

(2023) 04 GAU CK 0029
In the Gauhati High Court
Case No : MACApp. No. 109 Of 2013

Radha Jain

APPELLANT

Vs

New India Assurance Co. Ltd. And 2 Ors.

RESPONDENT

Date of Decision : 20-04-2023

Acts Referred:

Code Of Civil Procedure, 1908 — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 168, 173

Citation : (2023) 04 GAU CK 0029

Hon'ble Judges : Arun Dev Choudhury, J

Bench : Single Bench

Advocate : G. Jalan, R. K. Bhatra

Judgement

1. Heard Mr. G. Jalan, learned counsel for the appellant. Also heard Mr. R. K. Bhatra, learned counsel for the respondent No. 1, Insurance Company.

2. The present appeal under Section 173 of the Motor Vehicles Act, 1988 is directed against the Judgment and Award dated 18.12.2012, passed by the learned Member of Motor Accident Claims Tribunal, Kamrup at Guwahati in MAC Case No. 2962/2006 for enhancement of compensation.

3. The brief fact leading to filing of the present appeal as well as the projected claim can be summarised as follows:-

I. While on 08.07.2006 the deceased person was proceeding towards Gangotri from Haridwar in the offending bus bearing registration No. UA-07/C-9232, due to rash and negligent driving, the bus fell into a river near Dharasu Band, as a result of which the husband of the claimant and her brother-in-law died. Accordingly, the claim petition was filed before the Tribunal.

II. The learned Tribunal below issued notice to the opposite parties i.e. the insurance company, the owner and the driver of the offending vehicle.

III. The owner of the offending vehicle filed written statement inter alia

contending that the vehicle was insured with the New India Assurance Co. Ltd and if any liability arises, the company is liable to indemnify him.

IV. The driver of the offending vehicle did not participate in the proceeding and the claim case proceeded ex-parte against him.

V. The New India Assurance Co. Ltd. filed written statement and admitted that the vehicle at the relevant time was duly covered by policy of insurance. But the insurance company declined to accept the liability, if there was any violation of the terms and conditions of the policy and if the driver did not have a valid and effective license at the time of accident.

VI. The claimant examined some witnesses and examined exhibited Income Tax return of the deceased as individual and head of HUF.

VII. The insurance Company did not examine any witnesses, however, cross examined the witnesses of the claimant.

4. Findings of the learned Tribunal Below:

The tribunal held that the death was caused to the husband due to rash and negligent driving of the offending vehicle. It was also held that the vehicle was duly insured at the time of the accident and the driver was having a valid driving license. Therefore, the claimant is liable to be compensated by the insurance company.

5. Submissions of Mr. Jalan, learned counsel for the appellant: Mr. Jalan, learned Counsel for the appellant submits:

I. The tribunal has committed serious error by not relying upon the income tax return. The deceased assess himself as income tax assessee and paid the income tax before travelling to the state of Uttarakhand where he met with an accident and died. The return was not filed at that point of time and it was subsequently filed. Mr Jalan, learned counsel for the appellant argues that it is beyond any doubt that the husband of the claimant was an income tax assessee and he has paid income tax. However, the learned tribunal has ignored such evidence in as much as such evidence even has not been discussed.

II. The further contention of Mr Jalan is that in view of the change of law, the claimant is also entitled for the benefits as mandated, in the cases of Pranay Sethi and Magma General Insurance Company Limited.

III. The learned counsel further argues that this court in case of Future Generali held that even in absence of any cross appeal, the respondent claimants are entitled for the benefits as mandated in Pranay Sethi and in Magma. Therefore, the claimant is also entitled for benefit against loss of estate and consortium in terms of the aforesaid judgements.

6. Per contra, Mr. R. K. Bhatra, learned counsel for the respondent No. 1/ Insurance Company submits:

I. The learned Tribunal below has not committed any error of law or facts. The claimant herself claims the income of her deceased husband to be Rs. 15,000/- per month but produced Exhibit-7 and Exhibit-9 projecting that the income of the deceased will be Rs. 20,000/- per month inasmuch as mountain load of evidence cannot cure pleading.

