18.09. 2023
item No.4
n.b.
ct. no. 551

FMA 2008 of 2013
with
CAN 3 of 2016(Old No. CAN 1872 of 2016)
+
CAN 4 of 2023

I.C.I.C.I. Lombard General Insurance Co. Ltd.
Vs.
Reba Saha & ors.

Mr. Sayank Majunder,
.....for the appellant.
Mr. S. Dutta,
Md. M. Kalam,
.... For the added respondent.
Mr. Saidur Rahaman,l
... for the respondent.

Supplementary affidavit filed on behalf of the added respondent Santu Das is taken on record.

The instant appeal has been preferred against the judgment dated December 14, 2012 passed by the learned Judge, Motor Accident Claims Tribunal, 2nd Court, Jalpaiguri in M.A.C Case No.37 of 2009.

The brief fact the case is that the present respondent/claimant has preferred an application under Section 166 of M.V. Act before the learned Tribunal for getting compensation on the ground that their predecessor was died in a road traffic accident due the rash and negligent driving of the driver of the offending vehicle. The nature of the accident as stated in the claim application as follows:

On 13.11.2008 at about 11.30 hours while the deceased along with goods in the vehicle bearing no.WB-73/9371(Mini Door) was proceeding towards Jhankar. Suddenly, EICHER Truck bearing no. WB 73/6738 with rash and negligent driving dashed the Mini Door and victim sustained severe injuries and died. The Tribunal has proceeded with this case, and after hearing the parties, the learned Tribunal has awarded a sum of Rs.12,22,161/- in favour of the claimants towards the compensation. The present appellant being the insurer of the EICHER truck is directed to pay the compensation. The Insurance Company i.e. the insurer of the EICHER truck has preferred an appeal on the ground that the EICHER truck was not solely liable for the accident.

Learned advocate for the Insurance Company has placed the FIR, seizure list and charge sheet of police case being Siliguri P.S. case No.373 of 2008 dated 13.8.2008 arising out of the said accident.

It appears from the FIR of the said police case that the said FIR has lodged by the ASI of police, Siliguir, P.S. The FIR discloses the involvement of both the EICHER truck and the Mini door of the said accident. It has been stated in the FIR that both the vehicle were running dangerously at the time of accident. The final report of the police was submitted wherein it is reflected that both the driver of the vehicles were responsible as they were driving the vehicle dangerously and carelessly. Charge sheet has been submitted against both the drivers.

On citing such materials, learned advocate for the Insurance Company submits that the I.C.I.C.I. Lombard General Insurance Co. Ltd. i.e the insurer of the EICHER truck is not solely responsible to pay the compensation. During the pendency of the instant appeal notice was served upon the owner of the Mini Door. The owner, namely, Santu Das was represented with a supplementary affidavit. On perusal of the supplementary affidavit, it appears that the Mini Door was transferred to another person namely, Gokul Das before the date of accident. However, in such affidavit, he made a further statement that he is not a party of the instant appeal that the vehicle i.e. Mini Door is also involved in the said accident. The supplementary affidavit appears to be as contrary to the stand of the so-called early owner of the Mini Door being No. WB 73/9371(Mini Door).

Learned advocate for the Insurance Company cited the observation of the Hon'ble Supreme Court passed in **Khenyei Vs. New India Assurance Co. Ltd.** reported in **(2015) 9 SCC 273**. The Hon'ble Supreme Court has guided a specific principle in respect of composite negligence Paragraph 22.1 to 22.4 of the said citation is quoted below.

"22.1. In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the

joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors in joint and several.

22.2 In the case of composite negligence, apportionment of compensation between two tortfeasors vis-a-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3. In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/Tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4 It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint fortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in *independent proceedings after passing of he decree or award".*

In considering the entire appeal and memo thereof and in considering the materials, it appears to me that the argument of the learned advocate appearing on behalf of the I.C.I.C.I. Lombard General Insurance Co. has substance. Police paper which was exhibited before the learned Tribunal has specifically mentioned the involvement of both the vehicles in the said accident. Consequently, both the vehicles are the joint tortfeasors and both of them are jointly liable to pay the compensation.

By virtue of observation of the Hon'ble Supreme Court in **Khenyei(Supra)** the present respondent being the claimants shall not be harassed to received the compensation. It is the specific decision of the Hon'ble Supreme Court that the percentage of negligence cannot be determined by a Tribunal or the Appellate Court thereof. So, the extent of liability is to be determined by any other forum in a separate proceeding. At this juncture, the I.C.I.C.I. Lombard General Insurance Co./appellant is at liberty to prefer a specific proceeding/suit before the appropriate Court to recover the portion of compensation. The appellant is at liberty to use the supplementary affidavit filed by the added respondent before this Court in the said proceeding.

Considering the entire aspect, the appeal is hereby disposed of.

It appears that the Insurance Company has already deposited the entire awarded amount with the office of the Learned Registrar General, High Court, Calcutta. The present respondent being the respondent nos. 1,2,3 are entitled to get the entire sum of money as deposited by the Insurance Company. It further appears that the claimants has already receive 50% of the awarded amount from the office of Registrar General, High Court, Calcutta by the order of this Court, on the earlier occasion. The claimants are at liberty to receive the rest deposit amount along with accrued interest if any, from the office of the Learned Registrar General, High Court, Calcutta.

The appeal is disposed of with a liberty to the appellant/Insurance Company, that they may prefer separate application/proceeding/suit before the appropriate forum to recover the portion of the compensation from the owner/occupier/insurer of the other offending vehicle(Mini Door) being no. WB 73/9371, the extent of which shall be determined by that forum.

Accordingly, the FMA 2008 of 2013 is disposed.

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.)