HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

S.B. Civil Misc. Appeal No. **143 / 2002**

1. Pushpa Devi w/o late Gyan Chand Daga,
2. Girish s/o late Shri Gyan Chand Daga,
3. Monika D/o late Shri Gyan Chand Daga,

all by caste Oswal, r/o Jodhpuria Bas, Pali.

Appellant-claimants No.2 & 3 are minors, through their natural guardian and mother, Smt Pushpa Devi w/o late Gyan Chand Daga, appellant claimant No.1.

----Appellants

Versus

1. Sharif Khan s/o Vaseer Khan, by caste Musalman, r/o Kachi Basti, Kishan Pol, Diwan Shah Colony, Udaipur.
2. Rajasthan State Roadways Transport Corporation, Jaipur.
3. Rajasthan State Roadways Transport Corporation, Udaipur Depot, Udaipur.

----Respondents

Connected With

S.B. Civil Misc. Appeal No. **411 / 2002**

1. Rajasthan State Road Transport Corporation, Jaipur through Manager Director, Parivahan Marg, Jaipur.
2. Rajasthan State Road Transport Corporation, through Depot Manager, RSRTC, Udaipur (Raj.)

----Non-applicant-Appellants

Versus

1. Pushpa Devi w/o Shri Gyanchand Daga, age 26 years, by caste Oswal, r/o Jodhpuria Bas, Pali (Raj.)
2. Girish s/o Shri Gyanchand Daga, age 8 years, by caste Oswal, r/o Jodhpuria Bas, Pali (Raj.)
3. Monika D/o Shri Gyanchand Daga, age 3 years, by caste Oswal, r/o Jodhpuria Bas, Pali (Raj.)

{Respondents No.2 & 3 minor, through natural guardian mother Smt Pushpa Devi, respondent No.1)

… Claimant-respondents

4. Sharif Khan s/o Shri Vashir Khan, by caste Musalman, r/o Kachi Basti, Kishan Pole, Diwan Shah Colony, Udaipur (Raj.)

----Non-applicant-Respondents

For Appellant(s) : Mr Ravi Bhansali, Sr. Advocate with Mr Dhanesh Saraswat & Mr Vipul Dharnia

For Respondent(s) : Mr M.R. Pareek for RSRTC

HON'BLE DR. JUSTICE VIRENDRA KUMAR MATHUR

Judgment

Date of pronouncement: (07)/03/2018

The aforesaid Civil Misc. Appeals have been preferred under sec.173 of the Motor Vehicles Act, 1988 against judgment & award dated 31.10.2001 passed by the Motor Accident Claims Tribunal, Pali in MACT Case No.146/2001 (28/97) {Pushpa Devi & others v. Sharif Khan & others}.

The appeal No.143/2002 has been preferred by the claimants, seeking enhancement of compensation amount quantified & awarded vide judgment dated 31.10.2001 whereby the learned Tribunal, on adjudication of the claim of appellants under sec.166 of the Act of 1988 assessed the compensation at Rs.4,15,000/- under different heads. In connected Appeal No.411/2001, the non-applicant-appellant Rajasthan State Road Transport Corporation has prayed to quash & set aside the judgment & award dated 31.10.2001 on various grounds. Both the aforesaid appeals are being considered and decided by this common judgment.

The facts of the case giving rise to these appeals, briefly stated, are that on 16.10.1996 at about 5:00PM Gyan Chand Daga and Rajesh Tiwari coming to Pali from Jodhpur on Bajaj M80

motorbike No.RJ22-M-8313. Near Mogra, respondent No.1 Sharif Khan, who was working under the control & employment of respondents No.2 & 3 (RSRTC), while driving Bus No.RJ27-P-1174 rashly & negligently, hit aforesaid Bajaj M80 bike by coming to wrong side of the road. Due to this, Gyan Chand Daga and Rajesh Tiwari suffered injuries. Both of them died by those injuries. In this connection, an FIR No.150/96 was registered at Police Station, Luni. At the time of accident, owner of the Bus were respondents No.2 and 3.

