

(2006) 03 AHC CK 0019

In the Allahabad High Court

Case No : First Appeal From Order No"s. 1039 of 1995 and 1585 of 2002

Smt. Leela Bhanott (Since deceased) Km. Kritika Bhanott and Others APPELLANT

Vs

Petrolube India and Others
Petrolube India and Others RESPONDENT
Vs Km. Kritika Bhanott and Others

Date of Decision : 24-03-2006

Acts Referred:

Citation : (2006) 3 ACC 500 : (2007) ACJ 103 : (2006) 2 AWC 1840

Hon'ble Judges : V.M. Sahai, J;M.K. Mittal, J

Bench : Division Bench

Advocate : P.S. Tripathi, V.B. Singh, Brijesh Kumar and U.P. Singh, for the Appellant; H.N. Sharma, Aniruddha Sharma, A.B. Saran and K.S. Amist, for the Respondent

Final Decision : Allowed

Judgement

M.K. Mittal, J.—These two appeals have been filed against the judgment and decree dated 19.8.1995 passed by Motor Vehicle Claims Tribunal, (Special/Addl. District and Sessions Judge), Aligarh (in short Tribunal) in Motor Accident Claim Petition No. 79 of 1982 Smt. Leela Bhanott v. Petrolube India and Ors. whereby it allowed the claim petition for an amount of Rs. 3,35,000/- with interest at the rate of 9% per annum against the opposite parties 1 to 3 with the direction that the Oriental Fire and General Insurance Company (hereinafter referred as Insurance Company) was liable to pay an amount of Rs. 50,000/- and balance was to be paid by opposite parties No. 1 and 3 jointly and severally. Since these two appeals arise against the same order they have been heard together and are being decided by a common judgment. Smt. Leela Bhanott and Kumud Khaitan died during the pendency of the appeals and their legal heirs are on record/have been substituted.

2. Brief facts are that Smt. Leela Bhanott filed a claim petition alleging that when on 11.12.1981, her husband Major N.P. Bhanott sitting on the pillion seat of

motorcycle No. D.D.T. 684, being driven by Harsh Kumar reached near the road crossing in Awas Vikas Colony of Raghuveer Puri road and G.T. road, Aligarh at about 9.20 p.m., a Tanker No. U.P.B. 7010, being driven rashly and negligently by opposite party No. 3, Prem Pal Singh hit the motorcycle and as a result thereof Sri Harsh Kumar and Major N.P. Bhanott received injuries and later Major N.P. Bhanott succumbed to his injuries in the military Hospital, Aligarh. At the relevant time Sri N.P. Bhanott, who was a Major in the army, was attached to N.C.C. Group HQ at Ramghat Road, Aligarh. He left behind him his widow Smt. Leela Bhanott, minor daughter Kritika Bhanott and son Arun Kumar, Major Bhanott was getting about Rs. 2500/- per month as salary and his age was about 45 years. According to the claimant his life expectancy was up to 80 years. The claim petition was filed for award of Rs. 10,50,000/- as compensation.

3. The opposite party M/s Petrolube India Limited filed written statement and inter-alia pleaded that the accident took place on account of negligence of the motorcycle driver as at the time of the accident, he was in drunken condition and had no control over the vehicle. The vehicle was insured with Insurance Company against 3rd party risk with insurance policy number 2810/30 / 01933 / 3081 / 1278/T.P. and the conditions of the policy were fulfilled. The driver Prem Pal Singh was prosecuted in criminal case No. 1826 of 1982 State v. Prem Pal Singh but was acquitted for want of any evidence by order dated 16.6.1983.

4. The driver Prem Pal Singh filed separate written statement and pleaded that he was driving the Tanker carefully and the accident had taken place on account of rash and negligent driving of the motorcycle driver who was in drunken condition. He has further contended that he had a valid driving license.

