A.F.R.

Court No. - 6

Case :- FIRST APPEAL FROM ORDER No. - 169 of 2007

Appellant :- Smt.Madhuri Devi
Respondent :- Smt.Mamta Gulati And Another
Counsel for Appellant :- R.P.Tripathi
Counsel for Respondent :- Ashok Mehrotra

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Hon'ble Jaspreet Singh,J.

This appeal has been filed by the claimant under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award dated 06.11.2006 passed by A.D.J., Court No.1, Lucknow in Claim Petition No.40/2004 (Smt. Madhuri Devi vs. Smt. Mamta Gulati), whereby the claim petition of the appellant has been dismissed.

The Court has heard Shri R.P. Tripathi, learned counsel for the appellant and Shri Ashok Mehrotra, who has appeared on behalf of the respondent No.2. None appeared on behalf of the respondent No.1, consequently, the appeal has been heard exparte against her.

The primary contention of the learned counsel for the appellant is that the Tribunal has erred in dismissing the claim petition on the ground that merely because an FIR of the accident concerned was not lodged, this fact prevailed in the mind of the Tribunal and on the aforesaid ground, the claim petition has been dismissed.

It has been urged that the claimant was able to substantiate its case by filing documentary and oral evidence including by producing an eye witness who was examined and was cross-examined by the respondent and despite no contradiction in his testimony was noticed and he established the fact of the accident including the death of the deceased yet ignoring the evidence and taking a hyper-technical view, the Tribunal has erred in rejecting the claim petition.

Per contra, learned counsel for the respondent argued taking this court through the record indicating that the appellant herself was unable to establish her case and did not bring on record cogent evidence by which the accident could be established and thus it is in view thereof that the Tribunal has rightly rejected the claim petition and the same requires no interference from this Court.

The Court has given consideration to the submissions of the respective parties and the record has also been carefully perused.

The record indicates that the claimant instituted a Claim Petition No.40/2004 wherein she stated that Shri Ram Naresh her husband was engaged in the business of selling vegetables and was able to earn Rs.5,000/- per month from the said business. On the fateful day, he had gone to Mukeempur Choraha under the jurisdiction of the Police Station Sidhauli in District Sitapur and loaded his vegetables on Truck No.HR-37-B-9123. As soon as the truck moved ahead but its carriage was not properly secured and the same accidentally opened as a result of which Ram Naresh, who was also sitting along with his goods, fell down from the moving tuck sustained injuries. He was taken to the Medical College for his treatment, however, he succumbed to his injuries and it is in view thereof that the claimants being the wife and children and mother of the deceased filed the claim petition seeking a compensation of Rs.9,75,000/-.

The owner of the truck namely Smt. Mamta Gulati filed her written statement bearing Paper No.A-6, wherein a general defence was taken that the accident did not occur from the vehicle in question and that there was no documentary evidence supporting the averments made in the claim petition. Thus, it was alleged that all the

averments were false and fabricated. Accordingly, the claim petition is liable to be dismissed, however, the owner further took the defence that the claim made by the claimants was exaggerated and that the claimant whose husband was engaged as a vegetable hawker, he is not entitled to get compensation of more than Rs.3,00,000/-. It was also urged that the vehicle in question was duly insured and, therefore, if at all there is any liability, the same is liable to the indemnified by the insurance company.

Significantly, while filing the written statement, the owner had also annexed a copy of the insurance cover note as well as a copy of the driving licence of the driver of the truck in question, as part of its written statement bearing Paper No.A-6/5 and A-6/6. Thereafter, the owner did not contest and the matter proceeded exparte by means of the order of the Tribunal dated 28.09.2004.

The Insurance Company filed a separate written statement bearing Paper No.A-16 and took the general defence that unless and until the documentary evidence regarding the validity of the driving licence, insurance policy and permit, etc., is placed before the Tribunal on record till then no liability could lie on the insurance company.

Upon pleadings of the parties, the Tribunal framed six issues. While dealing with the Issue No.1 it held that there was not enough evidence by which it could be held that the deceased was travelling on the truck bearing No.HR-37-B-9123 nor the accident occurred on account of rash and negligent driving of the said truck driver.

