(2018) 03 GAU CK 0098

In the Gauhati High Court

Case No : MACApp. 42 of 2013

THE UNITED INDIA INSURANCE CO. LTD. — APPELLANT

Vs

MST. SUFIA MAZUMDAR and ORS — RESPONDENT

Date of Decision : 22-03-2018

Acts Referred:
Motor Vehicles Act, 1988 — Section 173

Citation : (2018) 03 GAU CK 0098

Hon'ble Judges : KALYAN RAI SURANA

Bench : Single Bench

Final Decision : Partly Allowed

Judgement

1.Heard Mrs. R.D. Mozumdar, the learned counsel for the appellant. Also heard Mr. P.K. Deka, the learned counsel appearing for the respondents

No.1, 2 and 3 and Mr. S. Dutta, the learned Senior Counsel, assisted by Mrs. M. Choudhury, the learned counsel appearing for the respondent No.8.

None appears on call for the respondent Nos. 4 to 7, the respective owners and drivers of the 2 (two) vehicles involved in the accident, as such, the

appeal has been heard ex-parte against them.

2) This appeal is under section 173 of the Motor Vehicles Act, 1988 is directed against the judgment and award dated 23.12.2011, passed by the

learned Member, Motor Accident Claims Tribunal, Hailakandi (hereinafter referred to as the â??Tribunal) in MAC Case No.45/2009.

3) This appeal is by the United Insurance Company Limited, who was the insurer of Tata truck bearing registration No.TR-01-E/1949, which was

being driven by the respondent No.4, namely, Dilip Debnath. Amongst others, the primary grounds of appeal is that 2 (two) vehicles are involved in the accident, one being the truck insured by the appellant and the other vehicle being Tata Safari vehicle bearing registration No.AS-11-C/5713, driven by

the respondent No.6 wherein the deceased, namely, Late Tafujul Ali Mazumder, was travelling at the time of the accident, as such, it is claimed that

as 2 (two) vehicles were involved in the accident, the other vehicle too had contributed to the accident and therefore, the award passed by the learned

Tribunal was required to be apportioned between both the Insurance Companies. The insurer of the Tata Safari Vehicle is the respondent No.8 i.e.

Oriental Insurance Company Limited. The other issue raised by the learned counsel for the appellant is that at the time when this appeal was filed, the

appellant was relying on the ratio laid down in the case of Sarla Verma and others Vs. DTC and others, (2009) 6 SCC 121 and hoping for reduction of

the award under the head of addition of future prospects, however, in view of the ratio laid down in the case of National Insurance Company Limited

Vs Pranay Sethi, MANU/ SC/1366/2017: (2017) 8 Supreme 107, the learned counsel for the appellant is now claiming relief on the terms of the said

case.

4) The deceased was a constable in the Assam Tea Plantation Security Force (ATPSF) of the State of Assam. The brief facts as stated in the claim

petition is that on 31.10.2008 at about 8:45 p.m., the deceased, while on duty, was travelling along by the Tata Safari vehicle with other occupants and

another security guard and they were returning to Dewan Tea Estate, Cachar from Guwahati. When the said vehicle reached Ratacherra Amjurghat

NH-44, the offending truck, while over taking of the Tata Safari vehicle in a rash and negligent manner capsized over the Tata Safari vehicle. As a

result of the impact, the deceased had died on spot with injuries on his chest, head and other parts of the body. The police registered a case, being

KLT P.S. Case No.165 (11) of 2008. The dead body was sent to Khiliehriat CHC. Thereafter, the body was handed over to the relatives of the

deceased. At the time of the accident, the deceased was drawing the consolidated salary of Rs.3,408/- per month as a security constable. His service

was regularized w.e.f. 01.11.2008 and he was entitled to a sum of Rs.7,650/- which could not be availed by the deceased. It was alleged that the

accident had occurred due to rash and negligent driving of the Tata Truck, which was the offending vehicle and the respondent Nos. 1, 2 and 3 being the wife, minor son and the mother of the deceased prayed for compensation of Rs.11,02,900/-. The appellant, the respondent No.8 as well as the

respondents No.4 and 5, had filed their respective written statements. The respondents No. 4 and 5, while denying that their vehicle was being driven

in a rash and negligent manner, disclosed the driving license details and further disclosed that there vehicle was duly insured with the appellant.

