
(2018) 05 GAU CK 0235
In the Gauhati High Court
Case No : MACApp. 12 of 2013

United India Insurance Co. Ltd.

APPELLANT

Vs

Purnima Das And Ors

RESPONDENT

Date of Decision : 31-05-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2018) 05 GAU CK 0235

Hon'ble Judges : KALYAN RAI SURANA, J

Bench : Single Bench

Advocate : S.S. Sarma, G. Jalan, L. Sharma, B.J. Mukherjee, R.K. Bhatra

Final Decision : Dismissed

Judgement

(1) Heard Mr. S.S. Sarma, the learned Senior Counsel, assisted by Mr. B.J. Mukherjee, the learned counsel appearing for the appellant as well as Mr.

R.K. Bhatra, the learned Counsel appearing for the respondent No.8 i.e. the National Insurance Co. Ltd. None appears on call for the other respondent.

(2) This appeal under Section 173 of the Motor Vehicles Act, 1988 is for claiming enhancement of compensation passed vide judgment and award

dated 07.02.2011, passed by the learned Member, Motor Accident Claims Tribunal, Kamrup, Guwahati in MAC Case No. 356/2007 (MAC Case No. 2297/2005).

(3) The case in the claim petition was that on 16.02.2005, at about 11.30 pm., the deceased Badan Das met with an accident at Dimow Madhupur village under Dimow P.S. and the victim died on the spot. It was projected that the accident occurred due to rash and negligent driving of a Maruti

Car bearing registration No. AS-06-B-6940 by its driver and therefore, prayer was made for compensation of Rs.7,00,000/- with 12% interest. The

respondent No. 1, wife of the deceased was the claimant No. 1 and her two daughters being minors at the relevant time where the claimants No. 2

and 3 in the claim. In the claim petition, it was projected that the deceased was 24 years of age at the time of his death and he was a mechanic having

a monthly income of Rs.5,000/- per month and that the said accident was registered as Dimow P.S. G.D. Entry No. 362 dated 16.02.2005 and the

post mortem of the dead body was conducted by the doctors at Dimow CHC. The respondent No. 8 herein, who had arrayed as opposite party No.

6 in the claim petition had filed its written objection and made a statement that there was no allegation of any rash and negligent driving against the

vehicle bearing registration No. NL-06A-0779 insured by them. The appellant herein, who had arrayed as opposite party No. 1 in the claim petition

also contested the claim. The appellant denied their liability and by taking the usual plea, the respondents No. 1, 2 and 3 put to strict proof of their

claim.

(4) On the basis of pleadings, the learned tribunal had framed the following two issues â?

1. Whether the victim Shri Badan Das died in vehicular accident on 16.02.2005 at about 11.30 P.M at Dimow, due to the rash and negligent driving of

the driver of the vehicles No. AS06-B-6940 and NL-06-A-0779?

2. Whether the claimant is entitled to get compensation and if so, what amount and from whom?

(5) In support of the claim, the respondents No. 1, 2 and 3 examined the respondent No. 1 as PW-1 and one Suday Sutradhar, a mechanic working in

Calcutta Auto Garage was examined as PW2 and exhibited the following documents, viz., Police Report (Ext.1), Post Mortem Report (Ext.2), and

Income Certificate (Ext.3).

(6) In the evidence it was stated that on 16.02.2005 at about 11.30 p.m., at Dimow Madhupur village, the deceased was repairing a truck bearing

registration No. NL-06-A-0779 in the PWD road which was out of order due to mechanical defect. At that time, the offending vehicle came in a rash

and negligent manner and hit the back side of the truck. As a result of the accident, the deceased got injured and after being admitted in Sivasagar

Civil Hospital, he lost his life after sometime. In the evidence it was stated that the deceased had left behind two minors girls and at the time of her husband's death. It was stated that the respondent No.1 was pregnant and after the death of her husband, a third child was born, who is now three years old (as on 19.03.2009, the date when the evidence on affidavit was sworn). The evidence of the said PW-1 could not be demolished during the cross-examination. The PW-2 had deposed that he and deceased were co-workers in the same garage and that the deceased had gone to repair a truck on 16.02.2005 and while he was repairing it, the offending vehicle came in a rash and negligent manner and knocked down the standing truck from behind, and that as a result of the said accident, the deceased had died on spot. The PW-2 claimed that the accident took place at 10.30 pm. and he received the information only next day morning and thereafter, he saw the dead body and also saw the truck and the offending vehicle lying in the police station. In his cross-examination PW-2 had admitted that he did not see the accident and did not see how the truck was parked on the road. His evidence also could not be demolished during the cross-examination. None of the parties contesting the claim petition had adduced any evidence in respect of their respective plea.

