(2015) 09 KAR CK 0213

In the Karnataka High Court

Case No : M.F.A. No. 25253/2010 (MV) and Cross-Objection No. 100004/2015

The Manager, Bajaj Allianz General Insurance Co. Ltd. and Others — APPELLANT

Vs

Savitri and Others — RESPONDENT

Date of Decision : 15-09-2015

Acts Referred:

Citation : (2015) 09 KAR CK 0213

Hon'ble Judges : G. Narendra, J.

Bench : Single Bench

Advocate : Ravindra R. Mane, Advocate, for the Appellant; S.P. Patil, Advocate, for the Respondent

Judgement

G. Narendra, J.—The appellant is the insurer and 2nd respondent before the Tribunal, whereas the cross-objectors are the claimants. The appellant have questioned the validity of the Award on the ground of denial of occurrence of the accident. The cross-objectors have preferred cross-objections being aggrieved by adequacy of the sum awarded.

2. The appeal and the cross-objections are taken up together for disposal by common judgment.

3. The facts necessary for adjudication of the case before this Court are as follows:

"The parties are referred to by the nomenclature before the Tribunal for the sake of convenience.

The case of the claimants is that on 23.08.2008 at about 3.00 p.m., Rudragouda Bhimagouda Patil @ Masaraguppi [deceased], who is the husband of the 1st claimant and father of the 2nd and 3rd claimants and son of the 4th claimant was proceeding on his bicycle on the left side of Hukkeri-Sankeshwar road and had he approached the lands of one Rajashekhar Basavanni Jarali, within the

limits of Nerli village, the driver of the offending vehicle came at a great speed and hit the bicycle, resulting in fatal injury to the deceased. It is averred that the accident has occurred on account of the rash and negligent driving by the driver of the offending vehicle, who had been examined as R.W.2 by the insurer. It is further averred that the accident occurred as the driver of the offending vehicle lost control over it. It is further submitted that the deceased was immediately shifted to the hospital. But, he succumbed to the injuries suffered and thereafter, post-mortem was conducted at the Government Hospital, Sankeshwar and the dead body was shifted in a hired vehicle to his native village and funeral ceremony was performed.

It is averred in the claim petition that the deceased was aged about 42 years and had acquired skill as an agriculturist. That apart, he was also doing milk vending business and thereby earning a sum of Rs. 1,00,000-00 p.a. from his agricultural work and about Rs. 6,000-00 p.m. from the milk vending business and out of the said income, he was maintaining the claimants, who are none other than the wife, children and mother. It is further averred that the above said persons were totally dependant on the deceased and that due to his untimely death, the claimants have lost their only earning member in the family. That apart, it is averred that they have lost his dear love and affection. It is averred that his death has caused mental, physical and financial loss to the claimants.

The 1st respondent before the Tribunal is the owner of the offending vehicle and he has not filed any objections. The driver of the offending vehicle was not arrayed as a party before the Tribunal. The insurer has been arrayed as the 2nd respondent. The insurer after entering appearance, has filed detailed objections, which can be summarized as follows:

1) It has been denied that the claimants are the legal heirs of the deceased;

2) It has been denied that the accident has occurred on account of rash and negligent driving of the driver of the offending vehicle;

3) The claimants have to prove which is the criminal case;

4) The amount claimed is on the higher side; and

5) In the event, the insurer is liable to pay any compensation, then it is subject to the validity, legality, terms and conditions with exceptions to the insurance policy and also subject to prove the presence of validity of the D.L., R.C., permit and other necessary documents.

It is specifically contended by the insurer that the accident is a false story and that the petitioners have concocted a false complaint colluding with the police and doctor in order to obtain wrongful gain from the 2nd respondent. Apart from that there is a delay of one day in lodging the complaint. There is no description of the offending vehicle and the driver, in the FIR registered on the same day and that the charge-sheet in the criminal case has been preferred and filed after lapse of 3 months 24 days and the same demonstrates collusion between the

claimants and the injured. It is thereafter alleged that it is a hit and run case and the surrounding circumstances by themselves create a doubt about involvement of the offending vehicle. It is also contended by the insurer that the deceased might have fallen from the bicycle elsewhere and the offending vehicle has been wrongly implicated with the motive of making unjust gains. The insurer has also placed reliance on the Motor Vehicle Inspector''s Report dated 02.12.2008, which is carried out after lapse of more than 3 months. Hence, on these grounds, the insurer has protested the legality of the claim and has stated that there are no legal basis for invoking jurisdiction of the Tribunal for awarding compensation.

