
(2017) 01 P&H CK 0061
In the Punjab And Haryana At Chandigarh
Case No : F.A.O No. 5030 of 2015 (O and M)

United India Insurance Company

APPELLANT

Vs

Kelo Devi

RESPONDENT

Date of Decision : 23-01-2017

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2017) 2 ACC 232 : (2017) 1 LawHerald 528

Hon'ble Judges : Mrs. Anita Chaudhry, J.

Bench : Single Bench

Advocate : Mr. R.K. Bashamboo, Advocate, for the Appellant (in FAO No. 5030 of 2015) and for Respondent No. 3. (in FAO No. 8394 of 2015); Mr. Jagat Benipal for Mr. Harish Nain, Advocates, for the Respondents No. 7 and 8 (in FAO No. 5030 of 2015); Mr. Ashwani Kumar, Advocate, for the Appellants (in FAO No. 8394 of 2015) and for respondents No. 1, 5 and 6 (in FAO No. 5030 of 2015)

Final Decision : Dismissed

Judgement

Mrs. Anita Chaudhry, J. - These are two appeals preferred against the award dated 4.5.2015 of the Motor Accident Claims Tribunal, Kaithal. The insurance company is aggrieved of the judgment the claimants who are seeking enhancement.

2. The factual scenario in nutshell is as follows :-

3. On 17.9.2012 Subhash along with his brother Suresh on the pillion was returning to his house from his fields on a motor cycle. When he entered the main road, a motor cycle bearing No. HR-09B-3320 TVS came from village Dhamtan Sahib without giving any horn and hit the motor cycle of Subhash and he fell down on the metalled road, while Suresh fell on the kacha portion. Subhash became unconscious. The driver of the motor cycle fled from the spot leaving his motor cycle behind. Suresh arranged a vehicle and shifted his brother to a hospital in Tohana from where he was referred to a Hospital in Hisar. The FIR was registered the next day on the statement of Suresh. Subhash died after six

months of the incident on 3.5.2013. The claim petition was preferred by his wife and five children. The claimants had pleaded that Subhash was an agriculturist and had monthly income of Rs. 50,000/-. It was pleaded that Subhash was admitted in a hospital and treatment was given to him till his death and they had spent Rs. 10,00,000/- on his treatment.

4. Respondents No. 1 and 2 denied the accident and pleaded that the FIR had been lodged in collusion with the complainant and a story had been concocted and he had been falsely implicated. It was pleaded that no accident had taken place due to the fault of respondent No. 1.

5. United India Insurance Company took the plea that the claimants in collusion with respondents No. 1 and 2 had got the FIR lodged just to grab compensation. Several preliminary objections were raised. It was pleaded that Kelo Devi in her statement to the investigator had stated that the deceased was only doing agricultural work and had no other source of income and he had 2? acres of land and the income disclosed was exaggerated. It was pleaded that the cause of death was not due to the injuries suffered in the accident and there was no privity between the injuries and death. It was pleaded that the deceased was not wearing a helmet and he had contributed in the road accident.

6. The claimants examined the wife and the brother of the deceased who is the eye witness. They also tendered the post-mortem report, the report under Section 173 Cr.P.C, some bills and attested copy of the MLR.

7. No evidence was led from the side of the respondents and respondents No. 1 and 2 were proceeded ex parte at the final stages.

8. The Claims Tribunal gave a categoric finding that the accident had occurred on account of negligence of respondent No. 1 and assessed the monthly income to be Rs. 10,000/- though there was material to show that the father owned the land and not the deceased and applying the multiplier of 14 and giving a deduction of 1/3rd assessed the compensation as under: -

(In Rs.)

Annual income of the deceased

:

1,20,000/-

1/3rd deduction

:

40,000/-

Net income

:

80,000/-

After applying multiplier of 14

:

11,20,000/-

Loss of consortium in favour of claimant No. 1

:

1,00,000/-

Funeral expenses

:

25,000/-

Love and affection in favour of claimants No. 5 and 6

:

1,00,000/-

Medicines expenses

:

1,00,000/-

Total compensation

:

14,45,000/-

9. The Tribunal awarded compensation of Rs. 14,45,000/- in favour of claimants No. 1, 5 and 6 alone as claimants No. 2 to 4 were major and the daughter was married. The Tribunal did not take into account some medical bills to the tune of Rs. 3,93,311/- as it noted that there was no prescription.

10. Aggrieved by the award the insurance company came up in appeal. Notice of motion was issued for 14.9.2015. Thereafter the claimants filed an appeal with an application seeking condonation of delay of 91 days seeking enhancement of compensation.

11. Counsel for the insurance company had urged that the Tribunal had erred while holding respondent No. 1 responsible for the accident as it was the deceased who suddenly appeared on the main road and he had to take all the precautions while entering the highway and he had to ensure that he did not cause any obstruction to any vehicle moving on the highway. It was urged that Subhash was not wearing a helmet and fell on the metalled road and his head struck the road while the pillion rider fell on the kacha portion of the road and he

did not sustain any injury and the claim petition should have been dismissed. Reliance has been placed on "Ravinder Kaur v. Haryana State 2000(2) R.C.R. (Civil) 746".