5. The insurance company filed written statement and alleged that driver had no valid driving licence and the accident had taken place on account of negligence of the deceased himself. In additional written statement the insurance company pleaded that the insurance was 3rd party insurance with limited liability of Rs. 50,000/-. The claim made by the petitioner was highly inflated and exaggerated.

6. This case has had a chequered history. The petition was filed on 31.5.1982 but the petitioner did not take steps from July 1982 to January 1986. Although petrolube India, the owner of the tanker had filed written statement on 12.12.1983, the steps were not taken for other opposite parties. The petition was dismissed for want of prosecution on 20.5.1986 and was restored on 14.11.1986. It was again dismissed on 8.3.1989. Several applications (Misc Case No. 13 of 1989, 54 of 1991, 25 of 1992) were given for restoration of the petition as well as restoration of restoration application and the petition was finally restored on 27.5.1994. The case was decided by judgment and order dated 29.9.1994 by Tribunal. Against that judgment M/s Petrolube filed first appeal from order No. 1111 of 1994 on the ground that the appellant did not get opportunity to contest the claim petition after it was restored. That appeal was allowed by judgment and order dated 8.2.1995 and the case was remanded to the Tribunal.

7. Learned Tribunal framed the following four issues in the case for determination:

(i) Whether the driver of Tanker No. U.P. B 7010 was driving the Tanker rashly and negligently ? If so, its effect.

(ii) Whether the accident took place on account of negligence of the motorcycle driver ? If so, its effect.

(iii) Whether the petition was bad for non joinder of parties ?

(iv) To what relief, if any, was the claimant entitled.

8. The parties led their evidence in the case and on behalf of the claimant Kritika Bhanott P.W.-1, Som Pal, P.W.-2 were examined. The respondents examined Prem Pal Singh driver as D.W.-1. Parties also filed documentary evidence in support of their contentions. On the basis of the evidence, learned Tribunal came to the conclusion that the incident had taken place due to rash and negligent driving of the Tanker driver as the Tanker had hit the back portion of the motorcycle. It further held that the age of the deceased was about 45 years and he was getting salary of Rs. 2500/- per month. Adding the value of the perks, the tribunal held that his total income was Rs. 4000/- per month and on that basis concluded that he must have spent Rs. 2700/- on the petitioners and on that basis, applying the multiplier of 10, calculated the compensation amount as Rs. 3,24,000/-. Tribunal also awarded Rs. 15,000/- for loss of consortium and rounded the figure to 3,35,000/-. It also awarded interest at the rate of 9 % from the date of filing of petition. Feeling aggrieved, both the parties have come up in these appeals.

9. The contention of claimants in appeal is that learned Tribunal has erred in determining the dependency at Rs. 2700/- because the overall salary of the deceased was Rs. 9128/- and after deduction of 1/3rd as personal expenses the dependency should have been fixed at Rs. 6100 per month; that the retirement age of the deceased was 58 years and the multiplier of 18 and in any case of 13 should have been applied; that the interest as awarded is less and that it should have been at the rate of 12% per annum.

10. The contention of the respondents in their appeal is that the driver of the motorcycle was not having any driving licence and was not conversant with the traffic rules and art of driving; that he was in drunken state; that the deceased was not a commissioned officer but was a Major of non commissioned rank coming up from J.C.O.; that the salary as shown was excessive; that the age of the deceased was more than 45 years; that he was retired person receiving pension; that the claimants were not entitled to get any interest for the period they did not take steps in the petition and the period during which the petition remained dismissed.

11. We have heard learned Counsel for the claimant, learned Counsel for the respondents and perused the record.

12. The following points arise for determination in these appeals:

1. Whether the accident took place on account of rash and negligent driving by the driver of the Tanker or on account of rash and negligent driving of the motorcyclist ?
2. To what amount of compensation, if any, are the claimants entitled ?

