

(2014) 06 SHI CK 0066

In the High Court Of Himachal Pradesh

Case No : FAO Nos. 320 & 321 of 2009

The New India Assurance Company

APPELLANT

Vs

Shri Anit Shankta

RESPONDENT

Date of Decision : 06-06-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 22, 141, 2(11), 2(2)

Citation : (2014) 06 SHI CK 0066

Hon'ble Judges : Mansoor Ahmad Mir, Acting C.J.

Bench : Single Bench

Advocate : B.M. Chauhan, Advocate for the Appellant; R.R. Rahi, Advocate for Respondent No. 1, Mr. Vishal Panwar, Advocate for Respondent No. 2 and Mr. Ashok Sharma, Advocate for Respondent No. 3, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Mansoor Ahmad Mir, Actg. C.J.

1. Both these appeals are outcome of a motor vehicular accident, which was allegedly caused by driver, namely Shri Parma Nand, while driving Canter, bearing registration No. HP-64-0400, belonging to Shri Jagmohan, rashly and negligently, on 23rd September, 2005, at about 10.00 P.M., at Shali, District Sirmour. Thus, I deem it proper to dispose of both these appeals by a common judgment.

2. By the medium of FAO No. 320 of 2009, the appellant-insurer has questioned the award, dated 30th March, 2009, passed by the Motor Accident Claims Tribunal, Shimla, Himachal Pradesh (hereinafter referred to as "the Tribunal") in MAC Petition No. 23-S/2 of 2006, titled as Anit Shankta versus Shri Jagmohan and others, whereby compensation to the tune of Rs. 9,40,600/- came to be awarded in favour of the claimant-Anit Shankta with interest @ 9% per annum from the date of filing of the claim petition till its deposition before the Tribunal (hereinafter referred to as "the impugned award-I") on the grounds taken in the

memo of appeal.

3. During the pendency of appeal, the claimant-respondent No. 1, Anit Shankta, died and his legal representative, Smt. Sheela, was brought on record.

4. In FAO No. 321 of 2009, the appellant-insurer has called in question the award, dated 30th March, 2009, passed by the Motor Accident Claims Tribunal, Shimla, Himachal Pradesh (hereinafter referred to as "the Tribunal") in MACC No. 24-S/2 of 2006, titled as Joginder Singh Shankta versus Shri Jagmohan and others, whereby compensation to the tune of Rs. 1,10,000/- came to be awarded in favour of the claimant-Joginder Singh Shankta with interest @ 9% per annum from the date of filing of the claim petition till its realization (hereinafter referred to as "the impugned award-II) on the grounds taken in the memo of appeal.

Brief Facts:

5. The claimants in both the claim petitions, i.e. Shri Anit Shankta and Shri Joginder Singh Shankta, sustained injuries in a motor vehicular accident, which was caused by the driver, namely Shri Parma Nand, on 23rd September, 2005, at place Shali, District Sirmour, while driving the offending vehicle-Canter, bearing registration No. HP-64-0400, belonging to Shri Jagmohan, rashly and negligently, were admitted in Government Hospital, Solan, thereafter referred to PGI Chandigarh and remained admitted there.

6. The claimants have sought compensation in both the claim petitions on the grounds taken in the memo of claim petitions, were resisted by all the three respondents, i.e. the owner-insured, the driver and the insurer.

7. The following issues came to be framed in both the claim petitions by the Tribunal on 16th November, 2007:

1. Whether the petitioner claimant has sustained injuries in question due to rash and negligent driving of vehicle No. HP-64-0400 by respondent No. 2, as alleged? ...OPP

2. If issue No. 1 is proved, to what amount of compensation the petitioner is entitled and from which of the respondents?...OPP

3. Whether the accident in question was result of mechanical defect in the vehicle No. HP-64-0400, as alleged, if so, its effect?...OPR-3

4. Whether the petitioner was a gratuitous passenger in the vehicle in question, if so, its effect?...OPR-3

5. Whether there is no cause of action in favour of the petitioner?...OPR-3

6. Whether respondent No. 2 was not holding valid and effective driving licence at the time of accident, if so, its effect?...OPR-3

7. Whether the vehicle No. HP-64-0400 was being driven in violation of the Motor Vehicles Act at the relevant time?...OPR-3

8. Whether the mechanical defect in the vehicle in question was not latent, if so, its effect?...OPR-3

9. Relief.

8. The claimants have examined witnesses and also appeared themselves in the witness box. The Tribunal, after examining the pleadings and scanning the evidence, held that the claimants have proved that driver, namely Parma Nand, had caused the accident while driving the offending vehicle-Canter bearing registration No. HP-64-0400 rashly and negligently, in which the claimants, namely, Shri Anit Shankta and Shri Joginder Singh Shankta, have sustained injuries.

