THE HIGH COURT OF MADHYA PRADESH

MA-224-2011

(SATISHCHANDRA UPADHYAY AND OTHERS Vs ***HARNAMSINGH AND OTHERS)***

Gwalior dtd. 04/03/2020

Shri R.P.Gupta, learned counsel for the appellants.

Shri Anand Purohit, learned counsel for the respondent No.2.

Shri B.K.Agrawal, learned counsel for the respondent No.3.

This miscellaneous appeal under Section 173(1) of Motor Vehicle Act, 1988 has been filed against the award dated 18/10/2010 passed by Fourth Additional Motor Accident Claims Tribunal, Gwalior in Claim Case No. 107/2009, by which the claim filed by the claimants has been partially allowed. The insurance company has been exonerated from its liability on the ground of violation of the insurance policy.

The necessary facts for disposal of the present appeal in short are that the appellants/claimants filed an application under Section 163A of M.V.Act on the averments that on 09/02/2009 at about 5 pm, the deceased Chadrakumari was coming back from Ratangarh Mata Temple and was standing by the side of the road and was waiting for the bus and at that time the defendant No.1 by driving the tractor and trolly bearing Registration No.UP093/Q2021 in rash and negligent

manner, turned the tractor and trolley upside down, as a result of which the deceased Chandrakumari, who was standing on the road got crushed under the tractor and trolley and died on the spot. FIR in Crime No.22/2009 was registered at Police Station Pandokhar, District Datia for offence under Sections 279, 337, 338 and 304-A of IPC and accordingly, a claim petition was filed claiming a total amount of Rs. 8,70,000/-.

The respondent No.3/insurance company filed the written statement and disputed the averments made in the claim petition. It was mentioned in the written statement that the tractor and trolley was being used for other than the agriculture purposes and was being used for transporting the passengers and the deceased was sitting in the trolley and, therefore, the insurance company is not liable to pay the compensation amount.

The defendants No.1 and 2/driver and owner of the tractor and trolley also filed their written statement and admitted the averments regarding the accident as alleged by the claimants and further pleaded that in case if any compensation amount is awarded, then the insurance company would be liable to pay the same.

The Claims Tribunal after framing the issues and recording the evidence allowed the claim petition by the impugned award dated 18/10/2010. However, further held that since the deceased was sitting in the trolley and the tractor was insured for the agriculture purposes only and as the insured had violated the conditions of the insurance policy, therefore, the insurance company is not severally and jointly liable to pay the compensation and awarded an amount of Rs.1,39,500/- against the owner and driver of the tractor.

Challenging the award passed by Claims Tribunal, it is submitted by the counsel for the appellants that the Claims Tribunal has exonerated the insurance company mainly on the ground that in the FIR Ex.P/1, it was mentioned that the deceased was sitting in the trolley and it is submitted that the claim petitions are to be decided on the basis of the evidence led before the tribunal and not on the basis of the documents of criminal case. It is further submitted that the FIR is not a substantive piece of evidence and in support of his contentions the counsel for the appellants has relied upon the judgment passed by Supreme Court in the case of **Sunita & Ors. Vs. Rajasthan State Road Transport Corporation & Anr.**

passed in **Civil Appeal No.1665/2019.**

It is further submitted that the Claims Tribunal has wrongly assessed the yearly income of the deceased as Rs.15,000/- per year, whereas the accident took place in the year 2009 and second Schedule II Section 163A of M.V.Act was inserted in the year 1994 and, therefore, considering the house hold services rendered by a house hold lady the Claims Tribunal should have assessed the yearly income of the deceased as Rs.36,000/-.

Per contra, the counsel for the respondents have supported the award passed by the Court below.

Heard the counsel for the parties.

The first question which requires adjudication is that whether the deceased was traveling in the trolley attached with the tractor or she was standing by the side of the road.

It is well established principle of law, that the claim petitions are to be decided by the evidence, which is led before the tribunal and they cannot be decided in the light of the document of the criminal case.