However, the appellant as well as the respondent No.8 disowned their liability and by taking the usual pleas, had put the respondent Nos.1, 2 and 3 to

strict proof of their claim. The appellant had further stated that the claim petition was filed in collusion with the owner of the vehicle and a false claim

was filed in a wrongful and illegal way.

5) The learned Tribunal, formulated only one point of determination â?" â?? Whether there was an accident which left the victim dead and whether

the claimants are entitled to get compensation as prayed for?â??

6) In support of the claim, the respondents No.1, 2 and 3 (i.e. the claimants) had examined 4 (four) witnesses including the respondent No.1 (PW-1),

Md. Abdul Kalam Mazumder (PW-2), Moni Kanta Singha (PW-3), and H.S. Singha (PW-4), and the following documents were exhibited:- (1) FIR

(Ext.1), (2) Charge sheet and the final report (Ext.2),

(3) Post mortem report (Ext.3), (4) Salary Certificate (Ext.4), (5) FIR (Ext.5), (6) Certificate issued by the employer (Ext.6). Five other documents

like Birth Certificate, Letter by Dewan Tea Company, Photocopy form-54, Government notification and Sanctioned letter were referred as Mark (I)

to Mark (V). The respondent No.8 herein had examined one Joyanta Bhattacharjee, their investigator as DW-1.

7) As per the learned Tribunal, on the basis of the evidence available on record concluded that 2 (two) vehicles were involved in the accident.

However, the truck in question was the offending vehicle in the accident and therefore, it was held that the insurer of the truck i.e. (the appellant)

could not evade the liability to pay compensation.

8) It was held that the deceased was 32 years old at the time of his death and he had left behind his wife, son and mother as his dependents and

therefore, by accepting the salary of the deceased to be Rs.3,408/- per month, 1/3rd of the income was deducted as personal expenses. The loss of

dependency and compensation on other conventional heads were assessed as follows:

(i)Â Â Loss of dependency- Rs.2,272/- x 12 x 6 = Rs.4,36,224/-

(ii) Funeral expenses = Rs. 2,500/-

(iii) Loss of estate = Rs. 8,000/-

(iv) Loss of consortium = Rs. 8,000/-

(v)Â Expenses of Carriage of dead body = Rs. 8,000/-

(vi) 50% of total dependency as future prospects= Rs.2,18,112/-

Total = Rs. 6,80,836/-

(Rupees Six lakh eighty thousand eight hundred and thirty six only.) Thus, a total compensation of Rs.6,80,836/- was awarded in favor of respondents

No.1, 2 and 3 with interest @ of 6% p.a. from the date of filing till the date of payment. The appellant was directed to satisfy the award.

9) Challenging the said award, the learned counsel for the appellant has made his submissions, which have already been narrated herein before. In

support of her submissions, the learned counsel for the appellant has placed reliance on the case of Khenyei Vs. New India Assurance Co.Ltd. &

Ors., (2015) 9 SCC 273 and Oriental Insurance Company Ltd. Vs. Divisional Manager, National Insurance Co. Ltd and ors., (2008) 3 GLJ 186: 2008

(3) GLT 153.

10) By referring to the said case citations it is submitted that as 2 (two) vehicles were involved in the accident, it was the duty of the learned Tribunal

to apportion the award between the 2 (two) insurers of the said two vehicles involved in the accident. It is further submitted that because of the

involvement of 2(two) vehicles in the accident, the learned Tribunal had erred in law as well as on facts by not holding that both the vehicles were at

fault and had contributed to the accident as per the ratio laid down in the case of Oriental Insurance Company Ltd, (supra). Hence, it is submitted that

the award was required to be apportioned between both the insurers at the equal ratio.

