26.09. 2023
item No.57
n.b.
ct. no. 551

FMA 442 of 2023

with

IA No. CAN 1 of 2023

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CAN 2 of 2023

Aaduri Bagdi & Ors.
Vs.
Bajaj Allianz General Insurance Co. Ltd. Ors.

Mr. Jayanta Banerjee,
Mr. Argha Bhattacharjee,
Mr. Sandip Bandhopadhyay,
.....for the appellants.

Mr. Soumalya Ganguli,
.... For the respondent No.1.

The instant appeal has been preferred against the judgment and award dated April 13, 2015 passed by the learned Tribunal, 4th Court, Burdwan, in M.A. C. case No. 44 of 2011 (MAC Case No.202 of 2011) being an application under Section 163A of the Motor Vehicles Act, 1988.

The brief fact of the case is that the present appellants being the claimants preferred an application before the learned Tribunal under Section 163A of the Motor Vehicles Act for getting compensation from the Insurance Company on the ground that their predecessor died in a road traffic accident due to rash and negligent driving of the driver of the offending vehicle duly insured under the policy of the insurance company. The Insurance

Company contested the matter before the learned Tribunal.

After hearing the parties the learned Tribunal has awarded a sum of Rs.3,91,000/- in favour of the claimants and directed the owner of the offending vehicle No.WB 51/2478 to pay the compensation. The claimants are before the appellate court with only submission that the Insurance Company must have the liberty to pay the compensation instead of owner.

Learned advocate for the appellants submits that the offending vehicle No.WB/51 2478 was insured under the policy of the insurance company i.e. the respondent no.1 of this case at the time of accident. The learned Tribunal has directed the owner to pay the compensation on the ground that issue no.6 was decided against the present appellant. The issue no.6 was framed by the learned Tribunal with the effect that whether the insurance company is liable to pay the compensation for the death of the deceased. The observation of the learned Tribunal in deciding the issue is that the insurance company has sufficiently proved the fact that the deceased was gratitude passenger of the bus so the insurance company may not be liable to pay the compensation. However, as the owner of the vehicle has allowed the deceased to board on top of the bus so owner was directed to pay the compensation.

Learned advocate for the appellants submits that the fact of boarding on the top of the bus by the deceased was not proved. He submits that one xerox copy of the statement was exhibited by the learned Tribunal. It appears to be signed by the P.W.2, though the P.W.2 has admitted the signature over the document i.e. marked as 'Exhibit – B', but the same cannot be treated to be a good peace of evidence. He further argued that treatment sheet was called for from the Burdwan Medical College & Hospital by the Insurance Company but the person appears from the Burdwan Medical College & Hospital could not produce the said treatment sheet to prove that the deceased was died due to fall from the top of the bus. He again argued on behalf of the decision of the Hon'ble Punjab and Haryana High Court in ***Oriental Insurance Co. Ltd. Vs. Smt. Meena Devi & Ors.*** reported in ***2012(4) T.A.C. 91(P.&H.)***. In ***Smt. Meena Devi & Ors***., the Hon'ble High Court has held that the Insurance Company in respect of passengers travelling of the roof top of the bus does not absolve the Insurance Company of its liability. He further argued that the Learned Tribunal has committed an error for directing the owner of the offending vehicle to pay the compensation as according to the direction of the Hon'ble Supreme Court passed in **Baljit kaur** in case of violation in terms of policy, the Insurance Company may be liable to pay the compensation and in turn they are at liberty to recover the same from the owner of the vehicle.