The Supreme Court in the case of **Mangla Ram Vs. Oriental Insurance Co. Ltd.** reported in **(2018) 5 SCC 656** has held as

under :-

> **"24.** It will be useful to advert to the dictum in *N.K.V. Bros. (P) Ltd.* v. *M. Karumai Ammal*, wherein it was contended by the vehicle owner that the criminal case in relation to the accident had ended in acquittal and for which reason the claim under the Motor Vehicles Act ought to be rejected. This Court negatived the said argument by observing that the nature of proof required to establish culpable rashness, punishable under IPC, is more stringent than negligence sufficient under the law of tort to create liability. The observation made in para 3 of the judgment would throw some light as to what should be the approach of the Tribunal in motor accident cases. The same reads thus: (SCC pp. 458-59)
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> "*3.* Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their neighbour. Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for State relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the

enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."

25. In *Dulcina Fernandes*, this Court examined similar situation where the evidence of claimant's eyewitness was discarded by the Tribunal and that the respondent in that case was acquitted in the criminal case concerning the accident. This Court, however, opined that it cannot be overlooked that upon investigation of the case registered against the respondent, prima facie, materials showing negligence were found to put him on trial. The Court restated the settled principle that the evidence of the claimants ought to be examined by the Tribunal on the touchstone of preponderance of probability and certainly the standard of proof beyond reasonable doubt could not have been applied as noted in *Bimla Devi*. In paras 8 & 9 of the reported decision, the dictum in *United India Insurance Co. Ltd.* v. *Shila Datta*, has been adverted to as under: (*Dulcina Fernandes case*, SCC p. 650) "*8.* In *United India Insurance Co. Ltd.* v.*Shila Datta* while considering the nature of a claim petition under the Motor Vehicles Act, 1988 a three-Judge Bench of this Court has culled out certain propositions of which Propositions (*ii*), (*v*) and (*vi*) would be relevant to the facts of the present case and, therefore, may be extracted hereinbelow: (SCC p. 518, para 10) '*10.* (*ii*) The rules of the pleadings do not strictly apply as the claimant is required to make an application in a form prescribed under the Act. In fact, there is no pleading where the proceedings are suo motu initiated by the Tribunal.

* * *

(*v*) Though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in an adversarial litigation. …

(*vi*) The Tribunal is required to follow such summary procedure as it thinks fit. It may choose one or more persons possessing special knowledge of and matters relevant to inquiry, to assist it in holding the

enquiry.'

9. The following further observation available in para 10 of the Report would require specific note: (*Shila Datta case*, SCC p. 519)

'*10.* … We have referred to the aforesaid provisions to show 5 that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a dispute, but a statutory determination of compensation on the occurrence of an accident, after due enquiry, in accordance with the statute.'"

In para 10 of *Dulcina Fernandes*, the Court opined that non-examination of witness per se cannot be treated as fatal to the claim set up before the Tribunal. In other words, the approach of the Tribunal should be holistic analysis of the entire pleadings and evidence by applying the principles of preponderance of probability."

The Supreme Court in the case of **Halappa Vs. Malik Sub.** reported in **(2018) 12 SCC 15** has held as under:-

"8. The judgment of the Tribunal indicates that the defence of the insurer based on the first information report, the complaint Ext. P-1 and the supplementary statement of the appellant at Ext. P-2 was duly evaluated. The Tribunal, however, observed thus:

"… Respondent 3 and RW 1 submitted that the petitioner has invited the alleged unfortunate accident but except the FIR and complaint Ext. P-1 Respondent 3 has not produced any documents to show that at the time of accident the petitioner was travelling as a passenger by sitting on the engine of the tractor in question. During the course of cross-examination RW 1 has admitted that Respondent 3 has maintained a separate file in respect of accident in question and he has also admitted that Respondent 3 has not produced the investigator's report of this case. Admittedly Respondent 3 has not examined any independent eyewitness to the accident to prove that on the relevant date and time of the accident the petitioner was travelling as a passenger by sitting on the engine of the tractor. If really the petitioner has sustained grievous injuries by falling down from the engine of said tractor

Respondent 3 insurer could have produced the separate file maintained by it in respect of the accident in question and it could have also produced investigator's report in respect of the said accident but admittedly Respondent 3 has not produced the said separate file and investigator's report in respect of the accident in question for the reasons best known to it. On the other hand as already stated above it is clear from the statement of petitioner on oath and eyewitness and from the supplementary statement of petitioner at Ext. P-2 and police statement of witnesses at 6 Ext. P-3 and charge-sheet at Ext. P-6 it is clear that due to rash and negligent driving of said tractor by Respondent 1 the said tractor turtled down and fell over the petitioner who was about to board the tractor and as a result of which the petitioner has sustained grievous injuries. Moreover as already stated above the Investigating Officer concerned after detail investigation has filed the charge-sheet against Respondent 1 for the offences punishable under Sections 279 and 338 IPC…"