(7) On the basis of evidence on record, the learned Tribunal had held that the accident took place on 16.02.2005 at about 11.30 p.m., at Dimow Madhupur village while the deceased was repairing the truck bearing registration No. NL-06-A-0779 which was out of order and that the Maruti Car bearing registration No. AS-06-B-6940 was driven in rash and negligent manner by its driver, who had dashed against the said truck which was kept standing on the road for repairs and that the victim had died on spot. The learned Tribunal had held that the Ext.1 i.e. the Police report disclosed about the accident and relying on the post mortem report, the issue No. 1 was decided in favour of the respondents No. 1, 2 and 3 and against the appellant.

(8) In respect of issue No. 2, it was held that the offending vehicle was duly insured with the appellant and the policy was valid at the time of the accident and therefore, they were liable to pay compensation. The learned Tribunal had discarded the Ext.3 i.e. the income certificate on the ground that the author was not examined and therefore, the monthly income of the deceased was held to be

Rs.3,000/- per month. Holding that the deceased had left behind his wife and three children, $\frac{1}{4}$ th of his income was deducted towards the personal

and living expenses of the deceased in terms of the ratio laid down in the case of *Sarla Verma & Ors. Vs. DTC and Anr.*, (2009) 6 SCC 121.

Considering the age of the deceased as well as the claimant (respondent No.1) being 24 years and 22 years respectively, on the basis of the decision

in the case of *Sarla Verma (supra)*, multiplier was taken to be 18. The loss of dependency was calculated as Rs.27,000/- X 18 = Rs.4,86,000/-. The

respondents No. 1, 2 and 3 had also held to be entitled to a sum of Rs.10,000/- under the head of loss of estate and Rs.10,000/- for funeral expenses

and accordingly, the respondents No. 1, 2 and 3 were held to be entitled to total compensation of Rs.5,06,000/-. The appellant was ordered to pay the

same with interest at the rate of 6% per annum. It was further held that on the failure to pay the award and interest within three months, the future

interest was to be paid at the rate of 9% per annum.

(9) Challenging the said award, the learned Senior Counsel for the appellant had submitted that the accident took place on 16.02.2005 and that the

deceased had died on the same day. It is submitted that as per the evidence-on-affidavit dated 19.03.2009, respondent No. 1 had a third child born out

of the wed-lock, who was three years of age there could not be a child of the deceased and therefore, it is submitted that the learned Tribunal had

erred in law in deducting $\frac{1}{4}$ th of the income of the deceased towards personal and living expenses which ought to have been deducted at the rate of

$\frac{1}{3}$ as per the ratio laid down in the case of *Sarla Verma (supra)*. The next issue which was strenuously urged by the learned Senior Counsel for the

appellant was that as two vehicles was involved in the accident, the learned Tribunal had committed grave error in shifting the entire burden of

compensation on the appellant. In this regard, by relying on the ratio laid down in the case of *Bijoy Kumar Dugar Vs. Vidyadhar Dutta*, (2006) 3 SSC

242:(2006) 0 Supreme (SC) 192, it is submitted that the Hon^{ble} Apex Court had laid down that as two vehicles are involved in the accident, the

driver of both the vehicles would be guilty of contributory negligence and therefore, the learned Tribunal ought to have apportioned some liability on

the other vehicle i.e. the truck insured by the respondent No. 8 herein.

(10) Per-contra, the learned counsel for the respondent No. 8 has denied the

liability of respondent No. 8. In this regard, he has referred to the cross-examination by PW-1, wherein the PW-1 had categorically denied that there was any rash and negligent driving of the truck involved in the accident.

It is also submitted that the deceased was repairing the truck and he was not a passenger of the said vehicle or a third party injured in the accident but

he was repairing the truck in question, which was parked on the side of the road and hence, so far as the said deceased is concerned, there is no way

that the truck could have been said to be contributed to have accident and therefore, on facts, the present case was distinguishable from the facts

involved in the Bijoy Kumar Dugar (supra). Hence, he denied the liability for paying any compensation to the respondents No. 1, 2 and 3.

