GAHC010121782016

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./350/2016

NATIONAL INSURANCE CO. LTD.
A PUBLIC SECTOR UNDERTAKING, HAVING ITS REGISTERED OFFICE AT KOLKATA, REPRESENTED BY ITS REGIONAL OFFICE AT BHANGAGARH, GUWAHATI, ASSAM-781005

VERSUS

SMTI BABITA SAHA and 6 ORS,
W/O LATE DILIP KUMAR SAHA

2:MISS LIPIKA SAHA

D/O LATE DILIP KUMAR SAHA

3:JYOTIRAJ SAHA

S/O LATE DILIP KUMAR SAHA

4:DHRITIRAJ SAHA

S/O LATE DILIP KUMAR SAHA
PRESENTLY RESIDING AT C/O R.L. SAHA
SANKARNAGAR
LAL GANESH GUWAHATI-34 PERMANENT R/O BAHARIHAT
P.S. TARABARI
DIST. BARPETA
ASSAM. RESPONDENT NOS. 2 TO 4 BEING MINORS ARE BEING REPRESENTED BY THEIR NATURAL GUARDIAN MOTHER I.E. RESPONDENT NO. 1

5:ANJANEYULU B
S/O SUBBA RAO

R/O DOOR NO. 1-56
GARAVA AJJAMARU
AKIVIDU
ANDHARA PRADESH
PIN 531235

6:GANAPATHI Y
S/O VANA BABU
R/O JAWAHARPETA
AKIVIDU
DIST. WEST GODAWARI
ANDHRA PRADESH.

7:UNITED INDIA INSURANCE CO. LTD.

DIVISION-1
ULUBARI
G.S. ROAD
GUWAHATI-

Advocate for the Petitioner : MS.L SHARMA

Advocate for the Respondent : MS C BORAH

BEFORE
HONOURABLE MR. JUSTICE DEVASHIS BARUAH

JUDGMENT AND ORDER (CAV)

Date : 11-08-2022

1. Heard Mr. B. J. Mukherjee, the learned counsel appearing on behalf of the Appellant and Mr. M. Bhuyan, the learned counsel appearing on behalf of the Respondent Nos. 1 to 4. I have also heard Mr. M. Choudhury, the learned counsel appearing on behalf of the Respondent No.7.

2. This is an appeal under Section 173 of the Motor Vehicles Act, 1988 challenging the judgment and award dated 10.06.2016 passed by the learned Member, MACT No.3, Kamrup (M), Guwahati in MAC Case No.1425 of 2013 thereby awarding a sum of Rs.1,31,72,948/- to the Respondent No.1 together

with interest @ 7.5% per annum with effect from the date of filing of the claim petition till realization.

3. The instant appeal has been filed primarily on three grounds which are as hereinunder:

(i) That the learned Member failed to take into consideration that there was a contributory negligence on the part of the deceased which led to accident and consequently, the said award could not have been passed thereby fastening the entire liability upon the insurance company.

(ii) There was no deduction of Income Tax on the future income of the deceased for which the computation of the award was erroneous by the learned Member MACT No.3. Kamrup (M), Guwahati.

(iii) The Tribunal also erred in law in awarding higher compensation on account of funeral and travelling expenses, loss of consortium to wife and loss of love and affection to children.

4. For deciding the tenability of said grounds of objections so taken in the said Memo of Appeal, it would be relevant to take note of the brief facts of the case. For the purpose of convenience, the parties herein are referred to in the same status as they stood before the Tribunal.

5. The case of the claimant is that on 16.07.2013 at around 12.45. pm, the deceased Late Dilip Kumar Saha (husband of the Claimant No.1 and father of Claimant No.2 to 4) was sitting in his Maruti Car parked in the left side of the road at Bandarkhowa on the National Highway 31. A truck bearing Registration No. AP-27-W-4697 coming from Barpeta Road side towards Manikpur, Bijni dashed against the standing Maruti Car. Consequently, as a result of the said accident, Late Dilip Kumar Saha sustained injuries and died on the spot. The accident was investigated by Sarbhog Police Station vide P.S. Case No.176/2013 under Section 279/304(A) IPC. In the claim petition, it was pleaded that on the

date of death, Late Dilip Kumar Saha was aged about 48 years 10 months 28 days and was working as Associate Professor, Department of Mathematics, Dudhnoi College, having a monthly salary of Rs.98,650/- The offending truck which caused the accident was insured with O.P. No.1 vide Policy No. 561001311263650019 78 which was valid up till 12.01.2014. The said Truck was driven by O.P. No.3 having valid Driving License.

