13.03.2024
Crt. No.551
Item No 2.
KB

F.M.A.T.(MV) 570 of 2023
with
IA NO. CAN 1 of 2023
with
IA NO. CAN 2 of 2023
with
IA NO. CAN 3 of 2024

Shriram General Insurance Co. Ltd.
Versus
Asema Bibi & Ors.

Mr. Rajesh Singh
… For the appellant/Insurance Co.

Mr. Amit Ranajan Roy
… For the Respondents/Claimants.

Affidavit of Service filed on behalf of insurance company is taken on record.

In Re: <u>CAN 2 of 2023</u>

Delay of 43 days in preferring the instant appeal is hereby condoned by virtue of CAN 1 of 2023.

It further appears that the insurance company in pursuance to the order of this Court has deposited the entire awarded sum amounting to Rs.10,27,430/- dated 17.10.2023.

Accordingly, the interim order passed by this Court be extended till the disposal of the instant appeal.

Thus the application being CAN 2 of 2023 is disposed of.

In Re: <u>F.M.A.T. (MV) 570 of 2023.</u>

The instant appeal is preferred against the judgement and award dated 18th April, 2023 passed by the Learned Judge, Motor Accident Claims Tribunal, Additional District Judge, 5th Court, Paschim Medinipur in M.A.C. Case No. 150 of 2015.

The Insurance Company has preferred the instant appeal against the award.

The fact of accident as stated in the claim application, is as follows:

On 31st December, 2014 at around 07.00 P.M. – 07.30 P.M. when the deceased namely Saidul Ali @ Sk. Saidul Islam was going from Changual to his own house as pedestrian by the intermediate portion of NH 60 road and when the deceased reached near Sanmoninathpur at that time one tractor bearing no. WB33/8330 coming with a very high speed with rash and negligent manner suddenly dashed the deceased and by such the deceased sustained grievous injuries on his head and body. The local people immediately shifted the deceased to Sub-divisional Hospital, Kharagpur for treatment but the deceased succumbed to his injury.

The present respondent-claimants are the legal heirs of the deceased who filed the claim application before the Learned Tribunal for getting compensation. The claim case was contested by the insurance company by filing written statement.

Learned Tribunal after hearing the parties and after receiving the evidence has allowed the claim application and directed the insurance company to pay the compensation amounting to Rs.7,45,000/- together with 5% interest per annum from the date of filing of the claim application.

Being aggrieved by and dissatisfied with such award, the insurance company has preferred the instant appeal.

It is pertinent to mention here that during the trial the widow of the deceased deposed as P.W.1 and two eyewitnesses were deposed as P.W.2 and P.W.3.

Learned Advocate Mr. Rajesh Singh appearing on behalf of the insurance company submits that the fact of accident as stated by the claimants and as demonstrated before the Learned Tribunal is not similar but of three types of manner of accident.

First manner of accident is that the deceased was dashed by the Tractor (as stated in the claim application as well as P.W.1).

Secondly, the tractor dashed the bush at the side of the road and thereafter the trailer capsized and the electric poles loaded in the tractor were fell down over the person of the deceased by which the deceased died.

Thirdly, it is revealed from the inquest report that the deceased died due to the falling of electric poles over his person.

Mr. Singh has pointed out the evidence of P.W.1, P.W.2 and P.W.3.

Mr. Singh also categorically shows the cross-examination of P.W.1 wherein she denied the suggestion of insurance company that her husband died due to fallen of electric poles on him.

Mr. Singh also pointed out the cross-examination of P.W.2 wherein he stated that he was the only person present at the time of accident. P.W.2 during his cross examination had admitted that the trailer attached with the tractor was loaded with electric poles and vehicle after crossing him hit one bush and trailer pelted upside down and the poles fell down on the person of the deceased.

He also pointed out the cross examination of the P.W.3 wherein he stated that he was present at the time of accident along with five and six persons and admitted that due to pelting down of the vehicle the electric poles which were carried on the trailer fell down over the body of the deceased.

Mr. Singh further argued that the accident was happened due to the pelting down of the trailer. The trailer though seized during investigation of this case but it has been proved that the trailer was not insured under the policy of the any insurance company. When the trailer is not insured so the insurance company is not liable to pay the compensation.

Mr. Singh further argued that the alleged accident happened on 31st December, 2014 and thereafter F.I.R. was lodged on 14th February, 2015. There are no explanations of such inordinate delay in lodging the F.I.R. So in this case the incidents proved that the so-called offending vehicle i.e. the tractor was falsely implicated.

He further argued that the tractor meant to be a vehicle used for the purpose of agriculture but in this case it has been proved that the tractor attached with the trailer was filled up with the electric poles. So the tractor was used for the commercial purpose which is not within the terms and conditions of the insurance policy.

Under the above circumstance, Mr. Singh submits that the insurance company is not liable to pay the compensation and the claimant has failed to prove that the insurance company is anyway liable to pay the compensation.

