SUPREME COURT OF INDIA

Usha Rajkhowa

Vs.

Paramount Industries

C.A.No.1088 of 2009

(S.B. Sinha and V.S. Sirpurkar JJ.)

17.02.2009

JUDGMENT

V.S. Sirpurkar, J.

1. Leave granted.

2. The appellants herein challenges the judgment passed by the High Court, confirming the judgment of the Motor Accidents Claim Tribunal (hereinafter referred to as `the Tribunal' for short), whereby, the Tribunal limited the appellants' entitlement to 50% of assessed claim amount and granted compensation of Rs.6,56,300/- on the ground that there was contributory negligence on the part of the driver of the Car, who lost his life in accident. He was the husband of appellant No. 1 and the father of appellant No. 2. The Car was insured by respondent No. 3 Oriental Insurance Company Ltd.

3. One Jadhav Rajkhowa died in a motor vehicle accident on 5.12.1998 at about 7 pm, when he had gone to Dergaon market from his house at Dadhara in his Maruti Car bearing Registration No. WB/12/6287. On the way of Dergaon, one truck bearing Registration No. NLA-241, coming from Jorhat side towards Bokakhat in a rash and negligent manner, hit the Maruti Car causing the instant death of said Jadhav Rajkhowa. Therefore, the claim petition was filed by his legal representatives (the appellants herein). The Car was insured with Oriental Insurance Company Ltd., while the offending truck belonged to M/s. Paramount Industries, Jorhat (respondent No. 1 herein), which was insured with United India Insurance Company Ltd., Golaghat Branch (respondent No. 2 herein).

4. The Oriental Insurance Company Ltd. in defence, contended that Maruti Car was under the valid insurance coverage with it and it was an Act Policy and the owner Jadhav Rajkhowa had paid Rs.373/- by way of premium covering the third party risk and that he had paid no additional premium covering his own life risk, even though there was provision under separate insurance policy nor had he paid any additional premium for driver and occupants. It was claimed by the Oriental Insurance Company Ltd. that the owner, driver and occupants were never treated as third party and since it was an Act Policy, the claimant

would not be entitled to claim any compensation from them. The owner of the truck had submitted that its truck was under the valid insurance policy with United India Insurance Company Ltd. and, therefore, the owner was not liable to pay any compensation and compensation, if any, had to be paid by the Insurance Company. The United India Insurance Company Ltd., however, submitted that the accident had taken place due to rash and negligent driving on the part of the driver of the Maruti Car and the valid insurance was in favour of the truck, as had been admitted.

5. In support of the claim, appellant/claimant Usha Rajkhowa appeared as PW-1 and stated that her husband was the driver of the Maruti Car at the time of its accident and he was an employee of Oil India Ltd. She further stated that her husband was 30 years old at the time of accident and he had two children at that time. She claimed the monthly pay of her husband to be Rs.10,536/-. PW-2 Sarbeswar Bora was an employee of Oil India Ltd. He stated that deceased Jadhav Rajkhowa was Safety Inspector at the time of accident. The other witness examined was Madhuriya Rajkhowa PW-3, who stated that he was travelling along with one Dhiren Hazarika in Maruti Car and that the offending truck No. NLA-241 was coming from the opposite direction in high speed and hit the car. It was claimed by the witness that both Dhiren Hazarika, as also Jadhav Rajkhowa had died on the spot, while he escaped the death with certain grievous injuries. In his Cross Examination, PW-3 stated that:-

> "As to which vehicle was at fault I can't say clearly. It is not a fact that accident took place because of fault of Maruti Car." He further stated:-
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> "Maruti Car was going on its own side. Truck hit the Maruti Car."
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> On the basis of this evidence, the Tribunal, firstly returned a finding that the Oriental Insurance Company Ltd. was not liable to pay any compensation, since the policy covering the owner of the Maruti Car, was not a comprehensive policy, but only an Act Policy. Insofar as the assessment of compensation is concerned on the basis of monthly salary and applying the multiplier formula, the amount was assessed at Rs.13,05,600/-. Adding the funeral expenditure of Rs.2,000/- and loss of consortium of Rs.5,000/-, the total amount was arrived at Rs.13,12,600/-. The Tribunal then came to the finding that this amount was payable by United India Insurance Company Ltd., which was the insurer of the truck No. NLA-241 to the extent of 50% only, while the balance amount is to be borne by the owner himself. The Tribunal, ultimately held that the claimant would be entitled to compensation of Rs.6,56,300/- from United India Insurance Company Ltd. with the accrued interest @ 9% p.a. from the date of filing of the claim petition."

6. This award of the Tribunal was appealed against by the present appellants under Section 173 of the *Motor Vehicles Act, 1988*. It was asserted in the appeal that the Tribunal in its award should not have limited the liability to 50% by apportioning between both the involved vehicles, as there were no pleadings or evidence in support of such apportionment. It was specifically stated in the appeal memo that the Tribunal itself had not held any contributory negligence on the part of Maruti Car nor had it given any finding and thus, the

claim could not have been reduced to 50%, applying the theory of contributory negligence. The High Court firstly endorsed the finding of the Tribunal that Oriental Insurance Company Ltd. was not liable to pay any compensation, since the policy was an Act Policy. The High Court then went into the exercise of appreciation of evidence and observed that the Tribunal had held that the accident took place due to contributory negligence of the drivers of the truck and the Maruti Car. Considering the evidence of PW-3, it referred to the stray sentence, which we have quoted earlier, to the effect that the witness was not able to say clearly as to which vehicle was at fault. On this very basis, the High Court endorsed the so-called finding of the Tribunal that it was an act of contributory negligence. The High Court, therefore, held both the vehicles equally responsible for the accident and proceeded to dismiss the appeal. It is this judgment, which has fallen for consideration before us.

