

(2010) 11 AHC CK 0118
In the Allahabad High Court

Case No : F.A.F.O. No"s. 1070 and 1068 of 2008 and 174 and 175 of 2009

The New India Assurance Co. Ltd.

APPELLANT

Vs

Richa Singh Katiyar and Others

RESPONDENT

Date of Decision : 18-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 2, Order 18 Rule 4, Order 9 Rule 10, Order 9 Rule 3

Citation : AIR 2011 All 107 : (2011) 3 AWC 2656 : (2011) 3 CivCC 773 : (2011) 6 RCR(Civil) 2473

Hon'ble Judges : Devi Prasad Singh, J;Arun Tandon, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. Heard Mr. U.P.S. Kushwaha and Mr. V.P. Singh, learned Counsel appearing on behalf of the Appellants and Mr. Vijai Pratap Singh and Mr. S.C. Verma, Mr. V.K. Yadav and Mr. Brijesh Kumar Shukla, appearing for the Respondents.

2. Delay in filing the appeal is condoned.

3. Present appeals have been filed challenging the award dated 15.7.2008, passed in Claim Petition No. 77 of 2004 by Additional District Judge/Motor Accidents Claims Tribunal/Court No. 1-Lucknow. The New India Assurance Co. Limited has filed the appeal challenging the award whereas the claimant Respondents have filed the appeal for enhancement of the compensation.

4. Facts giving rise to the present controversy relate to an accident occurred on 21.1.2004 at about 11.00a.m. The deceased was travelling in car Maruti Zen No. LX No. U.P.-32-Ad/7682 from district Lakhimpur. While they were turning from Lakhimpur towards Sitapur, a Bulero Jeep No. UP-31-F-8300 coming from Lakhimpur at a high speed of about 80km per hour collided with Maruti Zen resulting in the accident in which Smt. Pankaj aged about 47 years and Dr. Laxman Lal aged about 50 years succumbed to the injuries. Two other persons

who were in the Maruti Zen suffered injuries but their case is not before this Court.

5. The tribunal recorded a finding that because of rash and negligent driving of the Bulero Jeep, the accident occurred resulting in the death of the deceased. The tribunal has applied the multiplier of 13 with regard to Smt. Pankaj whereas with regard to Dr. Laxman Lal, multiplier of 10 has been used in terms of Schedule-II of the Motor Vehicles Act and awarded compensation accordingly.

6. Learned Counsel for the Appellant has challenged the award, mainly on three grounds, which are as under:

The evidence led by the claimants is not admissible.

It is a case of contributory negligence.

Multiplier applied by the tribunal is not correct.

7. Before the tribunal, an eye-witness namely P.W.2 Krishna Gangwar who was travelling in the same car supported the case of the claimant Respondents. The witness stated that the said Jeep was coming with high speed of 80 or more kilometre per hour when it dashed with Maruti Zen, the latter was moving at a speed of 30-35km per hour. He further stated that he is a junior scientist and was travelling in the Maruti Zen at the time of accident. After perusal of the site plan, the tribunal recorded a finding that direction of both the vehicles at the spot was towards Sitapur and the Bulero Jeep dashed with the car from the wrong side. On the basis of the technical report of the Maruti Zen, a finding has been recorded that the front portion was damaged whereas the technical report of bolero Car shows that its right front tyre was damaged along with main head screen. Keeping in view the damage caused to both the vehicles, the tribunal on the basis of the technical report and evidence led by the parties, recorded a finding that it was the fault of the Bulero Jeep which tried to overtake the Maruti Zen resulting in the accident in question.

8. Now, coming to the first contention with regard to admissibility of evidence. While assailing the award in question, it is submitted by the Appellants' counsel that before the tribunal, the witnesses had filed their affidavit and thereafter the Appellant's counsel was permitted to cross-examine them. Submission of the Appellant's counsel is that since no examination-in-Chief was recorded by the tribunal, the evidence led by the claimants is not admissible.

9. On the other hand, learned Counsel appearing for the Respondents submitted that from the Appellants' side also, an affidavit was filed which was taken on record and since no objection was raised by the Appellant before the tribunal with regard to affidavit filed by the claimant, at this stage, he has got no right to challenge the sustainability/admissibility of the affidavit.