6. The record shows that O.P. No.1 who is the appellant herein had filed its written statement denying that there was rash and negligent driving against the vehicle AS-25-C-7379 (the vehicle wherein the deceased Late Dilip Kumar Saha was sitting). It was mentioned that the vehicle No. AS-25-C-7379 was driven in violation to the provisions of Motor Vehicles Act. It was mentioned that the deceased did not die on 16.07.2013 due to rash and negligent driving of the vehicle bearing Registration No. AP-27-W-4697 or due to the accident that took place on 16.07.2013 under Sarbhog P.S. It was mentioned that there was no driving license as mentioned in the claim petition and the driver was driving the vehicle without a valid license for which the O.P. No.1 was not liable to indemnify the owner due to violation of the policy conditions if any, policy issued. However, it is very pertinent to mention that there was no pleadings as regards contributory negligence. The O.P. No.4 had filed the written statement. Relevant to mention that the O.P. No.4 is the Insurance Company of the Vehicle AS-25-C-7379 wherein the deceased Late Dilip Kumar Saha was sitting. In the said written statement, the O.P. No.4 admitted the issuance of Insurance Policy in respect to the vehicle No.AS-25-C-7379. It however denied the claim petition under Section 166 of the M.V. Act as not maintainable in law against the said Opposite Party No.4 in the present form.

7. The O.P. Nos. 2 and 3 who were the owner and driver of the truck bearing

Registration No. AP-27-W-4697 did not contest the case by filing written statement and the case proceeded ex-parte against them. Upon the said pleadings as many as two issues were framed which were:

(i) Whether deceased Dilip Kumar Saha died in the alleged road accident dated 16.07.2013 involving vehicle No. AP-27W-4697 (Truck) and AS-25-C-7379 (Maruti Car) and whether the said accident took place due to the rash and negligent driving of the driver of the offending vehicle ?

(ii) Whether the claimants are entitled to get any compensation and if yes, to what extent and by whom amongst the opposite parties, the said compensation amount will be payable ?

8. During the trial in support of the claim petition, the claimant examined herself as PW-1, Dr. Gopal Phukan as PW-2 and Sri. Ramendra Bhowmik as PW-3 and proved some documents. The Opposite Parties did not adduced any evidence.

9. Before further proceedings it would be relevant to mention that from the evidence of PW-1, it would be seen that the Claimant No.1 had specifically stated that on 16.07.2013, the vehicle bearing Registration No. AP-27-W-4697 (Truck) was coming from Barpeta Road side towards Manikpur, Bijni side and the said Truck was driven by the driver in a rash and negligent manner, and due to such driving the said truck knocked/dashed the vehicle bearing Registration No. AS-25-C-7379 (Maruti Car) which was in a stop position on the left side of the road at about 12.45 PM at Bandarkhowa on NH-31. The PW-1 further stated that at the time of the accident, Late Dilip Kumar Saha was sitting on the front side alongwith her in the said Maruti Car. She further stated that she saw the accident and had sustained injuries in the said accident and has submitted the claim petition being MAC Case No.1037/14 before the MACT,

Kamrup (M) Guwahati. Further to that, she stated that the occupation of her husband was Associate Professor, Department of Mathematics, Dudhnoi College, Dudhnoi and his monthly salary was of Rs.98,650/-. For the purpose of proving the said, the Plaintiff Witness No.1 exhibited the Motor Accident Information report (Exhibit-1), the certified copy of Post-Mortem (Exhibit-2), certified copy of the charge sheet in G.R. Case No.3973/13 (Exhibit-3), salary certificate of the deceased for the month of June, 2013 (Exhibit-4), monthly salary statement of the deceased from March, 2013 to June, 2013 (Exhibit-5), age certificate of the deceased (Exhibit-6), Driving License of the deceased (Exhibit-7), Identity Card of the deceased (Exhibit-8), PAN Card of the deceased (Exhibit-9). In the cross-examination of the Plaintiff Witness No.1, it would be seen that except putting question to the effect that two vehicles were involved in the accident which took place under the Sarbhog P.S., nothing could be taken out during the said cross-examination to show that there was any contributory negligence. It may be relevant herein to mention that the Plaintiff Witness No.1 stood to her stand taken in her evidence-on-chief.

