

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 6th MARCH, 2017

S.B. : HON’BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

MAC App. No.25 of 2015

Appellant : The Branch Manager,
National Insurance Company Limited,
Gangtok Branch,
NH 31-A,Gangtok,
P.O. & P.S. Gangtok,
East Sikkim.

versus

Respondents : 1. Shri Pankaj Kumar Balabhai Kapadia,
S/o Late Balabhai Vadilal Kapadia

2. Smt. Daxa Pankaj Kumar Kapadia,
W/o Shri Pankaj Kumar Balabhai Kapadia

3. Shri Raj Ritesh Kapadia,
S/o Raj Ritesh Balabhai Kapadia

All residents of A-7, Prerna Vihar Tower,
Near Rose Wood Estate,
Opposite Gokul Awas,
Jodhpur Village Road,
Jodhpur, Satellite,
Ahmedabad,
Gujarat.

4. Shri Krishna Prasad Giri (Owner),
S/o Late Bhim Lall Giri,
Presently residing at Tintek Busty,
Near Block Development Office,
P.O. Rakdong, P.S. Gangtok,
East Sikkim.

Appearance

Mrs. Vidya Lama, Advocate for the Appellant.

Mr. Ajay Rathi, Ms. Phurba Diki Sherpa and Mr. Pramit Chhetri,
Advocates for the Respondents No.1 to 3.

Mr. Ashok Pradhan, Advocate for Respondent No.4.

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal assails the Judgment and Award dated 30-04-2014 passed by the Learned Motor Accidents Claims Tribunal, North Sikkim at Mangan (for short "Learned Claims Tribunal"), in MACT Case No.14 of 2014.

2. The grounds taken for preferring the Appeal are that, the rash and negligent driving has not been established inasmuch as although a Charge-Sheet was filed against the offending driver before the Magisterial Court under Sections 279/337/338/304A of the Indian Penal Code, 1860 (for short "IPC"), but the Learned Judicial Magistrate, North Sikkim at Mangan, finding no *prima facie* materials, discharged him on 24-11-2014 in G.R. Case No.40 of 2014. Consequently, the rash and negligent act on the part of the driver has remained unproved.

3. That, the Learned Claims Tribunal adopted the multiplier of '14' based on the age of the deceased which is erroneous as it ought to have been calculated on the average age of the Claimants-Respondents No.1 and 2, who are both aged above 60 years.

4. It was also submitted that 30% future prospects was erroneously added by the Learned Claims Tribunal without basis, apart from which it was urged that the body of the deceased victim, namely, Ritesh Balabhai Kapadia, nor the vehicle in accident have been recovered till date, which therefore, flies in the

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

face of Section 108 of the Indian Evidence Act, 1872. It is prayed that the impugned Judgment be set aside.

5. The Respondents-Claimants No.1 to 3 contended that the records would reveal that in fact the witness of the Appellant, Kishore Kumar Subba has himself under cross-examination not disputed the death of the deceased nor was it disputed that the victim was one of the occupants of the vehicle in accident. That, the fact of rash and negligent driving has been established by the evidence of the Claimant's witness No.2, a relative of the deceased also an occupant in the accident vehicle. The witness has clearly stated that the accident occurred due to the rash and negligent driving of Leela Dhar Pokhrel, the driver who despite several requests made to him to drive cautiously continued to speed paying no heed to their request, resulting in loss of control of the vehicle, which fell into the river Teesta. The witness has also deposed that the victim was swept away in the current of the river Teesta along with the accident vehicle. That, according to the Investigating Officer (hereinafter the "I.O.") of the Criminal Case (*supra*), a witness of the Claimants in the instant matter, stated that investigation revealed the cause of accident to be the rash and negligent driving on the part of the driver, hence a Charge-Sheet against the Accused driver was filed under Sections 279, 337, 338/304A of the IPC.

6. With regard to the future prospects, it was argued that the Learned Claims Tribunal has merely relied on the principle laid down in ***Sarla Verma (Smt.) and Others* vs. *Delhi Transport***

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

***Corporation and Another*¹ and *Rajesh and Others* vs. *Rajbir Singh and Others*²** and, therefore, cannot be faulted.

7. Coming to the question of the multiplier to be adopted, reliance has been placed on the decision of ***Amrit Bhanu Shali and Others* vs. *National Insurance Company Limited and Others*³**, which held that, the selection of multiplier is based on the age of the deceased and not on the basis of the age of dependents. Therefore, there is no reason to interfere in the finding of the Learned Claims Tribunal and the same may be allowed to remain undisturbed.

8. I have carefully considered the rival contentions put forth by Learned Counsel, perused the impugned Award and the records of the matter.