(11) In view of the submissions made, the following points of determination arise for decision in this case:

1. Whether the deduction of $\frac{1}{4}$ income of the deceased towards personal and living expenses was justified?

2. Whether there was any contributory negligence on part of the truck which was out of order and standing on the road?

(12) In respect of point of determination No. 1, it is seen that when the evidence was led by PW-1, the appellant did not question the said witness on

her third issue. The said witness having not been confronted on facts, it is not open to this appellate Court to give a finding that the third child was not

born out of the bed lock as the same would be a finding of fact without any evidence on the point on record, which is likely to affect all the

respondents No.1, 2 and 3/claimants and the third child who is not even the party in the proceeding by declaring the status which would be adversarial

to their interest. In the opinion of this Court, had the PW-1 being cross-examined on the point now being raised in the appeal, there was a possibility

that the witness would have some answer to explain the situation. Therefore, having not confronted the said witness with any question on the point

during the cross-examination, it is not open to the appellant to raise the issue for the first time in this appeal. Therefore, it would be a miscarriage of

justice to opine on the third issue of the respondent No. 1 and, as such, the appellant is stopped from questioning the correctness of the decision of the

learned Tribunal on the applicable deductions on account of living and personal expenses of the deceased. In the opinion of this Court, on lack of any

cross-examination of the PWs on the point, the evidence by the respondent No. 1 has remained uncontroverted.

(13) It is seen that the Honâ??ble Apex Court is of the consistent view that the claimants in a motor accident death case is required to be given a just

and proper compensation. In that view of the matter, assuming that the deduction on account of personal and living expenses would be 1/3, then out of the total income of Rs.36,000/- per year, the contribution of the deceased towards the family would be Rs.24,000.00, being 2/3 of his income.

Therefore, the loss of dependency would be $\text{Rs.24,000} \times 18 = \text{Rs.4,32,000/-}$. In terms of the judgment of National Insurance Co. Ltd. Vs. Pranay

Sethi & Ors., MANU/SC/1366/2017: (2017) 8 Supreme 107, the respondents No. 1, 2 and 3 would be entitled to a sum of Rs.15,000/- towards loss of

estate, Rs.40,000/- on account of loss of consortiumÂ and Rs.15,000/- towards funeral expenses, as a result, the loss of dependency would be

$\text{Rs.4,32,000/-} + \text{Rs.70,000/-} = \text{Rs.5,02,000/-}$ and in the present case as the total award by the learned Tribunal was Rs.5,06,000/-, in that view of the

matter, this Court is not inclined to hold that the deceased had left behind only three dependents and that the deduction from income on account of

living expenses would be 1/3 instead of $\frac{1}{4}$ thÂ because as per the ratio laid down by the Honâ??ble Apex Court in the case of Sarla Verma

(supra), as upheld by the judgment rendered in the case of Pranay Sethi (supra), the respondents No. 1, 2 and 3 were entitled to enhancement of the

claim on account of future prospects which was not considered in the award. Therefore, the point of determination No. 1, in view of the discussion

above, is answered in the negative and against the appellant.Â

(14) In respect of point of determination No. 2 on the issue appropriation of award against the respondent No. 8, in this connection, it is seen that the

appellant did not lead any evidence to show that the truck which was in break-down condition was improperly kept on the road so as to invite the

accident. There was no cross-examination of the PWs to find out whether there was any indicative marks on the road to show that the truck under

repair was standing on the road. Moreover, it is seen that insofar as the deceased was concerned, as he was not a passenger of both the vehicles

involved in the accident this is not a case where either the composite negligence or contributory negligence on account of the truck under repair,

insured by the respondent No. 8. It is also seen that in course of cross-examination, the evidence of the PW- and PW-2 could not be shaken that the cause of accident was the rash and negligent driving of the Maruti Car insured by the appellant. In the absence of any rebuttal evidence, this Court is unable to hold that there was any contributory negligence on part of the truck which was being repaired by the deceased at the relevant time. The GD Entry (Ext.1) also establishes that the offending vehicle was the car insured by the appellant. Hence, this Court is of the opinion that on facts the present case is distinguishable from the facts of the case of Bijoy Kumar Dugar (supra), where it was held that when the offending vehicle was coming in a zigzag manner, the vehicle where the deceased was travelling could have taken steps to avoid the accident which was not done despite seeing that the offending vehicle was coming in a zigzag manner. In the present case in hand, the truck was in a break-down condition and therefore, parked in a stationary condition on the side of the road. Hence, as the evidence does not point out to the negligence on part of the truck, the second point of determination is also answered in negative and against the appellant. Therefore, award passed against the appellant does not warrant any interference.Â

(15) Accordingly, the appeal stands dismissed. Resultantly, the judgment and award dated 07.02.2011, passed by the learned Member, Motor Accident Claims Tribunal, Kamrup, Guwahati in MAC Case No. 356/2007 (MAC Case No. 2297/2005) is upheld. The appellant shall satisfy the balance award with accrued interest within 1(one) month from today before the Motor Accident Claims Tribunal No. 1, Guwahati.

(16) Return back the LCR.

(17) The Registry may refund the statutory deposit back to the appellant on full satisfaction of the award with interest.