II. The Exhibit-7 relates to the year 2006-2007 and Exhibit-9 is the Income Tax Return of the 2006-2007, and such Income Tax Return were filed subsequent to the accident i.e. after the death of the claimant. Therefore, the learned Tribunal below has rightly not relied on such exhibits.

III. The Tribunal has rightly granted compensation against the funeral expenses, loss of estate and loss of consortium inasmuch as on the date of passing of the judgment, law laid down in the case of National Insurance Company Limited –Vs- Pranay Sethi and Others reported in (2017) 16 SCC 680 and Magma General Insurance Co. Ltd v. Nanu Ram Alias Chuhru Ram & Ors, reported in (2018) 18 SCC 130.

Mr. Bhatra, learned counsel therefore, concludes that in the aforesaid backdrop of the case, the appeal is liable to be dismissed.

7. This Court has given anxious consideration to the arguments advanced by the learned counsel for the parties and also perused the material available on record including the exhibits.

8. There is no dispute as regard the factum of the accident as well as entitlement of the compensation of the claimant. However, issue raised is the question of just compensation. The whole case of the claimant is that, the learned tribunal has wrongly rejected the income tax return while determining the income of the deceased and the learned counsel for the Insurance Company submits that the learned Tribunal below has rightly rejected such income tax return being filed after death. In view of the aforesaid controversy, this Court has looked into the evidences on the basis of which the claimants tried to prove the income of the deceased husband.

9. Exhibit-9, is Form No. 2D (Sarl), for filing income tax return for non-corporate assessee. From perusal of Exhibit-9 in original, the following facts are discernible:

A. it is an income tax return for the financial year with effect from 01.04.2005 to 31.03.2006.

B. The assessment year is 2006-2007.

C. The Assessee is M/s Sanjay Kumar Jain HUF.

D. Total income from the house property is Rs. 78,100/- and income from other sources is Rs. 24,978/- and gross income of Rs. 1,03,078/- and income tax was determined at Rs. 308/-.

E. The accident took place on 08.07.2006. Such Return was received by the authority on 10.07.2006, after the death of the head of HUF.

10. Exhibit.10 is a receipt in original, which shows that tax amounting to Rs. 308, was deposited on 22.06.2006. The Exhibit.10 tallies with and relates to the Exhibit-9 including the PAN Number. Thus tax was paid prior to death of the head of the HUF.

11. Exhibit-7 which is an income tax return Form No. 2D in respect of the deceased as an individual. As per the Exhibit-7, the Assessment year is 2006-2007 and income tax return is filed for the period with effect from 01.04.2005 to 31.03.2006. The signature of the assessee is also available in the Exhibit-7 and date of submission reflects to be 22.06.2006. The PAN number of the assessee is also given in the form. The total income was shown to be Rs.1,04,973/- and total income tax was determined at Rs. 507/-. Such return was filed on 31.07.2006, i.e. after death of the deceased.

12. The Exhibit-8 is the income tax paid receipt in original corresponding to Exhibit-7, which shows that the income tax was deposited on 22.06.2006. Such receipt also reflects the PAN number as reflected in the Exhibit-7 which was filed on 31.07.2006.

13. Now, let this court consider the cross examination of PW-1, who exhibited the aforesaid exhibits. It is seen that the Insurance Company has cross-examined the claimant and the only question that was put to claimant was relating to income tax return is that she has not produced any balance sheet of the business of the deceased. The further cross examination was that the source of income had not been mentioned in the Exhibits-7 and 9. A suggestion was also made that the income shown in the Exhibits-7 and 9 is not correct. Regarding the age of the deceased, it was cross-examined that she has not produced any other document except the PAN Card.