The claimant-appellants filed claim seeking compensation to the tune of Rs.31,76,000/- with interest at the rate of 18% per annum from respondents. In the claim petition, the cause of death was attributed to rash & negligent driving of the Bus by its Driver, resulting into hitting bike Bajaj M80, by going on wrong side of the road. With a view to quantify the amount of compensation, the appellants have claimed in their petition that at the time of death, deceased Gyan Chand Daga was 32 years of age and he was earning Rs.3200/- per month. It was also contended that he would have survived up to age of 75 years and during that period, he could have earned Rs.16,51,000/-. On the strength of income of the deceased as aforesaid, the appellants made claim for compensation worth Rs.31,76,000/- under different heads.

After issuance of notices of the claim petition, the respondents filed their reply. On the basis of pleadings of the parties, the learned Tribunal framed issued and recorded evidence adduced by the parties. Issues of both claim cases were

considered and decided together by the learned Tribunal by the common judgment dated 31.10.2001.

Learned Tribunal issue No.1 in favour of claimants and held that on 16.10.1996 at about 5:00PM, the respondent No.1 while working under the control & employment of respondents No.2 & 3 and while driving the Bus from Udaipur to Jodhpur via Pali, hit bike No.RJ22-M-8313 Bajaj M80 by driving rashly & negligently and by going on wrong side and in that accident, bike-riders Gyan Chand Daga s/o Paras Mal and Rajesh Tiwari s/o Om Prakash suffered fatal injuries and died due to injuries suffered by them.

While deciding the issue No.2 & 3, the learned Tribunal, after appreciation of evidence took age of deceased Gyan Chand as 32 years and on the basis of his income-tax returns for Financial year 1995-96, accepted his annual income as Rs.38,600/- and after deducting 1/3rd towards his personal expenses, assessed loss of income to the dependents at Rs.25,000/- per year. The Tribunal by applying multiplier of 15, determined total loss of income at Rs.3,75,000/-. The learned Tribunal further determined Rs.10,000/- against consortium to claimant-widow and Rs.5,000/- each to claimant-children against loss of love & affection, totaling to Rs.20,000/-. Besides, Rs.5,000/- each were determined against trauma, pain & suffering and Rs.5,000/- towards funeral expenses. In this manner, total compensation of Rs.4,15,000/- was awarded vide judgment dated 31.10.2001.

The appellant-claimants feeling dis-satisfied with the award dated 31.10.2001, preferred aforesaid Appeal No.143/2002 for

enhancement of the compensation while non-claimant-appellant-RSRTC has filed appeal No.411/2002 praying for quashing & setting aside of the judgment & award dated 31.10.2001.

Claimants' appeal (No.143/2002)

The counsel for the claimant-appellants argued that the learned Tribunal has erred in passing the impugned award so far as it awards compensation of Rs.4,15,000/- only, from the date of filing of the claim petition instead of passing the award as claimed, for Rs.31,76,000/- with interest at the rate of 18% per annum from the date of accident itself, which is just and proper. He further submitted that no cogent reason for not allowing total compensation has been given and the amount of claim disallowed by the Tribunal is based on conjectures & surmises as as well as not supported by any valid reasons.

It was also submitted that the learned Tribunal has failed to consider that had the deceased would not have died in the ill-fated accident, he would have been able to earn handsome income in future and could have touched figure of Rs.6000-7000 per month in the ensuing years. Though the learned Tribunal has considered the income of the deceased as mentioned in the income-tax returns but failed to consider future income at rising trend. The future prospects ought to have been considered by the learned Tribunal and the income should have been considered taking into account his future prospects and advancement in life. It is settled law that future prospects and advancement in life & career should also be sounded in terms of money.

It was further contended that the learned Tribunal has applied multiplier of 15 only. In the instant case when deceased was 32 years of age and had he would not have met with the accident, he would have survived minimum 30-35 years and would have been able to provide more facilities to his family. It is no more in dispute that life expectancy in the country is not less than 70 years and a person can easily survive 70-75 years of age.

