A.F.R.

Reserved on: 22.2.2022

Delivered on: 11.3.2022

Court No. - 2

Case :- FIRST APPEAL FROM ORDER No. - 1165 of 2009

Appellant :- Prabhat Kumar And Others
Respondent :- Dheeraj And Others
Counsel for Appellant :- Vishesh Kumar Gupta
Counsel for Respondent :- Radhey Shyam

Hon'ble Dr. Kaushal Jayendra Thaker,J.
Hon'ble Ajai Tyagi,J.

1. Heard Shri A.K. Shukla for Vishesh Kumar Gupta, learned counsel for appellants; Shri Radhey Shyam, learned counsel for respondent-insurance company; and perused the judgment and order impugned.

2. This First Appeal From Order has been filed under section 173 of Motor Vehicle Act, 1988 (hereinafter referred to 'Act, 1988') by appellants, being aggrieved by judgment and award dated 20.12.2008 passed by Motor Accident Claims Tribunal, Court No.3, Moradabad (hereinafter referred to as 'Tribunal') in Claim Petition No. 326 of 2006 awarding a sum of Rs.55,363/- with interest at the rate of 6% to the injured.

3. The accident having taken place is not in dispute. A young boy of 16 years in the year 2006 met with an accident, the learned Tribunal granted a sum of Rs.55,363/- only. The tribunal considered contributory negligence of child to be 10%. The appellant having suffered loss of income besides other grievous injuries in whole of the body and had sustained compound fractures, various operations were carried out on appellant by doctors at Shri Sai Hospital and

All India Medical Institute of Delhi whereby his one kidney was removed due to injuries.

4. The vehicle being insured with insurance company and there is no breach of policy condition is not in dispute. The accident occurred way back in the year 2006 is not in dispute. The involvement of the vehicle is not in dispute and it is proved before the Tribunal that the driver of the vehicle was negligent.

5. The appellant challenges the findings being bad on facts against the record as far non grant of compensation and negligence is concerned. A factual data is not adverted to except that the accident occurred on 8.7.2006 at about 9.00 p.m. when the driver of motor cycle rashly and negligently drove Motorcycle No.UP 21 Q 2563 and caused accident injuring the appellant, when the appellant was going on his road side by moped which is proved by appellant by oral and documentary evidence as such appellant sustained injury on right side kidney and lever was badly damaged in the said accident. The appellant (minor) was about 16 years of age when the accident occurred and his **one kidney was removed** and he would be by now 32 years of age. Unfortunately tribunal has awarded only Rs.55363/- with 6% rate of interest in which medical Rs.14,000/- is for permanent disability and Rs.29,363/- for medical expenses and Rs.7000/- for special diet and Rs.5000/- for pain and suffering only.

6. It is submitted by the learned counsel for the appellant claimant that the Tribunal has materially erred in calculating the compensation. Learned counsel for appellant has heavily relied on the judgment of ***Kajal v. Jagdish Chand and others reported in AIR 2020 SC 776*** and has contended that the principles for grant of just compensation has not been followed by the tribunal though the appellant proved that the claimant was operated and one of his

kidneys got damaged due to accidental injuries had to be removed. According to learned counsel for appellant it was because of the fault of the opponent driver, that the appellant suffered the injuries. According to the learned counsel for the appellant notional yearly income of the injured should be considered Rs.60,000/- per annum; and 40% be added towards future loss of income; multiplier of 18 be granted; loss of earning be calculated at 30% disability; and Rs.1,00,000/- towards pain and suffering; and Rs.75,000/- for all other non pecuniary damages be granted which would be just and proper and would be adequate compensation. Learned counsel has relied on decision of Apex Court in case titled Kajal (Supra), paragraphs 15 and 16 of the (Kajal Supra) judgment quoted herein below:

"15. In R.D. Hattangadi v. Pest Control (India) Pvt. Ltd.6, dealing with the different heads of compensation in injury cases this Court held thus:

"9. Broadly speaking, while fixing the amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas nonpecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non pecuniary damages are concerned, they may include:

(i) damages for mental and physical shock, pain and suffering already suffered or likely to be suffered in the future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, 5 1980 ACJ 55 (SC) 6 (1995) 1 SCC 551 discomfort, disappointment, frustration and mental stress in life."

