(2019) 02 UK CK 0025

In the Uttarakhand High Court

Case No : Appeal From Order No. 139 Of 2013, Cross Appeal No. 15 Of 2018

Oriental Insurance Company Ltd & Others APPELLANT

Vs

Ramesh Chandra Tewari & Others RESPONDENT

Date of Decision : 13-02-2019

Acts Referred:

Citation : (2019) 02 UK CK 0025

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : Hari Mohan Bhatia, M.K. Goyal

Judgement

Lok Pal Singh, J

1. A.O. no. 139 of 2013 is directed against the award dated 29.01.2013, passed by the Additional District Judge / Motor Accident Claims Tribunal, Khatima, in M.A.C. Case No. 449 of 2011, whereby said Tribunal has awarded compensation of Rs. 10,95,000/- to claimant nos. 1 and 2 to be paid by Oriental Insurance Company Ltd. (appellant). It was also directed by the Tribunal that an amount of Rs. 3,00,000/- each in respect of claimant nos. 1 and 2, be kept in a Nationalized bank in some interest earning scheme for a period of five years and on remaining amount of compensation, claimant nos. 1 and 2 shall equally be entitled to receive through account payee cheque with simple interest at the rate of 6% per annum, thereon.

2) Heard learned counsel for the parties and perused the papers brought on record.

3) Brief facts of the case are that on 21.11.2011 when the son of applicant Himanshu Tiwari (deceased) along with his friend Bhupendra Singh were coming to his village Damgada on a motorcycle. At about 06:00 P.M., when both of them reached Lohia Head road, Sukha Pul, a Shaktiman truck, bearing registration no. URN 9330, which was being driven rashly and negligently came from opposite direction and hit the motorcycle, as a result of which both of them sustained

serious injuries. Himanshu died on the spot. Claimants / respondents alleged that the deceased was aged 22 years and was earning Rs.15,000/-per month by working as part time Accountant in different firms. Claimants mother and sisters of deceased claimed that they were dependent on him.

4) The petition was contested by owner and driver of trucks (respondent nos. 1 and 2) and the insurance company (respondent no. 3), with whom the truck was insured by filing separate written statements. In the written statements filed on behalf of respondent no. 1 and 2 before the Tribunal, they denied the allegations in the claim petition. It is also denied by them that on the date of accident, i.e., 21.11.2011 the truck was being plied with all valid documents and the driver of the truck was having valid driving license on the said date. It is also pleaded by the contesting respondents that the truck was being driven with caution and right speed on its side and the driver has committed no mistake in driving the same. It is also alleged that the respondents are not liable to make any payment of compensation and the liability to pay the same, if any, is of the insurance company.

5) The Oriental Insurance Company Ltd. (present appellant) in its written statement denied the allegations in the claim petition. It is pleaded by insurance company that the burden to prove the age of the deceased is of the claimant as no evidence was given in support thereof. It is also alleged that the accident took place due to rash and negligent driving on the part of the deceased, as such, the liability to pay the compensation is of the insurer of the motorcycle.

6) On the basis of the pleadings of the parties, following issues were framed by the Motor Accident Claims Tribunal, in this case:

1. Whether, the accident took place on 21.11.2011, at about 06:00 P.M., at Sukha Pul, within P.S. Khatima, District Udham Singh Nagar due to rash and negligent driving of the driver of the truck registration No. URN 9330, due to which Himanshu Tiwari died on the spot as a result of injuries sustained by him?

2. Whether, the accident took place as a result of contributory negligence? if so, its effect?

3. Whether, at the time of accident the Shaktiman truck was being plied with valid and effective documents? And whether the license of the driver was valid and effective?

