(2019) 06 GAU CK 0059

In the Gauhati High Court

Case No : Motor Accident Appeal No. 180 Of 2016

Reliance General Insurance Co Ltd — APPELLANT

Vs

Sangeeta Gogoi Terang And 5 Ors — RESPONDENT

Date of Decision : 24-06-2019

Acts Referred:
Motor Vehicles Act, 1988 — Section 173
Indian Penal Code, 1860 — Section 279, 304A, 427

Citation : (2019) 06 GAU CK 0059

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : K.K. Bhatta, B. Boruah

Final Decision : Dismissed

Judgement

1. Heard Mr. K.K. Bhatta, learned counsel for the appellant and Mr. B. Boruah, learned counsel for the claimant/respondents.

2. This appeal under Section 173 of the Motor Vehicles Act, 1988 ('M.V. Act'for short) is directed against the Judgment and award, dated 30.01.2014 and review order, dated 28.11.2014, passed by the learned Member, Motor Accidents Claim Tribunal ('MACT' for short) at Dibrugarh in MAC Case No. 17/2011.

3. The claimant/respondents' case, in short, is that on 06.01.2011 at about 5.35 a.m., while the husband of the respondent No. 1, Amar Terang was driving the vehicle, bearing registration No. AS 06/J-1866 (Maruti Dezire) from Sibasagar town towards Moran Oil Colony Campus, on NH, near Dehajan Tinali, Demow town, the vehicle, bearing registration No. AS 01CC 8948 (Truck) which was on from the opposite direction in a very high speed and in rash and negligent manner, dashed against the said Maruti Dezire vehicle. In the said accident, Amar Terang died on the spot. It was stated in the claim petition that at the time of death, the deceased was aged about 28 years and he earned Rs. 17,000/-, per month, from business. Therefore, the claimant/respondents claimed a

compensation of Rs. 24,35,254/-.

4. The claim case proceeded ex-parte against the respondent No. 4, the driver of the truck. The respondent No. 3/the appellant/ Reliance General Insurance Co. Ltd. and respondent No. 6/ National Insurance Co. Ltd. contested the proceeding by filing their written statements:

(i) The answering respondent No.3/ Reliance General Insurance Co. Ltd., that is, the appellant, who was the insurer of the vehicle No. AS 01/CC/8948 admitted that at the relevant time of the accident the said vehicle was insured with the answering it, but denied about the accident and other statement of allegations and wanted strict proof of facts and documents such as age, income of the deceased, nature of injury sustained etc. It was alleged that the accident occurred due to the rash and negligent driving of the deceased and as such the claimants are not entitled to get any compensation. It was further stated that the liability of the appellant if any, is subject to the terms and conditions of the policy and as per the provisions of the M.V. Act.

(ii) The answering respondent No.6/National Insurance Co. Ltd who was the insurer of the vehicle No. AS 06/J/1866 admitted that at the relevant time of the accident the said vehicle was insured with it, but denied about the other statement of allegations and wanted strict proof of facts and documents such as age, income of the deceased, amount incurred for the treatment of the deceased etc. The plea of the answering respondent No. 6 was that the claimants have filed the claim case alleging that the accident occurred due to rash and negligent driving of the driver of the vehicle No. AS 01/CC/4948 (Truck) and under such circumstances, the respondent No. 6 is no way liable to pay any compensation to the claimants.

5. Upon the pleadings, the learned MACT, Dibrugarh framed the following issues:

"1. Whether Amar Prasad Tamang died in the motor vehicle accident, that took place on 06.01.2011 involving vehicle No. AS-01/CC/8948 due to rash and negligent driving or any other fault of the driver/owner of the offending vehicle No. AS-02/CC 8948?

2. Whether the claimants are entitled to compensation as prayed for? If so, what shall be the quantum of compensation and by whom among the opposite parties compensation shall be paid?"