10. U.P. Motor Vehicles Rules, 1998 (in short, 1998 Rules) deal with the procedure to try the accident claims under the Motor Vehicles Act. Rule 205

provides that in case the claimant is present personally, then he may be examined on oath. Rule 208 provides that the owner of the vehicle and the insurer may, at or before the first hearing or within such further time as the Claims Tribunal may allow, file a written statement dealing with the claim raised in the application. In case the claim is contested, the claims Tribunal shall, with a view to elucidating matters in controversy between the parties, examine orally such of the parties to the claim proceeding as it deems, fit. Rule 209 relates to framing of issues and 210 relates to summoning of witnesses whereas Rule 212 relates to method of recording evidence. Rule 221 provides that the provisions of the Code of CPC may be made applicable as far as possible. For convenience, Rules 204, 205, 208, 209, 210, 212 and 221 are reproduced as under:

"204. Application for compensation.-(1) Every application for payment of compensation made u/s 166 shall as far as possible be made in Form SR-48 if the compensation is claimed otherwise than u/s 163A and in Form SR-49 if compensation is claimed u/s 163A and be accompanied by a fee of rupees ten in the form of court fee stamps.

Provided that the compensation u/s 163A shall be full and final settlement of the claim and claimant shall not be entitled to file any other application for claim under the Act.

(2) All applications, before the Claims Tribunal, other than those mentioned in Sub-rule (1) shall be stamped with a court fee stamp of rupees five. A process fee of rupees ten shall be in the form of court fee stamps paid for each witness or party summoned." "205. Examination of an applicant.-On receipt of an application under Rule 204 the Claims Tribunal may, if the applicant is present personally, examine him on oath, and the substance of such an examination, if any, shall be reduced to writing and it shall form part of the record." "208. Appearance and oral examination of parties.-(1) The owner of the motor vehicle and the insurer may, at or before the first hearing or within such further time as the Claims Tribunal may allow, file a written statement dealing with the claim raised in the application, and any such written statement shall form part of the record.

(3) Where the claim is contested, the Claims Tribunal shall, with a view to elucidating matters in controversy between the parties, examine orally such of the parties to the claim proceeding as it deems, fit and shall reduce the substance of the examination, if any to writing. " "209. Framing of issues.-After considering the application and the written statements and oral statements of the parties, the Claims Tribunal shall proceed to frame the issues on which the right decision of the claim appears to it to depend." "201. Summoning of witnesses.-Where an application is presented by any party to the proceeding for summoning of witnesses, the Claims Tribunal shall on payment of the expenses involved, if any, issue summons for the appearance of such witnesses, unless it considers that their appearance is not necessary for a just decision of the case." "212. Method of recording evidence.-The Claims Tribunal shall, as examination of

a party or a witness proceeds, make a brief memorandum of the substance of what is deposed and such memorandum shall be written and signed by the Claims Tribunal and shall form part of the record.

Provided that the evidence of any medical witness shall, as nearly as may be, taken down word for word.

Provided further that where the Claims Tribunal is unable to make a memorandum it shall cause the reason of such inability to be recorded and shall cause the memorandum to be made in writing from its dictation." "221. Code of CPC to apply in certain cases.-The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be apply to proceedings before the Claims Tribunal, namely, Rules 9 to 13 and 15 to 30 of order V, order IX, Rules 3 to 10 of order XIII, Rule 2 to 21 of order XVI, order XVII; and Rules 1 to 3 of order XXIII."

A combined reading of the aforesaid rules shows that option has been given to the claimant to record oral evidence. It does not specify that it shall be mandatory to record examination-in-Chief and only thereafter to permit cross-examination of the witness. Rule 204 specifically provides that the application for payment of compensation made u/s 166 shall as far as possible be made in Form SR-48. A perusal of the application form itself indicates that it is in the form of an affidavit which is to be filed by the claimant. Thus, on the face of record, it is evident that the claimant who approached the tribunal for payment of compensation has to file an affidavit in the form of application as provided in the Form SR-48. However, the rule does not prohibit filing of the affidavit of witness which seems to have been filed by the claimant Respondents in support of the his contention with regard to compensation.

11. Attention of this Court has been invited to the amendment done in the Code of CPC in 2002 under Order 18 Rule 4 CPC. which is reproduced as under:

4. Recording of evidence.--(1) In every case, the examination-in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence:

Provided that where documents are filed and the parties rely upon the documents, the proof and admissibility of such documents which are filed along with affidavit shall be subject to the orders of the Court.