FINDINGS

Point No. 1:

13. Learned Counsel for the claimants has contended that the accident in which Major Bhanott was killed took place due to rash and negligent driving of the opposite party No. 3 Prem Pal Singh, who was driver of the Tanker. As against it the contention of learned Counsel for the opposite parties is that the motorcycle driver was in drunken condition and was also not conversant with the traffic rules and was responsible for this accident. In this connection, the statement of Som Pal, P.W.-2 is important. This witness has stated that he was present when the incident took place. The Tanker hit the back portion of motorcycle which was dragged to some distance. Major Bhanott was wearing helmet which was also crushed. The driver of the tanker was drunk and was apprehended at the spot. The smell of liquor was coming from his mouth. He made a positive statement that this incident took place on account of rash and negligent driving of the Tanker Driver. In his cross examination, this statement of the witness has not been challenged. Even no suggestion has been given to him that the incident took place on account of any rash or negligent driving of the motorcyclist. If the statement of witness is not challenged in cross examination it has to be accepted as such. In this statement, it has also been stated that he was present at the time of incident and there is nothing in his statement to show that he was not present. In the circumstances, the statement of this witness shows that the accident took place on account of rash and negligent driving of Tanker driver.

14. Prem Pal Singh, D.W.-1, the driver has examined himself and stated in examination in chief, that the back portion of the motorcycle hit against the Tanker; although he has stated that the accident did not take place on account of his mistake or negligence but this contention cannot be accepted. Had there been a head on collision the position would have been different. It was the back portion of the motorcycle that was hit by the tanker and it shows that Tanker's driver was negligent in not controlling the speed of his Tanker although he had seen motorcycle from a distance of 50 yards as stated by him on oath. He did not tell any Police Personnel and did not give any report to the effect that the incident took place on account of mistake of the motorcycle driver. In view of this evidence, it is clear that this incident took place due to rash and negligent driving of the Tanker's driver and not that of the motorcycle driver and the findings as recorded by learned Tribunal are correct and are confirmed. The point is decided accordingly.

Point No. 2:

15. Now we have to see whether the claimants are entitled to any amount as compensation and if so, what amount. The assessment of damages to compensate the dependants is beset with difficulties because from the nature of things, it has to take into account many imponderables, e.g., the life expectancy of the deceased and the dependants, the amount that the deceased would have earned during the remainder of his life, the amount that he would have contributed to the dependants during that period, the chances that the deceased may not have lived or the dependants may not live up to the estimated remaining period of their life expectancy, the chances that the deceased might have got promotions better employment or income or might have lost his employment or income altogether and so on.

16. The manner of arriving at the damages is to ascertain the net income of the deceased available for the support of himself and his dependants, and to deduct there from such part of his income as the deceased was accustomed to spend upon himself, as regards both self-maintenance and pleasure, and to ascertain what part of his net income the deceased was accustomed to spend for the benefit of the dependants. Then that should be capitalized by multiplying it by a figure representing the proper number of years' purchase.

17. Much of the calculation necessarily remains in the realm of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case it is the overall picture that matters", and the Court must try to assess as best as it can the loss suffered.

18. The multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalizing the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased (or that of the claimants whichever is higher) and by the calculation as to what capital sum, if invested at a rate of interest appropriate to a stable economy, would yield the multiplicand by way of annual interest. In ascertaining this, regard should also be had to the fact that ultimately the capital sum should also be consumed-up over the period for which the dependency is expected to last.

19. Learned Counsel for the claimants has contended that the learned Tribunal has erred in determining the dependency at Rs. 2700/- per month. He has contended that over all income of the deceased should have been taken to be Rs. 9128/- and on that basis dependency should have been determined. The claimants contention is also that had the deceased lived, he must have been promoted as Colonel in the very near future and thereafter must have gone to the post of Brigadier. Learned Counsel for the respondents owner of the vehicle has contended that the earning of the deceased was Rs. 2500/- per month as said by Km. Bhanott, P.W.-1 herself. Therefore the dependency should have been determined at Rs. 1666/ and further there should have been deduction of Rs.