4. To what amount of compensation are the claimants entitled, and from whom?

7) On behalf of the claimants, certified copy of the FIR; Postmortem Report of the deceased; inquest report, High School examination certificate; Transfer Certificate, photocopy of registration certificate, photocopy of insurance, photocopy of fitness certificate, photocopy of permit, photocopy of driving license of, photocopy of charge sheet; appointment letters; certificate regarding salary; Form 35-C, certificate of trade tax of NCT; payment voucher; certificate regarding appointment letter on the post of Accountant of jewellery shop;

payment voucher; payment sheet and photocopy of medical report were produced.

8) On behalf of the respondent nos. 1 and 2, photocopy of registration, photocopy of insurance; driving license of the driver; insurance and pollution control certificate were produced. On behalf of respondent no. 3, investigation report; photocopy of insurance policy; certified copy of FIR and photocopy of complaint registered by Mahavir Singh.

9) On behalf of the claimants, evidence in the form of affidavits of Ramesh Chandra Tiwari PW1, Satish Kumar Pathak PW2, Bhupendra Singh Dhami PW3 were filed. PW4 Avinash Shamra, PW5 Ganga Singh and PW6 Rajendra Singh were also examined. On behalf of the respondents, evidence in the form of affidavits of DW1 Mahavir Singh and DW2 Nandan Singh were filed and they were also examined.

10) PW2 supported each and every averment made in the claim petition. In his cross-examination, PW2 stated that at the time of accident there were six persons present on the spot. The motorcycle was heading towards Lohia Head from Khatima. In his examination-in-chief, this witness has stated that he had witnessed the accident. PW3, Bhupendra Singh Dhami, is an injured eyewitness. He supported the averments made in the claim petition. In his cross-examination, PW3 stated that deceased Himanshu was driving the motorcycle and he is pillion rider. PW3 further stated that as soon as they stopped their motorcycle the accident took place. Thus, it is clear from the evidence of PW3 that the driver of the truck hit the stationary motorcycle and the accident took place, in which PW3 sustained serious injuries and Himanshu Tiwari succumbed to his injuries sustained in the accident.

11) After recording the evidence and hearing the parties, the Tribunal held that only the driver of the truck registration URN 9330 was rash and negligent in driving the vehicle and, as such, held that the liability lies with the insurer of said truck. It is further found by the Tribunal that the accident in question occurred due to rash and negligent driving by the driver of the truck no. URN 9330 and not as a result of contributory negligence of the driver of the motorcycle and decided the issue in favour of the claimants. Issue no. (iii) was also decided in favour of the claimants. Issue no. (iv) was decided by the Tribunal holding that the sister of the deceased cannot be said to be dependent on him. Legally, she was dependent on his father Ramesh Chandra Tiwari. As such, the claim petition filed by claimant no. 3 is liable to be rejected.

12) Learned Tribunal relying upon the judgment rendered by Hon'ble Apex Court in Smt. Sarla Verma and another vs Delhi Transport Corporation and others, 2009 (2) T.A.C. 677 (S.C.), observed that deceased used to earn Rs. 10,000/- by working part time in different firms. According to the High School certificate of the deceased, his date of birth is 10.05.1990. Thus, on the date of accident, the age of the deceased was 21 years 6 months and 11 days. On the basis of

document furnished with the claim petition he was unmarried. Further relying on paragraph nos. 17 and 18 of the case of Sarla Verma (supra), the Tribunal applied a multiplier of 18 and taking into consideration the salary of Rs.10,000/- per month, calculated the annual income of the deceased at Rs.1,20,000/-. After deducting 50% from the annual income of Rs.1,20,000, the amount comes to Rs. 60,000/-. In this way the amount of compensation comes to Rs. 60,000 X 18 = Rs. 10,80,000/-. Learned Tribunal also awarded Rs. 5,000/- towards funeral expenses and Rs.10,000/- as loss of estate. The total amount of compensation thus arrived at by learned Tribunal is Rs. 10,95,000/-. Learned Tribunal further observed that since the offending vehicle was ensured with respondent no. 3 insurance Co. and all the documents were valid on the date of accident, thus, the Insurance company is liable to pay compensation to the tune of Rs. 10,95,000/- to the claimants. Apart from this, the claimants shall also be entitled to simple interest at the rate of 6% per annum from the date of filing of claim petition, i.e., 12.12.2011 till the date of actual payment. The issue no. (iv) was, accordingly, decided.