It was further contended that the Tribunal has erred in awarding meager amount under the heads loss of consortium, love & affection. In the instant case, the appellant-claimant No.1 has lost company of her husband at very young age of 26 years and the appellant-claimants No.2 & 3 have lost love, affection and guidance of their father forever and therefore, the compensation assessed and awarded under these heads deserves to be suitably enhanced. The appellant-claimant No.1 would have enjoyed happily married life for 25 to 30 years more but due to tragic death of her husband in the ill-fated accident, she has been deprived of the company of husband for ever. Therefore, a suitable compensation under this head deserves to be awarded. Similarly, compensation under the heads of loss of estate and dependency has not been properly awarded. The issue relating to quantum of compensation pertaining to income of the deceased is proved from his income-tax returns.

The contentions of appellants, in view of evidence and material on record, have substance and deserves acceptance. The compensation awarded by the learned Tribunal deserves to be

suitably enhanced by modifying application of multiplier and considering compensation on account future income as also by revising compensation under heads of consortium etc, to meet the ends of justice.

In view of age of the deceased Gyan Chand at 32 years, applying multiplier of 16 would be just & proper. Taking future prospects of 30% increase in annual income of Rs.38,600/- as accepted by the Tribunal, it comes to Rs.38,600+Rs.11,580= Rs.50,180/-, out of which after deducing 1/3rd towards personal expenditure, loss of income to dependents comes to Rs.33,120/-. Applying multiplier of 16, compensation under the head of Loss of Income comes to Rs.5,29,920/-. As regard compensation under other heads viz. estate, loss of consortium, pain & suffering, funeral expenses etc, a lump-sum compensation of Rs.70,000/- would be just and reasonable. In this manner, the appellant-claimants are held entitled for compensation of **Rs.5,99,920/-**.

The appellant-claimants would also be entitled for interest at the rate of 7% per annum from the date of filing of the claim petition till payment, on the differential amount of compensation.

RSRTC's appeal (Appeal No.411/2002)

The respondent-RSRTC has assailed the judgment & award dated 31.10.2001 passed by the Tribunal on the grounds of contributory negligence and award of compensation by applying multiplier at higher side.

Perused entire evidence placed on record regarding issue No.1. In this case, AW4 & AW5 stated that the accident happened

due to rash and negligent driving by Driver of Roadways Bus but in the cross-examination, they admitted that at the time of accident, they were not at the site. Only AW1 was eye-witness of the accident, who in his statement said that on 16.10.1996 in the evening he was sitting in front of Laxmi Bhojnalaya. At that time two persons were coming to Pali from Jodhpur on Bajaj M80 bike No.RJ22-M-8313. One Roadways Bus, No.RJ27-P-1174 came from Pali side and the Driver of the Bus by rash & negligent driving hit Bajaj M80 bike by going on wrong side. Due to the accident, one person died at the spot and the other one died while taking to Jodhpur for hospitalization. The name of Driver of the Roadways Bus was Sharif Khan. The accident occurred due to rash & negligent driving of the Bus driver.

This witness stated that he himself saw the accident with own eyes and reported the accident at Police Station, Luni and the report is Ex.1. In the cross-examination he admitted that a group of cows was coming from village side but he refused to admit that Bajaj M80 bike driver, to save himself from group of cows, came before the Bus. From the statement of this witness, it is manifestly clear that the accident was caused due to rash and negligent driving by Driver of the Roadways Bus. This witness further stated that Bajaj M80 bike driver took his vehicle to lower side of the road and was driving the vehicle slowly.

From the statements of witnesses AW2 and AW3, it is abundantly clear that the accident was caused due to rash & negligent driving of the Bus Driver. From 'naksha-mauka' report

Ex.3 also, it is clear that the Bus Driver took the Bus to wrong side and caused the accident. Therefore, it can not be said that the deceased have also attributed in causing the accident.

It would be beneficial to consider law on contributory negligence. In *Jones Vs. Livox Quarries Ltd. (1952) 2 QB 608*, as per Lord Denning, *"A person is guilty of contributory negligence if she ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless."* In common parlance, the theory of contributory negligence comes into play only when the person who suffers injury or dies in an accident, is found to have contributed in the accident.

The crucial question that has cropped up for consideration is whether deceased has failed to use reasonable care for safety of either himself or his property so that he becomes blameworthy in part as an author of its own wrong. Merely because the deceased was plying motorbike with two pillion riders, it cannot be said that his act or omission amounts to one of ordinary care as the expression "contributory negligence" does not mean breach of duty. It is trite that, while apportioning the claim and reducing damages, the Court should take into account the respective blameworthiness of the parties as also the causative potency of their acts or omissions.

