Court No. - 33

Case :- FIRST APPEAL FROM ORDER No.2091 of 2007

Appellant :- The Oriental Insurance Company Ltd.
Respondent :- Chandrapal Sharma And Others
Counsel for Appellant :- V.C. Dixit
Counsel for Respondent :- Sanjay Shukla,Ankit Saran,R.K.Srivastava,R.Srivastava,Sanjay Kumar Dubey,Sanjeev Shukla

Hon'ble Dr. Kaushal Jayendra Thaker, J.

1. Heard Sri V.C. Dixit for the appellant - Insurance company, Sri Satish Chandra Tiwari holding brief of Sri Sanjay Shukla for the claimants. None has appeared for the owner.

2. By means of this appeal, the Insurance company challenges the judgment and award dated 23.5.2007 passed by Motor Accident Claims Tribunal, Aligarh, (hereinafter referred to as 'Tribunal') in Motor Accident Claim Petition No. 261 of 2006 awarding a sum of Rs. 8,23,000/- with interest at the rate of 6 per cent.

3. The brief facts go to show that on 11.6.2006 at about 05.00 p.m. deceased Nootan Sharma was riding his motorcyclye with his sister Beena Sharma as a pillion rider bearing no. UP-86-B-6633. Both brother and sister were coming to their village and when they reached Bhagwan-ki-Gadi, Nootan Sharma went for his natural call and at that point of time, a tractor bearing no. UP-81-P-7457 came and dashed the said vehicle whereby both of them were knocked down and the impact were such that Beena Sharma died on the spot. An F.I.R. was lodged against the driver of the tractor and the claimants filed the claim for Rs.19,22,000/-.

4. It is submitted by Sri V.C. Dixit that there was a head-on-collision and the accident occurred in the middle

of the road and, therefore, holding the driver of the tractor bearing no. UP-81-P-7457 is bad in eye of law. It is further submitted that the accident occurred due to the negligence on part of the driver of the motorcycle. It is further submitted that the site plan goes to show that accident occurred in middle of the road.

5. It is further submitted that the claim petition should have been rejected as owner and insurer of motorcycle were not joined.

6. It is further submitted that the compensation awarded is on higher side and the deceased was not an income-tax payee and, therefore, the income considered to be Rs.6,000/- per month was bad. It is further submitted that compensation awarded was highly excessive.

7. As against this, the learned counsel for the claimant has submitted that the Insurance company has not challenged the award in the other matter and, therefore, now they cannot raise the question of contributory negligence in the alternative it is submitted that the deceased, who was driving a motorcycle, was driving the said vehicle on its correct side and it was the driver of the tractor, who came and dashed with the scooter, the impact was so great that 2 people died out of the said accident.

8. It is further submitted that the claimants proved by cogent evidence that the income of the deceased was proved by the oral testimony of the Manager where he was serving. The Tribunal has not granted any amount under the head of future loss of income. The amount under the head of non-pecuniary damages is also on lower side. It is further submitted that the rate of interest is also on lower side.

9. While considering the question of negligence, the

principles enunciated by the courts will have to be looked into.

10. The concept of contributory negligence has been time and again evolved, decided and discussed by the courts.

11. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance or taking action which such a reasonable person would not. Negligence can be both intentional or accidental which is normally accidental. More particularly, it connotes reckless driving and the injured must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "*res ipsa loquitur"* meaning thereby "the things speak for itself" would apply.

12. The term contributory negligence has been discussed time and again a person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place. The Apex Court in **Pawan Kumar & Anr vs M/S Harkishan Dass Mohan Lal & Ors decided** on 29 January, 2014 has held as follows:

> *7. Where the plaintiff/claimant himself is found to be a party to the negligence the question of joint and several liability cannot arise and the plaintiff's claim to the extent of his own negligence, as may be quantified, will have to be severed. In such a situation the plaintiff can only be held entitled to such part of damages/compensation that is not attributable to his own negligence. The above principle has been explained in T.O. Anthony (supra) followed in K. Hemlatha & Ors. (supra). Paras 6 and 7 of T.O. Anthony (supra) which are relevant may be extracted hereinbelow:*
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> > *"6. "Composite negligence" refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrongdoers, it is said that the person was injured on account of the composite negligence of*

those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongdoer separately, nor is it necessary for the court to determine the extent of liability of each wrongdoer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is, his contributory negligence. Therefore where the injured is himself partly liable, the principle of "composite negligence" will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

13. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co. Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 which has held as under:

"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in

another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.