13) Learned counsel for the appellant would submit that the deceased was not having valid license on the date of accident and it was a case of head on collusion between offending truck and the motorcycle rider, who died in the accident, as such, it is a case of contributory negligence of both the parties.

14) Per contra, learned counsel for the claimants would submit that the heavy vehicle, the offending truck which hit the deceased was being driven rashly and negligently. The PW2 and PW3 have proved the fact that the offending truck was being driven rashly and negligently by adducing evidence. PW3 Bhupendra Singh Dhami has stated in his evidence that the motorcycle was on its side and the driver of the offending vehicle hit the motorcycle by going on the wrong side, which resulted in the accident. It is contended that the appellant insurance company did not adduce evidence in this regard. The insurance company has not led any evidence to prove that it is a case of contributory negligence. In the absence of any proof of contributory negligence, this Court cannot hold it to be a case of contributory negligence.

15) Learned Tribunal has recorded categorical findings in regard to the age, income and rash and negligent driving on the part of the driver of the offending vehicle, insured with the appellant, and has awarded an amount of Rs.10,95,000/- towards compensation along with 6% simple interest thereon.

16) The insurer has preferred the appeal on the ground that it was a case of contributory negligence, but the insurer has not led any evidence to prove that there was contributory negligence on the part of the deceased. It is settled position in law that the burden lies upon the party who pleads. The insurance company has not led any evidence to prove that it was a case of contributory negligence, per contra, the claimants have proved that it was a case of negligence on the part of the driver of the offending vehicle. This Court does not find that it was a case of contributory negligence.

17) The income of the deceased has been proved and the learned Tribunal has recorded the finding on the basis of evidence that the deceased was earning Rs.10,000/- per month by doing part time work of accountancy.

18) Cross Appeal no. 15 of 2018 has been filed by the claimants [respondent nos. 1 and 2 (parents of the deceased)] seeking enhancement of compensation.

19) Having gone through the cross appeal filed by the claimants, this Court is of the view that the death of young educated boy, a commerce graduate from University of Delhi, who was engaged in part time work of accountancy in various Firms, and earning Rs.10,000/- per month, the future prospects have not been awarded to the claimants. Perusal of the impugned Award would show that the learned Tribunal has awarded Rs. 5,000/- towards funeral expenses and Rs. 10,000/- towards loss of estate.

20) In view of the judgment of Hon'ble Apex Court rendered in the case of National Insurance Company vs Pranay Sethi, reported in AIR 2017 SC 5157, The Apex Court has laid down the principle that in case of death Rs.15,000/- towards funeral expenses and Rs.15,000/- towards loss of estate will be payable to the claimants of the deceased, but in the present case an amount of Rs. 5,000/- and Rs.10,000/- respectively have been awarded towards funeral expenses and the loss of estate which are at the lower side in view of the judgment (supra). Since the deceased Himanshu Tiwari was working as a part time Accountant in various Firms, in view of Pranay Sethi's case (supra) while determining income, where the deceased was self employed or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years for determining future prospects. Thus on account of death of Himanshu Tiwari, claimants are also entitled to future prospects at the rate of 40%. The amount of compensation is being re-assessed as under:

21) The re-assessed amount of compensation thus arrived at shall be paid by the insurance company to the claimants along with simple interest at the rate of 6% per annum from the date of institution of claim petition till the date of actual payment.. The statutory amount deposited before this Court be also remitted forthwith to the Tribunal concerned.

22) Cross appeal is, accordingly, allowed.

23) In view of the above, Appeal from Order no. 139 of 2013 stands dismissed. Lower court record be sent back to the Tribunal concerned. No order as to costs.