9. The High Court has proceeded to reverse the finding of the Tribunal purely on the basis that the FIR which was lodged on the complaint of the appellant contained a version which was at variance with the evidence which emerged before the Tribunal. The Tribunal had noted the admission of RW 1 in the course of his cross-examination that the insurer had maintained a separate file in respect of the accident. The insurer did not produce either the file or the report of the investigator in the case. Moreover, no independent witness was produced by the insurer to displace the version of the incident as deposed to by the appellant and by PW 3. The cogent analysis of the evidence by the Tribunal has been displaced by the High Court without considering material aspects of the evidence on the record. The High Court was not justified in holding that the Tribunal had arrived at a finding of fact without applying its mind to the documents produced by the claimant or that it had casually entered a finding of fact. On the contrary, we find that the reversal of the finding by the High Court was without considering the material aspects of the evidence which justifiably weighed with the Tribunal. We are, therefore, of the view that the finding of the High Court is manifestly erroneous and

that the finding of fact by the Tribunal was correct."

The Supreme Court in the case of **State of M.P. Vs. Surbhan** reported in **AIR 1996 SC 3345** has held as under :

> **"7**. It is contended that the FIR mentions the names of above persons who were specifically mentioned and it lends corroboration to the evidence of P.W. 2. We find no substance in this contention. The FIR cannot be used as substantive evidence or corroborating a statement of third party, i.e., P.W. 2. FIR cannot be used to corroborate the evidence of P.W.2. It can be used either to corroborate or for contradiction of its maker."

The Division Bench of this Court in the case of **Dhanwanti and others Vs. Kulwant singh and others** reported in **1994 ACJ 708** has held as under :

> "10. ....It is a well settled proposition of law that evidence recorded in criminal court and the findings arrived at thereon should not be used in claim cases. Such evidence for the purposes of claim cases is inadmissible. [See Shabbir Ahmed Vs. M.P.S.R.T.C., Bhopal, 1984 ACJ 525 (M.P.)]"

The co-ordinate bench of this Court in the case of **Oriental Insurance Co. Ltd. Vs. Kamli and others** reported in **2010 ACJ 1340** has held as under :

> "F.I.R. is not a substantive piece of evidence and as such, it cannot be placed on pedestal higher than the statement made before the Claims Tribunal on oath..... therefore, we do not find any illegality in the approach of the Claims Tribunal while coming to the conclusion that the deceased was not travelling in the tractor-trolley."

The Supreme Court by judgment dated 14.2.2019 passed in

Civil Appeal No.1665/2019 (**Sunita and Ors. Vs. Rajasthan State Road Transport Corporation & Anr.)** has held as under :-

> "20..... It is thus well settled that in motor accident claim cases, once the foundational fact, namely, the actual occurrence of the accident, has been established, then the Tribunal's role would be to calculate the quantum of just compensation if the accident had taken place by reason of negligence of the driver of a motor vehicle and, while doing so, the Tribunal would not be strictly bound by the pleadings of the parties. Notably, while deciding cases arising out of motor vehicle accidents, the standard of proof to be borne in mind must be of preponderance of probability and not the strict standard of proof beyond all reasonable doubt which is followed in criminal cases."

In the present case the claimant has examined one Anand Samadhiya (P.W.2) as an eye witness. Satish Chandra Upadhyaya (P.W.1), who is the husband of the deceased Chandrakumari was not present on the spot and he is not an eye witness. Anand Kumar Samadhiya (P.W.2) has stated in paragraph 5 of his cross-examination that Satish (P.W.1) is not known to him and he resides at a distance of 50 to 60 k.m. away from the house of Satish (P.W.1). It is also admitted by this witness that Satish P.W.1 had come to his house one day prior to recording of his evidence and had requested this witness to depose in the Court. He had further stated in paragraph 6 of his cross examination that prior to 09/02/2009

(i.e. the date of the accident) Satish (P.W.1) had never met with him. He further denied that he was on visiting term with Satish (P.W.1). Thus, there is a serious doubt as to how Satish (P.W.1) came to know that Anand (P.W.2) is an eye witness of the incident.