11) By referring to the statements made in (i) the claim petition, (ii) statement of PW-1 in course of her cross-examination, and (iii) the charge-sheet

(Ext.-2), the learned counsel for the appellant that as per the final report/ charge sheet (Ext.-2), the IO had projected that the driver of the Safari

vehicle was overtaking the loaded truck and at the same time the driver of the loaded truck drove his vehicle in a rash and negligent manner and

capsized over the Tata Safari from a rear portion which resulted in the death of the deceased. In the cross-examination of PW-1, had specifically

stated that â??it is not a fact that for the fault of the truck No.TR-01-E-1949 the accident had taken place.â? Accordingly, the learned counsel for the

appellant submits that these statements are sufficient enough to indicate that at the time of the accident, both the vehicles had contributed to the

accident and therefore, it is submitted that the learned Tribunal had erred in ordering the appellant to satisfy the award.

12) In support of her submissions, the learned counsel for the appellant had produced a photograph of the Tata Safari vehicle involved in the accident

to supplement her argument that the said Tata Safari had contributed towards the accident. The learned Senior counsel for the respondent No.8 has

objected to the production of the photograph at this stage on the ground that the appellant had not introduced the said photograph at the trial stage and

therefore, it was not open to the appellant to now introduce any un-exhibited photograph and take the respondent No.8 by surprise. The said objection

was sustained and the photograph of the Tata Safari vehicle was returned back, without taking any cognizance of the same.

13) The learned Senior counsel for the respondent No.8 has submitted that in the claim petition as well as on the tone and tenor of the statement by

the claimantsâ?? witnesses, the consistent case of the said respondents No.1, 2 and 3 was that the truck was the offending vehicle. By referring to

the charge-sheet (Ext.2), it is submitted that although the police had stated that the Tata Safari vehicle was overtaking the loaded truck, but the finding

recorded by the I/O was that the truck was driven in a rash and negligence manner and in the process it capsized over the Tata Safari from the rear

portion, resulting in the death of the deceased. Hence, a stray statement by the PW-1 in her cross-examination â??that it is not a fact that for the fault

of the truck the accident had taken placeâ? was not sufficient to disprove the other overbearing evidence showing that the truck was the offending

vehicle. Therefore, it is submitted that no part of the compensation should be apportioned against the respondent No.8.

14) By referring to the case of Khenyei (supra), it is submitted that in the said case, the Honâ??ble Apex Court had explained the difference

between the composite negligence and contributory negligence. In this regard, it is submitted that the plea of contributory negligence can only be

leveled against the driver of both the vehicles and that if a such plea is taken, the learned Tribunal is required to find out that whether one of the

drivers was solely or partly responsible for the accident and upon finding that both the drivers had contributed towards the accident, the extent of his

responsibility would be his contributory negligence in respect of the accident. It is also submitted that as per the ratio of the case of Khenyei (supra), if

the insurer himself is a party, then the principles of composite negligence will not apply. It is further submitted that the deceased was an occupant of

the Tata Safari Vehicle and therefore, being a passenger, no allegation of contributory negligence can be sustained so far as any passenger in a

vehicle is concerned, as such, it is submitted that the deceased could not be said to be guilty of any negligence. It is further submitted that in so far as

the principles of composite negligence is concerned, in the present case as the respondents No. 1, 2 and 3 had stated that the truck was the offending

vehicle, it was open for the said respondents (i.e. the claimants) to recover their claim from the insurer of the truck, being the offending vehicle, but

unless contributory negligence on part of the vehicle insured by the respondent No.8 is proved, no part of the award can be apportioned against the

Respondent No.8, i.e. the insurer of the Tata Safari vehicle, notwithstanding that both the insurers and the vehicle owners were made parties in the

claim case.