800/- as this amount was admittedly being received by the dependents as family pension. The learned Counsel for the opposite parties has further contended that he was already a retired person from regular army and was posted in the NCC office. But no document to that effect has been placed and no such suggestion has been given to the claimant Km. Bhanott during her cross examination that her father had already retired from service. Therefore this plea is not tenable.

20. The statement of Km. Bhanott shows that her father was getting a salary of Rs. 2500/- per month. Besides, he was also getting free residence, medical facilities and also used to get subsidies in the conveyance and education of the children. It appears that the claimants did not file any salary certificate of the deceased in the Trial court. The statement of Km. Kritika Bhanott that her father was getting Rs. 2500/- as salary has not been challenged in cross examination. It has also not been challenged that the deceased was not getting perks in the form of free and subsidized services, as mentioned above. However, the learned Counsel for the claimants could not show as to how the income should have been assessed at Rs. 9128/- per month, when the salary was about Rs. 2500/-. The value of perks could not have been about three times of the salary. The petitioners should have given the details. The contention of learned Counsel for the opposite parties that the dependency should have been determined at Rs. 1666/- is also not correct because deceased was getting free residence, medical facilities and also some facilities at subsidised rates. In the circumstances, learned trial Court has rightly assessed the monthly income of the deceased at Rs. 4000/-.

21. Again the contention of learned Counsel for the respondents that the amount of pension should have been deducted, is also not correct because if any family pension is payable to the dependants of the deceased, it does not affect the amount of compensation. In the case of *Urmila Kaur and Ors. v. Bapu Raja Ram Kothala* 1985 ACC 86 (Bombay), it has been held that deduction on account of contributory provident fund, gratuity and family pension for compensation for accident is not justified. Thus we come to the conclusion that learned Tribunal has rightly assessed the dependency at Rs. 2700/- per month and the finding in this regard is confirmed.

22. Learned Counsel for the claimants has further contended that learned Tribunal has erred in applying the multiplier of 10 while calculating the amount of compensation. He has contended that multiplier of 18 or in any case 13 should have been adopted. The age of the deceased has been given as 45 years in the claim petition. Km. Kritika Bhanott has also given the age of the deceased as 45 years and the same has not been challenged in her cross examination.

23. The claimant did not file any certificate showing the date of birth of deceased. In the circumstances, the contention of learned Counsel for the claimant that the age of the deceased was less than 45 years cannot be accepted. The contention was also raised by learned Counsel for the respondents owner that the deceased had retired and was getting pension and his age was

more than 45 years but no evidence to that effect has been adduced by the respondents as well. In the circumstances, the age of the deceased can be taken to be in the group of 45 years to 50 years and in view of the amended schedule, the multiplier of 13 can be said to be the appropriate multiplier in the instant case. Learned Trial Court has erred in adopting the multiplier of 10 and that finding is to be set aside.

24. Now we come to the question of interest. The contention of learned Counsel for the claimants is that learned Trial Court has erred in awarding the interest at the rate of 9 % whereas it should have been given at the rate of 12%. Learned Counsel for the claimants has also contended that it appears that learned Trial court has awarded interest at the rate of 9 % because he has awarded interest for the entire period from the date of application. In the impugned order learned Trial Court has mentioned that the petition was dismissed for default otherwise petitioners could have been given interest at the rate of 12%.

25. Learned Counsel for the claimants has referred the case of Smt. Sarla Dixit and another Vs. Balwant Yadav and others, In that case the incident had occurred in the year 1975 and the Hon''ble Apex Court while deciding the appeal on February 29, 1996 awarded interest at the rate of 12 % per annum from the date of claim petition.

26. Learned Counsel for the claimants has also referred the case of New India Assurance Company Limited, Sadar Bazar, Jhansi v. Kalicharan Rai and Ors. decided by a division bench of this Court in F.A.F.O. No. 1201 of 1993 wherein the interest has been awarded at the rate of 12 % per annum from the date of application. The death had taken place on 25.9.1990.

