

17.01.2024
SL No.11 & 12
Court No. 551
Ali

**IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction**

FMA 767 of 2023

**Oriental Insurance Co. Ltd.
Vs.
Rina Marandi & Ors.
With**

COT 71 of 2023

**Rina Marandi & Ors
Vs.
Oriental Insurance Co. Ltd. & Anr.**

Mr. Sanjay Paul,
Ms. Jaita Ghosh
.... for the appellant/Insurance Co.

Mr. Ashique Mondal,
Mr. Subhankar Mandal
.....for the respondents.

The instant appeal has been preferred against the Judgment and Award dated 17th December, 2022, passed by the learned Judge, Motor Accident Claims Tribunal, 1st Court, Asansol, in MAC Case no. 15/2016/109/2015.

The brief facts of the case is that the present respondents being the claimants have preferred the claim case before the learned tribunal under Section 166 of the 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.

The learned tribunal after hearing the parties and after receiving the evidences has awarded a sum of Rs.69,63,848/- together with interest @ 6% per annum in favour of the claimants from the date of filing of the claim application.

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

The sole grounds of appeal of the Insurance Company is that the learned tribunal has not considered the plea of Insurance Company regarding the contributory negligence on the part of the victim himself.

Mr. Paul, learned advocate appearing on behalf of the Insurance Company submits that the Insurance Company has taken the plea in the written statement that the victim was responsible for the accident and there is a contributory negligence on the part of the victim. The WS was filed on the said plea. To substantiate the pleadings the Insurance Company has produced two witnesses i.e. OPW-1 and OPW-2. OPW-1 is the owner of the offending vehicle who stated that his driver, namely, Debasish Dutta was driving the car at the time of the alleged accident. OPW-2 is the driver of the offending vehicle who was driven the car at the time

of accident. The OPW-2 has deposed before this Court that at the time of the said accident, the victim was driving the motor cycle. The motor cycle and the said vehicle were going in the said direction. The motor cycle was just in front of the said vehicle about distance of 10 to 12 feet. The driver of the motor cycle suddenly put brake of the motor cycle and as a result the offending vehicle collided with the motor cycle on the National Highway. He also stated that at the time of the accident his vehicle was running at a speed 60 to 70 km per hour. He also deposed before the learned tribunal that due to such accident one criminal case was started wherein his driving licence and other papers were seized. He was acquitted from the criminal case after trial.

On the basis of the said statement Mr. Paul submits that by virtue of the decision of the Hon'ble Division Bench of this Court passed in **Mita Samanta** the owner and the driver of offending vehicles are the best persons regarding the involvement of the vehicle. In this case, the owner and the driver of the offending vehicle has appeared before the learned tribunal and stated the real facts of the accident. The PW-2 is the eye witness of the accident who stated that the offending vehicle i.e. the TATA MANZA Car has dashed the victim from behind when he was riding the motor cycle over the NH.

Mr. Paul submits that the statement of the OPW-2 is a valuable statement regarding the cause of the accident. From the said statement it reveals that the victim himself put the brake of the motor cycle consequently the TATA MANZA Car dashed him from behind. He further submits that the learned tribunal has not considered the fact and is of opinion that the acquittal of a person in the criminal case cannot exonerate, the Insurance Company to pay the just and proper compensation. He argued that the learned tribunal has committed the error in not considering the evidence of OPW-2.

Learned advocate appearing on behalf of the respondents/claimants submits that during the cross examination of OPW-2. He specifically admitted that he has not filed the document regarding his acquittal from the criminal case. He also admitted before the learned tribunal that he did not file in Narazi petition against the charge-sheet.

He submits that if the OPW-2 i.e. the driver of the offending vehicle, if not responsible for the accident, he must have filed Narazi petition against the charge-sheet which is the prima-facie charge against which is the proof of the prima-facie offence of the OPW-2 in the alleged accident. He further argued that the observation of criminal trial is not binding upon the case initiated under Section 166 of the M.V. Act. In support of his contention, he also

the decision of Hon'ble Supreme Court passed in **Mohammed Siddique and Another Versus National Insurance Company Limited and Others** reported in (2002) SCC 57.

“12. But the above reason, in our view, is flawed. The fact that the deceased was riding on a motorcycle along with the driver and another, may not, by itself, without anything more, make him guilty of contributory negligence. At the most, it would make him guilty of being a party to the violation of the law. Section 128 of the Motor Vehicles Act, 1988, imposes a restriction on the driver of a two-wheeled motorcycle, not to carry more than one person on the motorcycle. Section 194-C, inserted by Amendment Act 32 of 2019, prescribes a penalty for violation of safety measures for motorcycle drivers and pillion riders. Therefore, the fact that a person was a pillion rider on a motorcycle along with the driver and one more person on the pillion, may be a violation of the law. But such violation by itself, without anything more, cannot lead to a finding of contributory negligence, unless it is established that his very act of riding along with two others, contributed either to the accident or to the impact of the accident upon the victim. There must either be a causal connection between the violation and the accident or a casual connection between the violation”.

Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak & Ors. AIR (2002) SC 2864.

“we do not think that these two reasons given by the High Court fully justify the accepted principles of contributory negligence. The question of contributory negligence

arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own Wrong."

Meera Devi & Anr. Vs. H.R.T.C. & Ors.

2014 AIR SCW 1709

"10. To prove the contributory negligence, there must be cogent evidence. In the instant case, there is no specific evidence to prove that the accident has taken place due to rash and negligent driving of the deceased scooterist. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of common law cannot be applied in the present case. We are, thus, of the view that the reasoning given by the High Court has no basis and the compensation awarded by the Tribunal was just and reasonable in the facts and circumstances of the case".

