21.08. 2023
item No.5
n.b.
ct. no. 551

**FMA 464 of 2009**

**With**

**IA No. CAN 1 of 2008(Old NO. CAN 10358 of 2008)**
**+**
**CAN 2 of 2008(Old No. CAN 10362 of 2008)**
**+**
**CAN 3 of 2013(Old No. CAN 7093 of 2013)**
**+**
**CAN 4 of 2015(Old No. CAN 905 of 2015)**
**+**
**CAN 5 of 2023**

**The New India Assurance Co. Ltd.**
**Vs.**
**Radha Rani Maity & Ors.**

Mr. Saibalendu Bhowmik,
.... For the appellant.
Mr. Bhabani Kr. Mondal,
Mr. Tarasankar Samanta,
...for the respondent nos.1,4,5.

The instant appeal has been preferred by the Insurance Company against the judgment dated April 25, 2008 passed by the learned Judge, 2nd Court of M.A.C. Tribunal, Tamluk in M.A.C.C No. 445 of 2005 renumbered as M.A.C.C No. 81 of 2006.

The brief fact of the case is that the respondent being the claimants filed an application before the learned Tribunal for getting compensation under Section 166 of the Motor Vehicles Act on the ground that that their predecessor was died in a road traffic accident due to rash and negligent driving of offending vehicle duly insured under the policy of the Insurance Company. The learned Tribunal has heard, the parties received the evidences and awarded a sum of Rs.5,86,000/-in favour of the claimants towards the compensation.

Being aggrieved by and dissatisfied with the impugned award the present appeal has been preferred by the Insurance Company.

Learned advocate for the Insurance Company submitted that there are two main grounds in the impugned award. First, the learned Tribunal has held that there was a violation of terms of policy instead of which the Insurance Company was directed to pay the compensation. He argued that at the time of alleged accident, the driver of the offending vehicle was not carrying the proper driving licence to ply the heavy vehicle i.e. truck. The Driver namely, D. K. Shaw was hold a licence for carrying of light motor vehicle (Transport). Admittedly, the offending vehicle truck was a heavy vehicle. So, the owner has a categorically violated term of the policy. Thus, the insurance Company is not at liable to pay the compensation. He submitted before this Court that by virtue of the decision of Hon'ble Supreme Court passed in **Challa Bharallamma** at paragraph 13 subsequently, followed by other judgments of Hon'ble Supreme Court passed in **Baljit Kaur** and **Swaran Singh**, the Insurance Company is first of all to secure the compensation from the owner, thereafter, they may be ordered to pay.

Another ground was raised by the learned advocate for the Insurance Company that the learned Tribunal has erroneously assess the compensation considering the monthly income of the deceased Rs.6,000/- per month. The assessment of the learned advocate regarding the monthly income of the deceased is perverse. Though, it has been pleaded by the claimants that the deceased was earring Rs.6,500/- per month from the Manager of two Buses but only the PW. 3 who is employee of only one bus adduced evidence before the learned Tribunal and submitted that he used to pay Rs.100/- per moth to the deceased for the Manager of his bus. Learned Tribunal has observed the evidence but erroneously the income of the deceased was calculated 6,000/- per month. The income of the deceased should be calculated Rs.3,000/- per month.

Learned advocate for the Insurance Company also raised doubt about the statement of P.W.2 regarding the manner of alleged accident and he stated that the evidence of P.W.2 is not convincing.

Heard the learned advocates and perused the materials including the police papers, it appears to me that on some portion of the cross-examination of P.W. 2; there may be some deviation under the fire of cross-examination but his deposition of examination-in-chief, he has stated on regarding the accident. The police papers including the FIR proved the involvement of the vehicle in question. The driver was also charge-sheeted due to rash and negligent driving of the offending vehicle. Considering the same, I find there is no doubt regarding the rash and negligent driving of the driver of the offending vehicle, who is responsible for the accident.