27. The learned Counsel for the respondents owner has contended that the learned Trial Court has rightly allowed the interest at the rate of 9 % per annum. In a recent case of Tamil Nadu State Transport Corporation Ltd. Vs. S. Rajapriya and Others, the Hon''ble Apex Court awarded the interest @ 7.5 % per annum on account of reduced prevailing rate of interest. In that case age of the deceased was 38 years and the death took place on 30.8.2001. In the instant case although the claim petition was filed in the year 1982 but it was not effectively prosecuted till the year 1994 and the delay was caused mainly on account of the claimants.

28. Considering all the facts and circumstances of the case, as well as the prevailing rate of the interest, we are of the opinion that the claimants are entitled to get interest @ 9 % per annum and in this connection, the finding as recorded by the learned Tribunal needs no interference.

29. Learned Counsel for the respondents has further contended that learned Tribunal has erred in awarding the interest from the date of petition and in not excluding the period during which the claimants did not take steps or the petition remained dismissed. The record shows that the petitioner did not take effective steps from July 1982 to January 1986 and that the petition was dismissed for

non prosecution on 20.5.1986 and was restored on 14.11.1986. The petition was again dismissed on 8.3.1989 and was finally restored on 27.5.1994. Regarding non prosecution and dismissals, learned Counsel for the claimants has contended that at the relevant time the claimants lived at Dehradun and their counsel was directed to take steps and to prosecute the petition but he was negligent and that the claimants should not suffer on account of laches on the part of the counsel.

30. In this connection, learned Counsel for the claimants has placed reliance on the case of Shaikh Abdul Rafi Abdul Aziz and Another Vs. Aspy Beharam Talathi and Another, In this case, Bombay High Court has held that the claimants should not be refused hearing because of the negligence of their lawyers. But in the instant case, the facts are different and this ruling does not help the claimants.

31. The learned Counsel for the respondents has cited the case of Sanjay Kumar and Another Vs. Munnalal and Another, In that case, the claimants had failed to properly pursue the claim and petition was dismissed and after restoration the trial had been limping on account of their fault for a long time. In that matter Gwalior bench of Madhya Pradesh High Court held that the interest was not admissible from the date of filing of the claim petition but from the date of that judgment.

32. It is true that if there is a bonafide mistake or negligence on the part of the lawyers, the party should not be made to suffer. But it is equally true that for the negligence of the counsel of one party, the other party should not suffer. In the instant case there was negligence on the part of learned Counsel for the claimants. He did not take steps and also the case remained dismissed for a long time and in this circumstance, the opposite parties cannot be made to suffer and to pay the interest for that period. In the circumstances, we come to the conclusion that the learned Tribunal has erred in awarding the interest for the period the claimants did not take effective steps and also for the period, the petition remained dismissed. The point is decided accordingly.

33. In view of the above discussion we come to the conclusion that the claimants are entitled to get Rs. 2700 X 12 X 13= Rs. 4,21,200/- as compensation. They are further entitled to get Rs. 15,000/- as awarded by learned Tribunal. Thus they are entitled to get Rs. 4,36,200/- and interest thereon as mentioned above. The liability of the insurance company is limited to the extent of Rs. 50,000/-, it shall also pay the interest thereon as directed herein,

34. Therefore both the appeals are to be partly allowed.

35. The appeal No. 1039 of 1995 is allowed to the extent that the claimants shall get Rs. 4,36,200/- as compensation. The appeal No. 1585 of 2002 is partly allowed to the extent that the appellants of this appeal shall not be liable to pay interest w.e.f. July 1982 to January 1986, 20.5.1986 to 14.11.1986 and 8.3.1989 to 27.5.1994. The interest on the compensation amount shall be payable w.e.f. the date of petition to the actual date of payment excluding the aforesaid period

and at the rate of 9 % per annum. Opposite parties shall pay the amount and the interest as above within a period of two months, failing which the claimants shall be entitled to recover the amount in accordance with law. It is also made clear that if any amount has been paid earlier, the same shall be liable to adjustment.

36. The parties are directed to bear their costs of these two appeals.