17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330****. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality,

new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. *In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits* ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840)****.*

22. *By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."*

14. The insurance company has failed to prove that accident occurred due to carrying of more persons as pillion rider. In absence of such a finding, the insurance company having not proved factum of negligent on the part of the scooterist, cannot be benefitted. The negligent act must contribute to the accident having taken place. The Apex Court recently has considered the principles of negligence in case of **Archit Saini and Antother Vs. Oriental Insurance Company Limited, AIR 2018 SC 1143**.

15. While going through the record and oral testimony, it emerges that the accident occurred on 11.6.2006 at 05.00 p.m. The deceased Nootan Sharma was plying with her sister Beena Sharma on motorcycle no. UP-86-B-6633. When they came near village Sahajpura, deceased Nootan Sharma stopped the motorcycle and wanted to go for

nature call at that time the driver of the tractor drove the tractor and dashed with the motorcyclist. Both the sisters died on the spot. A complain came to be lodged against the driver of the tractor. The F.I.R. and post mortem report was filed before the Tribunal. The chargesheet was filed against the driver of the tractor. The claimants examined PW1 - father of deceased and PW2 – widow of deceased and PW-3 - Mahesh Chandra Sharma, who was the Manager of Janta Convent High School. The Tribunal considered the documents F.I.R., Post-mortem report and the oral testimony of PW-1 and PW2 and came to the conclusion that the accident caused the death of both the persons. The break gear was found to be broken and damaged. The Tribunal held that from the cross of the witnesses nothing could be elucidated to show that the motorcyclist was in any way negligent. The tractor driver was held to be negligent. The driver nor the owner of the tractor stepped into the witness box. Even if we see the site plan, it cannot be said that the motorcyclist was negligent. The site plan does not throw much light on this aspect. In that view of the matter, the finding of fact of the Tribunal on this issue cannot be interfered with.

16. The Tribunal answered the issue no.5 regarding compensation and held that PW3 proved that the deceased was in the pay scale of Rs.3050 – 4590 and the deceased was marked to be in job and PW3 produced all the documents namely his appointment letter and his salary certificate who was cross-examined. The Tribunal considered his income to be Rs.6200 and rounded it up to Rs.6,000/- and deducted 1/3rd and granted Rs.8,16,000/- and added Rs.7,000/- under the head of non-pecuniary damages and granted 6% interest. It is submitted that this figure is not proved and the Tribunal has committed an error. While considering the facts it emerges that the

Tribunal has considered cogent evidence laid by the Manager of the School, who had produced all the documents and the multiplier is also not on the basis of Sarla Verma's judgment. The counsel for the claimant has submitted that the Tribunal has fallen in error in not granting future loss of income which has not been granted. The interest should be at the rate of 9% and not 6%. It is further submitted that the appellant's appeal be dismissed and the compensation be enhanced as per the judgment of this Court in ***National Insurance Co. Ltd. Vs. Smt. Vidyawati Devi and 2 others, F.A.F.O. No. 2389 of 2016, decided on 27.07.2016***. In that view of the matter, this Court will have to reevaluate the compensation granted and demanded. The income of the deceased has been rightly held to be Rs.6,000/- per month and the said finding cannot be interfered with. The deceased was in the age group of 21 – 25 years and multiplier of 17 has been granted, which should be 18 as per judgment of ***Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another, reported in 2009 ACJ 1298***. To this, the Tribunal has not added any amount for future loss of income, which as per ***National Insurance Company Limited Vs. Pranay Setthi and others, S.L.P. (Civil) No.25590 of 2014, decided on 31.10.2017*** should be 50% as he was a salaried person. The Tribunal has granted only Rs.7,000/- for non-pecuniary damages.

17. As per the latest decision of the Apex Court, the income of the deceased should be added with future loss of income. In this case, the future loss of income would be 50% of the salary meaning thereby Rs.3,000/- per month. Hence, Rs. 6,000 + 3,000 divided by 1/3rd as his personal expenses would be Rs.6,000 x 12 x 18 = Rs. 12,96,000/-

Plus Rs. 70,000/- under the head of non-pecuniary damages. The interest would be 7.5% as per the latest decision of the Apex Court reported in ***National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)*** wherein the Court has held as under :

> *"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court.*"

18. The submission of the counsel for the appellant that the deceased was not an income-tax payer cannot be accepted as in the year of accident income of Rs.72,000/- was not taxable hence the said submission fails. In the result the appeal preferred by the Insurance company fails and is dismissed. The cross-objection and the application for vacation of stay are entertained and accepted. The Insurance company, the owner and the driver of the tractor shall deposit the difference of amount within 12 weeks from today.

19. The judgment and decree shall stand modified to the aforesaid extent. The claimant shall be entitled to a sum of Rs.13,66,000/- with 7.5% interest from the date of filing of claim petition till the amount is deposited. The difference of amount be calculated and be deposited by the Insurance company within 12 weeks.

Order Date :- 30.8.2019
Irshad