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05.09.2022
Ct. No.237
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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURICTION
APPELLATE SIDE

FMA 887 of 2013
With
IA No. CAN 2 of 2022

Dipak Debmunsi @ Dipak Deb Munshi & Anr.
Vs.
National Insurance Co. Ltd. & Ors.

Mr. Jayanta Kumar Mondal
... For the Appellants/claimants

Mr. Parimal Kumar Pahari
... For the respondent no.1/Insurance Co.

In re: CAN 2 of 20022

Affidavit of service filed in Court today is taken on record.

This application has been filed on behalf of the appellants to incorporate the grounds delineating some law points.

Heard both the parties and the prayer is allowed.

The application, being CAN 2 of 2022 is disposed of.

In re: FMA 887 of 2013

This appeal is directed against the judgment and order passed in MAC Case No.04 of 2011 renumbered as 18 of 2011 whereby the learned Judge, Motor Accident Claims Tribunal, 5th Court, Burdwan, passed an order directing the Insurer of the Truck No.WB-03/9296, i.e., National Insurance Company Limited, to pay compensation of Rs.2,06,250/- along with interest at the rate of 7% per annum accrued over the amount from the date of filing of the claim application to the petitioner nos.2 to 4 as well as the pro-forma respondent.

The brief facts of this case are that on 3rd October, 2010 when the victim was driving his two-wheeler, bearing no.WB-42L/5748, from his house to Burdwan Market along with G.T. Road, one truck bearing no.WB-03/9296, coming with high speed negligently and dashed the victim who suffered several injuries on his person and succumbed to his injuries.

It is the case of the claimants that at the time of accident, victim was 29 years old and having his profession of fish seller and would earn Rs.40,000/- per annum. One police case, being Burdwan P.S. Case No.669 of 2010 dated 3rd October, 2010 under Sections 279/304A/427 of the Indian Penal Code was started.

The respondents/National Insurance Company contested this application under Section 163A of the Motor Vehicles Act wherein the claim of compensation was of Rs.4,90,000/- with interest at the rate of 9% per annum.

The learned Judge examined the witnesses on behalf of the petitioners and documents, including the First Information Report, charge sheet and the seizure list of the aforesaid police case, were admitted in evidence as Ext.-1 series, P.M. report of victim was also admitted as Ext.-2, Voters' Identity Card of the major petitioners and voters' list as Ext.-3. After considering the entire evidence, the learned Tribunal assessed the total compensation at Rs.4,12,500/- including loss of estate and funeral expenses along with interest at the rate of 7% per annum. That apart, the learned Judge also allowed Rs.5,000/- towards loss of consortium.

The learned Judge in his judgment returned a finding to the effect that:-

> "Now, since it has been held that the two wheeler bearing no.WB-42L/5548 and the truck bearing no.WB-03/9296 both were involved in the subject accident, it is held that owner of truck WB-03/9296 shall pay ½ (half) of the amount assessed thereinabove and hence, owner of WB-03/9296 is liable to pay 2,06,250 along with interest @ 7% p.a. Over that amount being Rs.2,06,250 from 27.1.2011 to till the date of realization thereof to the petitioner and owner of truck shall also pay Rs.2500/- to petitioner no.3 herein.
>
> Now, it is admitted that the said two wheeler was being driven by the victim himself and since no single document connected to the two wheeler has been produced before the tribunal, no effective order can be passed in this regard particularly where, victim himself was the driver of the two wheeler and it is known to this tribunal as to whether victim was owner of the two wheeler and there would limited liability or not. However, it is ordered that if law permits petitioners can proceed

against the insurer of two wheeler for payment of compensation."

In view of his decision on the point of negligence, the learned Judge ordered only payment of compensation of Rs.2,06,250/- along with interest to the claimants with liberty given to the Insurer to recover the entire amount of compensation from the owner of the vehicle, being No. WB-03/9296 as the driver of the truck had no valid licence at the relevant point of time. The learned Judge also given liberty to the claimants to take steps for recovery of rest amount from the Insurer of the two-wheeler.

Learned advocate appearing on behalf of the claimants submits that the claimants in terms of facts of this case can claim compensation from any of the Insurers of the vehicles involved in the accident. In support of his contention, he relied on a case reported in 2000 WBLR (Cal 289 (The National Insurance Co. Ltd. v. Swapan Kumar Dakua & Anr.).

It has been further contended on behalf of the claimants that though the learned Tribunal considered about negligence on the part of the victim in a case under Section 163 A of the Motor Vehicles Act, Insurer cannot raise this issue of negligence. In support of his contention, he refers to a judgment reported in 2018 (1) TAC 3 (SC) (United India Insurance Co. Ltd. v. Sunil Kumar & Anr.).

In the aforesaid view of the matter, the learned advocate appearing on behalf of the claimants submits that the claimants are entitled to entire assessed amount of compensation already made by the learned Tribunal.

On behalf of the Insurance Company, learned advocate refers to the judgment passed by the learned Tribunal and submitted that it was rightly ordered by the learned Tribunal as the victim was driving the vehicle at the time of the accident by the involvement of the truck, bearing no. WB-03/9296 and in view of the facts and circumstances, the Insurance Company of the truck is not at all liable to pay the entire compensation.

So far as the negligence is concerned, it was held by the Hon'ble Supreme Apex Court in the case of Sunil Kumar (supra) that in a proceeding under Section 163A of the Motor Vehicles Act does not open to the Insurance Company to raise any defence of negligence on the part of the victim.

From that point of view, I am not agreeable with the contention of the learned advocate for the Insurance Company with regard to the observation of the learned Tribunal as to negligence of the victim for which the learned Tribunal was directed to recourse the action of claim of compensation from the Insurance Company of the two-wheeler.

In Swapan Kumar Dakua (supra), the Hon'ble Division Bench observed as follows:-

> "**7.** In *Bhanuben P. Joshi* (supra), in a case where a truck dashed against a motor cycle from behind

> and sped away, and a claim was made on the ground of alleged laches and negligent manner of driving on the part of the driver of the motor cycle and in flagrant violation of the traffic rules and regulations, it was held that motor cyclist was also responsible along with the driver of the unidentified truck. The said decision, although cannot be said to be an authority for the proposition propounded before us by the learned Counsel appearing on behalf of the appellant, we are of the opinion that the said decision also goes to show that at least in absence of the insurance company of the truck also, the claim petition was entertained."

From the aforesaid discussion as well as the observation of the above authorities, I find that the claimants are entitled to entire compensation amount along with the general damage and loss of consortium.

It is contended on behalf of the claimants that the claimants have also received Rs.2,06,250/- along with interest at the rate of 7% per annum from the filing of the application out of Rs.4,17,500/-

In the aforesaid view of the matter, the Insurance Company, i.e., the National Insurance Company Limited, being the respondent no.1, is directed to pay the rest amount to the claimants along with interest at the rate of 6% per annum from the date of filing till realisation of the amount according to the manner as prescribed in the order of the learned Tribunal. The rest amount shall be deposited before the learned Tribunal within two months hence.

With the above observations, the appeal, being FMA 887 of 2013, is disposed of.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Bibhas Ranjan De, J.)