

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT: - THE HON'BLE JUSTICE SUBHENDU SAMANTA

FMA 2448 of 2014
IA No. :CAN/2/2014 (Old No.:CAN/4034/2014),
CAN/3/2015 (Old No.:CAN/1358/2015),
The National Insurance Co. Ltd.
versus
Dipali Sarkar & Ors.

For the Appellants	: Mr. Sanjay Paul, Advocate.
For the Respondents	: Mr. Amit Ranjan Roy, Advocate
Hearing on	: 25.01.2024
Judgment on	: 29.07.2023

Subhendu Samanta, J.:-

1. The instant appeal has been preferred against the judgment and awarded dated 12th December, 2013 passed by the learned Judge, Motor Accident Claims Tribunal, 1st court, Nadia in MAC Case No. 464 of 2010.
2. The brief facts of the case is that the present respondents No. 1-3 being the claimants have preferred an application before the learned tribunal under Section 166 of M.V. Act for getting compensation on the ground that their predecessor was 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 claim case was contested by the Insurance Company by filing written statement.

3. After hearing the parties and after receiving the evidences the learned tribunal has awarded a sum of Rs. 16,35,760/- towards the compensation in favour of the claimants and directed the Insurance Company to pay the compensation. .

Being aggrieved by and dissatisfied with the said award, the Insurance Company has preferred the instant appeal.

4. The learned advocate for the Insurance Company submits that the impugned award passed by the learned tribunal is erroneous. The learned tribunal has failed to appreciate the fact that the manner of accident stated by the claimants in the claim application is totally false. The learned tribunal also not considered the contributory negligence on the part of the driver of the vehicle wherein the deceased was travelled at the point of time. He further argued that the driver of the police vehicle was solely responsible for the accident but the learned tribunal has committed error by fixing liability upon the insurer of the vehicle which was stationery. He argued that the claim case contended that the deceased was a police personnel and while they were in a petrol duty at the time the driver of the offending vehicle/truck dashed them from behind. By such accident, the victim sustained severs bodily injury and, thereafter, succumbed to his injuries. The actual fact of the case is that the truck was stationary besides the NH-34 as his one of the wheel has been broken. There was a fog and the police vehicle,

wherein the deceased was travelling was under the pattrol duty. The driver of the police vehicle was driving the police vehicle in a high speed in a rash and negligent manner and could not see the truck standing besides the NH-34 and dashed the truck from behind. The deceased was sited left side of the police vehicle and he sustained severe head injury. He argued, on the attending circumstances, the fact and manner of accident as stated in the claim application is itself wrong but the learned tribunal has not considered the entire fact and passed the erroneous award. So, the award is liable to be set aside.

5. Learned advocate appearing on behalf of the claimants submits that the learned tribunal has committed no error in awarding the compensation. The learned tribunal has assessed the evidence of PW-1 and PW-2 and also perused the police papers i.e. FIR, charge-sheet etc. wherein it appears that the offending vehicle (truck) was driving the vehicle in a rash and negligent manner and dashed the vehicle. He further argued that the evidence of OPW-1 i.e. the driver of the truck cannot be considered to be true.
6. Heard the learned advocates, perused the impugned judgment. It appears that the claim application was filed stating the fact of accident that at midnight on 26.11.2010 the victim alongwith some other police officers went out petrol duty from Kaliachak P.S., Malda. At about 12.15 a.m. near Solepur over the N.H.-34 one Truck bearing No. WB-23/2561 came from behind and dashed the Police Jeep from its back. At the time of accident the offending

truck was coming in a high speed and rash and negligent manner. By such accident the victim sustained severe injuries and, thereafter, he succumbed to his injuries. The said fact of the claim case was corroborated by PW-1 as well as PW-2 by adducing oral evidence. Surprisingly, the OPW-1 i.e. the owner of the offending vehicle also filed written objection and stated that the truck dashed the police vehicle in Kaliachak on 26.11.2010 midnight. Subsequently, such OPW-1 on behalf of Insurance Company appeared and deposed as follows:- ***“I have a truck bearing No. WB-23/2561 and I also drive the said truck by myself. I met with an accident in the said truck in the month of December, 2010. I used to start my truck from Kolkata to Gangarampur and after crossing Kaliachak, District of Malda for about 30 Kilometres, the bearing of wheel of my truck was broken and as such, I somehow stop the vehicle by the side of the road and I left from Gangarampur for bringing a mechanic. I park my truck at about 10.30 p.m. and about 11.00 a.m. I got news that one bolero jeep from Kalichak P.S. came with high speed and dashed from behind while driving the vehicle in a rash and negligent manner. I reached the spot and found Additional S.P. Nadia many people gathered on the spot. My vehicle was not there at the place when I had kept it. I latter found that my vehicle was taken away by the police to Kaliachak P.S. and kept in the compound in the Kaliachak P.S”.***