16. In Raj Kumar v. Ajay Kumar and Others, this Court laid down the heads under which compensation is to be awarded for personal injuries.

"6. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i)Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising: (a) Loss of earning during the period of treatment; (b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life." 7 (2011) 1 SCC 343"

7. Recently the Supreme Court had an occasion of deciding a similar matter relating to a minor who had become practically crippled. The principles of just compensation have been laid in the said judgment.

8. The Tribunal held that claimant/appellant to be negligent to the tune of 10%. The counsel has submitted that appellant was not at all negligent.

9. The issue of negligence has to be decided from the perspective of the law laid down by the Courts.

10. The term negligence means failure to exercise care towards others which a reasonable and prudent person would in a circumstance. Negligence can be both intentional or accidental

which can also be accidental. More particularly, term negligence connotes reckless driving and the injured of claimants must always prove that the either side is negligent. If the injury rather death is caused by something owned or controlled by the negligent party then he is directly liable otherwise the principle of "*res ipsa loquitur"* meaning thereby "the things speak for itself" would apply.

11. The principle of contributory negligence has been discussed time and again. A person who either contributes or is author of the accident would be liable for his contribution to the accident having taken place.

12. The Division Bench of this Court in **First Appeal From Order No. 1818 of 2012 (Bajaj Allianz General Insurance Co.Ltd. Vs. Smt. Renu Singh And Others)** decided on 19.7.2016 has held as under :

> *"16. Negligence means failure to exercise required degree of care and caution expected of a prudent driver. Negligence is the omission to do something which a reasonable man, guided upon the considerations, which ordinarily regulate conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Negligence is not always a question of direct evidence. It is an inference to be drawn from proved facts. Negligence is not an absolute term, but is a relative one. It is rather a comparative term. What may be negligence in one case may not be so in another. Where there is no duty to exercise care, negligence in the popular sense has no legal consequence. Where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which would be reasonably foreseen likely to caused physical injury to person. The degree of care required, of course, depends upon facts in each case. On these broad principles, the negligence of drivers is required to be assessed.*
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> *17. It would be seen that burden of proof for contributory negligence on the part of deceased has to be discharged by the opponents. It is the duty of driver of the offending vehicle to explain the accident. It is well settled law that at intersection where two roads cross each other, it is the duty of a fast moving vehicle to slow down and if driver did not slow down at*

intersection, but continued to proceed at a high speed without caring to notice that another vehicle was crossing, then the conduct of driver necessarily leads to conclusion that vehicle was being driven by him rashly as well as negligently.

18. 10th Schedule appended to Motor Vehicle Act contain statutory regulations for driving of motor vehicles which also form part of every Driving License. Clause-6 of such Regulation clearly directs that the driver of every motor vehicle to slow down vehicle at every intersection or junction of roads or at a turning of the road. It is also provided that driver of the vehicle should not enter intersection or junction of roads unless he makes sure that he would not thereby endanger any other person. Merely, because driver of the Truck was driving vehicle on the left side of road would not absolve him from his responsibility to slow down vehicle as he approaches intersection of roads, particularly when he could have easily seen, that the car over which deceased was riding, was approaching intersection.

19. In view of the fast and constantly increasing volume of traffic, motor vehicles upon roads may be regarded to some extent as coming within the principle of liability defined in ***Rylands V/s. Fletcher, (1868) 3 HL (LR) 330****. From the point of view of pedestrian, the roads of this country have been rendered by the use of motor vehicles, highly dangerous. 'Hit and run' cases where drivers of motor vehicles who have caused accidents, are unknown. In fact such cases are increasing in number. Where a pedestrian without negligence on his part is injured or killed by a motorist, whether negligently or not, he or his legal representatives, as the case may be, should be entitled to recover damages if principle of social justice should have any meaning at all.*

20. These provisions (sec.110A and sec.110B of Motor Act, 1988) are not merely procedural provisions. They substantively affect the rights of the parties. The right of action created by Fatal Accidents Act, 1855 was 'new in its species, new in its quality, new in its principles. In every way it was new. The right given to legal representatives under Act, 1988 to file an application for compensation for death due to a motor vehicle accident is an enlarged one. This right cannot be hedged in by limitations of an action under Fatal Accidents Act, 1855. New situations and new dangers require new strategies and new remedies.