9. Briefly narrated the facts are that, the victim along with his family comprising of his wife, daughter, son, sister, brother-in-law and few other family members had gone to Yumthang, North Sikkim, on 27-05-2014 and were returning on 28-05-2014. On their return journey, it was raining and although the deceased and his brother-in-law requested the driver to be cautious, no heed was paid to their advice who after some time due to the reckless driving lost control of the vehicle causing it to go off the road into the river Teesta resulting in the death of the victim, his wife and daughter on the spot.

1. (2009) 6 SCC 121
2. (2013) 9 SCC 54
3. (2012) 11 SCC 738

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

10. Firstly, while visiting the question of the death of the deceased victim, we may briefly refer to the evidence of Kavish Nareshbhai Chokshi, witness No.2 for the Claimant. He was travelling in the vehicle in accident bearing registration No.SK 01 J 0897 along with the deceased. According to him, on their return journey from Yumthang, it was raining but the driver of the vehicle was speeding and driving rashly, near the edge of the road, towards the cliff. When he along with the victim requested the driver to slow down as the weather was not good, he refused to pay heed and continued to drive in the same reckless manner. On reaching near Toong Check Post, the vehicle went off the road, leading to the death of the wife of the witness on the spot, along with the wife and daughter of the victim. The victim was swept away in the current of the river Teesta along with the accident vehicle. His evidence remained uncontroverted. Undisputedly, he is an eye-witness to the accident having been an occupant of the vehicle with the victim and a survivor of the tragic accident which wiped away his family.

11. In tandem with his evidence in the evidence of the father of the victim, i.e., the Claimant/Respondent No.1, according to whom after a frantic search for several days neither the vehicle nor the body of the victim could be traced, while the bodies of the other victims were evacuated by the Police from the spot. To prove the death of the victim, he relied on Exhibit 2, the FIR, which mentions that one of the occupants was swept away in the

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

current of the river Teesta. His evidence too remained uncontroverted.

12. A perusal of Exhibit 2, the FIR, recorded in the Nepali vernacular would reveal that, three women died, while five persons including the driver were seriously injured in the accident and one of the tourists was washed away by the river along with vehicle. The evidence of P.W.3, the I.O. who conducted investigation into the criminal case reveals that the vehicle in question was reportedly swept away by the river Teesta along with one of the tourists. Hence, a careful consideration of the evidence on record fortified by Exhibit 2 would reveal that, the victim was indeed washed away by the river along with the vehicle in accident.

13. Indeed as per Law, a person is believed to be dead only if it is proved that he has not been heard of for seven years by those who would naturally have heard of him, if he had been alive, but in the instant case, the co-occupant of the vehicle has vouched for the presence of the deceased in the vehicle before the accident occurred and thereafter the sequence of events which followed, as a consequence of which the victim was swept away by the river. There is no reason for any of the witnesses to be weaving tales about such an unfortunate event. Thus, in the absence of any evidence to the contrary merely because the body was not recovered, when all evidence points to the victim's demise, I am of the considered opinion that there can be no other conclusion than the fact of death of the victim.

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

14. Coming to the question of rash and negligent driving on the part of the driver, on this count again, the evidence of the Claimant's witness No.2, the survivor of the accident, establishes that despite repeated requests the recalcitrant driver continued driving rashly and speeding along the edge of the road. A finding of a Criminal Court is not binding on the Motor Accidents Claims Tribunal has been concluded in a number of decisions of various High Courts. It is to be reiterated that the standard of proof of "beyond reasonable doubt" being an indispensable requisite in criminal cases is not applicable to a Claim Petition. The Magisterial Court having discharged the offending driver in G. R. Case No.40 of 2014 pertaining to the instant accident, without even framing Charges when an event of such an enormity has taken place is another question which requires to be mulled over, which of course, is not appropriate here.

15. Coming to the question of choice of multiplier, the decision in **Amrit Bhanu Shali**³ (*supra*) requires no further reiteration. It has been ruled therein that the selection of multiplier is to be based on the age of the deceased and not on the age of the dependent.

16. The age of the victim appears to have been calculated as '40 years' or more, pursuant to which the Learned Claims Tribunal has erroneously added 30% as future prospects. In **Sarla Verma**¹ (*supra*) duly followed in **Rajesh**² (*supra*), it has been laid down that "***In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual***

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years.” Perusal of Exhibit 44, a copy of the Passport of the victim reveals his date of birth to be ‘19-12-1974’, the accident having occurred on 28-05-2014, it would make him short of 40 years by a few months. Thus, future prospects cannot be calculated at 30% only, as he was yet to achieve the milestone of 40 years. It would be appropriate to place his future prospects at 50% of his net income. Considering the age of the victim, the multiplier to be adopted in terms of the decision in **Sarla Verma**¹ (*supra*) is ‘15’.