In view of the finding given in Issue No.1, which was decided in negative, it further went on to consider the Issue No.3 and

considering the driver's licence which was brought on record as paper No.A-6/6, it found that the driver of the truck had a valid and effective driver's licence. While considering the Issues No.4 and 5, the Tribunal found that the truck in question was duly insured with the respondent No.2 i.e. United India Insurance Company Ltd. However, since the factum of the accident was not proved, accordingly it held that if at all there would be a liability the same would be attributable to the respondent No.2. Thus, by means of the award dated 06.11.2006, the Tribunal rejected the claim petition and being aggrieved against the aforesaid award, the claimant preferred the aforesaid appeal.

Upon considering the rival contentions of the parties and upon perusal of the record, it indicates that the Tribunal has been swayed by the fact that the FIR of the incident was not lodged. It went on to consider that since the claimant did not produce any evidence on record nor any employee of the transport company with which the truck in question was under contract nor the claimant produced the driver as a witness, consequently there was not enough evidence to find that the accident had occurred and that the deceased sustained injuries and ultimately met his maker on account of the aforesaid accident.

This Court finds that the reasoning adopted by the Tribunal is completely flawed. The Tribunal has failed to consider that so far as the claimant is concerned, they had produced the best evidence that was available with them and examined an eye witness as PW-2 namely Sarvesh Kumar. This witness clearly deposed that on 30.09.1993 he along with Ram Naresh (deceased) had gone to load

the vegetables near Mukeempur crossing on Truck No.HR-37-B-9123. He further clearly deposed that the deceased Ram Naresh sat along with vegetable in the carriage, however, since the carriage was not properly secured accordingly as the truck moved at a little distance, the said carriage opened and as a result, Ram Naresh fell and sustained grievous injuries. He also made a clear statement that he along with other persons available at the site including with the help of the father of the deceased took Ram Naresh to the Medical College Lucknow and after a short treatment at the Medical College he expired. He also brought on record a copy of the entry of the aforesaid incident made in the general diary maintained at Police Station Sidhauli, Sitapur.

The claimants also brought on record documentary evidence in shape of the postmortem report. The receipts of the vegetables commission agent to establish that the deceased was engaged in the business of selling vegetables on commission basis.

This witness Sarvesh Kumar was cross-examined by the respondent Insurance Company and in the entire cross-examination, there is no discrepancy or contradictions in his testimony. On the complete analysis of the evidence of this eye witness, he has been able to establish the fact that the deceased had boarded the truck in question. He had paid consideration and that he fell from the truck in his presence and the deceased Ram Naresh was taken to the medical college, Lucknow for his treatment where after brief treatment, he succumbed to his injuries. Copy of the postmortem report was also brought on record which has been proved and thus, there was enough material to indicate and support the version of the claim

petition.

The claimant herself deposed as PW-1, however that would not be material since she was not an eye witness, however, she has been able to prove her relationship and her dependency. Even this witness was cross-examined but nothing adverse could be elicited from her testimony during her cross-examination. In light of the aforesaid, the claimant discharged their burden and there was nothing more that was required of them to establish their claim.

The significant feature is the fact that the owner of the vehicle Smt. Mamta Gulati filed her written statement and along with the written statement, she had annexed the copies of the driving licence of the driver as well as the cover note of the insurance policy relating to the vehicle in question for the relevant period. Though general defence was taken but the owner failed to contest the proceedings and, therefore, all her contentions and defences raised in the written statement remained unusubstantiated. The Insurance Company also contested the proceedings and though having cross-examined the claimant witnesses but it was unable to shake the testimony or elicit any contradiction which could materially affect the quality of the testimony insofar as the accident is concerned.

In light of the aforesaid, the Tribunal was not justified in shifting the burden on the claimant and to state that the claimant did not bring any evidence by examining the driver or the employee of a transport company to establish the case and even the none filing of the FIR was not a fatal so far as the claim petition is concerned.

The Hon'ble Apex Court in the case of ***Ravi vs. Badrinarayan and others, reported in (2011) 4 SCC Page 693*** observed as

under:-

> *"17. It is well-settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a common man to first rush to the Police Station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the Police Station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the Police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim."*

Moreover, once the defendant had taken the defence that the accident had not occurred yet had filed the copy of the driver's licence and the cover note of the insurance policy along with written statement and thereafter failed to establish her defence and led no evidence despite being aware of the consequences of the proceedings. It was incumbent on the owner to have established her defence and contradict the positive testimony of the eye witness, who was produced on behalf of the claimants. This was not done by the owner. Thus, the owner failed to establish her defence.