Although, Anand (P.W.2) in paragraph 12 of his evidence has tried to explain that he had given his mobile number to one of the injured Jamantri but Satish (P.W.1) has not stated that he had informed the mobile number of Anand (P.W.2). Therefore, if the discrepancy in the evidence of Satish (P.W.1) and Anand (P.W.2) are considered in the light of the FIR Ex.P/1, then it is clear that in fact the deceased Chandrakumari was not standing by the side of the road but in fact she was traveling in the trolley, which was attached to the offending tractor.

It is accordingly held that the findings recorded by the Claims Tribunal that the deceased was traveling in the trolley and was not standing by the side of the tractor are based on due appreciation of evidence and accordingly, they are affirmed and the insurance company is exonerated from its liability. However, the question for consideration that whether the principle pay and recover would apply or not.

This Court in the case of **Kalicharan alias Kallu Kushwah Vs. Gulab Singh and others** passed in **M.A.No.1161/2005** decided on 26/03/2019 has held as under :-

> 10. In the present case, the Insurance Policy was filed by the claimant himself which has not been disputed by any of the parties. Thus, without applying the doctrine of strict proof, it is held that the Tractor and Trolley were insured for agricultural purposes and the deceased was travelling in the trolley and she was not covered under the Insurance Policy. Thus, it is clear that there was a violation of Insurance Policy and thus, the Insurance Company is not jointly and severally liable along with the owner and driver.
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> 11. However, in the light of the judgments passed by the Supreme Court in the cases of **Shivaraj Vs. Rajendra** reported in **(2018) 10 SCC 432, Amrit Paul Singh and Another vs. TATA AIG General Insurance Co. Ltd and Others** reported in **2018(3) TAC 1 (SC)** and **Shamanna and Another vs. Divisional Manager, Oriental Insurance Company Limited and Others** reported in **(2018) 9 SCC 650**, the Insurance Company is held liable to pay compensation amount with liberty to recover the same from the owner of the tractor.

Insurance is a statutory contract between the insured and insurer. By which, the insurer indemnifies the insured against

all the compensation, which may be claimed against him. However, the insurance company can avoid its liability on the ground that the terms and conditions of the insurance policy were violated by the insured. Therefore, it is an inter se dispute between the insured and the insurer. If the insurance company is of a view that the conditions of the insurance policy were violated and it is not responsible to pay the compensation, then the insurance company can always recover the amount from the insured. Since, the insurance company has the right to recover the amount by execution of the impugned award itself and is not required to institute a separate suit, therefore, it is held that although the insurance company is exonerated due to violations of the conditions of insurance policy but it shall satisfy the award with a right to recover the compensation amount from the owner/driver.

So far as, the question of quantum is concerned, undisputedly the deceased was a house hold lady. The Supreme Court in the case of **Arun Kumar Agrawal and Ors. Vs. National Insurance Company and Ors.** reported in **(2010) 9 SCC 218** passed in **Civil Appeal No.5843/2010** has held as under :-

51. In India the Courts have recognised that the contribution made by the wife to the house is invaluable and cannot be computed in terms of money. The gratuitous services rendered by wife with true love and affection to the children and her husband and managing the household affairs cannot be equated with the services rendered by others. A wife/mother does not work by the clock. She is in the constant attendance of the family throughout the day and night unless she is employed and is required to attend the employer's work for particular hours. She takes care of all the requirements of husband and children including cooking of food, washing of clothes, etc. She teaches small children and provides invaluable guidance to them for their future life. A housekeeper or maidservant can do the household work, such as cooking food, washing clothes and utensils, keeping the house clean etc., but she can never be a substitute for a wife/mother who renders selfless service to her husband and children.

52. It is not possible to quantify any amount in lieu of the services rendered by the wife/mother to the family i.e. husband and children. However, for the purpose of award of compensation to the dependents, some pecuniary estimate has to be made of the services of housewife/mother. In that context, the term `services' is required to be given a broad meaning and must be construed by taking into account the loss of personal care and attention given by the deceased to her children as a mother and to her husband as a wife. They are entitled to adequate compensation in lieu of the loss of gratuitous services rendered by the deceased. The amount payable to the dependants cannot be diminished on the ground that some close relation like a grandmother may volunteer to render some of the services to the family which the deceased was giving earlier.