14. In the aforesaid backdrop of the case, it is clear that the insurance has not doubted the authenticity of the document of income tax return. The Exhibit-9 clearly shows that the income from M/s Sanjay Kumar Jain HUF is against income from house property and income from other sources. The income tax return filing form, i.e. Form No. 2D provides such heads. Therefore, it cannot be said that the source of income is not disclosed in Exhibit-9, which relates to the income of M/s Sanjay Kumar Jain, HUF. So far relating to the independent income of Sanjay Kumar Jain, in the return form, income of Rs. 83,750/- is shown against income from business or profession and Rs. 21,223/- is shown against income from other sources. Therefore, it also cannot be concluded that the source of income was not disclosed in the income tax form.

15. Now, coming to the filing of the income tax return, it is clear that the tax amounting to Rs. 314/- for the assessment year 2006-2007 was deposited and receipt was issued, which is dated 22.06.2006 i.e. prior to date of the death of the deceased i.e. 08.07.2006.

16. Coming to the other individual income tax return of the deceased, it is shown that the amount was deposited on 22.06.2006 i.e. prior to the death of the deceased. Thus, the assessment was made and income tax was paid prior to the death of the deceased. However, returns from the M/s Sanjay Kumar Jain HUF was filed on 10.07.2006 and the individual tax return of Sanjay Kumar Jain was filed on 31.07.2006 i.e. after death of the assessee.

17. From the aforesaid, it is clear that assessment was made prior to the death of the income tax payee and on the basis of such assessments, tax were also deposited prior to death of the assessee. However, the return was filed subsequent to the death. From the aforesaid, it is clear that the deceased was an assessee under Income Tax Act, 1961 and he had also paid the income tax. The income tax return i.e. Exhibit-9 and Exhibit -7 co relates to the Exhibit-8 and Exhibit-10.

18. In that view of the matter, in the considered opinion of this Court the learned Tribunal below ought not to have discarded the Exhibit-7, 8, 9 and 10. In fact the learned Tribunal has not gone into the income tax paid receipts, which were exhibited before the Tribunal in original with the seal of the Bank.

19. While determining the income of the deceased to be Rs.6000/-, the Tribunal has not given any reason why such assessment is made. In view of the aforesaid, this Court is of the considered opinion that the claimant has proved the income of the deceased through Exhibits-7, 8, 9 and 10.

20. From the aforesaid now the income from both the aforesaid sources joined together, the income of the deceased is determined at Rs. 13,000/- per month.

21. In the case of Pranay Sethi (Supra), the Apex Court has identified specific conventional heads for payment of compensation and held that the amount to be paid for funeral expense and loss of estate will be Rs. 15,000/-each. It has also held that Rs. 40,000/- should be paid for loss of consortium. The aforesaid amounts should be enhanced at the rate of 10% in every three years from the date of the judgment of Pranay Sethi (supra).

22. The Apex Court in the case of Magma General Insurance Co. Ltd v. Nanu Ram Alias Chuhru Ram & Ors, Civil Appeal No. 9581 of 2018, referring to the decision in Pranay Sethi (supra) further held that the word "consortium" encompasses the following:- (1) Spousal consortium (2) Parental consortium and (3) Filial consortium.

(1) Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, co-operation, affection, and aid of the other in every conjugal relation."

(2) Parental consortium is granted to the child upon the premature death of parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training."

(3) Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection companionship and their role in the family unit.