12. Continuing with the submissions it was urged that the death had taken place after six months and it had to be proved that the death was on account of the injuries sustained by Subhash and no doctor was examined. It was urged that Suresh did not lodge any FIR though the accident had taken place around 1.00 P.M. and he had made the statement only on the next day. It was urged that the onus of proving negligence is always upon the claimants and they have to discharge it and merely tendering the FIR or the report under Section 173 Cr.P.C. are not enough to make the insurance company liable. It was urged that the Tribunal had not dealt with the issue of negligence correctly and the claimants had failed to prove the negligence and the death was on account of the fault of the deceased. Reliance was placed on "Oriental Insurance Co. Ltd. v. Meena Variyal and others 2007 ACJ 1284 and Ram Karan v. Zile Singh 2001(3) R.C.R. (Civil) 582".

13. On the other hand, the submission was that the Tribunal had rightly held that the accident was an outcome of the negligence of the driver and the insurance company had not led any evidence to prove that the accident was as a result of the negligence of Subhash and FIR had been lodged which is a prima facie proof of the fact that the driver was negligent. It was urged that the order has not been questioned by the driver and the insurance company cannot raise the plea that the driver was not driving the vehicle rashly and negligently and the insurance company was liable to pay. It was urged that the Court has not awarded compensation on some heads and they were entitled to compensation. Reliance was placed on "New India Assurance Co. v. Pawan Kumar and another 2015 AAC" 2651 and "United India Insurance Company Ltd. v. Rachna Devi and others 2015 AAC 2721".

14. The manner in which the accident had occurred is disclosed in the FIR. Suresh Kumar brother of the deceased had lodged the FIR on the next day. He had stated that he along with his brother were coming on a motor cycle. He was sitting on the pillion. They were returning from the fields and the moment they entered the road at the same time, a motor cyclist came in a rash and negligent manner and struck against their motor cycle upon which his brother fell down on the road while he fell on the kacha portion. The claim filed by the legal heirs of Subhash was resisted by all the respondents and their categorical plea was that the deceased himself was rash and negligent and it was his duty to take care while entering the road. The plea was negated by the Tribunal and the motor cyclist on the main road was held responsible for the accident.

15. In support of the claim, the author of the FIR had stepped into the witness box and had given his affidavit Ex. PW2/A. Para 1 of the affidavit reads as under:

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"That on 17.9.2012 at about 5.20 PM the deponent and his brother Subhash son of Inder were going to their houses from fields on Motor cycle No. HR41A - 9147 in a normal speed and Subhash was driving the motor cycle, when they reached on road then a driver of motor cycle bearing no. HR09B - 3320 TVS came from village Dhamtan Sahib in a high speed in rash and negligent manner without giving any horn directly hit the motor cycle of deceased Subhash and caused accident with Subhash and deponent and due to which Subhash fell down on the metalled road and deponent was fell down on kachha side of the road. Thereafter I stand up and I saw that Subhash was unconscious due to injuries received in the accident and there was bleeding in his head."

16. He had also stated that his brother remained under treatment from 17.9.2012 to 3.5.2013 and his brother died on 3.5.2013 due to the injuries received in the accident and he was in coma/unconscious from the date of the accident till his death. In the cross-examination he has admitted that they had entered the metalled road from the link road. He has also admitted that his brother was not wearing a helmet at the time of the accident and he had suffered head injuries. He has also stated that he was also not wearing a helmet. He has stated that no photographs were taken by the police at that time but the accident occurred due to the sole negligence of the driver who was on the metalled road.

17. So far as the oral evidence is concerned the claimants had examined Suresh, brother of the deceased. No independent witness was examined. There are no photographs. The claimants did not place on record the site plan to show the exact spot of the accident.

18. The insurance company has disputed their liability and their submission was that the driver of the vehicle which entered the road had to give way to the vehicle proceeding on the main road, i.e. all the traffic coming on his right hand and both in the FIR and in the statement made by Suresh there is an admission that the deceased entered the main road from the fields/link road and that is the spot where the accident had occurred and Subhash was responsible for the accident and the motor cyclist driving on the main road could not be blamed for the accident.

19. The deceased had taken a sudden entry on the main road from the field/path. He was expected to be careful and he ought to have entered the main road only if he had satisfied himself that there was no danger to the life of the persons when he entered the main road. It was respondent No. 1 who was on the main road and had the right of way. There was no light point at that point. There is no evidence that any damage had been caused to the motor cycle. The deceased was not wearing a helmet and he fell on the metalled road and his head hit the road. His brother fell on the kacha path and did not get a scratch.

20. Hon"ble Apex Court while referring to the distinction between the provisions of Section 163-A and Section 166 of the Motor Vehicle Act had held that it was

for the claimants to establish that the vehicle that was driven by respondent No. 1 was rash and negligent and in case they failed to do so they would not be entitled to any compensation. The Apex Court in *Surender Kumar Arora and another v. Dr. Manoj Bisla and others* 2012 AIR (SC) 1918 observed in para 10 as under: -

"In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in the case of *Oriental Insurance Co. Ltd.* (supra). In the said decision the Court stated :

"....Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle."