FAO No. 320 of 2009:

9. Learned counsel for the appellant(s)-insurer argued that the claim petition and the appeal have abated due to the death of the claimant-Anit Shankta-injured during the pendency of the appeal, thus, his legal heir/legal representative, Smt. Sheela, cannot claim compensation and is not entitled to the same. He also argued that the awarded amount is excessive. Further argued that the claimant-Anit Shankta was travelling in the offending vehicle as a gratuitous passenger, the risk was not covered in terms of the insurance policy.

Issue No. 1:

10. The owner-insured, Shri Jagmohan, had admitted the occurrence of accident, but stated that it was due to some mechanical failure. The Tribunal held that the claimant has proved that he had sustained injuries in the said accident. The owner-insured, the driver and the insurer have not questioned the findings returned on issue No. 1. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

11. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3, 5 and 8.

Issues No. 3, 5 and 8:

12. The insurer-appellant had to discharge the onus to prove these issues, which it had failed to do so. In view of the findings returned hereinabove on issue No. 1, these issues are to be decided against the insurer-appellant. It is also apt to record herein that the learned counsel for the insurer-appellant has not virtually addressed any argument on these issues. However, I have returned findings on issue No. 1, thus, the said findings govern all these issues. Accordingly, issues No. 3, 5 and 8 are decided in favour of the claimant and against the insurer-appellant.

Issue No. 4:

13. It was for the insurer-appellant to prove that the claimant was travelling in the offending vehicle as a gratuitous passenger. There is nothing on the file

which can be made basis for holding that the claimant was travelling in the offending vehicle as a gratuitous passenger. Though, the issue was raised by the insurer-appellant, but has not led any evidence to this effect.

14. It is worthwhile to mention herein that the claimant-Shri Anit Shankta had specifically pleaded in para 10 of the claim petition that he was travelling in the offending vehicle as owner of apple boxes alongwith Shri Joginder Singh Shankta (claimant in MACC No. 24-S/2 of 2006), who too sustained injuries. The driver and the owner-insured have denied the said fact and have not denied para 10 of the claim petition, rather have admitted the same. The insurer-appellant has evasively denied para 10 of the claim petition in its reply. The evasive denial is admission. No doubt, the insurer-appellant has stated that the claimant was not travelling in the offending vehicle as owner of the goods, but has failed to prove the same. At the same time, the claimant has proved that he was travelling in the said vehicle as owner of the apple boxes. Thus, the findings returned by the Tribunal on issue No. 4 are upheld.

Issues No. 6 and 7:

15. It was for the insurer-appellant to plead and prove that the driver was not having valid and effective driving licence and the vehicle was being driven in violation of provisions of the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") and thus, the owner has committed willful breach. The insurer-appellant has not led any evidence to prove these issues. Learned counsel for the appellant-insurer has also not disputed the impugned award-I so far it relates to issues No. 6 and 7. Therefore, the findings returned by the Tribunal on issues No. 6 and 7 are upheld.

Issue No. 2:

16. The Tribunal has given details in paras 19, 21 and 22 how the claimant had suffered because of the injuries, had gone through pain and sufferings and had lost amenities of life. The Tribunal has also given details how much the claimant had spent on medical expenses and has awarded Rs. 7,34,400/- under the head "loss of future income" while taking his notional income as Rs. 4,000/- per month, to what extent that injury has affected the earning capacity of the claimant and held that the injury had affected 85% of the income earning capacity. Multiplier of "18" was applied while keeping the age of the claimant in view, which was admittedly 26 years.

17. I am of the considered view that the amount of compensation awarded cannot be said to be excessive. Rather, I wonder why the Tribunal has not awarded compensation under the head "pain and sufferings for future". While going through the pleadings and particularly paras 19, 20 and 21 of the impugned award-I, the petitioner has virtually lost his matrimonial life and other amenities. However, the claimant has not questioned the adequacy of compensation, by no stretch of imagination, it can be said to be excessive. Therefore, the amount awarded is to be upheld. Thus, the findings returned by

the Tribunal on issue No. 2 are upheld.

18. Learned counsel for the appellant has raised a legal issue that the claimant-Anit Shankta has died during the pendency of the appeal, thus, the claim petition has abated and the legal representative of the deceased claimant cannot claim compensation.