The 1st claimant got examined as P.W.1 and produced 9 documents, which are marked as Exs.P1 to 9. The insurer-2nd respondent got examined its Law Officer and also the driver of the offending vehicle as R.Ws.1 and 2 respectively and they have produced 10 documents, which are marked as Exs.R1 to 10.

In the above background, the Tribunal has formulated the following two among other issues for adjudication of the claim of the parties:

1) Whether the petitioners prove that the death of Rudragouda Bhimagouda Patil @ Masaraguppi is caused in a motor vehicle accident which took place on 23.08.2008 due to the rash and negligent driving of Goods Tempo bearing Reg. No. 22/9722 by its driver?

2) Whether the respondent No. 2 proves that the alleged vehicle is not at all involved in the accident and it is falsely implicated, hence they are not at all liable to pay any compensation?"

4. The Tribunal has been pleased to render a finding in the affirmative in respect of issue No. 1 and a finding in the negative in respect of issue No. 2 i.e., in effect, the Tribunal has believed the case put-out by the claimants and has been pleased to reject the case set-out by the insurer and this finding has been arrived on the basis that the insurer has primarily failed to plead and place cogent evidence and material to falsify the claim set-up by the claimants and nextly that R.W.2 is the driver of the offending vehicle has himself admitted in the cross-examination about occurrence of the accident and hence has been pleased to award a total compensation of Rs. 6,42,000-00 under these heads.

The Tribunal also found fault with the insurer for not having made any attempts to legally challenge the charge-sheet or the proceedings indicting the driver of the offending vehicle [R.W.2]. The Tribunal has also concluded that the insurer has not produced any material in support of their assertion that they have challenged the charge-sheet and hence it has disbelieved the version of the insurer and has proceeded to award the claim as it deemed fit and necessary and in the light of the materials placed before it.

5. In the foregoing facts and circumstances, the appeal preferred by the insurer is taken up first for consideration.

The grounds of the appeal is that the offending vehicle has been fraudulently got

involved in the accident as a result of collusion between the owner, driver and the police authorities in order to make a wrongful gain by extracting money from the appellant under the grab of compensation. That the Tribunal failed to appreciate the defence of the appellant in a proper way and that the burden of proving the accident lay on the claimants, which they have failed to discharge. It is also argued that the Tribunal failed to appreciate one day''s delay in lodging the complaint. It is contended that there are no eye-witnesses to the accident and hence questions identification of the offending vehicle. He also relied on the Motor Vehicles Inspector''s Report, which states that no damage is recorded by the Motor Vehicle Inspector. It is also contended that in view of the above, the Tribunal ought to have concluded that the claim petition is a concoction and as a result of collusion and unholy alliance between the claimants and other stakeholders.

6. In the light of the above contentions, it is required to see as to what is the material placed by the insurer-appellant herein to discharge the onus cast upon it as per the law of evidence. The insurer has specifically set-up a case and reading of the contentions made on behalf of the insurer would lead to the following inference:

"In one breath, it is contended that the accident has never happened. In the same breath, it is stated that the deceased might have fallen from his bicycle resulting in his death. In the next breath, they state that it is a case of hit and run accident and the vehicle which caused the same is not known. The insurer cannot approbate and reprobate. It is the case that when no accident has occurred, then it cannot argue the case of hit and run. The alternate pleas of the insurer is negatived by the post-mortem report. Even in order to discard the other evidence in the FIR and the complaint, the post-mortem report clearly evidences the fact that the deceased has suffered fatal injuries as a result of road traffic accident. The insurer has not led any evidence which creates a doubt as to the authenticity of the post-mortem report. The post-mortem report conclusively proves the death of the deceased in a road traffic accident on the one part. The other part that is required to be demonstrated is the non-involvement of the offending vehicle. Though it has been asserted by the insurer in general terms, no specific case is pleaded by the insurer. Apart from raising a general denial, the insurer has not made any effort to have the complaint or allegation against the offending vehicle investigated by any independent body. The assertion of the insurer regarding non-involvement of the offending vehicle has to shy in the face of the admission of R.W.2, who is facing prosecution before the criminal court. R.W.2 has been summoned and examined by the insurer and he has admitted that he fled from the accident spot fearing a thrashing at the hands of the people and he got repaired the left side front indicator which got damaged in the accident. The insurer while cross-examining the driver-R.W.2, has not been able to elicit any answer which contradicts the version of the claimants. It is also to be noted that the offending vehicle has been implicated and the driver has been charge-sheeted as a result of the efforts by the

investigating authority. The charge-sheet is laid by the investigating authorities based upon the independent material and that the said charge-sheet has not been questioned by the insurer either before the authorities or in a manner known to law or by initiating any judicial proceedings. That being the case, the defence set-up by the insurer has to make way to the assertion of the claimants. The insurer having set-up by the specific defence and having failed to discharge the burden upon it, the natural corollary is examination of the claimants version, which the Tribunal has adjudicated."

7. It is seen that the insurer has raised several grounds, but has miserably failed to lead cogent evidence to demonstrate its allegation. The insurer has not been able to elicit anything adverse during the cross-examination of P.W.1, who is none other than the 1st claimant and the wife of the deceased. The complaint regarding the delay of one day in lodging the complaint has to be discarded for the reason that the FIR has been registered on the same day. It is a indisputable fact that the family of the deceased would have been in turmoil on account of the untimely and sad demise of their only earning member. Hence, the complaint that the claimants ought to have lodged a complaint immediately cannot be accepted and is to be discarded as an argument without any legs to stand on and must be rejected at the threshold and it is accordingly rejected.

That apart, as rightly concluded by the Tribunal, the insurer has not led any evidence to demonstrate its version to prove the allegations and they have remained mere allegations. The reasoning of the Tribunal that the insurer has not submitted any evidence to show that they have challenged the veracity of the charge-sheet nor they have initiated any proceedings to challenge the correctness of the charge-sheet coupled with the admission of R.W.2, who has been summoned on behalf of the insurer, this Court does not find any good grounds which warrants interference in the findings of the Tribunal on the second issue.

In the above facts and circumstances, it is held that the onus and burden is on the person who makes the allegation and anybody failing to discharge this obligation must necessarily suffer the consequences of the same. In view of the above discussion, this Court is of the considered view that the appeal preferred by the insurer is liable to be rejected and it is accordingly rejected.

Further the converse demonstrates that the accident in fact has happened as alleged and narrated by the claimants. In that view of the matter, the only question that is left for consideration of this Court is;

"Whether the quantum awarded is just and fair compensation or in other words, the sum awarded is just and fair compensation?"

8. The 1st claimant/wife has entered into the witness box and deposed on behalf of the other claimants. In the deposition, she has gainfully contended that her husband i.e., the deceased was a skillful agriculturist and that he was earning more than sum of Rs. 1,00,000-00 p.a. from the agricultural activities alone and

further a sum of Rs. 6,000-00 p.m. from the milk vending business. The Tribunal while appreciating the evidence has tended to disbelieve the same and has fixed a notional income at Rs. 150-00 per day and has proceeded to deduct 1/4th from the said sum. The said finding is liable to be interfered with on the short ground that the Tribunal has gravely erred in planting its reasons in place of evidence.

9. The Tribunal has concluded that the evidence of P.W.1 i.e., the 1st claimant, remains uncontroverted i.e., in essence, the insurer has not been able to elicit any admission adverse to the case of the claimants.