(2) The evidence (cross-examination and re-examination) of the witness in attendance, whose evidence (examination-in-chief) by affidavit has been furnished to the Court shall be taken either by the Court or by the Commissioner appointed by it:

Provided that the Court may, while appointing a commission under this sub-rule, consider taking into account such relevant factors as it thinks fit:

(3) The Court or the Commissioner, as the case may be, shall record evidence

either in writing or mechanically in the present of the Judge or of the Commissioner, as the case may be, and where such evidence is recorded by the Commissioner he shall return such evidence together with his report in writing signed by him to the Court appointing him and the evidence taken under it shall form part of the record of the suit.

(4) The Commissioner may record such remarks as it thinks material respecting the demeanour of any witness while under examination:

Provided that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments.

(5) The report of the Commissioner shall be submitted to the Court appointing the commission within sixty days from the date of issue of the commission unless the Court for reasons to be recorded in writing extends the time.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of Commissioners to record the evidence under this rule.

(7) The Court may by general or special order fix the amount to be paid as remuneration for the services of the Commissioner.

(8) The provisions of rules 16, 16A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return of such commissions under this rule."

Order XVIII Rule 4 Code of CPC shows that the legislature to their wisdom has provided that in every case, the examination in-chief of a witness shall be on affidavit and copies thereof shall be supplied to the opposite party by the party who calls him for evidence.

12. Reliance has been placed by the learned Counsel appearing for the Appellant on a case reported in 1982 ACJ 458 Kripal Singh v. Mst. Kalla and Ors. whereby the provisions contained in Motor Vehicles Act, 1939 have been interpreted. In the case of Kripal Singh (supra), a Division Bench of this Court has held that there is no provision in the Act or the Rules framed thereunder conferring jurisdiction on the tribunal to record evidence by means of affidavits. It has been further held that the Claims Tribunal is a creature of the Motor Vehicles Act, 1939 and it can exercise only those powers which are conferred on it by the statute. The judgment in Kripal Singh's case (supra) seems to have lost its binding nature because of enactment of new Motor Vehicles Act, 1988 and the Rules framed thereunder, read with amended Code of CPC As observed above, Rule 221 specifically provides that the provisions contained in the Code of CPC may be made applicable to the permissible limit.

13. In view of above, we are of the opinion that in case there is no conflict between the provisions contained in the Code of CPC to the extent of Rule 221 and the U.P. Motor Vehicles Act, 1988, then inference may be drawn and the

procedure prescribed in the Code of CPC may be made applicable. Since the Rules itself provide that the provisions contained in the Code of CPC to some extent may be made applicable, the affidavit filed by the claimant while approaching the tribunal shall not suffer from inadmissibility of evidence.

14. In *Devasahayam (D) by LRs. Vs. P. Savithramma and Others, Nagubai Ammal and Others Vs. B. Shama Rao and Others, Rajasthan State Road Transport Corporation and Another Vs. Bhik Nath, SACI Allied Products Ltd., U.P. Vs. Commissioner of Central Excise, Meerut, Devasahayam (D) by LRs. Vs. P. Savithramma and Others, Devasahayam v. P. Savithramma* (para 29 and 33) 2006 (9) SCC 177, *Bansraj Laltaprasad Mishra Vs. Stanley Parker Jones, State of Karnataka and Another Vs. All India Manufacturers Organization and Others, Agri Gold Exims Ltd. Vs. Sri Lakshmi Knits and Wovens and Others, Kashmir Singh Vs. Union of India (UOI) and Others*, Hon"ble Supreme Court held that a doctrine of approbate and reprobate is a species of estoppel. A person cannot be permitted to admit or accept a thing on one pretext and deny for other.

In *Mumbai International Airport Pvt. Ltd. Vs. Golden Chariot Airport and Another*, Hon. Supreme Court held that a party receiving benefit under an order cannot claim that it was valid for one purpose and invalid for other purposes.

15. The Appellant himself has filed an affidavit of his witness before the tribunal. A party who approached the Court with specific plea assailing the conduct of other side cannot assail the action of other side in case such party also adopts the same procedure. In view of above, the plea raised by the Appellant that the affidavit filed by the claimant Respondent is not admissible evidence does not seem to be sustainable.