21. The Apex Court in *Municipal Corporation of Greater Bombay v. Shri Laxman Iyer and another* 2003(4) R.C.R. (Civil) 764 while defining the negligence held as under: -

"A plea which was stressed strenuously related to alleged contributory negligence. Though there is no statutory definition, in common parlance "negligence" is categorised as either composite or contributory. It is first necessary to find out what is a negligent act. Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations who ordinarily by reason of conduct of human affairs would do or obligated to, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence and duty are strictly correlative. Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not an absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies under different conditions and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of care according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even

the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act. Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See Charlesworth on Negligence, 3rd Edn. Para 328). It is now well settled that in the case of contributory negligence, courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damage are reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise. Where a person is injured without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Pollock as injury by composite negligence. (See Pollock on Torts, 15th Edn. P.361)."

22. It would be necessary now to refer to the Regulations 8 and 9 Appendix IV Rules of the Road Regulations, 1989. It had been framed in exercise of the powers conferred by Section 118 of the Motor Vehicles Act, 1988 which casts a duty on the driver of a motor cycle and the same reads as under: -

"8. Caution at road junction - The driver of a motor vehicle shall slow down when approaching at a road intersection, a road junction, pedestrian crossing or a road corner, and shall not enter any such intersection, junction or crossing until he has become aware that he may do so without endangering the safety of persons thereon.

9. Giving way to traffic at road junction - The driver of a motor vehicle shall, on entering road intersection at which traffic is not being regulated, if the road entered is a main road designated as such, give way to the vehicles proceeding along that road, and in any other case give way to all traffic approaching the intersection on his right hand."

23. The contention of the claimant is that the finding of the Tribunal has not been

questioned by the driver, therefore, the insurer cannot raise the plea. The argument has to be rejected. The insurance company could take all the pleas and can question the award on all the points. The driver has also contested the petition and had disputed his liability and had denied that the accident was a result of his fault though it is another matter that he was proceeded ex parte at the later stages of the case. The deceased had entered the road from the field/link road. It was his duty to give way and ensure that he would not endanger anyone. In my view this case can be said to be a case of contributory negligence with the major liability resting on the deceased which I would apportion at 70:30.

24. There is another aspect of the matter which is important. The case of the claimants was that the death had occurred on account of injuries in this accident. Plea was taken that Subhash was under treatment till his death. At the stage of evidence the witness for the first time stated that Subhash remained in coma after the accident till he died in May 2013. The claimants did not examine any medical officer and only tendered copy of the MLR and PMR. The MLR refers to four injuries i.e. a laceration in the eye, a lacerated wound on the right side of the scalp, a black eye and a laceration on the knee. The claimants had also tendered Ex. PG a bill to show that Subhash was admitted in the hospital on 17.9.2012 and discharged on 5.11.2012. Ex. PF shows admission again on 16.11.2012 and discharge on 19.11.2012. Ex. PE shows his admission on 26.11.2012 and discharge on 6.12.2012. Some procedure was done on that day. There is no reference to the fact that the patient was in coma. The discharge summary was not summoned from the hospital. The condition at the time of admission was not proved. The death took place after six months of the last discharge from the hospital in December 2012. According to the brother Subhash was in coma. In that case, the medicines in the form of tablets and syrups could not have been administered. Those are reflected in the medical bills Ex. P-36 to Ex. P-44. Had the patient been in coma there would have been bills of purchase of the main requirements i.e. ryles tubes, catheter, medications given through the ryles tube etc.

25. According to the post-mortem report the cause of death was a cardio-respiratory arrest and it was the result of old head injury which was ante mortem in nature and was sufficient to cause death. Could it be another accident which led to another injury ? The main documents were withheld. If the head injury suffered in September 2012 was the cause of death then it would mean that there were complications. There are serious doubts that Subhash was in coma as his condition of the body would not have been shown as "nourished body" in the post-mortem report Ex. PB. The injuries received on the head had healed. It had to be proved that there were complications and it lead to his repeated hospitalisation. A person who is in coma for a number of months would have developed bedsores and he would have made quite a number of visits to the hospital even after December 2012. That evidence is missing and becomes a suspect. It is held that the death was not on account of the injury received in September 2012. It has not been proved that the patient had gone in coma. The

claimants had failed to prove that the death was a result of the injury suffered in the accident. Therefore the claimants are not entitled to any compensation for the death. They are only entitled to amount spent on the treatment and loss to the estate which I assess at Rs. 2,00,000/-.

26. The claimants have produced bills which were taken into account by the Tribunal which are to the tune of Rs. One lac. It is held that the claimants were only entitled to the amount which was actually spent on the treatment. After apportioning the amount in the ratio of 70:30 it is held that the claimants were entitled to only to Rs. 30,000/- for medicines (his share) and Rs. 60,000/- on the head of loss of estate payable by the insurance company at the same rate of interest and from same date as allowed by the Tribunal. If any amount is paid in excess it would be refunded by the claimants. The award passed by the Tribunal is modified.

27. The appeal filed by the insurance company is partly allowed. The appeal filed by the claimants is dismissed.