Learned advocate for the respondents/claimants submitted before this Court that the monthly income of the deceased was correctly calculated by the learned Tribunals as Rs.6,000/- per month. The deceased was Manager of two vehicles among them only one employer i.e. owner of a vehicle deposed as PW.3. The owner of another vehicle never turned up for which the document was not properly exhibited which was marked as X/1 for identification. He submitted that the learned Tribunal has considered the document and for which he assessed the income of the deceased to Rs.6,000/- per month.

Heard the learned advocates and perused the materials on record; on consideration the plea of the Insurance Company that the driver of the offending vehicle had no valid driving licence at the time of accident. I am of the view that the learned Tribunal has considered the issue and after through finding, he passed the impugned award in favour of the Insurance Company, so that they may recover the award from the O.P no.1 i.e. the owner of the offending vehicle. However, the order of the learned Tribunal is not specific to that effect.

Considering the circumstances, it is ordered that the Insurance Company is not liable to pay the compensation but according to the direction of the Hon'ble Supreme Court passed in **Swaran Singh** if there is violation in terms of the policy agreement, though the Insurance Company is not liable to pay compensation but they are to pay the compensation to the fateful third party claims and they are at liberty to recover the same from the owner of the vehicle. It is very much specified by the Hon'ble Supreme Court in **Challa Bharallamma** and **Baljit Kaur** regarding mode of recovery. At this juncture, the Insurance Company is at liberty to recover the compensation amount from the owner of the offending vehicle according to the direction of Hon'ble Supreme Court passed in **Challa Bharallamma**

Considering the income of the deceased, it appears to me that the learned Tribunal has considered the income of the deceased to be Rs.6,000/- per month. He is of the opinion that the deceased was the Manager of two Buses one is Haldia-Basirhat bound and another Haldia-Kolaghat bound, for which he assessed the income of each bus to Rs.3,000/- each and for which monthly income comes to Rs.6,000/-. Let him considered whether the observation of the learned Tribunal the correct or not. It appears from P.W.1 at the time of deposition, the wife of the deceased has produced two agreements before the learned Tribunal, which was marked as X and X/1 for identification. P.W. 3 appears to be the owner of the one vehicle and signatory of one agreement, which was marked as exhibited. But the another agreement was not marked, as the claimant could not produce the other signatory of the said agreement. Thus, the agreement was not properly marked but it was marked for identification.

I have perused the LCR, it appears that the alleged agreement, which was marked as exhibit X/1 for identification, was signed by the deceased. It is a old document of 2004. The income of the deceased through the Manager of that bus was mentioned as Rs.120 per day. Learned Tribunal has considered the document marked as X/1 for identification. It is not specifically mentioned in the impugned judgment itself regarding the admissibility of the agreement (X/1) but learned Tribunal has considered its validity without any proof. I have perused agreement (X/1), it appears to me that the agreement is of same nature, which was marked as exhibit 8. The agreement (exhibitX/1) contained the signature of both the deceased and one Sujoy Bhuia(owner) the agreement also witnessed by two other persons. The agreement extended into much prior to the accident. Admitedly, deceased was engaged in same type of job.

Considering the contents of the agreement, I think it necessary to observe that in the cases under the M.V. Act for providing compensation to the claimants, it is not necessary to look into the strict rule regarding the proof of documentary evidence. It is a summary procedure, only decided under the touchstone of preponderance of probabilities. However, learned Tribunal has considered the documentary evidences (X/1) and passed the impugned award fixing the monthly income of the deceased to Rs.3,000/- per month. I find no justification to vary the same finding. Considered the same income of the deceased is correctly considered to Rs.6,000/- per month.

The other part of the order of the Tribunal has not challenged before this appellant Court, thus, the impugned award passed by the learned Tribunal to the tune of Rs.5,86,000/- is remain as it is. I find no issue to interfere with the quantum of compensation.

The appeal is disposed of

It appears that the Insurance company has deposited the entire compensation to the office of the Learned Registrar General, High Court, Calcutta amongst which the claimant has already received 50%. The claimants are at liberty to withdraw the rest amount along with accrued interest, if any, from the Officer of the Learned Registrar General, High Court, Calcutta according to the prevalent rules.

Accordingly, FMA 464 of 2009 is disposed of.

All connected applications, if any, are also disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

**( Subhendu Samanta, J.)**