16. The purpose of statutory provisions is for due compliance of the principle of natural justice. The Rules provide for the examination of applicant in case present (Rule 205) and in case parties contest then witness be examined orally. However, it is silent whether there should be examination-in-chief in every case. Rules provide that the oral evidence may be recorded with regard to facts in dispute. In case a party had filed an affidavit and liberty is given to the other side to cross-examine the witness and other side accepts the proposal and cross-examines such witness, (in the present case like the claimant), then no objection may be raised at later stage with regard to violation of principle of natural justice or statutory provisions, more so when the statute is silent. As we have observed(supra), in absence of any repugnancy, inference may be drawn to regulate the proceedings of the tribunal by applying the provisions of Code of CPC The order 18 Rule 4 Code of CPC since provides for adducing evidence by filing affidavit, there appears to be no illegality on the part of the tribunal while accepting the affidavit and permit the Appellant to cross-examine the witness.

17. Next submission of the learned Counsel for the Appellants relates to contributory negligence. It is argued by the Appellants' counsel that the accident occurred by head on collusion. Attention of this Court has been invited to the site

plan which is on record. A perusal of the site plan on the face of record shows that after the accident, the face of both the vehicles were towards Sitapur and nothing has been brought on record to show that for any reason whatsoever, the situation of the vehicles was turned towards different direction after the accident in question. On the site plan it has been noted that the face of both the vehicles was towards Sitapur. Neither any argument has been advanced nor there is any pleading on record which may provide that the site plan was incorrectly prepared. The only submission is that the P.W. 2 Krishna Gangar in his statement stated for head on collusion. Minor contradiction in the statement of a witness shall not vitiate the material documentary evidence on record. From the site plan, it is evident that it is not a case of head on collusion; rather the statement of P.W. 2 to the effect that the Bolero Jeep was coming at higher speed while dashing the Maruti Zen car seems to be correct.

18. We have perused the written statement filed by the Appellant before the tribunal. A perusal of the written statement does not indicate that the defence was taken by the Appellant before the tribunal that it is a case of head on collusion. Collusion from side by side or it is a head on collusion should have been specifically pleaded by the Appellants before the tribunal. In para 26 of the written statement, the solitary pleading on record is that from para 23 of the claim petition, it is clear that the accident took place between both the vehicles due to collusion. For convenience, para 23 of the claim petition is reproduced as under:

"23...(i) That the parents of applicants/claimants were going by their Maruti Zen Lx No. UP32-Ad/7682 from Lakhimpur. The Driver of Jeep No. UP-31 F-8300 was coming with rashly and negligently from Lakhimpur at 11.00 a.m. On dated 21.01.2004 and collided with above said Maruti Zen LX of claimant's father at the turning of Canal at Oyal Qasba, fully damaged the vehicle. The vehicle was driver by claimant's father, four persons were in said vehicle. The mother of claimants Smt. Pankaj died on spot and father of claimants expired in Hospital without any treatment and other two persons were injured seriously. The driver of Bolero Jeep No. UP 31 F-8300 escaped away....."

19. A perusal of the contents of the aforesaid para at the face of record shows that the specific pleading made by the claimant Respondents is that the Maruti Zen LX No. UP 32-Ad/7682 was going from Lakhimpur whereas the driver of Jeep of Jeep No. UP-31 F-8300 was coming rashly and negligently from Lakhimpur at 11.00 a.m. on 21.1.2004. A close reading of the language used by the claimants before the tribunal shows that both the vehicles were coming from Lakhimpur and moving towards Sitapur. There appears to be no doubt that the specific case of the claimant was that both the jeeps were coming from the same direction, i.e. from Lakhimpur and going towards Sitapur.

20. In case the Appellant wants to make out a case that it is a case of head on collusion and both the jeeps were coming from reverse direction, then there should have been specific pleading in the written statement. Once the Appellant

himself has not pleaded in the written statement with regard to head on collusion, then at first appellate stage, argument advanced by the Appellants' counsel is not acceptable. We are constrained to observe that the Appellant's counsel has tried to make out a case against the pleading on record. While hearing an appeal against the order passed by the trial Court or the tribunal, this Court is bound to appreciate the pleading on record and not to proceed otherwise. Since in the written statement filed before the tribunal, there is no specific pleading with regard to "head on collusion", the argument advanced by the Appellants' counsel seems to be not sustainable.

