
(2017) 05 AHC CK 0019
In the Allahabad High Court
Case No : 1981 of 2014

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Rajesh Devi And Ors.

RESPONDENT

Date of Decision : 03-05-2017

Acts Referred:

[Motor Vehicles Act, 1988](#), [Section 173](#),
[Section 173](#) -
Uttar Pradesh Motor Vehicles Rules, 1998, — Rule 220A, Rule 220A(4)

Citation : (2017) 05 AHC CK 0019

Hon'ble Judges : Pankaj Mithal, Shashi Kant

Bench : Division Bench

Advocate : S.C. Srivastava, A.B. Singh, Ram Singh, V.K. Shukla

Judgement

1. This appeal under Section 173 of the Motor Vehicles Act, 1988 has been preferred by the appellant The Oriental Insurance Company Ltd. against the award dated 26.11.2013 passed by the Motor Accident Claims Tribunal awarding a sum of Rs.5,87,000/- to the claimants with 7% simple interest p.a. from the date of the filing of the claim petition. The liability to indemnify the said compensation has been saddled upon the appellant-insurance company as the offending vehicle was covered under a policy issued by it.

2. We have heard Sri S.C. Srivastava, learned counsel for the appellant-insurance company and Sri Ram Singh, learned counsel for the claimant-respondents No.1 to 4. The respondents No.5, 6 and 8 were unrepresented despite deemed service of notice, whereas respondent No.7 was represented by Sri A.B. Singh, Advocate who had not turned up.

3. Learned counsel for the appellant-insurance company had made the following two submissions:

(1) The riders of the motorcycles had also contributed to the negligence as there were three persons on it; and

(2) The tanker involved in the accident was a gas tanker and the driver of the said vehicle had no licence to drive a hazardous goods vehicle, therefore, the liability to indemnify would not rest upon the appellant-insurance company.

4. The facts of the case reveal that the accident had taken place on 20.3.2011 and the vehicles involved in it were a motorcycle and a tanker. One Satyabhan aged about 34 years was carrying his ailing mother Smt. Prabhadevi to a hospital with one Banwari on the motorcycle when the accident took place.

5. The negligence of the driver of the tanker was proved by the eye-witness Praveen who was following his brother Satyabhan on another motorcycle along with one Roop Kishore. He had lodged the first information report and has proved that the tanker was being driven negligently and that despite all efforts of Satyabhan to avoid the accident for which purpose he took the motorcycle in Kachcha area the tanker hit the motorcycle due to which Satyabhan and his mother died on the spot. The site map of the accident as prepared by the police also proved that the tanker had hit the motorcycle on the Kachcha site. Nothing material could be extracted from the cross-examination of the aforesaid witness to prove otherwise. The appellant-insurance company as well as the owner failed to produce the driver of the tanker Rajesh Kumar in the witness box. The driver who himself happened to be party in the claim petition failed to turn up to say that he was not negligent in driving the vehicle. In these circumstances, the Tribunal had no option but to hold that the accident had occurred due to the sole negligence of the driver of the tanker.

6. Merely for the reason that there were three persons on the motorcycle which may be violation of the traffic rules, does not ipso facto establish that the motorcycle was being driven rashly or in a negligent manner or that it was out of control of its driver. The violation of traffic rules is altogether different from proving the fact of negligence in driving the motorcycle which may have contributed to the accident. It is no ones case that due to overloading the motorcycle got disbalanced or that its driver lost control over it. Thus, in the absence of any specific evidence to prove negligence on the part of the driver of the motorcycle which may have contributed to the accident, the argument that it was a case of contributory negligence cannot be accepted.

7. In the claim petition the description of the offending vehicle has been given as a tanker with its registration number. The appellant-insurance company filed its written statement wherein it accepted that the accident took place with the tanker in question. In the written statement no pleading was drawn to the effect that the tanker was carrying gas or that it was a hazardous vehicle for which any special licence was required by its driver. In paragraph 20 only a bald allegation was made that the driver of the tanker was not having a valid and effective driving license but it was nowhere pleaded that the tanker was a hazardous vehicle.

