance co. failed to adduce any evidence to substantiate, that the deceased also contributed to the accident. Therefore, the finding of the learned tribunal holding the offending

bus solely responsible for the accident cannot be faulted.

12. The next point raised by the learned counsel for the insurance co. is that the income of the deceased was assumed on higher side. Admittedly the deceased was a professional driver. The claimant/wife of the deceased herself deposed on

oath, that at the time of accident, the deceased was earning Rs. 9,400/- per month. However, except her oral evidence, no other evidence was adduced by the claimant to support the income of the deceased and as such the learned tribunal

assumed the monthly income of the deceased as Rs. 6,000/- in absence of any supporting evidence.

13. The Apex Court in *Sayed Sadiq & Ors.-VS- Divisional Manager, United India Insurance Co. Ltd.* reported in (2014) 2 SCC 735 observed that a person working in an unorganized sector cannot be expected to produce documentary

evidence of his income and the tribunal is required to assess the income of such person, engaged in an unorganized sector, having regard to the occupation of the person, his age and other ground realities. Admittedly the deceased was a

professional driver. Thus, having regard to the avocation of the deceased, his monthly income of Rs. 6,000/- as assumed by the learned tribunal, in my considered view, appears to be quite reasonable.

14. Further contention of Mrs. R.D. Mozumdar is that in view of the age of the deceased, future prospect ought to have been added 40% of the income, in view of ratio laid down by the Apex court in *National Insurance Co. Ltd. -VS- Pranoy Sethi*

and Ors. (supra). However, learned tribunal added 50% as future prospect and the award therefore, requires to be modified by reducing future prospect to 40%, as per the guidelines of *Pranoy Sethi*'s case. The objection is also

raised by the learned counsel for the insurance co. as to the quantum of award on account of loss of consortium and other non-pecuniary conventional heads. It is the contention of the learned counsel, Mrs. Mozumdar, that as per the judgment

of the Apex Court in *Pranoy Sethi*'s case, in a death case, the claimant is entitled to Rs. 40,000/- as loss of consortium, when the spouse is the claimant, and Rs. 15,000/- each towards funeral expenses and loss of estate. Besides the

above, no other amount for non-pecuniary conventional heads is permissible in a

Rs. 15,000/-

Loss of consortium Rs. 40,000/-

Total Rs. 11,45,200/-

(Say Rs. 11,45,000/-)

16. The insurance co. shall satisfy the above award of Rs. 11,45,000/- by depositing the same with the registry of this Court with interest, as fixed by the tribunal, within six weeks. The amount already paid including the statutory deposit made

by the insurance co. shall be adjusted. It is also made clear that the quantum of future prospect shall not carry any interest. The direction given by the tribunal as to the fixed deposit in the name of the minor shall stand.

17. Appeal is partly allowed.

18. Send back the LCR.