21. The third limb of the argument of the Appellants' counsel is with regard to use of multiplier. It has been argued by the Appellant's counsel that the deceased was the Principal Scientist and the P.W. 2 Dr Krishna Gangwar, was senior Scientist. Hence the age of the deceased must be more than the age of the P.W. 2 Dr. Krishna Gangar. The argument seems to be mis-conceived. Nowhere in the written statement, a specific pleading has been made that the age of the deceased more than 57 years or alike. Hence, in absence of any pleading, the argument advanced by the Appellants' counsel seems to be not sustainable.

22. There is another aspect of the matter. Only because in the hierarchy of system, a person occupies a higher post, then it shall not always be necessary that he should be older than the juniors. Number of instances are available where a person lesser in age occupies higher office. Hence, the argument in this regard on the part of the Appellants' counsel is not sustainable. We are of the view that inference drawn by the tribunal with regard to age seems to be based on correct appreciation of evidence on record.

23. The tribunal has applied the multiplier of 13 with regard to Smt. Pankaj, aged about 47 years whereas with regard to Dr. Laxman Lal, multiplier of 10 has been used. The multiplier used by the tribunal is in accordance with Schedule II of the Motor Vehicles Act and it does not seem to suffer from any infirmity or illegality.

24. While parting with the case, we would like to mention a judgment of Hon'ble Supreme Court in the case reported in Arun Kumar Agrawal and Another Vs. National Insurance Company and Others, where their Lordships of Hon'ble Supreme Court held that the provisions of multiplier given in the Act have lost its utility. Their Lordships observed that the income of the domestic/ housewife cannot be assessed casually and due importance should be given to the work done by the housewife while running the family.

25. In another case reported in 2008(2)TAC 394 (S.C.) Laxmi Devi and Ors. v. Mohammad Tabbar and another, their Lordships of Hon'ble Supreme Court held that even notional income under the Motor Vehicles Act should not be less than Rs. 3000/-per month. It has been observed by Hon'ble Supreme Court that even an unskilled labourer earns Rs. 100/- per day and accordingly, the monthly income comes to Rs. 3,000/-. Their Lordships further held that the notional

income of Rs. 1,500/-provided in the Second Schedule of the Motor Vehicles Act has become redundant by lapse of time and the Government of India should revise the same keeping in view the inflation and price index prevailing now-a-days.

26. In view of above, we do not find any reason to record a finding contrary to what has been recorded by the tribunal.

27. Reliance has been placed by the Appellants' counsel to a case reported in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, judgment, reported in Central Bank of India Ltd. Vs. Prakash Chand Jain, .

28. The case of Shri Prakash Chand Jain (supra) relates to a dispute under the Industrial Disputes Act where their Lordships held that a domestic tribunal though not bound by the technical rules of evidence contained in the Evidence Act cannot ignore substantive rules which would form part of principles of natural justice. The case of Shri Prakash Chand Jain (supra) seems to be based on different facts and circumstances and seems to be not applicable in the present case. Moreover, we have interpreted the statutory provisions and held that reasonable opportunity was given to the Appellants to contest the case before the tribunal. Hence, the present case seems to be not covered by the case, relied upon by the Appellants' counsel.

29. The case of R.V.E. Venkatachala(supra) also relates to different facts and circumstances and it does not seem to be applicable with regard to the present context. While dealing with objections as to admissibility of documents in evidence, their Lordships held that admissibility of documents may be classified into two classes, namely an objection that the document which is sought to be proved is itself inadmissible in evidence, and secondly where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient.

30. In the present case, we have observed above that filing of an affidavit is permissible under the amended Code of Civil Procedure. Hence the case cited above does not extend any assistance to the Appellants, more so when the Appellant himself has filed the affidavit of his witness.

31. In view of above, we do not find any reason to interfere with the impugned award. The compensation assessed and awarded by the tribunal is perfectly in accordance with Second Schedule of the Motor Vehicles Act. Let the amount deposited in this Court be remitted to the tribunal forthwith. The Appellant shall deposit the remaining amount before the tribunal along with interest within two months which shall be paid to the Respondents claimants.

32. Subject to above, the appeals are dismissed. No order as to costs.