IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction

11.08.2023
SL No.4
Court No. 551
Ali

F.M.A. 1250 of 2015
IA No.:CAN/1/2010 (Old No.:CAN/1893/2010)
CAN/2/2010 (Old No.:CAN/10423/2014)

Chhaya Sarkar & Ors.
Vs.
The New India Assurance Co. Ltd. & Ors.

Mr. Saidur Rahaman
……for the appellants-claimants.
Mr. Rajesh Singh
………..for the respondents-insurance Co.

The instant appeal has been preferred against the judgment and order dated 7th April, 2009 passed by the learned Judge, Motor Accident Claims Tribunal, 3rd Court, Malda in MAC Case No. 277 of 2005 under Section 166 of the M.V. Act.

The present appellant being the claimants/appellants preferred an application under Section 166 of the M.V. Act before the learned tribunal for getting compensation on the ground that their predecessor was died in a road traffic accident due to the rash and negligent driving of the driver of the offending vehicle being No. W.B.-65/ 1467 (Maxi-Taxi). Recital of the claim application stated the factum of accident is as follows:-

On 19th August, 1997 at about 17-30 Hrs. while the deceased Mangal Sarkar was proceeding towards the Milki from Nazirpur by availing Maxi-Taxi No. W.B.-65 of 1467 near Nazirpur the said

Maxi-Taxi was about to capsize when the door of the said Maxi-Taxi suddenly open, Mangal Sarkar fall down from the Maxi-Taxi and sustained severe injuries. The injure was shifted to Malda Sadar District Hospital. He expired on the way from Manikchak Hospital.

The claimants pleaded compensation for rash and negligent driving of the driver of the offending vehicle i.e. Maxi-Taxi. The claim application was contested by the insurance company by filing written statement. The evidences were adduced by the claimants both oral and documentary. The insurance company has adduced no evidence. After hearing the parties, the learned tribunal has rejected the claim application. Hence this appeal.

In passing the impugned judgment the learned tribunal is of opinion that the rash and negligent driving of the driver of the offending vehicle could not proved by the claimants and claimant has no statutory right to get compensation under Section 166 of the M.V. Act though it is the fact that they have received compensation in a proceeding under Section 140 of the M.V. Act in respect of the self-same accident.

Learned advocate for the appellants submitted before this court that the impugned judgment passed by the learned tribunal suffer illegality and liable to be set aside. The learned tribunal has not considered the evidence of PW-1 and PW-2 also not considered the police papers, thus, there is a miscarriage of justice. He also argued that the investigation of the police suggested the rash and negligent driving of the driver of the offending vehicle thus the observation of the learned tribunal in that score is erroneous and the impugned judgment is liable to be set aside. One argument was advanced on behalf of the learned advocate for the claimants-appellants that the accident has already been proved in this case for which the compensation was awarded under Section 140 of the M.V. Act. Thus at this juncture, the learned tribunal has no scope to raise doubt in the application under Section 166 of M.V.Act.

Learned advocate for the insurance company submitted before this court that the learned tribunal has committed no error in passing the impugned judgment. He also argued that the claimants have failed to prove the rash and negligent driving of the driver of the offending vehicle thus the claim petition was rejected. He again placed the impugned judgment wherein the learned tribunal has mentioned that no document regarding R.C. Book, D.L or other relevant documents of the vehicle were produced before the learned tribunal.

Learned advocate for the insurance company also repudiate the plea of the appellant that one application under Section 140 when allowed the accident regarding the involvement of the vehicle has well been proved thus the claim application filed under Section 166 of the M.V. Act need be allowed. On the score, learned advocate for the insurance company submitted that there are catena of judgments of Hon'ble Supreme Court to the fact that under Section 166 of the M.V.Act, the rash and negligent driving of the driver of the offending vehicle is a sine-qua-non and a mandatory fact which has to be proved and established before the learned tribunal. On the score, he cited the decisions of Hon'ble Supreme Court passed in:

I) Deepal Girishbhai Soni and Ors. versus United India Insurance Co. Ltd., Baroda reported in **(2004) 5 SCC 385**

II) Surender Kumar Arora and Ors. versus Manoj Bisla and Ors. reported in **(2012) 4 SCC 552**

III) Reshma Kumari and Ors. versus Madan Mohan and Anr. reported in **2013 (2) T.A.C. 369 (S.C.)**

IV) Minu B. Mehta and Ors. versus Balkrishna Ramchandra Nayan

and Ors. reported in **(1977) 2 SCC 441**

V) **Lachoo Ram and Ors. versus Himachal Road Transport Corpn. And Ors.** reported in **(2014) 13 SCC 254**

VI) **Nishan Singh and Ors. versus Oriental Insurance Company Ltd. and Ors.** reported in **(2018) 6 SCC 765**

The principle regarding rash and negligent driving of the driver of the offending vehicle is a sine-qua-non of a claim case filed under Section 166 of the M.V. Act, is no doubt. It has been specifically observed in different times by the Hon'ble Apex Court that the claimants must have proved the rash and negligent driving of the driver of the offending vehicle for getting compensation under Section 166 of the M.V.Act. In this case, the learned tribunal is of opinion that the claimant has not proved the rash and negligent driving of the driver of the offending vehicle. Learned advocate for the claimants submits that the claim petition as well as PW-1 and PW-2 supported by police papers proved the rash and negligent driving of the driver of the offending vehicle. The learned advocate for the insurance company contradicted and submitted that the learned tribunal has committed no error. The separate factum of manner of accident was pleaded before the learned tribunal that is why the learned tribunal could not believe any one of them.