The insurer stepped into the shoes of the owner of the vehicle to contest the proceedings but it also failed to produce any evidence nor could elicit any contradictions in the testimony of the claimant witnesses.

Thus, the Tribunal erred in taking a contrary view against the claimant in holding that the driver was not produced by the claimant rather the correct position would be that if the defendant-owner wanted to rebutt the testimony of the claimant witness then it was the duty of the owner to have produced the driver in evidence, who was its employee. In such a case the claimant would have had an

opportunity to cross-examine the said driver or else it is extremely strange that for the claimant to produce the driver as a witness, who naturally would not depose against himself and it would be a self-defeating exercise.

Thus, considering the entire evidence, it is clear that the reasoning of the Tribunal was flawed and it incorrectly shifted the burden on the claimant. It also failed to consider the effect of the documentary and oral evidence led by the claimant which established her case and especially when there was no contrary evidence from the side of the respondent to rebut the same. Thus, the Tribunal below has committed a manifest error in rejecting the claim petition.

The Court is fortified in its view and derives benefit from the recent decision of the Hon'ble Apex Court in the case of ***Sunita & Ors. vs. Rajasthan State Road Transport Corporation & Anr., in Civil Appeal No.1665 of 2019, decided on 14.02.2019*** wherein after considering the earlier decision of ***Mangla Ram vs. Oriental Insurance Company Limited & Ors., (2018) 5 SCC 656***, the Hon'ble Apex Court held as under:-

> *"11. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimant's predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a postmortem report vis-a-vis the averments made in a claim petition.*
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> *14. Some discrepancies in the evidence of the claimant's witnesses might have occurred but the core question before the Tribunal and consequently before the High*

Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying the burden of proof in terms of the provisions of Section 106 of the Evidence Act, 1872 as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by Respondents 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

(emphasis supplied)

The Court restated the legal position that the claimants were merely to establish their case on the touchstone of preponderance of probability and standard of proof beyond reasonable doubt cannot be applied by the Tribunal while dealing with the motor accident cases. Even in that case, the view taken by the High Court to reverse similar findings, recorded by the Tribunal was set aside.

23. Following the enunciation in Bimla Devi case, this Court in Parmeshwari vs. Amir Chand[1] noted that when filing of the complaint was not disputed, the decision of the Tribunal ought not to have been reversed by the High Court on the ground that nobody came from the office of the SSP to prove the complaint. The Court appreciated 7 (2011) 11 SCC 635 21 the testimony of the eyewitnesses in paras 12 & 13 and observed thus: (Parmeshwari case, SCC p. 638)

"12. The other ground on which the High Court dismissed the case was by way of disbelieving the testimony of Umed Singh, PW 1. Such disbelief of the High Court is totally conjectural. Umed Singh is not related to the appellant but as a good citizen, Umed Singh extended his help to the appellant by helping her to reach the doctor's chamber in order to ensure that an injured woman gets medical treatment. The evidence of Umed Singh cannot be disbelieved just because he did not file a complaint himself. We are constrained to repeat our observation that the total approach of the High Court, unfortunately, was not sensitised enough to appreciate the plight of the victim.

1 (2011) 11 SCC 635

13. The other so-called reason in the High Court's order was that as the claim petition was filed after four months of the accident, the same is "a device to grab money from the insurance company". This finding in the absence of any material is certainly perverse. The High Court appears to be not cognizant of the principle that in a road accident claim, the strict principles of proof in a criminal case are not attracted. …"

24. It will be useful to advert to the dictum in N.K.V. Bros. (P) Ltd. v. M. Karumai Ammal[2], 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)

"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 8 (1980) 3 SCC 457 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 nofault 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

2 (1980) 3 SCC 457

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[3], 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[4], 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 that an award by the Tribunal cannot be seen as an adversarial adjudication between the litigating parties to a

3 (2013) 10 SCC 646
4 (2011) 10 SCC 509

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 nonexamination 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 Division Bench judgment of this Court, reported in ***2014 (32) LCD 1533 Shiv Murti Singh vs. Nawab Khan***, also lays down similar proposition and wherein it has held as under:-

"(11) In United India Insurance Company Ltd. Vs. Shila Dutta and others (2011)10 SCC 509, a three Judges Bench of Hon'ble Supreme Court culled out certain underlying principles and propositions for deciding claim petitions under the Act. Some of them as relevant to the facts of present case are :-

1. The rules of the pleadings in principle 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 moto initiated by the Tribunal.