7. On the basis of such evidence of OPW-1 it is the argument on behalf of the Insurance Company that the police patrol, bolero car was driving the vehicle in a rash and negligent manner, so the fact of the claimant cannot be believed. It appears that, during the cross examination the OPW-1 has denied his signature in the written objection filed by him before the learned tribunal after receiving the summons; rather he affirmed a letter written by him to the manager National Insurance Company Ltd. regarding the fact of the accident.
8. Considering the fact of this case, it appears to me that the police started a specific case being Kaliachak 687/10 dated 26.11.2010 out of the said accident. Investigation of the police is ended in charge-sheet citing the present OP as an accused of the case. The CD has been placed before the learned tribunal. In perusing the CD it appears that the IO has taken the report whether there is a mechanical defect or not the report suggests that there are no mechanical fault and the accident has occurred due to other than the mechanical failure. So, considering the same it is quite unbelievable that while one wheel of the truck was broken how the report of the mechanical expert has issued that both the car had no mechanical defect. Moreover if the wheel of a heavy road vehicle i.e. truck was broken it is not possible for the police to bring the vehicle instantly or after the accident without using of any crane. The driver cum owner of the offending vehicle has only denied his signature over the written objection filed by him before the learned

tribunal after receiving the summons; but he has not taken any steps or lodged any complaint to any authority that any person has filed the written objection by manipulating his signature there on. Moreover, I find no justification to entertain the evidence of the OPW-1 while the evidence as appears to be not true to its perspective. The learned tribunal has correctly disregarded the evidence of OPW-1. Considering the facts and circumstances of this case I think it necessary to observe that there is no negligence on the part of the driver of the police bolero car in the alleged accident. Thus, the argument on behalf of the Insurance Company regarding contributory negligence is turned down.

9. The learned advocate for the respondents/claimants submits that the claimants are entitled to get the benefit of the law laid down by the Hon'ble Apex Court in **Pranay Sethi**. They are entitled to get the future prospects as well as the general damages in this case. Learned advocate for the Insurance Company submits that the appeal has been preferred by the Insurance Company against the award. The claimants has not preferred an appeal or cross appeal against the award so in an appeal of Insurance Company they are not entitled to get any enhance compensation.
10. Learned advocate for the respondent submits that the instant appeal is the continuation of the claim case. Under the provision Order 41 Rule 33 of CPC, the Appellate Court has power to grant any relief to the respondent if they are actually entitled to. He further argued that the claim for future prospects and general

damages was not at all considered by the learned tribunal so according to the observation of Hon'ble Apex Court in **State of Andhra Pradesh Vs. B. Ranga Reddy** it has been held that *"The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the Court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate Court exercising power under Rule 33 of Order 41"*.

Learned advocate for the respondent further argued in view of the **B. Ranga Reddy (supra)** this appellate Court may award the compensation on the ground of future prospects and general damages when they were not at all considered or rejected by the learned tribunal.

11. Refuting the argument of the learned advocate for the respondent, the learned advocate for the appellant cited the decision of Hon'ble Supreme Court in **Ranjana Prakash and Others Vs. Divisional Manager and another** reported in (2011)

(4) TAC 11 (SC) and also cited a decision of Divisional Bench of this Court in **National Insurance Company Limited V. Smt. Sulekha Das & Ors.**

12. Heard the learned advocate perused the observation of Hon'ble Supreme Court as well as the observation of Division Bench of this Court. The issue has been settled time and again by this Court that by virtue of decision of Division Bench of this Court in **Smt. Sulekha Das and Ors (Supra)** the claimant cannot get enhance compensation in an appeal filed by the Insurance Company. So, following the decision of Hon'ble Division Bench of this Court in **Smt. Sulekha Das & Ors** it has been held that

“46. Wee, however, part with the observation that unless the Supreme Court revisits the issue and reverses the ratio of the decisions in R. Swaminathan (supra) and Ranjana Prakash (supra) and lays down the law authoritatively for guidance of the High Court's thereby paving the way for award of enhanced compensation in course of appeal proceedings without there being any cross-object, in exceptional cases warranting such approach, Order XLI Rule 33 cannot come to the rescue of the respondents/claimants for enhanced compensation in an appeal by the owner or the insurer for reducing the compensation awarded”.

13. Considering the all aspects and considering the observation made above, on the other hand no justification to interfere with the

impugned judgment and award passed by the learned tribunal.

Hence the instant appeal being devoid on merit is dismissed.

14. The instant **FMA 2448 of 2014** is disposed of with the above observation.

It appears that the Insurance Company has deposited the entire awarded sum together with interest with the office of the learned Registrar General, High Court, Calcutta; the same amount must have carried sum interest. The learned Registrar General, High Court, Calcutta is directed to disburse the same amount alongwith accrued interest in favour of the claimants within six weeks from this date.

15. All connected applications, if any, stand disposed of.
16. Interim orders, if any, stand vacated.
17. Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)