15) The learned counsel for the respondents No.1, 2 and 3 has submitted that in the present case, the accident had taken place on 31.10.2008, but in

the dispute between the 2 (two) insurers, the respondents No.1, 2 and 3 have received only 50% of the awarded sum and therefore, it is submitted that

the compensation may not be reduced as prayed by the appellant. It is further submitted that if the ratio of the said case of Pranay Sethi (supra) is to

be applied, then the respondents No.1, 2 and 3 should also be entitled to be entitled to a just and fair compensation by enhancing the award on the

conventional head of loss of estate, loss of consortium and funeral expenses, which has been settled at Rs.15,000/-, Rs.40,000/- and Rs.15,000/-

respectively.

16) Thus, two points of determination arise for decision in this appeal:-

i. Whether the Tata Safari vehicle, insured by the respondent No.8 was guilty of contributory negligence?

ii. Whether the award passed by the learned Tribunal warrants any interference?

17) On a perusal of the claim petition and the evidence on record, it appears that the respondents No.1, 2 and 3 and stated in their claim case that the

truck had capsized on the Tata Safari vehicle while being driven in a rash and negligent manner. In the claim petition, it was stated that the truck was

overtaking the Safari vehicle. Similar stand was taken by the CW-1 and CW-2. While, CW-1 had stated in the cross-examination that â??it is not a

fact that on the fault of the truck, the accident had taken placeâ?, the CW-2 had stated that he did not see the accident and therefore there was no

further cross-examination on the said witnesses. In the charge-sheet/ final report (Ext.2), although the I/O had stated that the Safari was overtaking

the loaded truck but it was stated that the truck was driven in a rash and negligent manner and had capsized on the Tata Safari from a rear portion. In

this case, after the Pw-2 had admitted in his cross examination that he did not see the accident, he was not cross examined any further. In this regard,

in the opinion of this Court, it is very difficult for a wife of the deceased to trace out an eye witness and get evidence of such a person recorded. It is

too well settled that the provisions in the Motor Vehicles Act, 1988 in so far it relates to motor accident claims, is a social and beneficial legislation.

Moreover, in cases involving death by vehicular accident, in an appropriate case, it is open for the learned Tribunal to take recourse to the well settled

principles of res ipsa loquitur. Thus, non-examination of PWs, who are not eye witnesses, may not be of any help to the insurer. In order to prove

contributory negligence of the other vehicle, the appellant was required to adduce evidence and prove the same.

18) From the contents of the FIR (Ext.1), it is seen that it was stated therein that the truck was being driven in a rash and negligent manner.

Therefore, notwithstanding that the PW-1 had denied the suggestion, the overwhelming evidence on record appears to be pointing towards the truck

being the offending vehicle.

19) Thus, this Court is of the considered opinion that if the appellant had desired to project that the Tata Safari vehicle had contributed towards

negligence, it was required by the appellant to take such a plea in its written statement and then the appellant was required to lead evidence to prove

their stand. The appellant has not been able to show that such a plea had been taken in their written statement. It is also seen that although a

statement was made in the written statement, seeking leave to file additional written statement, but no additional written statement was filed to take

the plea of contributory negligence on part of the other vehicle i.e. Tata Safari. Accordingly, no issue was framed by the learned Tribunal on the plea

of contributory and on composite negligence.

20) Therefore, this Court, being an Appellate Court is not permitted to make its own assessment at the appellate stage to determine whether there was

any contributory negligence on the part of the Tata Safari vehicle so as to apportion the liability of compensation between the two insurers of the two

vehicles involved in the accident. However, from the ratio laid down by the Honâ??ble Apex Court in the case of Khenyei (supra), it is seen that the

Honâ??ble Apex Court had laid down in para 18(iii) that in case both of the insurers have been impleaded and the apportionment/ extent of their

negligence has been determined by the Court/tribunal, in that case one of joint tortfeasor can recover the amount from the other in the execution

proceedings. However, in the present case in hand, notwithstanding that the appellant had not called upon the learned Tribunal to determine the extent

of the negligence of the other vehicle, yet on facts, the learned Tribunal had arrived at a categorical finding that the truck was the offending vehicle.