21. In the light of the above discussion, we are of the view that even if courts may not by interpretation displace the principles of law which are considered to be well settled and, therefore, court cannot dispense with proof of negligence altogether in all cases of motor vehicle accidents, it is possible to develop the law further on the following lines; when a motor vehicle is being driven with reasonable care, it would ordinarily not meet

> *with an accident and, therefore, rule of res-ipsa loquitor as a rule of evidence may be invoked in motor accident cases with greater frequency than in ordinary civil suits* ***(per three-Judge Bench in Jacob Mathew V/s. State of Punjab, 2005 0 ACJ(SC) 1840)****.*
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> *22. By the above process, the burden of proof may ordinarily be cast on the defendants in a motor accident claim petition to prove that motor vehicle was being driven with reasonable care or that there is equal negligence on the part the other side."*

13. The aforesaid judgment would apply to the facts of this case just because the injured did not have licence to drive moped when the accident occurred would not permit us to concur with the tribunal.

14. While going through the record, it is proved that the victim was 16 years of age and was a minor. In our case, the tribunal on the basis of evidence held that accident had taken place due to rash and negligent driving of the motorcyclist and held the minor was also negligent. The tribunal relied on the decision of the Apex Court in ***Bishan Dass v. Himachal Road Transport Corporation (hrtc) And Ors, AIR 2014 ACJ 1012*** and, therefore, the findings of fact that the child was negligent and accident was between the Scotty which was being driven by the injured is upheld. **The driver of the motorcycle did not even appear before the tribunal as the witnesses have been examined who have deposed in favour of the minor.**

COMPENSATION

15. We now decide the compensation the right side kidney of the appellant was damaged is an admitted position of fact which is borne out from the records and the judgment, he was treated by

several doctors he was treated in All India Medical Institute, Delhi who was opined as oath as PW-7 (Dr. Loti P.) just because the respondent has contended that treatment was on Government expenses. The injuries suffered by the appellant go to show that **his one kidney had to be removed**. The learned tribunal has taken a hyper technical view in the matter. The medical treatment papers also go to show that the liver was damaged, there was lot of blood which had to be drained. Dr. Arun and Dr. R.S. Gupta had also examined the juvenile, Dr. Mohit Agarwal who was working with Sai Hospital has also treated him his left kidney have to be removed. There was blood Clots in the stomach and therefore he had to be operated his health though Dr. Mohit Agarwal has been examined as PW-4, who has stated that there was grade-4 injuries to the damage and grade-4 injury means that the kidney was damaged to a great extent.

16. The learned tribunal has not taken sympathetic view which is required by tribunal in such matters when the child has suffered such a great loss of body part. Theories of just compensation has also been overlooked by the tribunal while adjudicating this matter, just because no disability or injury report was filed. Section 166 of the Motor Vehicles Act, 1988 reads as follows:-

166. Application for compensation.—

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made —

(a) by the person who has sustained the injury; or
(b) by the owner of the property; or
(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or
(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be: Provided that where all the legal representatives of the deceased

have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application. 1[(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred, or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed: Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.] 2[***] 3[(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

17. We reproduce the evidence of doctor, as PW-7 (Dr. Loti) has categorically mentioned that "मरीज के पेट में 600 ml खून जमा था, राइट किडनी को बहार निकल दिया था". The patient was admitted from 9.7.2006 to 15.7.2006, thereafter also he was under constant treatment and it is opined that he would need treatment in future despite that the tribunal has granted a meagre amount of Rs.55,633/- out of Rs. 29,363/- is for medical expenses, and Rs. 5000/- for pain and suffering. This shows the perversity in non granting what is known as just compensation.

18. Victim was 16 years of age. As per the medical report, he has suffered 30% disability for the body as a whole which means it would be 30% disability for earning. The accident occurred before a decade, namely, 2006. Hence he would be at the age of 32 years as of today.