6. The claimant/respondent No. 1 herein examined herself as C.W. 1 and another witness namely, Ainul Haque as C.W. 2. The appellant/Insurance Company and others did not examine any witness.

7. The learned MACT, Dibrugarh, after hearing the learned counsel of both sides and consideration of the evidence, oral and documentary, delivered the impugned Judgment awarding a sum of Rs. 20,52,000/- only in favour of the claimant/respondents, with interest @ 6%, per annum, from the date of filing of the claim petition till payment against the appellant/Insurance Company.

8. Being aggrieved by the above Judgment and award, the instant appeal is filed, inter-alia, on the following grounds:

(a) That the learned Tribunal failed to appreciate that the accident occurred due to head-on collision between the deceased driven Maruti Swift Dezire car bearing registration No. AS 06 J 1866 and another vehicle and it happened due to the contributory negligence of the deceased to the extent of 50%; and

(b) That the learned Tribunal was not justified in assessing the annual income of the deceased at Rs. 1,80,000/- p.m.

9. Advancing his argument, Mr. K.K. Bhatta, learned counsel for the appellant/ insurance company has basically relied on the above ground of appeal and referred to the principles laid in Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Ors, reported in (2006) 3 SCC 242.

10. Per contra, Mr. B. Boruah, learned counsel for the respondents, has submitted that the appellant/insurance company failed in duty to discharge its burden of prove that the deceased contributed to the accident by rash and negligent driving of his vehicle. According to Mr. Boruah, the appellant neither by cross-examining the claimant's witnesses nor by leading some independent evidence has established the claim of contributory negligence. Mr. Boruah has relied on the proposition of law in this regard rendered by the Hon'ble Supreme Court in Pramad Kumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and Ors, reported in (2002) 6 SCC 455.

11. Needless to say that to determine the question as to who contributed to the happening of the accident, it is relevant to ascertain who was driving the vehicle negligently and rashly and in case both were, who was more responsible for the position and who of the two had the last opportunity to avoid the accident. For determination of these questions, as to when the respective drivers saw each other for the first time as they were heading to the intersection, the speed of the respective vehicles, the blowing of the horn, steps taken to control the respective vehicles, care and caution exercised for avoiding the collision etc. are material considerations on the touchstone of evidence. In such a case, the evidence must show an act or omission amounting to want of ordinary care on the part of the husband of the respondent No. 1 while driving the vehicle, which concurring with the other vehicle driver's negligence, was the proximate cause of the accident.

12. The learned Tribunal in issue No. 1 of the Judgment and award, dated 30.08.2014, dwelt on in detail the question of contributory negligence if any, on the part of the deceased towards the occurrence of the accident. The learned Tribunal while answering the issue in the affirmative held that the appellant/ insurance company failed to substantiate the plea by adducing any evidence and that the positive evidence of the eye witness C.W.2 has denied any such contributory negligence on the part of the deceased.

13. It is pertinent to be mentioned that the appellant/insurance company in its

written statement did not plead contributory negligence on the part of the deceased before the learned Tribunal. However, the appellant during trial of the case raised the issue by way of confronting C.Ws. in cross-examinations.

14. C.W.1 Smti. Sangeeta Gogoi Tamang, the claimant/respondent No. 1 herein, who was the wife of the deceased, in her cross-examination denied the appellant's suggestion that due to rash and negligent driving of the vehicle by her husband the occurrence took place. She admitted that a case was registered against the driver of the truck being Demow P.S. Case No. 02/11 under Sections 279/304 A/427 of the IPC and as per the police report, the accident occurred due to rash and negligent driving of the truck vide Ext. 'ka', the police report (Under objection). She did not witness the accident.