2. That, though the Tribunal adjudicates on a claim and determines the compensation, it does not do so as in adversarial litigation.

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

4. The Tribunal while passing the award makes a statutory determination of compensation on the occurrence of an accident after due enquiry in accordance to the statute.

(12) In Bimla Devi and others Vs. Himachal Road Transport Corporation (2009)13 SCC 530, Hon'ble Supreme Court held that a motor accident claim petition is required to be decided by the Tribunal on the touch stone of preponderance of probability and not on the basis of proof beyond reasonable doubt.

(13) In Dulcina Fernandes and others Vs. Joaguim Xavier Cruz and another, (2013) 31 LCD 2432, Hon'ble Supreme Court following the dictum laid down by it in Shila Dutta and Bimla Devi's Cases (Supra) held that the rules of pleadings do not strictly apply to motor accident claim cases and that the plea of negligence is required to be decided by the Tribunal on the touch stone of

preponderance of probability and not on the basis of proof beyond reasonable doubt."

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.

Thus, this Court is the opinion that the learned Tribunal did not perceive the claim petition in the proper light and also failed to keep the principles of law as extracted above in mind while deciding the claim petition.

Thus, this Court finds that the findings returned by the Tribunal on Issue No.1 is erroneous and is consequently set aside. Though in the aforesaid circumstances, this matter would have been remitted for fresh decision. Since, the claim is of the year 2004 and this appeal has been pending before this Court since 2007 and more than 12 years have lapsed, therefore, it would not be in the fitness of things to remand the matter especially when the Issues No.3, 4 and 5 were already adjudicated by the Tribunal in favour of the claimant and the same have not been disputed by any of the respondents either during the course of arguments or by filing any cross appeal.

In view of the aforesaid facts and circumstances, this Court at

this stage takes upon itself to calculate the compensation payable to the appellant.

In the claim petition the age of the deceased is shown as 30 years and his earnings around Rs.5,000/- per month. He is survived by his wife and three minor children. Though the age of the deceased mentioned in the postmortem is 25 years, however, the claimant herself has stated the age of the deceased as 30 years. Accordingly, the same is taken as 30 years. The multiplier applicable to the deceased for the age group of 26-30, would be of 17 and since the deceased was married and had his wife and three minor children as dependent. Thus for his living expenses 1/4rd shall be deducted to calculate the dependency. Since, there is no established proof of the income of the deceased and a statement was made on oath that the deceased was earning Rs.5,000/- per month. Considering the circumstances, this Court finds that it would be appropriate if the monthly income of the deceased is taken to be Rs.4,000/- per month. Thus, in light of the above, the claimant shall be entitled to get compensation as under:-

Income	: Rs.4,000/- per month
Multiplier	: 17
Deduction towards personal expenses	: Rs.1,000/-
Thus Rs.3,000 x 12 x 17	: Rs.6,12,000/-
Loss of consortium for spouse	: Rs.40,000/-
Loss of Parental consortium	: Rs.40,000/- for minor children
Funeral Expenses	: Rs.15,000/-
Loss of Estate	: Rs.15,000/-
Total	**Rs.7,22,000/-**

The claimant shall be entitled to receive the aforesaid compensation amount of Rs.7,22,000/- along with interest @ 7% per annum from the date of application till the date of actual payment from the respondent No.2.

In the result, the appeal stands allowed and the impugned judgment and award passed by the M.A.C.T./A.D.J., Court No.1, Lucknow dated 06.11.2006 passed in M.A.C.P. No.40/2004 is set aside and the claim petition is allowed in terms above.

There shall be no order as to cost.

The registry is directed to remit the lower court record to the Tribunal concerned within two weeks from today.

Order Date :- 14.02.2019
Rakesh/-