10. The PW-2 was the Principal of Dudhnoi College, Goalpara who appeared before the Tribunal upon receipt of summons. He proved the Exhibit-4, i.e. the salary certificate. He produced Exhibit-10 which is the monthly salary bill for the month of June, 2013 and proved that the deceased's name appeared at Serial No.10. He further proved Exhibit-11 which was the passbook of the deceased. Exhibit-12 was brought on record which was a copy of transit book of Dudhnoi College, Dudhnoi which showed that for the Financial year 2012-13, the deceased's total Income Tax was Rs.1,32,860/- + Rs.24,366/- i.e. Total Rs.1,57,226. Further to that , he also proved the Exhibit-13 which was the document to show that the deduction and the deposit of Income Tax of the

employees of the Dudhnoi College as well as Exhibit-14 which was the Income Tax deducted for the month of February, 2013. During the cross-examination, it would show that there was nothing substantial which could be taken out from the stand so taken by the PW-2 in his evidence.

11. The PW-3 was the Income Tax Officer, Goalpara who proved the Exhibit-15 i.e. the Income Tax return of Late Dilip Kumar Saha for the Assessment Year 2013-14, Financial Year 2012-13. According to the Income Tax return, it was mentioned that the total salary was Rs.12,29,564/- and the taxable income after deduction was Rs.11,29,560/- and Late Dilip Kumar Saha had paid Tax of Rs.1,57,226/-. He further mentioned that the actual Tax was Rs.1,73,934/- but Late Dilip Kumar Saha got relief under Section 89 of the Income Tax Act, 1961 of an amount of Rs.16,709/- and thus his total payable income tax was Rs.1,57,226/-. He further proved Exhibit-16 which is the processing order under Section 143 (1) of the Income Tax Act. In the cross-examination also nothing substantial could be brought on record.

12. The Opposite Party No.1 i.e. the appellant herein did not adduce any evidence. However, the Opposite Party No.4 i.e. United India Insurance Company adduced evidence through the Assistant Manager. A perusal of the said evidence on affidavit of the Assistant Manager of the O.P. No.4 would show that the O.P. No.4 was not liable to pay any compensation. During the cross-examination, the Assistant Manager of O.P. No.4 said that he did not see the accident neither he had submitted any investigation report before the Tribunal.

13. The learned Member, MACT vide a judgment and award dated 10.06.2016 came to a finding that the offending truck i.e. the vehicle registered as AP-27W-4697 was driven in a rash and negligent manner and as such held that the road traffic accident solely occurred due to rash and negligent driving of the

offending vehicle and resultantly the deceased expired. As regards the Issue No.2, the Tribunal below came to a finding that an amount of Rs.1,31,73,000/- was the just and reasonable compensation and awarded an interest of @7.5% from the date of filing of the claim petition i.e. 19.08.2013 till payment from the O.P. No.1 i.e. the National Insurance Company. It is against the said award that the instant appeal has been filed on the ground as aforementioned.

14. The first ground is taken as of contributory negligence. In the instant case, it would be seen that there is no pleadings as regards contributory negligence in the written statement taken by the Opposite Party No.1. No evidence has been adduced by the Opposite Party No.1 to show that there was any contributory negligence. In the evidence of the claimants, the Plaintiff Witness No.1 had categorically stated that the vehicle wherein the deceased was in a standing position on the left side of the road when the offending vehicle had dashed against the said vehicle in question. Nothing could be culled out during the cross-examination from the Plaintiff Witness No.1 who was an eye witness of the said accident except the statement to the effect that the two vehicles were involved in the accident. In the charge sheet so submitted though, there was a mention that while the Maruti Car bearing No. AS-25-C-7379 wherein the deceased alongwith his family was travelling, the accident happened but there was no evidence brought on record that it was due to the fault of the Maruti Car which had led to the said accident. In this regard, this Court deems it proper to refer to a judgment of the Supreme Court in the case of ***K. Anusha and Others Vs. Regional Manager Sriram General Insurance Company Ltd.*** *reported in* ***MANU/SC/1100/2021*** wherein at Paragraphs 11, 12 and 13, the Supreme Court while approving the judgment in the case of ***Astley Vs. Austrust Ltd.*** of the High Court of Australia held that whereby negligence of

one party, another party is in a situation of danger, compelling the other party to act quickly in order to extricate himself, it does not amount to contributory negligence. This Court in the case of ***Dibyajyoti Moran Vs. Manoj Kumar Ladia and others*** *reported in* ***(2021) 6 GLR 403*** while relying upon the said judgment of the Supreme Court observed at Paragraph Nos. 5 and 6 and 7 as hereinunder:

> "***5.*** *I have perused the written statement filed by the respondent No. 3 and surprisingly there is no shred of any pleadings as regards contributory negligence. Though, it is a trite principle of law that without pleadings, there cannot be any evidence led, then also upon perusal of the evidence on record, it is seen that there is no shred of evidence even adduced by the respondent No. 3 to prove contributory negligence. Under such circumstances, I am of the opinion, that the reduction of the compensation amount by 50% on the ground of contributory negligence in the impugned award is liable to be interfered with. In this regard, it may be relevant to refer to a very recent judgment of the Supreme Court dated 6.10.2021 passed in the case of K. Anusha v. Regional Manager, Shriram General Insurance Co. Ltd., wherein at paragraphs 11, 12 and 13 the Supreme Court, while approving the judgment in the case of Astley v. Austrust Ltd. of the High Court of Australia, held that where, by the negligence of one party another party in a situation of danger, compelling the other party to act quickly in order to extricate himself, it does not amount to contributory negligence. Paragraphs 11,12 and 13 of the said judgment is quoted here-in-below*
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> > '***11****. The first grievance of the appellants about the finding of contributory negligence is liable to be sustained for three reasons namely, (i) that even according to the Tribunal and the High Court, the spot where the lorry was parked, as indicated in Exhibits P-1 to P-6 (FIR, complaint, spot magazar, etc.) and Exhibit P-22 (spot, sketch), was not a parking place; (ii) that according to the High Court, the driver of the lorry ought to have parked the vehicle on the left side of the road by giving proper indication/signal, but it was not done; and (iii) that as per the finding of the High Court, the accident occurred at about 4.30 a.m. when the lighting should have been poor.*
> >
> > ***12.*** *The view expressed by the High Court to effect that if the driver of the car had been vigilant and driving the vehicle carefully following the traffic rules, the accident would not have happened, is presumptuous and not based on any evidence. There was nothing on record to indicate that the driver of the car was not driving at moderate speed nor that he did not follow traffic rules. On the contrary, the High Court holds that if the lorry had not been parked on the highway, the accident would not have happened even if the car was driven at*

a high speed.

***13**. Therefore, the entire reasoning of the High Court on Issue No. 1 is riddled with inherent contradictions. To establish contributory negligence, some act of omission, which materially contributed to the accident or the damage, should be attributed to the person against whom it is alleged. In Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi, this court quoted a decision of the High Court of Australia v. Austrust Ltd. to hold that "…where, by his negligence, one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence, if that other acts in a way which, with the benefit of hindsight is shown not to have been the best way out of the difficulty". In fact, the statement of law in Swadling v. Cooper, that "the mere failure to avoid the collision by taking some extraordinary precaution, does not in itself constitute negligence." was also quoted with approval by this court. Therefore, we are compelled to reverse the finding of the Tribunal and the High Court on the question of contributory negligence.'*

***6.** A perusal of the evidence of Shri Anjan Saikia (CW-2) and the evidence of Raj Ratnam Gogoi (CW-3), who were the eye witnesses to the accident, they stated on oath that the Maruti Car registration No. As-03-G-7556, which was coming from the opposite direction, suddenly tried to overtake another vehicle and come to the wrong side of the road and directly dashed against the motorcycle in which the claimant suffered injury along with Bidyut Vikash Moran. The evidence goes to show that the claimant suffered grievous injuries, whereas, Sri Bidyut Vikash Moran, who was the pillion rider, had succumbed to his injuries. In the cross-examination, the evidence given by the witness Nos. 2 and 3 could not be dislodge.*

***7.** Under the above circumstances, the question of contributory negligence does not arise in the facts of the instant case and accordingly the claimant is entitled to the hundred per cent of the compensation amount."*

15. It would be therefore seen that the question of contributory negligence so raised, does not arise in the instant case. More so, when there is no pleadings or evidence led in that regard by the Appellant/Opposite Party No.1. The Court below had also rightly observed the same that it was not a case of contributory negligence.

16. The next ground of objection so raised is as regards not deducting 30%

while ascertaining the future prospects. The future prospect which was calculated was done @ 30% of the net salary and the Tribunal while computing loss of dependency had come to a finding that Rs.2,29,845/- was the amount towards future prospects. The said 30% i.e. Rs.2,29,845/- was 30% of Rs.766,151/-. The said amount of Rs.7,66,151/- has been taken into account after deduction of the Income Tax as well as after deducting 1/4th on the ground that the deceased left behind his wife and three children. Therefore, the said amount of Rs.2,29,845/- was arrived at after taking into consideration the Income Tax. Accordingly, the said amount has been rightly arrived at by the learned Court below in deciding the further prospects.