19. The argument of the learned counsel for the appellant, though attractive, is devoid of any force, for the following reasons:

20. The impugned award-I has been passed and the claimant has been held entitled to an amount of Rs. 9,40,600/- as compensation with interest @ 9% per annum. The owner-insured and the driver have not questioned the same, has attained finality so far it relates to them. The claimant has earned award, which can be executed by his legal representative and even right to sue survives for the reason that the award is subject matter of appeal (FAO No. 320 of 2009). Had the claimant died during the pendency of the claim petition, the question would have otherwise and may be, the claim petition would have abated for the limited purpose.

21. In terms of the award, the compensation has been awarded in terms of money, which is an estate and estate devolves upon the legal representative.

22. Section 2(3) of the CPC (hereinafter referred to as the "CPC") defines "decree-holder" and Section 2(11) of CPC defines "legal representative". It is apt to reproduce Sections 2(2), 2(3) and 2(11) herein:

2.....

(1)

(2)

(3) "decree-holder" means any person in whose favour a decree has been passed or an order capable of execution has been made;

(4)

(5)

(6)

(7)

(8)

(9)

(10)

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the

person on whom the estate devolves on the death of the party so suing or sued.

(Emphasis added)

23. The legal representatives in law represents the estate of the deceased person. The award is an estate in terms of the provisions of law and on the death, it devolves upon the legal representatives. Thus, the legal representatives have every right to reap the fruits of the litigation/award.

24. The definition of word "estate" is given in The New Oxford Dictionary of English at page 629, which reads as under:

estate: noun 1 an area or amount of land or property, in particular:

an area of land and modern buildings developed for residential, industrial, or commercial purpose an extensive area of land in the country, usually with a large house, owned by one person or organization all the money and property owned by a particular person, especially at death: in his will, he divided his estate between his wife and daughter. a property where coffee, rubber, grapes, or other crops are cultivated. (in South Africa) a registered vineyard producing wines made exclusively from grapes grown within its boundaries.

(Emphasis added)

25. In Black's Law Dictionary, Sixth Edition, the word "estate" has been defined at page 547 as under:

Estate. The degree, quantity, nature, and extent of interest which a person has in real and personal property. An estate in lands, tenements, and hereditaments signifies such interest as the tenant has therein. 2 Bl. Comm. 103. The condition or circumstance in which the owner stands with regard to his property. *Boyd v. Sibold*, 7 Wash. 2d 279, 109 P. 2d 535, 539. In this sense, "estate" is commonly used in conveyances in connection with the words "right", "title" and "interest", and is, in a great degree, synonymous with all of them.

When used in connection with probate proceedings, term encompasses totality of assets and liabilities of decedent, including all manner of property, real and personal, choate or inchoate, corporeal or incorporeal. *In re Adams' Estate*, 148 C.A. 2d 319, 306 P. 2d 623, 625.

26. Order XXII Rule 11 of CPC provides that provisions of Order XXII CPC applies to appeal also. It is apt to reproduce Order XXII Rule 11 of CPC herein:

ORDER XXII

DEATH, MARRIAGE AND INSOLVENCY OF PARTIES

...

11. Application of Order to appeals.-In the application of this Order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word

"defendant" a respondent, and the word "suit" an appeal.

27. Section 141 of CPC also mandates that the provisions of CPC applies to all miscellaneous proceedings. Having glance of these discussions, it can be safely said and held that after earning the award, the legal representatives are entitled to the said amount being estate of the deceased.

28. The Apex Court in the year 1985 has laid down the same principles in the case titled as Melepurath Sankunni Ezhuthassan Vs. Thekittil Geopalankutty Nair, . It is apt to reproduce para 9 of the judgment herein:

9. The position, therefore, is that had the appellant died during the pendency of his suit, the suit would have abated. Had he died during the pendency of the appeal filed by him in the district court, the appeal would have equally abated because his suit had been dismissed by the trial court. Had he, however, died during the pendency of the second appeal filed by the respondent in the High Court, the appeal would not have abated because he had succeeded in the first appeal and his suit had been decreed. As, however, the High Court allowed the second appeal and dismissed the suit, the present appeal by special leave must abate because what the appellant was seeking in this appeal was to enforce his right to sue for damages for defamation. This right did not survive his death and accordingly the appeal abated automatically on his death and his legal representatives acquired no right in law to be brought on the record in his place and stead.

