

(2017) 03 CAL CK 0045
In the Calcutta High Court
Case No : 260 of 2011

Shraboni Khatun & Ors.

APPELLANT

Vs

Sk. Momtaj & Ors.

RESPONDENT

Date of Decision : 15-03-2017

Acts Referred:

Indian Penal Code, 1860, Section 427,
Section 279, Section 304A, Section 338 - Mischief causing damage to the amount of fifty
rupees - Rash driving o

Citation : (2017) 03 CAL CK 0045

Hon'ble Judges : Dipankar Datta, Sahidullah Munshi

Bench : DIVISION BENCH

Advocate : Uday Sankar Chattopadhyay, Suman Sankar Chattopadhyay,
Santanu Maji, Souvik Dutta, Snigdha Saha, Sanjay Paul

Judgement

1. This appeal filed by the claimants, is against a judgment and award dated 29th August, 2009 passed by the Motor Accidents Claims Tribunal, Burdwan being the Additional District Judge, Fast Track 1st Court in M.A.C. Case No.113 of 2006.

2. The claimants filed an application under Section 166 of the Motor Vehicles Act, 1988 (hereinafter to be called "Act"), claiming compensation on account of death of their father late Nur Nabi Sk. The claimants being minors were represented by their grandmother Joygun Mallick, wife of Samsul Mallick. According to the claimants, victim Nur Nabi Sk. was 38 years of age on the date of death and he was running a tea and fast-food stall at Chandul Bus Stand on G.T. Road and he was earning Rs.3,300/- (Rupees Three Thousand Three Hundred) only, per month from such business. In the claim application it was initially stated that the income of Nur Nabi before his death was Rs.3,600/- (Rupees Three Thousand Six Hundred) only, per month but, subsequently, by way of amendment vide Order No.38 dated 11th May, 2009, the income was shown to be Rs.3,300/- instead of Rs.3,600/- per month. The claimants made a claim for compensation to the tune

of Rs.5,18,400/- (Rupees Five Lakh Eighteen Thousand Four Hundred) only, for the accidental death of their deceased father. According to the claimants, on 20th May, 2005 at about 12 noon on G.T. Road, near Chandul Bus Stand, the deceased Nur Nabi Sk. and his wife were waiting to board a bus for going to Burdwan and at that time the bus bearing No. WMH 138, which was coming towards Burdwan, while stopping to pick up passengers, was dashed all of a sudden by a tractor bearing No. WB 41B/3009. In that accident Nur Nabi Sk. and his wife Galanoor Begam died at the spot. The bus bearing No. WMH 138 was insured with National Insurance Company Limited, respondent no.7 vide policy No.153502/31/04/670/386 and such policy was valid between 23rd May, 2004 and 22nd May, 2005. The tractor was insured with the United India Insurance Company Limited, respondent no.8 vide policy No.031600/31/04/00911 for the period between 13/07/2004 and 12/07/2005. The accident took place within the coverage period, i.e., on 20th May, 2005. After the accident, Burdwan P.S. Case No.301/05 dated 20th May, 2005 was started in respect of the said accident and it appears that one Sk. Md. Isha lodged an FIR which was written by the scribe Mihir Kumar Datta on 20th May, 2005. Police started a case under Sections 279/338/304A/427, I.P.C.

3. In support of the claim case Joygun Mallick, the grandmother of the minor claimants, deposed as PW 1. She claimed that deceased Nur Nabi Sk., aged about 38 years, was an able bodied person at the time of accident and that he used to earn Rs.3,600/- (Rupees Three Thousand Six Hundred) only, per month from his tea and fast food stall at Chandul Bus Stand. She claimed that there was an eye witness at the accident spot and that she claimed Rs.5,18,400/- (Rupees Five Lakh Eighteen Thousand Four Hundred) only, towards compensation. In her cross-examination she has denied the suggestion given by the learned advocate for the United India Insurance Company Limited that Nur Nabi Sk. had no income of Rs.3,600/- as claimed, rather he had an income of Rs.2,000/- (Rupees Two Thousand) only, per month. Cross-examination was also conducted on behalf of the National Insurance Company Limited, the respondent no.7 but no question was put with regard to the claim of income of the deceased Nur Nabi Sk.

4. On the basis of the evidence on record learned Claims Tribunal has arrived at a finding that there had been an accident and the accident caused due to the use of the vehicles bearing No.WMH 138 and WB 41B/3009. Learned Claims Tribunal has held that owners of the said vehicles are liable to pay compensation to the petitioners since they were covered under insurance coverage of respective insurance companies, namely, respondent no.7 and respondent no.8. Learned Claims Tribunal has gone one step further and held that since one other vehicle being No. WB 41B/0297 was also involved in the accident and inasmuch as the claimants did not bring him on record, the compensation is to be divided amongst all three vehicles and fixed the liability of each vehicle to the extent of 1/3rd only.

5. The learned Tribunal, while computing the compensation, has held that the victim had no fixed income and that there is no evidence on record to show that the claimants had been able to prove the income of the victim although, a claim has been made that the victim had a business wherefrom he was earning Rs.3,600/- per month but subsequently, the claim application has been modified to one under Section 163A and amendment was brought to the income cap showing that the victim had an income of Rs.3,300/- (Rupees Three Thousand Three Hundred) only, per month. Be that as it may, since the Tribunal came to a finding that no document could be produced in support of running of the said business, the existence of such business could not be proved by the claimants by adducing cogent evidence.