15. C.W. 2 Md. Ainul Hoque was an eye witness to the accident. His version is that on 06.01.2011 at about 5.35 a.m. at Dehajan Tinali under Demow P.S., he saw the deceased Amar Prasad Terang driving one Maruti Dezire car bearing registration No. 06 J 1866 by NH 37 with a normal speed on his left side of the road and at that time, all on a sudden, one truck bearing registration No. AS 01 CC 8948, which was on from the opposite direction, on negligent manner dashed against the said Maruti Dezire car, head-on with a great force. In the said accident, the husband of the respondent No. 1 died on the spot. In cross-examination, he denied the suggestion of the appellant/insurance company that the accident occurred due to the fault of the driver of Maruti Dezire, that is, the deceased.

16. The Accident Information Report vide Ext. 1 shows that the vehicle No. AS 01 CC 8948 was involved in the said accident and the police report vide Est. 'ka' also shows that the accident occurred due to rash and negligent driving of the said truck with an insurance policy valid till 16.09.2011. The accident occurred on 06.01.2011.

17. As stated above, the appellant/insurance company made no attempt to adduce any evidence contrary to the claim of facts and evidence in their support. The appellant had put some suggestions to the C.Ws, which they denied firmly and as such, whatever they stated in their examination-in-chief on affidavit have remained credible and intact as suggestions are not legal evidence.

18. What it appears from the claimants' witnesses is that a case being Demow P.S. Case No. 02/11 under Sections 279/304 A of the IPC against the driver of the truck and after investigation having found prima facie evidence, as submitted by the learned counsel for the claimant/respondents, filed a charge-sheet, which is an actional negligence. On the other hand, the claimant's witnesses also have established the rash and negligence of driving of the truck, which led to the occurrence of the accident.

19. In Pramodkumar Rasikbhai Jhaveri (supra), the Hon'ble Supreme Court observed:

"10.It has been accepted as a valid principle by various judicial authorities that where, by his negligence, if one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence if that other acts in a way, which, with the benefit of hindsight, is shown not to have been the best way of the difficulty. In Swadling v. Copper2 AC at p. 9 Lord Hailsham said: (ALL ER p. 260 D-E)

"Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence. The plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances."

20. The principle on contributory negligence laid by the Hon'ble Supreme Court in Bijoy Kumar Dugar (supra) is not applicable to the instant case as in the backdrop of the facts and circumstances of the motor vehicles accident in the said case and in the instant case are found to be totally different and in the instant case, the burden of prove of contributory negligence was not discharged by the appellant/insurance company. Hence, the issue of contributory negligence on the part of the deceased driver of the Maruti Dezire is answered in the negative.

21. So far the ground (b) of appeal is concerned, the learned Tribunal discussed this aspect in the issue No. 2 of the impugned Judgment and order with reference to the evidence, oral and documentary, adduced by the claimant/ respondents herein. By the aforesaid Judgment and award, the learned Tribunal assessed the compensation at Rs. 23,07,000/- only, but later on, by an order, dated 28.11.2014, passed in the case, pursuant to a review petition filed by the appellant/insurance company reduced the awarded amount to Rs. 20,52,000/- only, by way of rectifying the arithmetical error in calculation of the compensation, when the annual income of the deceased was accepted to be Rs. 1,80,000/-. In the aforesaid review petition, the appellant/insurance company did not raise any objection in regard to the income of the deceased at Rs. 1,80,000/- per annum.

22. The Tribunal relied on the evidence of the claimant/respondent No. 1 (C.W. 1) and income tax returns of the financial years 2009 to 2010 and 2010 to 2011 issued by the Income Tax Department, shown paid by the deceased vide Ext. 3 and Ext. 4 respectively. It is noticed from Ext. 4 that the deceased's Gross total income was Rs. 2,13,298/- and after necessary deductions made total annual income was Rs. 1,88,298/-. Therefore, taking of the annual income of the deceased at Rs. 1,80,000/-cannot be said to be exorbitant and unjustified. Accordingly, this issue is decided in the negative.

23. Considered thus, this Court is of the opinion that this appeal is devoid of any merit and accordingly, stands dismissed.

Return the LCRs.

Appeal stands disposed of.