17. With regard to the income of the deceased, the Claimant No.1 asserts that in the month of April, 2014, the victim’s net annual income was shown to be Rs.7,44,014/- (Rupees seven lakhs forty four thousand and fourteen) only, as per the summary in Form 16 for the year 2014-15. Based on the evidence of this witness, the Learned Claims Tribunal has calculated net annual income of the victim as Rs.7,44,014/- (Rupees seven lakhs forty four thousand and fourteen) only. In this regard, Exhibit 51, the Pay Slip of the victim is to be examined. It bears an entry pertaining to Form 16, summary for 2014-15, *inter alia*, giving details of the Gross Salary and Tax deductions. At the same time, there are also columns which indicates the Basic Salary, the House Rent Allowance, Conveyance and Compensatory Allowance as well as Conveyance Expenses of the victim. Another column indicates deductions made from the earnings of the victim of which “Ee PF Contribution” is Rs.4,531/- (Rupees four thousand five hundred and thirty one) only, and

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

"GSLI" is Rs.120/- (Rupees one hundred and twenty) only. In view of the Pay Slip of the deceased it cannot be disputed that his monthly income is the amount reflected therein. Obviously, the contribution in the "Ee PF" and "GSLI" per month would be returnable to the victim and is accordingly added to his net monthly pay. Thus, his net monthly income would be as follows;

$$\text{Rs.56,755/-} + 4,531/- + \text{Rs.120/-} = \text{Rs.61,406/-}$$

18. In such a circumstance, I am inclined to lean in favour of the net pay of the victim being Rs.61,406/- (Rupees sixty one thousand four hundred and six) only, per month, in terms of the Pay Slip of the victim and not Rs.7,44,014/- (Rupees seven lakhs forty four thousand and fourteen) only, as calculated by the Learned Claims Tribunal.

19. In the light of the above discussions and findings, the compensation stands re-calculated and modified as follows;

Monthly income of the deceased		Rs.	61,406.00
Annual income of the deceased	(Rs.61,406/- x 12 months)	Rs.	7,36,872.00
Add 50% of Rs.7,36,872/- as Future Prospects	(+)	Rs.	<u>3,68,436.00</u>
Yearly income		Rs.	11,05,308.00
Less 1/3 rd of Rs.11,05,308/-	(-)	Rs.	<u>3,68,436.00</u>
Net yearly income		Rs.	7,36,872.00
Multiplier to be adopted '15'	(Rs.7,36,872/- x 15)	Rs.	1,10,53,080.00
Loss of estate	(+)	Rs.	2,500.00
Loss of love and affection	(+)	Rs.	<u>10,000.00</u>
Total	=		<u>Rs.1,10,65,580.00</u>

(Rupees one crore, ten lakhs, sixty five thousand, five hundred and eighty) only.

The Branch Manager, National Insurance Company Limited vs. Mr. Pankaj Kumar Balabhai Kapadia and Others

20. The Claimants-Respondents No.1 to 3 shall be entitled to simple interest @ 10% per annum on the above amount with effect from the date of filing of the Claim Petition before the Learned Claims Tribunal until its full realisation.

21. The impugned Judgment of the Learned Claims Tribunal stands modified accordingly.

22. The Appellant is directed to pay the awarded amount to the Claimants-Respondents No.1 to 3 within one month from today, failing which he shall pay simple interest @ 12% per annum from the date of filing of the Claim Petition till realisation, duly deducting the amounts, if any, already paid by the Appellant-Insurance Company to the Claimants-Respondents No.1 to 3.

23. The awarded amount of compensation shall be divided amongst the Claimants-Respondents No.1 to 3, as follows;

- (i) 12.5% of the total award to the Claimant-Respondent No. 1.
- (ii) 12.5% of the total award to the Claimant-Respondent No. 2.

The above amounts are awarded to the Claimants-Respondents No.1 and 2, considering the fact that they are the aged parents of the deceased and would obviously have been dependent on his income.

- (iii) 75% of the total award to the Claimant-Respondent No. 3, out of which 60% shall be kept in a Fixed Deposit in a Nationalised Bank until he attains the age of majority. The remaining 15% shall be expended towards his education and upkeep.

The Branch Manager, National Insurance Company Limited vs. **Mr. Pankaj Kumar Balabhai Kapadia and Others**

24. The Appeal is dismissed.

25. No order as to costs.

26. Copy of this Judgment be sent to the Learned Claims Tribunal for information and compliance.

27. Records of the Learned Claims Tribunal be remitted forthwith.

(Meenakshi Madan Rai)
Judge
06-03-2017

Approved for reporting : **Yes**

Internet : **Yes**