(Emphasis added)

29. In a case titled as Chisalal (deceased by L.R's) Vs. Nihal Singh and Others, , compensation was awarded in the claim petition. The claimant, feeling dissatisfied, filed appeal for enhancement and during the pendency of appeal, the claimant died and the question arose as to whether the entire claim petition had to abate or otherwise. The High Court of Madhya Pradesh, Indore Bench, while applying the principle laid down in Melepurath Sankunni Ezhuthassan" case (supra), held that the award of compensation made in favour of the injured-claimant before his death forms a part of his estate and thus, the legal representatives have every right to claim the same. However, the appeal abated so far it relates to enhancement of compensation. It is apt to reproduce paras 26 and 27 of the judgment herein:

26. The award of compensation made in favour of the claimant-injured before his death had apparently formed a part of his estate. Upon the instant appeal having been filed by the claimant-injured the two points which required determination by this court were, firstly, the amount of enhancement for a just and fair compensation in respect of the injuries suffered by the claimant, and secondly, the liability of the respondent insurance company to pay the amount of compensation. As regards enhancement of compensation in respect of the inures it can be said that the cause of action to sue for enhancement of compensation in respect of personal injury sustained by the claimant did not survive on the

death of the claimant injured during the pendency of the appeal. But as regards the liability to pay compensation which had been determined in an award made by the learned Tribunal and as such had become an estate realisable from the respondents, the right to prosecute the appeal did survive for obtaining a just determination of the share of liability among the respondents inter se.

27. It is thus, clear that it may not be permissible for the legal representatives of the deceased claimant who died during the pendency of the appeal, to prosecute the appeal for enhancement of compensation in respect of injuries sustained by the deceased claimant against the respondents, as is the case here, but the legal representatives of the deceased claimant are certainly entitled to the award of compensation already made by the Tribunal in favour of the claimant before his death and to prosecute this appeal for fixing the liability of payment among the respondents inter se. Since in the instant case, it has not been proved that the owner Kailashchandra had transferred the vehicle before the date of accident which took place during the cover of the policy, it must be held that the respondent insurance company is jointly and severally liable along with the owner and the driver to pay the amount of compensation awarded.

30. In the given circumstances, the argument of the learned counsel for the appellant-insurer is rejected.

31. Having said so, the appeal merits to be dismissed and the impugned award-I is to be upheld.

FAO No. 321 of 2009:

32. The only dispute in this appeal is about the adequacy of the compensation.

Issues No. 1 and 3 to 8:

33. The findings returned on issues No. 1 and 3 to 8 are replied hereinabove. Only, I deem it proper to mention herein that the claimant-Joginder Singh Shankta was also travelling in the offending vehicle-Canter as owner of apple boxes. The insured-owner, the driver or the insurer has not disputed the same. Thus, the findings returned by the Tribunal on issues No. 1 and 3 to 8 are upheld.

Issue No. 2:

34. Admittedly, issue No. 1 has been decided in favour of the claimant-Joginder Singh Shankta. Thus, he is entitled to compensation.

35. The question is-whether the compensation awarded is adequate or otherwise? While going through the findings recorded by the Tribunal, it appears that the compensation awarded is inadequate.

36. The Tribunal has awarded Rs. 5,000/- each under the heads "Expenses on medicines and treatment", "Expenses of attendance", "Expenses of conveyance" and "Expenses of special diet", which comes to Rs. 20,000/-. The Tribunal has also awarded Rs. 75,600/- under the head "loss of future income" taking his

income as Rs. 3,000/- per month, after making deductions while keeping in view 42% disability suffered by him, which has affected his earning capacity to the tune of Rs. 15,120/- per annum. Multiplier of "5" was applied while taking his age above 65 years. An amount of Rs. 15,000/- has also been awarded to the claimant under the head "pain and sufferings". Thus, the total amount comes to Rs. 1,10,600/-. A lump-sum amount of Rs. 1,10,000/- with interest @ 9% per annum from the date of filing of the claim petition came to be awarded in favour of the claimant, by no stretch of imagination, can be said to be excessive, is meager. But, the claimant has not questioned the same. Thus, the findings returned on issue No. 2 are reluctantly upheld.

37. Accordingly, both the appeals are dismissed and the impugned awards are upheld.

38. The awarded amount be deposited before the Registry within eight weeks. The Registry is directed to release the awarded amount in favour of the legal representative of deceased claimant-Anit Shankta in FAO No. 320 of 2009 and in favour of the claimant in FAO No. 321 of 2009 strictly as per the terms and conditions contained in the impugned awards.

39. Send down the records after placing copy of the judgment on each of the files.