23. In *The Future General India Insurance Co. Ltd -Vs- Bobby Bora and Ors.* reported in 2022 3 GLR 211, a coordinate Bench while dealing with an issue whether the claimants are entitled to an enhanced compensation in absence of a cross appeal or a cross objection, after elaborately discussing different judgments of the Hon'ble Apex Court and considering the provisions of Order 41 Rule 33 of the Code of Civil Procedure, 1908 held that while Order 41 Rule 33 of the Code of Civil Procedure empowers an appellate court to pass appropriate order to do justice but subject to certain limitation as judicially formulated, whereas Section 168 of MV Act imposes a statutory obligation upon the tribunal as well as the appellate court sans way any appeal or cross objection filed to award a compensation which is just and reasonable. Accordingly, it was held that the appellate court is bound to maintain the balance while exercising power under Order 41 Rule 33 of the Code of Civil Procedure within the limitation imposed and also keeping in mind the statutory duty imposed upon it by Section 168 of MV Act, 1988. After holding such, the learned Bench held in that case that though there was no cross objection however, the benefit of *Pranay Sethi & Others (Supra)*, *Magma General Insurance Co. Ltd. (Supra)* and *Sarla Verma & Others - Vs- Delhi Transport Corp. & Anr.* reported in AIR 2009 SC 3104 can be made applicable keeping in mind the statutory duty imposed upon the appellate court under Section 168 of the MV Act, 1988 to award the just and reasonable compensation.

24. In *the Oriental Insurance Co. Ltd. Vs- Champabati Ray* reported in 2020 ACJ 2409 while dealing with entitlement of interest on the amount awarded under the head "future prospect" a coordinate Bench held the following:-

"Another ground of challenge to the impugned judgment is that the learned Tribunal had awarded interest on future prospects, which could not be done.

In the case of *Khusboo Chirania @ Kanta Chirania v. Kamal Kumar Sovasaria*, reported in 2018 0 Supreme (Gau) 966 and in the case of *Nasima Begum V. Keramat Ali*, reported in 2019 0 Supreme (Gau) 507, this Court has stated no interest on future prospects should be given. Though no reasons have been enunciated in the above judgments, the reasons for the same seems to be due to the fact that future prospects is relatable to an income to be received in the future and as such, there could not be any loss to the claimants for the payment of future prospects, at the time the deceased met with the accident. The reason for awarding interest on the compensation amount, minus the future prospects is due to the fact that though the loss of dependency starts from the date of the accident and the compensation amount is computed on the date of the Award of the Tribunal, interest is awarded to compensate the loss of money value on

account of lapse of time, such as time taken for the legal proceedings and for the denial of right to utilize the money when due. However, future prospects is with regard to the probable income to be received in the future and as such there is no requirement to compensate the claimant by way of future interest, for the loss that is to occur in the future, as the future is yet to happen. Further, future prospects is given for the entire future and as such, the claimant is getting compensation in a lumpsum under future prospects prior to the occurrence of future event/s. Thus, with regard to future prospects, this Court is also of the view that there cannot be any interest on future prospects, as the same relates to an income to be given in the future". (Emphasis supplied)

25. Such determination is binding upon this Court.

26. In view of the above fact and settled proposition of law, the compensation payable would be as follows:-

SL

No.

Head

Amount

1.

A. Annual Income

Rs.13000/-X12 =1,56,000

B. Future Prospect @

30% of income.

Rs.46800 /-

C. Less 1/3rd

Rs. 1,35,200

D. Add Multiplier

14 X Rs.1,35,200/-

Total compensation Rs. 18,92,800/-

2.

Loss of Estate

Rs. 16500/-

3

A. Spousal

Consortium for wife

Rs. 44,000/-

B. Funeral

expenses

Rs. 16500/-

Total = Rs.19,69,800/-

27. While not interfering with the award of interest @ 5%, awarded by the learned Tribunal, it is made clear that the interest awarded must not be calculated on the amount of compensation awarded against future prospects in terms of the decision in Champabati Ray (supra)

28. Consequently, the impugned Judgment and Award dated 18.12.2012, passed by the learned Member of Motor Accident Claims Tribunal, Kamrup at Guwahati in MAC Case No. 2962/2006, is hereby modified to the extent indicated above.

29. Statutory deposit if any be released in favour of the Insurance Company after proper verification.

30. LCR be sent back forthwith to the learned tribunal below.