8. The accident had taken place on 20.3.2011. The information furnished by the

licensing authority on Form 54 clearly reveals that the driver Rajesh Kumar had the license to drive the tanker which was valid from 11.12.2006 to 10.12.2009 and 20.9.2010 to 19.9.2011.

9. In the absence of any pleading to the effect that the offending vehicle was a hazardous vehicle for which a special license was required in law, the licence brought on record which was valid for driving the tanker was sufficient to establish that it was not being driven in violation of terms and conditions of the insurance policy.

10. In these circumstances, none of the two contentions as raised by the learned counsel for the appellant has any force and are rejected.

11. Sri Ram Singh on behalf of the claimant-respondents No.1 to 4 has filed cross-objections on 28.5.2014. There is no adverse report on the said cross objections.

12. The claimant-respondents by means of the above cross-objection have claimed higher compensation than awarded on the ground that the income of the deceased was proved to be over Rs.7,500/- p.m. and, as such, the Tribunal erred in taking the notional income of Rs.3000/- p.m.; the Tribunal illegally deducted 1/3rd of the income towards his personal expenses through under the facts and circumstances of the case only 1/4th of it was liable to be deducted; and lastly the Tribunal has not awarded any compensation for the loss of love and affection.

13. A Full Bench of this Court in U.P. State Road Transport Corporation Vs. Smt. Janki Devi and others 1982 ACJ 429 : 1982(8) ALR 460 on a question regarding maintainability of cross-objections in an appeal under the Motor Vehicles Act, 1939 held that the cross-objection as contemplated under Order XLI Rule 22 are maintainable at the instance of the respondents in an appeal filed under the Act.

14. The Apex Court in Superintending Engineer and others Vs. B. Subba Reddy 1999(4) SCC 423 held that the cross-objections by the respondent in an appeal under Order XLI Rule 22 of the Act is nothing but an appeal, in fact a cross-appeal, and that even if the appeal is withdrawn or is dismissed the cross-objections would still survive to be heard and decided on merits. It was held as under:

(1) Appeal is a substantive right. It is a creation of the statute. Right to appeal does not exist unless it is specifically conferred.

(2) Cross objection is like an appeal. It has all the trappings of an appeal. It is filed in the form of memorandum and the provisions of Rule 1 of Order 41 of the Code, so far as these relate to the form and contents of the memorandum of appeal apply to cross-objection as well.

(3) Court fee is payable on cross-objection like that on the memorandum of appeal. Provisions relating to appeals by an indigent person also apply to cross-objection.

(4) Even where the appeal is withdrawn or is dismissed for default, cross-objection may nevertheless be heard and determined.

(5) The respondent even though he has not appealed may support the decree on any other ground but if he wants to modify it, he has to file cross-objection to the decree which objections he could have taken earlier by filing an appeal. Time for filing objection which is in the nature of appeal is extended by one month after service of notice on him of the day fixed for hearing the appeal. This time could also be extended by the Court like in appeal.

(6) Cross-objection is nothing but an appeal, a cross-appeal at that. It may be that the respondent wanted to give a quietus to whole litigation by his accepting the judgment and decree or order even if it was partly against his interest. When, however, the other party challenged the same by filing an appeal the statute gave the respondent a second chance to file an appeal by way of cross-objection if he still felt aggrieved by the judgment and decree or order.

15. In view of the above, the cross-objections of the claimant-respondents are liable to be heard and decided as an independent appeal so as to enhance the compensation, if necessary, despite the fact that on the plain reading of Rule 22 of Order XLI it is apparent that in an appeal the respondent apart from supporting the decree is entitled to challenge by way of cross-objection the finding against him, if any, recorded by the court below.

16. In view of the above, we proceed to consider the cross-objections of the claimant-respondents on merits.

17. The first submission of Sri Ram Singh, learned counsel for the claimant-respondents is regarding the quantum of income of the deceased.