He further submits that the learned tribunal has considered the argument advanced by the Insurance Company and has correctly opined that in a case under Section 166 of the M.V. Act. The findings of Criminal Court are about proof of gist beyond reasonable doubt and cannot be acquitted with test of preponderance probability as in civil case. He further argued that the ground of the Insurance Company in the appeal is meritless and

appeal is liable to be dismissed. He further argued that the respondents have preferred one COT being No. 71 of 2023 only on the ground that the income of the deceased was not properly considered but the learned tribunal the income of the deceased should be considered on the basis of the Form 16 issued by the concerned department. According to the Form 16 the annual income of the deceased less the Tax component and Professional Tax would be Rs. 5,52,331/-. The learned tribunal has erroneously assessed the income of the deceased annually to be Rs. 5,26,800/-.

Heard the learned advocate perused the observation of Hon'ble Supreme Court also perused the evidence of OPW-2. It is a fact that by virtue of decision of Hon'ble Division Bench of this Court in **Mita Samanta**, the evidence of owner and the driver of the offending vehicle is a best evidence to state about the involvement of the vehicle. The entire facts goes to show that the evidence of PW-2 i.e. the eye witness and the evidence of OPW-2 i.e. the driver of the offending vehicle is not at all different. While the victim was driving the motor cycle over the NH the offending vehicle dashed him from behind by such he sustained injuries. It is the evidence of OPW-2 that the accident occurs due to the application of sudden brake by the victim in his motor cycle. The fact goes to show that the two vehicles are running

over the NH at a speed 60-70 km per hour having distance between them was only 10-12 feet. Consequently, when the vehicle running in front put the brake the distance is so minimum that the vehicle running behind must collided the front vehicle. Moreover, it appears from the evidence of OPW-2 that he made statement before the IO regarding such facts. The CD was not placed before the learned tribunal or before this Court. The charge-sheet does not content the statement of the OPW-2. The charge-sheet may not contain the OPW-2 but the evidence of OPW-2 may place in the CD. However, the observation of the criminal Court after completion of trial is not placed before the learned tribunal or before this Court so it is quite impossible for this Court to ascertain the truthfulness of the statement of OPW-2 before the learned tribunal. However, it appears itself from the statement of OPW-2 that there are only 10-12 foot difference between two vehicles and the vehicles were running at a speed 60 to 70 km per hour. The distance is very minimum. So, the driver of the offending vehicle must have taken caution to make more distance between two vehicles when the motor cycle applies his brake, what prevented the driver of the offending vehicle to put his brake. However, there is no fact or statement of OPW-2 that he also put his brake in the TATA MANZA Car. The OPW-2 did not maintain

the proper distance between victim motor cycle and his car while driving over the N.H., he also not applied break of his car. Thus the OPW-2 is driving the offending car in rash and negligent manner. Consequently, it appears to me that the plea of contributory negligence submitted by the learned advocate for the appellant is appeared to be not justified.

The charge was framed against the OPW-2 under Sections 279/304F/427 of IPC the offence mentioned in the specific Section of the IPC has its significance ingredient to prove in the trial. The ingredients of such offences requires specific proof and not at par with the fact of rash and negligence manner driving of the driver of the offending vehicle.

On that score, it appears to me that the plea of contributory negligence raised before this appellate Court has no leg stand upon. Accordingly, the same is set aside.

In considering the submission of the cross objector/respondents it appears to me that the learned tribunal has assessed the income of the deceased on the basis of the Pay Slip issued by the concerned department. The same department has also issued the Form 16 which content the yearly income of the deceased just prior to the accident. The Form 16 and the statement thereof is more reliable then the Pay Slip. Accordingly, the income of

the deceased would be Rs. 5,52,331/- instead of Rs.5,26,800/-.

Accordingly, the award passed by the learned tribunal need be modified. Thus, the just and proper compensation of this case is hereby recasted as follows:-

Calculation of compensation

1. Annual Income	:Rs.5,52,331/-
2. Less Personal Expenses 1/5 th :	Rs. 4,41,865/-
3. Add: 30% Future Prospects	:Rs.5,74,424/-
4. Multiplier 13 (Rs.5,74,424/- X 13)	:Rs.74,67,512/-
5. Add Non Pecuniary damages	:Rs.77,000/-
	:Rs.75,44,512/-
Less: amount awarded	:Rs. 69,63,848/-
Enhance compensation	:Rs.5,80,664/-

After calculation the award comes to Rs. 75,44,512/-.The award must have carried some interest @ 6% per annum from the date of filing of the claim application. It appears that the Insurance Company has already deposited the statutory amount of Rs. 25,000/-vide OD Challan No. 785 dated 16.6.2023 and further deposited Rs. 99,95,310/- vide OD Challan No. 1357 dated 31.07.2023 the same amount must have carried some interest. The office of the learned Register General, High Court, Calcutta is directed to disburse the deposited amount alongwith the accrued interest to the respondents according to the direction of the

learned tribunal. After receiving such amount the respondents shall inform the Insurance Company regarding the amount they have received and after receiving such information the Insurance Company shall deposit the rest amount alongwith interest within six weeks thereafter.

Learned advocate for the Insurance Company submits that there are some typographical mistakes in the cause title of the memo of appeal the same may be corrected. So, he prayed for necessary order.

Heard the learned advocate perused the cause title of the memo of the appeal it appears that there are some typographical mistake and they are made inadvertents. Accordingly, the advocate on record of the appellant is directed to correct the cause title of the memo of the appeal within a fortnight.

Accordingly, the instant FMA 767 of 2023 alongwith COT 71 of 2023 is disposed of.

All connected pending 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.)