Hon'ble Apex Court in **Pramodkumar Rashikbhai Jhaveri V. Karmasey Kunvargi Tak & ors** (AIR 2002 SC 2864), while

dealing with the doctrine of contributory negligence, has elaborately discussed its meaning varying with circumstances and factual situation of each case, and held:

> 8. The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence.' Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong."
>
> 9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of defendant's negligence is decided. The standard of reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in Astley Vs. Austrust Ltd. (1999) 73 ALJR 403 is worthy of quoting:
>
> > "A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property."

10. It has been accepted as a valid principle by various judicial authorities that where, by his negligence, if 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 Swadling Vs. Cooper [1931] A.C. 1 at page 9, Lord Hailsham said:

> "Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances."

11. It is important to note that the respondents did not contend before the Tribunal that there was contributory negligence on the part of the appellant, the driver of the car. There was not even an allegation in the written statement filed by the respondents that the car driver was negligent and the accident occurred as result of partial negligence of the car driver. During the trial of the case, there was an attempt on the part of the respondents to contend that the driver of the car was trying to overtake a truck which was going ahead of the car. The appellant-car driver had also pleaded that the truck driven by the second respondent was trying to overtake another car, which was going ahead of the truck. But these circumstances are not proved by satisfactory evidence. One expert had also given evidence in this case but he had not seen the accident spot. His opinion was based on the observation of the damaged parts of the two vehicles. The total width of the tarred portion of the road was 22 feet and there were mud shoulders on either side having a width of three feet. It is proved by satisfactory evidence that the offending truck had come to the central portion of the road and there was only a three feet width of the road on the left side of the car driven by the appellant. In this factual situation, the High Court was not justified in holding that there was contributory negligence on the part of the appellant. It would, if at all, only prove that the appellant had not shown extraordinary precaution. The truck driven by the second respondent almost came to the center of the road and the appellant must have been put in a dilemma and in the agony of that moment, the appellant's failure to swerve to the extreme left of the road did not amount to negligence. Thus, there was no contributory negligence on his part especially when the second respondent, the truck driver had no case that the appellant was negligent."

My this view is further fortified by a decision of Hon'ble Apex Court in **Sudhir Kumar Rana vs Surinder Singh & Ors.** (AIR 2008 SC 2405), wherein Court held:

> "If a person drives a vehicle without a licence, he commits an offence. The same, by itself, in our opinion, may not lead to a finding of negligence as regards the accident. It has been held by the courts below that it was the driver of the mini-truck who was driving rashly and negligently. It is one thing to say that the appellant was not possessing any licence but no finding of fact has been arrived at that he was driving the two-wheeler rashly and negligently. If he was not driving rashly and negligently which contributed to the accident, we fail to see as to how, only because he was not having a licence, he would be held to be guilty of contributory negligence."

Well it is true that Section 128 of the Act of 1988 postulates certain safety measures and ordains that two wheeled motorcycle is to be plied with only one pillion rider but prevailing Indian conditions are not unknown to all of us that at times an incumbent passenger has no option but to travel, on account of exigencies, emergencies, or paucity of transport, by accepting whatever transport is readily available. The scarcity of transport vehicles in rural areas has created a situation where often two wheeled motorbikes are plied with more than one pillion rider. It is really strange that how and in what manner the learned Tribunal has apportioned 30% responsibility to the deceased for occurrence of accident. On appreciation of facts, it is amply clear that it was head on collision between motorbike and the truck and therefore the truck, which was a heavy vehicle, ought to have been driven with greater care and responsibility.

In the result, I find no substance in Appeal No.411/2002 filed by the RSRTC and the same is hereby dismissed.

The Appeal No.143/2002 filed by claimants Smt Pusha Devi and her children, dependents of deceased Gyan Chand Daga for enhancement of compensation is allowed in aforesaid terms and the award dated 31.10.2001 passed by the Tribunal stands modified accordingly.

(VIRENDRA KUMAR MATHUR)J.

mma