17. The third ground which have been taken was that the amount of compensation so given on statutory heads i.e. Funeral and Travelling Expenses Rs.25,000/-, Loss of consortium to wife Rs.1,00,000/-, Loss of love and affection to children Rs.1,00,000/- was on the basis of the judgment of the Supreme Court in the case of ***Rajesh Vs. Rajbir Singh*** *reported in* ***(2013) 9 SCC 54***. The learned Tribunal had delivered the said judgment at the time when the law as regards the compensation on statutory heads was laid down by the Supreme Court in the case of ***Rajesh (supra)***. Subsequently, vide the Constitution Bench in the case of ***National Insurance Company Ltd. Vs. Pranay Sethi*** *reported in* ***(2017) 16 SCC 680*** had laid down the guidelines as regards the compensation. On the conventional heads namely loss of a state, loss of consortium and funeral expenses to be Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively and the said amount should be enhanced @ 10% in every 3 years. The said judgment was delivered on 31.10.2017.

18. Subsequent to the exposition of the said law in ***Pranay Sethi (supra)***, the Supreme Court in various judgments i.e. in the case of ***Magma General***

Insurance Company Ltd. Vs. Narayana *reported in* ***(2018) 18 SCC 130, New India Assurance Company Ltd. Vs. Somwati and Others*** *reported in* ***(2020) 9 SCC 644*** as well as in ***United India Insurance Company Ltd. Vs. Sathinder Kaur alias Sathbindar Kaur and Others*** *reported in* ***(2021) 11 SCC 780*** have categorically held that loss of consortium would not only include spousal consortium but also parental consortium and filial consortium. Taking into account the judgment and award passed by the learned Tribunal below was at the time when the law prevailing as per ***Rajesh (supra)*** and further taking into account the recent judgments of the Supreme Court after Pranay Sethi and there would be no material differences in the compensation so awarded, this Court is of the opinion that no case for interfering with the award of Rs.1,31,73,000/- is made as regards the quantum.

19. Under such circumstances, this Court is of the opinion that the award dated 10.06.2016 passed in MAC Case No.1425/2013 does not call for any interference. Before parting with the record, it is also relevant to take note of that this Court while admitting the appeal on 02.01.2017 in I.A.(C) No.1942/2016 had directed the appellant to deposit 50% of the awarded amount before the Registry of this Court within a period of 1 (one) month. This Court had further directed that in terms with the award, the Registry shall keep 25% of the deposited amount in a Fixed Deposit account in a Nationalised Bank in the name of O.P. Nos. 2 to 4 for the benefit of the minor children and permit the O.P. No.1 to withdraw 25% of the deposited amount after proper identification. The 50% of the balance deposited amount shall be kept in a Fixed Deposit in the Nationalised Bank which shall be subject to the result of the appeal.

20. It further appears from the Office Note that the appellant Insurance

Company had deposited an amount of Rs.65,86,500/- before the Registry of this Court. It further appears on record that the claimant No.1 have received a cheque of Rs.16,46,625/-. The remaining amount which have been kept in the Fixed Deposit as directed by this Court vide the order dated 02.01.2017 shall be released to the claimants upon Bank details being furnished to the Registry of this Court.

21. As has been stated hereinabove, only an amount of Rs.65,86,500/- have deposited by the appellant Insurance Company in pursuance to the order dated 02.01.2017, the appellant Insurance Company is directed to deposit the remaining after deducting the amount of Rs.65,86,500/- before the Tribunal within a period of 6 (six) weeks from today. The Tribunal is directed to invest the said amount so deposited on long term Fixed Deposit in the nearest Nationalised Bank in the name of the Claimants in equal proportion in the area where the claimants resides with a condition that the Bank will not permit any loan or advance and interest accrued on the said amount would be paid annually, directly to the claimants in equal proportion. It is also directed that upon an application made by the claimants or any one of them, the above condition can be modified by the Tribunal in exceptional circumstances if made out by the claimant(s) that there is a necessity that the claimants require the amount or part thereof.

22. Accordingly, the instant appeal stands disposed of.

23. Return the LCR to the Court below.

JUDGE

Comparing Assistant