

(2016) 11 AHC CK 0067

In the Allahabad High Court

Case No : First Appeal From Order No. 3174 of 2016

The New India Assurance Co. Ltd.

APPELLANT

Vs

Irfan

RESPONDENT

Date of Decision : 09-11-2016

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, Section 166, Section 168

Citation : (2017) 1 ADJ 667

Hon'ble Judges : Sudhir Agarwal and Dr. Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Vinay Kumar Khare, Advocate, for the Appellant

Final Decision : Dismissed

Judgement

1. Heard learned counsel for appellant.

2. This appeal under section 173 of Motor Vehicle Act, 1988 (hereinafter referred to as the " Act, 1988") is preferred by New India Assurance Company Limited against judgment and award dated 6.8.2016 passed by Sri Gulab Singh II, Motor Accident Claims Tribunal / Additional District Judge, Court no. 12, Bulandshahar in MACP No. 419 of 2014, whereby compensation of Rs. 6,30,176/- was awarded to claimants-respondent against claim of Rs.28,82,000/- claimed for death of sole bread winner.

3. Learned counsel for appellant has pressed its challenge to the judgment and award on the following grounds only:

(i) That compensation awarded is higher than what claimants were entitled to, as they are not dependent on deceased, and they are not entitled for compensation on the basis of dependency but are entitled for compensation only on non pecuniary basis namely amount under No fault liability.

(ii) That Tribunal committed a glaring error in not invoking principle of contributory negligence in present case.

4. Brief facts necessary for our purpose are that on 9.10.2014 a accident took place in which Ayub Khan died. It is an admitted position of fact that Ayub Khan who was going on a moped which collided with Mahendra Max Pickup No. U.P.-81 BT-2086 driven by opponent no. 1 and owned by opponent no. 2 and insured with appellant. Tribunal after considering all evidence led before it awarded Rs.6,30,176/- with 7% interest. It is not in dispute that claimants were legal representative and legal heirs of deceased. Owner filed its reply which was of denial and contended that even if it is proved that his vehicle was involved in accident, driver had valid driving licence, and none of terms of policy of Insurance of vehicle were breached and vehicle was insured with New India Insurance Company Limited. Insurance Company filed its reply which was one of denial. Respondents did not lead any oral evidence to prove their defence.

5. It is contended by learned counsel for appellant that Tribunal has erred in granting compensation of Rs.6,30,176/- though claimants were sons / heirs of deceased and were not entitled to any amount more than that specified under Section 140 of Act, 1988 as they were major and not dependant on deceased. To bring home this submission, learned counsel has relied on Manjuri Bera (Smt) v. Oriental Insurance Company Ltd., (2007) 10 SCC 643. It is further submitted that claimants were not dependant and income of deceased was not proved. It is submitted that service record of deceased was not proved so as to prove age and income of deceased and witness-Rupendra Kumar also did not prove salary of deceased. He has taken us through the site plan and contended that Tribunal has wrongly relied on so called eye witness to hold the driver of bolero as the sole tort fessor though evidence to contrary was there. It is further contended that claim petition is not regular trial but it is an inquiry and these all material which is placed before Tribunal, whether proved or not, (exhibited or not), are required to be taken into consideration for deciding matter. It is contended that finding holding that driver of vehicle insured by appellant alone was negligent is bad on facts. Ist challenge : -

6. It would be necessary to advert to provisions of Sections 140, 160 and 168 of Act, 1988 as learned counsel has taken us through judgment in Manjuri Bera (Smt) v. Oriental Insurance Company Ltd. (supra) to contend that nothing more than mentioned as fixed compensation under Section 140 of Act, 1988 was to be awarded to claimants.

7. Section 166 read with section 140 of Act, 1988 reads as under :

"140. Liability to pay compensation in certain cases on the principle of no fault. -

(1) Where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation in respect of such death or disablement in accordance with the provisions of this section.

(2) The amount of compensation which shall be payable under sub-section (1) in

respect of the death of any person shall be a fixed sum of 1[fifty thousand rupees] and the amount of compensation payable under that sub-section in respect of the permanent disablement of any person shall be a fixed sum of 2[twenty-five thousand rupees].

(3) In any claim for compensation under sub-section (1), the claimant shall not be required to plead and establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person.

(4) A claim for compensation under sub-section (1) shall not be defeated by reason of any wrongful act, neglect or default of the person in respect of whose death or permanent disablement the claim has been made nor shall the quantum of compensation recoverable in respect of such death or permanent disablement be reduced on the basis of the share of such person in the responsibility for such death or permanent disablement. 3[(5) Notwithstanding anything contained in sub-section (2) regarding death or bodily injury to any person, for which the owner of the vehicle is liable to give compensation for relief, he is also liable to pay compensation under any other law for the time being in force: Provided that the amount of such compensation to be given under any other law shall be reduced from the amount of compensation payable under this section or under section 163A."