53. In Lata Wadhwa v. State of Bihar (supra), this Court considered the various issues raised in the writ petitions filed by the petitioners including the one relating to payment of compensation to the victims of fire accident which occurred on 3.3.1989 resulting in the death of 60 persons and injuries to 113. By an interim order dated 15.12.1993, this Court requested

former Chief Justice of India, Shri Justice Y.V. Chandrachud to look into various issues including the amount of compensation payable to the victims. Although, the petitioners filed objection to the report submitted by Shri Justice Y.V. Chandrachud, the Court overruled the same and accepted the report. On the issue of payment of compensation to housewife, the Court observed:

> "So far as the deceased housewives are concerned, in the absence of any data and as the housewives were not earning any income, attempt has been made to determine the compensation on the basis of services rendered by them to the house. On the basis of the age group of the housewives, appropriate multiplier has been applied, but the estimation of the value of services rendered to the house by the housewives, which has been arrived at Rs.12,000 per annum in cases of some and Rs.10,000 for others, appears to us to be grossly low. It is true that the claimants, who ought to have given data for determination of compensation, did not assist in any manner by providing the data for estimating the value of services rendered by such housewives. But even in the absence of such data and taking into consideration the multifarious services rendered by the housewives for managing the entire family, even on a modest estimation, should be Rs.3000 per month and Rs.36,000 per annum. This would apply to all those housewives between the age group of 34 to 59 and as such who were active in life. The compensation awarded, therefore, should be recalculated, taking the value of services rendered per annum to be Rs.36,000 and thereafter, applying the multiplier, as has been applied already, and so far as the conventional amount is concerned, the same should be Rs.50,000 instead of Rs.25,000 given under the Report. So far as the elderly ladies are concerned, in the age group of 62 to 72, the value of services rendered has been taken at Rs.10,000 per annum and the multiplier applied is eight. Though, the multiplier applied is correct, but the values of services rendered at Rs.10,000 per annum, cannot be held to be just and, we, therefore, enhance the same to Rs.20,000 per annum. In their

> case, therefore, the total amount of compensation should be redetermined, taking the value of services rendered at Rs.20,000 per annum and then after applying the multiplier, as already applied and thereafter, adding Rs.50,000 towards the conventional figure."
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> (emphasis supplied)

The Claims Tribunal has assessed the yearly income of the deceased as Rs.15,000/-. The schedule II of the Section 163-A of M.V.Act was inserted in the year 1994, whereas the accident took place in the year 2009, therefore, considering the price index and hike in the prices of the living standard as well as the considering the services which the deceased must be rendering to her family, it is held that the income of the deceased of Rs.15,000/- per year assessed by the Claims Tribunal is on lower side. Accordingly, her income is assessed Rs.30,000/- per year.

Accordingly, it is held that the claimants are entitled for the following compensation amount.

Yearly Income	:	Rs.30,000/-
Personal Expenses 1/3	:	Rs.10,000/-
Loss of yearly Income	:	Rs.20,000/-
Multiplier 13	:	Rs.2,60,000/-
Funeral Expenses	:	Rs.2,000/-
Loss of consortium	:	Rs.5,000/-
Loss of Estate	:	Rs.2,500/-

Total	:	Rs.2,69,500/-

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The claims tribunal has awarded Rs.1,39,500/- whereas the claimants are held to be entitled for an amount of Rs.2,69,500/-. however, the appeal has been valued at Rs.1 Lac thus, the appellants are entitled for a further amount of Rs.1 Lac only. The enhanced amount shall carry the interest @ 6% from the date of the filing of the claim petition till realization and the insurance company shall also be liable to satisfy the award with right to recover the amount from the driver/owner.

With the aforesaid modification, the award dated 18/10/2010 passed by Fourth Additional Motor Accident Claims Tribunal, Gwalior in Claim Case No. 107/2009 is hereby affirmed.

The appeal succeeds and is hereby **allowed**.

(G.S.Ahluwalia)
Judge

Pj'S/-