18. The deceased was said to be working as a Munim on a brick kiln and drawing a salary of Rs.7,500/-. In addition to it, it was stated that he had an agricultural income of Rs.80,000/-. In order to prove his income, the brother of the deceased Praveen alias Sandeep Kumar was examined as P.W. 2. He stated that his brother was working on Giriraj Ji Maharaj Eit Udyog as a Munim and drawing a salary of Rs.7,500/- and that he had agricultural income of Rs.80,000/-.

19. The father of the deceased D.W. 3 Hori Lal corroborated the above evidence. The wife of the deceased who was examined as P.W. 1 accepted that she had never seen her husband receiving salary from the brick kiln; he had no bank account and was not paying any income tax; her family is very poor and financially weak.

20. Thus, in the overall facts and circumstances of the case the Tribunal came to the conclusion that as there is no specific evidence to prove the income of the deceased and the statements of P.W. 2 and P.W. 3 are not sufficient to either prove the salary of the deceased or his agricultural income, it is on the safe side to take the notional income of Rs.3,000/- per month as the base.

21. There is no independent or documentary evidence to prove the agricultural income or the salary of the deceased. In the absence of any such evidence, we do not find any error of law on the part of the Tribunal in taking the aforesaid notional income of the deceased.

22. The deceased had left behind four dependents. The family thus consisted of five persons including the deceased. According to Rule 220-A of the U.P. Motor Vehicles Rules, 1998, (hereinafter referred to as "the Rules") where the family members are between four to six in number 1/4th of the income has to be deducted towards personal living expenses of the person concerned. Therefore, the Tribunal was supposed to deduct 1/4th of the income towards personal expenses instead of 1/3rd.

23. We accordingly hold that Tribunal erred in deducting 1/3rd income of the deceased towards the personal expenses in place of 1/4th of it.

24. The Tribunal has awarded a compensation of Rs.5,000/- for funeral expenses, Rs.1,000/- for transportation of the dead body, Rs.5,000/- for loss of consortium but nothing for the loss of love and affection. It has not even assigned any reason for not awarding any compensation for loss of love and affection.

25. Sub-Rule (4) of Rule 220-A of the Rules provides for compensation for the loss of love and affections to be between Rs.5,000/- to Rs.15,000/-.

26. In view of the above, in the absence of any material to prove that there was no loss of love and affection, a sum of Rs.10,000/- under the aforesaid head would suffice the purpose.

27. We thus, award Rs.10,000/- for loss of love and affection.

28. Thus, the total compensation admissible to the claimants-respondents would be as under:

Income Rs.3,000/- p.m $\text{Rs.3,000} \times 12 = \text{Rs.36,000/- p.a.}$

50% addition for future prospects $\text{Rs.36,000} \times 50/100 = \text{Rs.18,000/-}$ $\text{Rs.36,000} + \text{Rs.18,000} = \text{Rs.54,000/- p.a.}$

Total Income

$= \text{Rs.54,000/- p.a}$

1/4th deduction towards personal expenses $\text{Rs.54,000} \times 1/4 = \text{Rs.13,500/-}$
 $\text{Rs.54,000} - \text{Rs.13,500} = \text{Rs.40,500/- p.a.}$

Multiplier 16 (As applied by the Tribunal) $\text{Rs.40,500} \times 16 = \text{Rs.6,48,000/-}$

For funeral expenses Rs.5,000/- (As awarded by the Tribunal) $\text{Rs.6,48,000} + \text{Rs.5,000} = \text{Rs.6,53,000/-}$

For transportation of dead body Rs.1,000/- (As awarded by the Tribunal)
 $\text{Rs.6,53,000} + \text{Rs.1,000} = \text{Rs.6,54,000/-}$

For loss of consortium Rs.5,000/- (As awarded by the Tribunal) Rs.6,54,000 + Rs.5,000 =Rs.6,59,000/-

For loss of love and affection Rs.10,000/- Rs.6,59,000 + Rs.10,000 =Rs.6,69,000/-

Total Compensation

Rs.6,69,000/-

29. The aforesaid amount is payable by the Insurance Company with 7% simple interest as awarded by the Tribunal. The award of the Tribunal would stand modified accordingly.

30. The appeal is dismissed and the cross-objections are allowed as aforesaid.

31. No order as to costs.