7. The Learned Counsel, appearing on behalf of the appellants, firstly invited our attention to the award passed by the Tribunal, as also to the evidence led on behalf of the appellants and severely criticized the same. The Learned Counsel also submitted that the approach of the Tribunal and the High Court is erroneous and contrary to the evidence on record. The Learned Counsel for United Insurance Company Ltd., however, supported the impugned judgment.

8. In spite of our minute scrutiny of the award, we have not been able to even find a mention of words "contributory negligence" in the award passed by the Tribunal. There is, in fact, no finding given by the Tribunal as regards the contributory negligence. The subject is discussed in paragraphs 10 and 11, where we do not find any specific finding to the effect that Maruti Car was guilty of the contributory negligence. It is only because the amount of compensation is restricted to the 50% of the assessed amount that we have to infer that the Tribunal had given a finding of contributory negligence. Even at the cost of repetition, we may say that the words "contributory negligence" nowhere appear in the award passed by the Tribunal. There is only one stray statement in the award, concerning the evidence of PW-3 Madhuriya Rajkhowa to the effect that he failed to state which of the vehicles was actually at fault. On this backdrop, when we see the impugned judgment, very interestingly, the judgment mentions in paragraph 9:-

> “In the present case at hand, the learned Tribunal has held that the accident took place due to contributory negligence of the driver of the truck and the Maruti Car."
>
> We are afraid, such sentence is not to be found in the award of the Tribunal. We do not know, as to where has this finding been found by the High Court in the award. The High Court then referred to the evidence of PW-3 and referred to the same sentence by PW-3. It is on the basis of this stray sentence that the High Court chose to confirm the finding of the Tribunal (which is not to be found) regarding the contributory negligence. Such appreciation is clearly erroneous.”

9. We must say that the criticism by the Learned Counsel for the appellants that the High Court, as well as, the Tribunal have not applied their mind to the matter, is quite justified. We, ourselves, have seen the evidence of PW-3. In the Examination-in-Chief, the witness

very specifically asserted that the truck was coming from the opposite direction in a high speed from Jorhat side and it hit the Car, as a result of which Shri Jadhav Rajkhowa and Shri Dhiren Hazarika died, while he had received injuries. He was undoubtedly right in saying that he could not say clearly as to which vehicle was at fault, however, he was quick to deny the suggestion thrown at him that the accident took place because of the fault of Maruti Car. He has very specifically denied that suggestion in the following words:-

> "It is not a fact that accident took place because of fault of Maruti Car."
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> As if all this was not sufficient, he then in his Cross-Examination at the instance of Oriental Insurance Company Ltd., asserted that Maruti Car was going on its own side (when the truck hit the Maruti Car). Now, the following factors are clear from this evidence:-
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> 1. The truck was coming in high speed.
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> 2. It was the truck, which hit the Car and not vice versa.
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> 3. The Maruti Car was going on its own side.
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> It seems that the Tribunal, as well as, the High Court had chosen to go by the inference drawn by PW-3 or at any rate, his inability to fix the liability. It is not the judgment of the witness, which is decisive in the matter. In fact, the Tribunal, as well as, the High Court should have framed their own opinion, instead of going by the judgment or as the case may be, inference by PW-3.
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> Under such circumstances, applying the doctrine of res ipsa loquitor, it is clear that it was because of the negligence on the part of the truck that the accident took place. After all the hit given by the truck was so powerful that two persons in the Car died on the spot, while the third escaped with serious injuries. When we see the award of the Tribunal, as also the appellate judgment, they are astonishingly silent on these aspects. We are, therefore, convinced that there was no question of any contributory negligence on the part of the driver of the Maruti Car and it was solely because of the negligence on the part of the truck that the accident took place."

10. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in *Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and Ors.*[1]. That was also a case of collusion in between a Car and a truck. It was observed in Para 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."

This Court further relied on an observation of High Court of Australia in *Astley Vs. Austrust Ltd.*[2] to the following effect:-

"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."

Keeping these principles in mind, we find that there was absolutely no evidence to suggest that there was any failure on the part of the Car driver to take any particular care or that he had breached his duty in any manner. Such breach on his part had to be proved by Insurance Company as it was its burden and for that, the Punchanama of the spot, showing tyre marks caused by brakes, the Panchanama of the damaged car and the truck could have been brought on record. The Insurance Company has obviously failed to discharge its burden. We, therefore, respectfully follow the above mentioned judgment."

11. Under the circumstances, there would be no question of restricting the claim to the 50% of the assessed amount of compensation.

12. The Learned Counsel for the respondents did not address us on the question of quantum. We hold that the compensation was correctly assessed. We, however, would not confirm the theory that the accident took place because of the contributory negligence and would choose to award full compensation to the appellants. The appeal is allowed. The award of the Tribunal and appellate judgment of the High Court are modified to the extent we have indicated. The appeal stands allowed with costs.

[1]*2002 (6) SCC 455* [2]*1999 (73) ALJR 403*