19. We, therefore, would rely on the judgment in case titled Kajal (Supra) and in this backdrop let us evaluate the income in view of

the decisions of the Apex Court titled **Hdfc Ergo General Insurance Co. Ltd. v. Mukesh Kumar, 2021 (0) AJEL-SC 67851** and **Jithendran v. New India Assurance Co. Ltd., 2021 (0) AIJEL-SC 67944** and, the recalculate the compensation which would be as follows:

i. Income =3,000/-p.m.
ii. Percentage towards future prospects : 40% namely = Rs.1200/-
iii. Total income : Rs.3000+1200 = Rs.4200/-
iv. Loss of earning capacity: 30% namely Rs.1260/-
v. Annual Loss : Rs.1260 x 12 = Rs.15,120/-
vi. Multiplier applicable : 18
vii. Total Loss : Rs. 15,120 x 18 = Rs.2,72,160/-
viii. For pain & sufferings : Rs.1,00,000/-(as his one kidney has been removed)
ix. All other heads for non pecuniary damages = Rs.70,000/-

x. **Total compensation (vii+viii+ix):** Rs.2,72,160 + Rs. 1,00,000 + Rs.70,000 **=4,42,160/-**

20. On depositing the amount in the Registry of Tribunal, Registry is directed to first deduct the amount of deficit court fees, if any. Considering the ratio laid down by the Hon'ble Apex Court in the case of **A.V. Padma V/s. Venugopal, Reported in 2012 (1) GLH (SC), 442**, the order of investment is not passed because applicants /claimants are neither illiterate or rustic villagers.

21. In view of the ratio laid down by Hon'ble Gujarat High Court, in the case of **Smt. Hansagauri P. Ladhani v/s The Oriental Insurance Company Ltd., reported in 2007(2) GLH 291**, total amount of interest, accrued on the principal amount of compensation is to be apportioned on financial year to financial

year basis and if the interest payable to claimant for any financial year exceeds Rs.50,000/-, insurance company/owner is/are entitled to deduct appropriate amount under the head of 'Tax Deducted at Source' as provided u/s 194A (3) (ix) of the Income Tax Act, 1961 and if the amount of interest does not exceeds Rs.50,000/- in any financial year, registry of this Tribunal is directed to allow the claimant to withdraw the amount without producing the certificate from the concerned Income- Tax Authority. The aforesaid view has been reiterated by this High Court in Review Application No.1 of 2020 in First Appeal From Order No.23 of 2001 (**Smt. Sudesna and others Vs. Hari Singh and another)** while disbursing the amount.

22. As far as issue of rate of interest is concerned, it should be 7.5% in view of the latest decision of the Apex Court in **National Insurance Co. Ltd. Vs. Mannat Johal and Others, 2019 (2) T.A.C. 705 (S.C.)** wherein the Apex Court has held as under :

"13. The aforesaid features equally apply to the contentions urged on behalf of the claimants as regards the rate of interest. The Tribunal had awarded interest at the rate of 12% p.a. but the same had been too high a rate in comparison to what is ordinarily envisaged in these matters. The High Court, after making a substantial enhancement in the award amount, modified the interest component at a reasonable rate of 7.5% p.a. and we find no reason to allow the interest in this matter at any rate higher than that allowed by High Court."

23. In view of the above, the appeal is **partly allowed**. Judgment and decree passed by the Tribunal shall stand modified to the aforesaid extent. The respondent-Insurance Company shall deposit the amount along with additional amount within a period of 12 weeks from today with interest at the rate of 7.5% from the date of filing of the claim petition till the amount is deposited. The amount already deposited be deducted from the amount to be deposited.

24. We are thankful to learned counsels for the parties for ably assisting the Court

25. The lower court record be sent back, if here, to the tribunal for disbursement.

26. A copy of this order be sent to Shri P.C. Mishra, Additional District Judge/MACT, Court No.3, Moradabad, if he is in service so that he may be more careful in future.

(Ajai Tyagi, J.) ***(Dr.Kaushal Jayendra Thaker, J.)***

Order Date :- 11.03.2022
A.N. Mishra