8. Section 166 of Act, 1988 reads as follows :

"166. Application for compensation. - (1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made -

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of

whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

(3) [* * *]

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

9. Principles for grant of compensation under Section 166 are based on provision of Section 168 of Act, 1988 also. Tribunal has relied on decision of this Court in Mohd. Yunus and Adarsh v. Raies and others, 2015(2) TAC, 526 (Alld) and has held that the word "dependent" is not found in the Act. Decision of Apex Court relied by learned counsel for claimants was confined to compensation under section 140 of Act, 1988 only and it was held that claimants was at least entitled to amount not less than Rs.50,000/- as compensation under Section 140 of Act, 1988. Decision of Manjuri Bera (Smt) v. Oriental Insurance Company Ltd. (supra) cannot be applied to the facts of this case as Apex Court categorically held that principles for granting compensation under Section 140 and factors for grant under Section 166 of Act are quite different.

10. This takes us to the amount awarded as compensation to claimants. Tribunal has categorically given a finding based on facts that just because some of heirs are serving, they cannot be denied compensation under Act. Tribunal has considered income of deceased, after all deductions, to be Rs.8308/- per month and as deceased was in the age group of 56 to 60, Tribunal awarded multiplier of 9 as per decision in Smt. Sarla Verma and others v. Delhi Transport Corporation and another, 2009 ACJ 1298 and gave Rs.5,98,167/- for loss of Estate to which Rs.32,000/- were added under other heads. We find no force in the submission of learned counsel that amount of Rs.6,30,176/- awarded could not have been awarded. Principles for grant of compensation applied by Tribunal are based on decision of Smt. Sarla Verma and others v. Delhi Transport Corporation and another (supra) and thus we concur with the Tribunal.

11. The second contention:- To appreciate the second ground of challenge regarding role of deceased in causing accident, it would be relevant to discuss principles for deciding contributory negligence and for that concept of "negligence" will also have to be looked into.

12. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an

absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. Degree of care required, of course, depends upon facts in each case. On these broad principles, negligence of drivers is required to be assessed.

13. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by opponents. It is duty of driver of offending vehicle to explain accident. It is well settled law that at intersection where two roads cross each other, it is duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

14. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of road. It is also provided that driver of vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of Truck was driving vehicle on left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that car over which deceased was riding, was approaching intersection.

15. In view of fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within principle of liability defined in *Rylands v. Fletcher*, (1868) 3 HL (LR) 330. From the point of view of pedestrian, roads of this country have been rendered by use of motor vehicles, highly dangerous. "Hit and run" cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.

16. These provisions (sec.110A and section 110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of parties. Right of action created by Fatal Accidents Act, 1855 was "new in its species, new in its quality, new in its principles. In every way it was new. Right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

17. In the light of above discussion, we are of the view that even if courts may not by interpretation displace principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of *res-ipsa loquitor* as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits (per three-Judge Bench in *Jacob Mathew v. State of Punjab*, 2005 0 ACJ(SC) 1840).

18. By the above process, burden of proof may ordinarily be cast on defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part of driver of another vehicle.

19. Submission that the site plan shows that accident took place due to error of both is also not acceptable. Driver of bolero has not stepped into witness box. Charge sheet is laid against driver of Mahindra Max Pickup i.e. deponent. The eye witness-PW-2 for claimants have proved that driver of offending vehicle came from behind and in rash and negligent manner, dashed with moped and there was no head on collision. In this case Tribunal has also found that deceased was going on his moped, when vehicle Mahindra Max Pickup No. UP-81 BT-2086 dashed from behind causing accident and that is how negligence of driver of tempo taxi has been considered. Vehicle which is plying behind has to be more cautious while driving the vehicle. Maker of site plan has not been examined. The fact that FIR was delayed by two days does not permit us to hold otherwise. Deceased died on the very same day in the hospital while undergoing treatment. Driver driving a bigger vehicle has to be more careful this case is not taken is evident from evidence of eye witness. Hence, we are not persuaded to take a different view than that taken by Tribunal.

20. FIR is corroborated by PW-2 that moped was dashed from behind and there was no head on collision, PW-1 the informant withstood cross examination and has categorically denied that accident took place in middle of the road thus submission that site plan depicts something else cannot be accepted. We are fortified in our view by decision of *New India Insurance Company Ltd. v. Lekhraj* and another, 2009 (74) ALR 654 based on which Tribunal has held against the driver of Mahendra Max. Driver of vehicle is the best witness to speak about the accident. He has not been examined in this case. Thus an adverse inference has been drawn. In case the driver would have been examined he would have spoken the truth which would be adverse to owner. Thus appellant has failed to show that deceased had contributed to accident having taken place.

21. Both issues raised are answered against appellant and in favour of claimants.

22. The appeal is devoid of merits. Dismissed at the stage of hearing under Order 41, Rule 11 C.P.C.