Therefore, this Court finds no infirmity in the finding by the learned Tribunal that the appellant, i.e. the insurer of the truck could not escape the

liability. Such a finding would otherwise mean that the respondent No.8, the insurer of the Tata Safari vehicle was exonerated. Therefore,

notwithstanding that no issues on the contributory and composite negligence was framed, but the learned Tribunal was concerned of the involvement

of the two vehicles in the accident and had decided the claim against the appellant in the absence of any admissible evidence to show that Tata Safari

vehicle had contributed to the negligence. Thus, this Court does not find any evidence to upset the said finding by the said learned Tribunal and arrive

at a different conclusion in the absence of any evidence in favor of the appellant on this issue raised.

21) In view of the discussions above, the point of determination No.1 is decided

in the negative and against the appellant by holding that the Tata

Safari vehicle, insured by the respondent No.8 was guilty of contributory negligence.

22) The next issue relates to question as to whether the impugned award is liable to be enhanced and/or reduced on account of conventional heads. In

this regard, this Court is of the opinion that as the appeal is being decided today, the case of Pranay Sethi (supra), is considered to have a binding

effect. Therefore, as per the ration laid down in the case of Pranay Sethi (supra), it is seen that in this present case, the deceased was aged below 40

years, and that for the said age group, the addition on account of future prospects has been settled at 40% in the case of Pranay Sethi (supra).

Therefore, by following the said ratio, the future prospects, the total loss of dependency is liable to be scaled down to 40%, which would come to

Rs.1,74,489.60p. On the point of enhancement of under conventional heads, this Court in the case of National Insurance Company Limited Vs. Utpal

Saikia, (2017) 2 GLR 406: (2017) 0 Supreme (Gau) 91, this Court by relying on the ratio laid down in the case of Ranjana Prakash v. Divl. Manager

(2011) 14 SCC 639, had refused enhancement of the compensation in appeal filed by the insurer by holding that the Court cannot increase

compensation in an appeal by the insurer nor it can reduce compensation in the appeal made by the claimants seeking enhancement of the

compensation. Following the said ratio, the prayer made by the learned counsel for the respondents Nos.1, 2 and 3 for enhancement of compensation

on the conventional heads of loss of estate, loss of consortium and funeral expenses is declined. Thus, the point of determination No. (ii) is answered

in favour of the appellant by holding that the quantum of compensation was liable to be reduced on on account of addition for future prospects, the

quantum of award of compensation stands reduced by a sum of Rs.43,622.40p. Therefore, the re-assessed compensation would be follows:

(i)Â Â Loss of dependency- (Rs.2,272/- x 12 x 6) = Rs.4,36,224/-

(ii) Funeral expenses = Rs. 2,500/-

(iii) Loss of estate = Rs. 8,000/-

(iv) Loss of consortium = Rs. 8,000/-

(v)Â Expenses of Carriage of dead body = Rs. 8,000/-

(vi) 40% of total dependency as future prospects= Rs.1,74,490/-

Total = Rs.6,37,214/-

(Rupees Six lakh thirty seven thousand two hundred fourteen only.) The interest on the award shall continue @ 6% from date of filing of claim petition

i.e. 01.06.2009 till the date of its payment.

23) The appellant shall now deposit balance award within the period of 45 (forty five) days from today. The appellant shall be liable to adjust the (i)

statutory deposit, (ii) payment made against â??no fault liabilityâ??, and (iii) deposit/ payment of any part of the award.

24) The appeal stands partly allowed to the extent as indicated above by reducing the award to Rs.6,37,214/- (Rupees Six lakh thirty seven thousand

two hundred and fourteen) as indicated above.

25) The parties are left to bear their own costs of this appeal.

26) Let the LCR be returned back.