Learned advocate appearing on behalf of the Insurance Company submits that the observation of the learned Tribunal in respect of fixing up liability to pay the compensation by the owner is not at all incorrect. In deciding the issue no.6, the learned Tribunal has observed that exhibited documents both oral and documentary evidences before him. After considering the evidence on record, the learned Tribunal has come to a logical finding that the deceased was gratuitous passenger. Thus, the insurance company had no liability to pay the compensation. He specifically pointed out the evidences both oral and documentary evidence before this Court. He pointed out that it has been sufficiently proved that the deceased boarded on the roof top of the bus and when the bus was moving, he fall down from the roof top and succumbed to his injuries. The passenger, who travelled on a motor vehicle through the roof top of motor vehicle is a gratuitous passenger according to the provisions of Section 123(2) of the Motor Vehicles Act, 1988. On that score, he cited that the Tribunal has correctly assessed the compensation and fixed the compensation upon the owner to pay the compensation.

In support of his contention he cited a decision of ***Smt. Upasi Bala Devi @ Kumhar @ Majhi & Ors. Vs. The Oriental Insurance Co. Ltd. & Anr.*** reported in

2017 SC Online CAL 360. In case ***of Smt. Upasi Bala Devi (supra)***, the learned Tribunal has rejected the claim case on the ground that the claimant was failed to prove the rash and negligent driving of the driver of the offending vehicle. In deciding the same, Division Bench of this Court has placed reliance upon the provisions of Section 123(2) of the Motor Vehicles Act, 1988 and observed that the deceased boarded the roof of the bus and he did so according to his own risk and in violation of Section 123(2) of the M.V. Act. Thus, the rash and negligent driving of the driver is not proved. The Hon'ble Division Bench has upheld the decision of the Tribunal on such ground.

The instant case is filed under Section 163A of the M.V. act. only the death and injury of the predecessor of the claimant regarding the involvement of a motor vehicle is required to be proved in this case. Section 166 of the M.V. Act requires a specific proof of rash and negligent driving of the driver of the offending vehicle which is not required under Section 163A of the M.V. Act.

The observation of the Division Bench of this Court in respect of rash and negligent driving of the driver of the said case is filed under Section 166 of the M.V. Act. So, above observation is not squarely applicable in this case. Though, the provision of law enumerated under Section 123(2) of the M.V. Act is justifiably applicable in this case, if the Insurance Company had proved that the deceased was travelling on the roof top of the bus.

Learned advocate for the Insurance Company also cited decision of Karnataka High Court reported ***in ILR 2011 KAR 4845 para 26.*** The said judgment of the Division Bench has discussed as follows:

"26. Travelling on roof top of the Bus is pure negligence. But, unless the said negligent act contributed to the accident and consequential loss. The passenger cannot be denied the compensation. But by such negligent act if the passenger has contributed to the accident, the extent of his contribution has to be ascertained. To that extent, the compensation payable would get reduced. No contributory negligence or fixed percentage of contribution could be attributed to the passenger, merely because he was travelling on the roof top of the bus. Hence, the precise percentage by which the award of compensation amount is to be reduced is a pure question of fact, to be decided by the Court, on the evidence adduced and in the circumstances of the each case."

It has been held by the Division Bench of Karnataka High Court that the travelling on roof top is pure negligence. Thus, on the basis of the said principle, the Hon'ble Division Bench has passed the judgment fixing the part of the negligence on behalf of the person travelling on the rooftop. The judgment was passed in respect of contributory negligence fixing the percentage of negligence. So, this judgment is also not squarely applicable in this case.

Let me consider what is the factual aspect in this case. It is the case of the claimants that the deceased along with brother, P.W. 2, travelled on the fateful day. They were the fish sellers. At the relevant point of time, they entered into the bus at the place of occurrence from the back door of the bus. The P.W. 2 has entered into the bus and deceased was just entered at the first stair of the bus. At the time, the bus suddenly starts and he fell down from the bus and sustained bleeding injuries and later, succumbed to his injury.

On the other hand, the Insurance Company has tried to set out the fact that the deceased travelled through the bus and the deceased was sitting on the roof top of the bus at that time, he fell down from the roof top of the running bus and succumbed to his injury.