It is the submission of the learned advocate the insurance company that the recital of claim application stated that the door of the Maxi-Taxi suddenly open that is why the deceased fell down on the Taxi and sustained injuries. On the other hand, the PW-2 stated that the Maxi-Taxi was capsized and at the time the deceased fell down from the taxi and sustained injuries. The FIR stated that the Maxi-Taxi was about to capsize when the deceased fell down from the Maxi-Taxi and sustained severe injuries on his person.

Let me considered whether the fact of accident as stated by the claimants or PW-2 i.e. the eye witness and the police papers i.e. in the FIR are connected each other or they are different. The claim application stated that the driver of the offending vehicle was driven in the vehicle in a rash and negligent manner that is why when the Maxi-Taxi was about to capsize the door of the Maxi-Taxi was opened, PW-2 stated that the Maxi-Taxi was over turned because of the rash and negligent driving by the driver of the said vehicle by which the deceased and several persons sustained injuries. The FIR which was registered by SI of police himself who conducted the inquest over the dead body stated the accident or suddenly the Maxi-Taxi about to capsize when the deceased fell down from the Maxi-Taxi and sustained severe injuries. The investigation of the police also suggested the same fact; so considering the facts stated in the claim application as well as the statement of PW-2 and the police papers, it appears to me that the Maxi-Taxi was at that time capsized due to rash and negligent driving of the driver of the offending vehicle. Whether the deceased fell down due to the opening of the door or he felt down due to the jerk of the rash and negligent driving, is not necessary to prove here. The only basic ingredience regarding the rash and negligent driving of the driver of the offending vehicle has well established in this case. The learned tribunal has misguided himself in deciding the issue of opening of gate of offending vehicle. The gate may be open or may not be open in this case but the factum which proved specifically that the Maxi-Taxi was capsized due to rash and negligent driving of the driver of the offending vehicle and the deceased sustained injuries by such rash and negligent driving of the driver of the offending vehicle thus in this the observation of the learned tribunal is not correct.

In this case, I am of the view that the impugned judgment of the leaned tribunal on that score is not correct.

Another point was raised regarding the non availability of the documents of the offending vehicle before the learned tribunal. It appears that the police papers were produced including the seizure list before the learned tribunal. The seizure list contained the specific D.L No. of the driver of the offending vehicle which was renewed upto 10.10.1998. The tax token of the Maxi-Taxi was also seized where the date of expiry is 22.02.18. The permit was valid upto 28.02.98 and the pollution certificate was also there valid upto 20.02.98. Considering the same, it appears to me that the learned tribunal has not concentrated upon the police papers and the documents as placed before him and come to an erroneous conclusion.

Considering the same, the impugned judgment passed by the learned tribunal is appears to be not justified and it is set aside. The claimants-appellants are entitled to get the compensation according to the structure formula. The income of the deceased is taken to be Rs. 2,500/- per month, yearly income comes to Rs. 30,000/-, $1/3^{rd}$ which is deducted towards personal leaving expenses. After deducting the early dependency comes to Rs. 20,000/-. The claimants are also entitled to get the 40% upon his establishment income according to the decision of the Hon'ble Apex Court passed in ***Pranay Sethi*** towards the future prospect; so after adding the future prospect the yearly dependency comes to Rs. 28,000/-. Considering the age of the deceased, the applicable multiplier of the case would be 16. So after multiplying the multiplier the award comes to Rs. 4,48,000/-. The appellants are also entitled to get some more compensation towards the general damages to the tune of Rs. 70,000/-; so after adding all heads the award comes to Rs. 5,18,000/-. The claimants are already received Rs.50,000/- towards the compensation under Section 140 of the M.V. Act. Thus the balance amount comes to Rs.4,68,000/- thus the balance comes to Rs.4,68,000/-The just and proper calculation is as follows:-

1.Monthly Income Rs.2,500/-

2. Annual Income....................................Rs.30,000/-

3. Less 1/3rd..Rs. 20,000/-
4. Future prospect ....Rs. 28,000/-
5. Multiplier apply 16
(Rs.28,000/- X 16)......Total Rs..................Rs.4,48,000/-

6. Add: General damages..........................Rs.70,000/-
Rs.5,18,000/-
Received already awarded...........Rs. 50,000/-
Balance.......................................Rs. 4,68,000/-

The insurance company is directed to pay the balance amount of Rs. 4,68,000/- alongwith interest @ 6% per annum from the date of filing of this case i.e. from 07.09.2005 within eight weeks through the office of the learned Registrar General, High Court, Calcutta. On such deposit the claimants are at liberty to receive the amount subject to the ascertainment of payment of requisite court fees.

The instant FMA is disposed of.

All connected applications, if any, stand disposed of.

Interim orders, if any, stand vacated.

Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)