6. Mr. Uday Sankar Chattopadhyay, appearing on behalf of the appellant, submitted that learned Claims Tribunal has gone wrong in not holding that in case of a composite negligence it is the choice of the claimant to sue either of the owners of the vehicles for compensation. He submitted that the learned Claims Tribunal ought not to have divided the liability of the insurance companies rather it could have fixed the responsibility of anyone of the two or more offending vehicles.

7. In support of the above contention, Mr. Chattopadhyay has relied on a judgment in the case of Khenyei - Vs. - New India Assurance Co. Ltd., reported in (2015) 9 SCC 273 which speaks that even if only one of the joint tortfeasors (insurance companies of one of the two vehicles involved in accident) is impleaded by a claimant, it would be obliged to make every payment of compensation. The principle laid down in the aforesaid judgment of the Hon'ble Apex Court is undoubtedly, a guideline for deciding cases of this nature. In the present case, the Claims Tribunal has arrived at a finding that the claimants have failed to prove their income, it held that the compensation should be computed on the basis of notional income as per Second Schedule of the Act. Learned Tribunal held that the deceased was 38 years old and according to Second Schedule, applicable multiplier would be 16 and accordingly, computation of compensation has been made by multiplying 16 with Rs.15,000/- (notional income) which comes to Rs.2,40,000/- (Rupees Two Lakh Forty Thousand) only. Learned Claims Tribunal has deducted 1/3rd towards personal and living expenses of the deceased and it added Rs.2,000/- towards funeral expenses and Rs.2,500/- towards loss of estate. Learned Tribunal has directed payment of interest @ 8.5% per annum from the date of filing of the application, i.e., 26th August, 2005 till the date of payment of the award as directed by the learned Tribunal, failing which, however, there shall be further interest of 6.5% per annum on the principal amount.

8. In this case, the Claims Tribunal computed the compensation at Rs.1,64,500/- (Rupees One Lakh Sixty Four Thousand Five Hundred) only. As it has held that vehicle no. WB 41B/0297 was also involved in the accident but the authorised insurer of that vehicle was not made party, it would be deemed that the

claimants have waived their claim against the insurer of vehicle no. WB 41B/0297. The Tribunal has divided the total compensation into three parts and since vehicle no. WB 41B/0297 was not a party, the other two insurers have been directed to make payment of 1/3rd each of the said computed compensation of Rs.1,64,500/- (Rupees One Lakh Sixty Four Thousand Five Hundred) only. Such finding and the calculation and the ultimate calculation based thereon is absolutely contrary to settled law. As held by the Hon''ble Supreme Court in Khenyei (supra) that where there are joint tortfeasors, if only one of such tortfeasors is impleaded by a claimant, such tortfeasor could be obliged to make every payment of compensation. That being the law settled by the Hon''ble Supreme Court, we hold that the Claims Tribunal has committed an error in dividing the liability among the three vehicles. However, since two of the co-sharers were made parties, we hold that they are jointly liable to make payment of the entire sum which may be awarded in this case. The award passed by the Tribunal can, therefore, be not sustained.

9. Learned Claims Tribunal has held that since the income, particularly the source of income of the deceased could not be proved by cogent evidence, he has taken help of notional income in computation of the income of the deceased and on the basis of the notional income compensation has been assessed.

10. From the total income of the deceased, some amount has to be deducted on account of personal and living expenses which the deceased is likely to have spent for himself. However, in *Sarla Verma & Ors. - Vs. - Delhi Transport Corporation & Anr.*, reported in (2009) 6 SCC 121, the Hon''ble Supreme Court held that it is necessary to standardize the deductions to be made under the head of personal and living expenses sometimes at (one-third) 1/3rd, onehalf (50%) and even (one-fourth) 1/4th depending upon the members of the family of the deceased. In the present case, from the claim application it appears that apart from the mother of the deceased admittedly, the deceased had two minor daughters and one minor son. In the case of no income or in the case of a very meager income with a bigger family, it is unexpected that a man would be able to spend much on himself ignoring his beloved ones. Therefore, applying the principle of *Sarla Verma* (supra) we deem it appropriate to deduct 1/4th of the total income towards personal and living expenses of the deceased.

11. The computation of compensation will be as follows :- Loss of dependency = 15,000/- X 16 = Rs.2,40,000/- If 1/4th therefrom is deducted towards personal and living expenses the figure comes to Rs.1,80,000/-. A sum of Rs.2,000/- and a sum of Rs.2,500/- is added towards funeral expenses and loss of estate respectively. Total compensation would, therefore, be Rs.1,84,500/- (Rupees One Lakh Eighty Four Thousand Five Hundred) only. The claimants shall be entitled to interest @ 9% as directed by the Hon''ble Apex Court in recent cases.

12. As submitted by the learned Counsel for the parties that the award has already been satisfied, we direct the respondent nos. 7 and 8, the Insurers, to pay the balance amount of award together with accrued interest to the claimants

in equal share. We also direct the respondent/Insurers to make payment of the said balance sum with interest in equal share to all the claimants and to issue account payee cheques in their favour within a period of one month from the date of obtaining certified copy of this order. Such cheques shall be handed over by the learned advocate for the insurer to the learned Registrar General of this Court, who shall hand over the same to the learned advocate for the claimants.

13. In the event it is found that the claimants are still minors, the insurer shall pay the said balance sum with interest as indicated above by an account payee cheque in favour of the learned Registrar General of this Court and he shall arrange for keeping the share of the respective claimants in separate auto renewable fixed deposit account in any nationalized bank through Joygun Mallick, grandmother of the claimants.

14. The judgment and award passed by the learned Claims Tribunal stand modified and the appeal is disposed of. Urgent Photostat certified copy of this judgment, if applied for, be given to the learned advocates for the respective parties upon compliance of all formalities.