The Learned advocate for the Insurance Company submits that if the deceased travelling through the roof top of the bus, then, obviously he is a gratuitous passenger under Section 123(2) of the M.V. Act. Thus, the Insurance Company is not liable to pay compensation. The learned Tribunal has admitted the contention of the Insurance Company in this case.

Let me consider whether the observation of the learned Tribunal is correct to that respect or not. It appears that the learned Tribunal has considered an alleged written up xerox statement of Sova Bagdi, who happens to be the mother of the deceased. One Xerox statement with the Xerox signatures of the family members, the deceased was marked as 'Exhibit B'. The writter of the said statement stated to be one Uttam Hati, the learned Tribunal has placed reliance upon the said statement. Since, it is the case of the Insurance Company that the Investigating officer of the Insurance Company has visited the house of the deceased and collected the statement. If this be the statement collected by the Investigating officer why the statement filed in Xerox copy. The signature and LTI over the maker of the document was not at all proved. Sova Bagdi is the party to the proceeding. So, the Insurance Company must have called the appellant no.4 before the learned Tribunal to prove the LTI, moreover, the LTI of the said, Sova Bagdi can be compared to prove those documents. Moreover, the maker of the document i.e. Uttam Hati was not produced before the learned Tribunal to prove such document.

Considering the same, I think it necessary that the observation of the learned Tribunal on the basis of the 'Exhibit- B' is erroneous. Learned Tribunal should have more conscious to discuss regarding the correctness and probative value of the document. The Insurance Company also exhibited one document issued by the medical Record Department, Burdwan Medical College & Hospital. The 'Exhibit- D' is the answer in respect of RTI application of one investigating officer of the Insurance Company. The Insurance Company has placed reliance upon the answer wherein it has been mentioned the road traffic accident has a history of fall from the rooftop of the bus. The said answer cannot be ipso facto proved the fact that who stated the fact that the person i.e. deceased fell from the rooftop of the bus. Moreover, the Insurance Company has know the legal provision of law, so, they tried to prove the fact that calling for the record from the Burdwan Medical College & Hospital. The document appears to be missing and a G.D was lodged on behalf of the Burdwan Medical College & Hospital Leaned Tribunal has placed reliance upon the 'Exhibit – B' and 'Exhibit – D'. It has been categorically observed earlier that 'Exhibit –B" is a document on the basis of which no reliance can be placed and 'Exhibit- D' was not sufficiently proved answer to the quarry of RTI. Thus, the observation of the learned Tribunal in respect of issue no.6 is erroneous. The Insurance Company may have a good ground in a case under Section 166 of the M.V. Act, where the rash and negligent driver of the offending vehicle is required to be proved, but not under Section 163A of M.V. Act, where the principle based upon no fault liability. So, the liability and the rash and negligent manner of driving in a bus is not required to be proved. Moreover, it appears that the Insurance Company has failed to prove that the deceased was actually travelled on the rooftop of the bus.

Considering the same observation of the learned Tribunal, appears to me erroneous and it is hereby set aside.

The quantum of compensation is not challenged here. Thus, I think it necessary that the order of the learned Tribunal need be modified. It appears that in considering general damages of this case, the learned Tribunal has awarded Rs.2,000/- towards the future expenses and Rs.5,000/- as loss of consortium. The loss of state according to the 2^{nd} schedule of the Section 163A of the M. V. Act. Rs.2,500/- was not considered towards the general damages , so the claimants are entitled to get the said award of Rs.2,500/- along with already awarded compensation. So, the award comes to Rs.3,21,000/- +2,500= Rs.3,93,500/-.

Insurance Company is directed to pay the above mentioned award amount to the claimant through the office of Learned Registrar General, High Court, Calcutta along with 6% interest per annum from the date of filing of the claim application i. e. from 26.7.2021 within eight weeks from the date of passing of the order.

On such deposit, the claimants are at liberty to receive the same according to the prelevant rules

Accordingly, FMA 442 of 2023 is disposed of.

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.)