10. The Tribunal erred in resorting to mere guess work while arriving at the finding regarding income. The Tribunal has not accorded any reasons while rejecting or refusing to believe the evidence of P.W.1. It is the specific evidence of P.W.1 that her deceased husband was a skilled agriculturist and was earning handsome of Rs. 1,00,000-00 p.a. and that apart, he was earning Rs. 6,000-00 p.m. from the milk vending business. It is true that a person in his 40''s is in the prime of his life and by which time he would have acquired both physical skill and mental maturity and it is at that stage where the person would have exclusively used his physical and mental capabilities to nurture his profession and source of income and thereby increase the same in order to provide better facilities and luxuries to the family. It is seen that the deceased has been a committed family man and has remained a member of the family and has been able to raise two children aged 17 and 16 years apart from looking after his mother also. The picture one can draw with the background is that he was a progressive man committed to the upliftment of his family members and was their sole benefactor. In that view of the matter, this Court is of the considered opinion that the sum arrived as notional income by the Tribunal is grossly on the lower side. It is seen that the deceased was maintaining two grownup children, who are described as students before the Tribunal and this fact coupled with the fact that the deceased was the lone earning member, it can be safely inferred that it was he, who was providing money for their education. It is also seen that the 1st and the 4th claimants being the wife and mother respectively are described as homemakers, which yet again implies that it was the deceased who was providing for them also. Thus, the undeniable picture, one can arrive at is that the entire family of 5 was being maintained by the income earned by the sole member i.e., the deceased. It is not the case of the insurer that either of the claimants were contributing to the upkeep of the family or were providing financial assistance and hence it can be safely presumed that the notional income fixed at Rs. 4,500-00 p.m. is on the lower side.

11. It is seen that the accident is of the year 2008 and the Hon''ble Apex Court in the case of an accident pertaining to the year 2011 has been pleased to fix the notional income at Rs. 12,000-00 p.m. The Apex Court''s Judgments rendered in Civil Appeal Nos. 348-349/2015 arising out of SLP(C) Nos. 4897-4898/2014 as in the case involving the death of two brothers, who are described as carpenters have been pleased to fix the notional income at Rs. 12,000-00 p.m. keeping in

view of the fact that the carpenters are skilled workmen. The deceased herein is also described as skilled agriculturist, but no material is placed by the claimants to accord the same. In that view of the matter, it has to be and it can be safely stated without fear of contradiction that the deceased was earning at Rs. 250-00 per day considering the minimum and basic requirement of the family of 5. The fact also remains that no payments or vouchers can be produced in respect of agriculturist. The evidence regarding milk vending business has not been appreciated by the Tribunal without any reasonable basis. In view of the matter, the Judgment and Award rendered by the Court by the Addl. MACT., which came in M.V.C. No. 3122/2008 dated 31.08.2010 warrants interference at the hands of this Court in the nature of modification of the compensation awarded.

12. The Apex Court and this Court have consistently held that the compensation awarded should be just and fair, in other words commensurate with the actual earnings of the deceased. It is settled law that in the absence of any direct evidence regarding the natural earnings, the same has to be inferred from the attending circumstances. In the present case, the evidence that the deceased was a skilled agriculturist and milk vendor has not been dispelled by contesting litigant in a manner known to law. No admission is also elicited in the cross-examination of the witnesses i.e., P.W.1. In that view of the matter, this Court is of the considered opinion that the notional income are to be fixed at the rate of Rs. 250-00 per day, which automatically would result in enhancement of the compensation awarded under the head of loss of future income.

The claimants are entitled to the sum of Rs. 7,500 x 1/4 = Rs. 5,625 x 12 x 14 = Rs. 9,45,000-00 under the head of loss of dependency. Apart from the compensation awarded on the head of loss of dependency, the Tribunal has awarded a meagre amount under the head of loss of consortium. Hence, a sum of Rs. 50,000-00 is awarded under this head.

I do not find any error in the compensation awarded under other conventional heads. In that view of the matter, the cross-objections preferred is accepted by this Court and the Judgment and the Award is modified and the insurer is directed to pay the enhanced amount as follows:

In the circumstances, the appeal filed by the insurer is dismissed and the cross-objection filed by the claimants is partly allowed. The claimants are entitled to a sum of Rs. 4,08,000-00 with interest at 6% p.a. from the date of the petition till its payment, in addition to the compensation awarded by the Tribunal. Ordered accordingly.