In support of his contention Mr. Singh cited a decision of the Hon'ble Apex Court passed in *National Insurance Company Ltd. Vs. Chinnama* reported in *2004 ACJ 1909.*

> *"15. Furthermore, a tractor is not even a goods carriage. The "goods carriage" has been defined in Section 2(14) to mean "any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods" whereas "tractor" has been defined in Section 2(44) to mean "a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion); but excludes a road-roller"". The "trailer" has been defined in Section 2(46) to mean "any vehicle, other than a semi-trailer and a side car, drawn or intended to be drawn by a motor vehicle".*
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> *"16. A tractor fitted with a trailer may or may or may not answer the definition of goods carriage contained in Section 2(14) of the Motor Vehicles Act. The tractor was meant to be used for agricultural purposes. The trailer attached to the tractor, thus, necessarily is required to be used for agricultural purposes, unless registered*

otherwise. It may be as has been contended by Mrs. K. Sharda Devi, that carriage of vegetables being agricultural produce would lead to an inference that the tractor was being used for agricultural purposes but the same by itself would not be construed to mean that the tractor and trailer can be used for carriage of goods by another person for his business activities. The deceased was a businessman. He used to deal in vegetables. After he purchased the vegetables, he was to transport the same to market for the purpose of sale thereof and not for any agricultural purpose. The tractor and trailer, therefore, were not being used for agricultural purposes. However, even if it be assumed that the trailer would answer the description of the "goods carriage" as contained in Section 2(14) of the Motor Vehicles Act, the case would be covered by the decisions of this Court in Asha Rani (supra) and other decisions following the same, as the accident had taken place on 24-11-1991, i.e. much prior to coming into force of 1994 amendment. For the reasons aforementioned, the impugned judgments cannot be sustained which are set aside accordingly. This appeal is allowed. In the facts and circumstances of this case, there shall be no order as to costs."

Mr. Singh also cited a decision of the Hon'ble Apex Court passed in *Oriental Insurance Co. Ltd. Vs. Brij Mohan and Ors.* wherein the Hon'ble Apex Court has held regarding the use and applicability of a tractor and trailer.

The Hon'ble Apex Court after following the decision in Chinnnama had held that the insurance company is not liable to pay the compensation when the tractor is not carrying out the agricultural work. However, the Hon'ble Apex Court by exercising its extraordinary jurisdiction enumerated under Article 142 of the Constitution of India directed the insurance company to pay the compensation first and thereafter recover it from the owner.

Mr. Singh further argued that the direction of pay and recovery in Brij Mohan (*supra)* is passed by the Hon'ble Supreme Court by only using their extraordinary jurisdiction under Article 142 of the Constitution of India. So this High Court has no such jurisdiction to pass an order of pay and recovery.

Mr. Singh further argued that the Learned Tribunal has awarded compensation fixing monthly income of the deceased to be Rs.5,000/-. There is no suggestion of such observation; the claimant has failed to prove the avocation and income of the deceased. So, in this case the notional income fixed by the Learned Tribunal is erroneous. Learned Tribunal should have followed the decision of Hon'ble Apex Court in fixing the notional income to be Rs.3,000/- per month.

Mr. Singh further argued that the claimant may be entitled of getting the future prospect according to the observation of the Hon'ble Apex Court in *National Insurance Co. Vs. Pranay Sethy.*

Mr. Amit Ranjan Roy, learned advocate appearing on behalf of the claimant-respondent submits that the Learned Tribunal has not committed any error. He submits that the evidence of P.W.2 and P.W.3 cannot be examined and scrutinised as a manner of scrutinising in a criminal case.

The name of the P.W.2 and P.W.3 is appearing in the charge sheet as a witness. So, their evidence cannot be disbelieved.

He further argued that both of the eyewitnesses have deposed before the Learned Tribunal. Initially, the victim was dashed by the offending vehicle i.e. the tractor and thereafter the trailer capsized over the person of the victim.

He further argued that the trailer was capsized due to rash and negligent driving of the offending vehicle i.e. the tractor. So the driver of the tractor is liable for the accident. He further argued that the investigation of the police ended in charge sheet accusing the driver of the tractor to be responsible for the accident. So, in this case the principle and the law laid down by the Hon'ble Apex Court in *Kalim Khan vs Fimidabee* is required to be applicable.

Mr. Roy further argued that the use of vehicle has been specifically dealt with by the Hon'ble Apex Court in this case. He argued following the principle of Hon'ble Apex Court in *Kalim Khan*, in the present case, the trailer was used by the driver of the offending vehicle tractor. So in this case the driver of the tractor as well as the insurer of tractor is liable to pay compensation.

Mr. Roy further argued the inquest report which was placed before the Appellate Court was never proved or produced by the insurance company before the Learned Tribunal. Moreover, the evidentiary value of inquest report enumerated under Section 147 Cr.P.C. cannot be used in this case as it is only used for proof of position of a dead body after the commission of death is in question and for the purpose of corroboration and contradiction.

He cited the decision of this Court passed in *Pinki Bhuia & Ors.* wherein the Hon'ble Division Bench has held the statement under Section 147 of the Code of Criminal Procedure at best be used only a previous statement to corroborate and contradict the person making it at the trial and none else.

Mr. Roy further cited a decision of Hon'ble Apex Court in *Kusum Lata and others vs. Satbir and others* wherein the Hon'ble Apex Court following the earlier decision of this Court in *Bimala Devi vs. Himachal Road Transport Corporation* has held that the claimants are merely to establish their case on the touchstone of preponderance of probability.

> *"9. There is no reason why the Tribunal and the High Court would ignore the otherwise reliable evidence of Dheeraj Kumar. In fact, no cogent reason has been assigned either by the Tribunal or by the High Court for discarding the evidence of Dheeraj Kumar. The so-called reason that as the name of Dheeraj Kumar was not mentioned in the FIR, so it was not possible for Dheeraj Kumar to see the incident, is not a proper assessment of the fact-situation in this case. It is well known that in a case relating to motor accident claims, the claimants are not required to prove the case as it is required to be done in a criminal trial. The Court must keep this distinction in mind."*

Finally Mr. Roy cited a decision of the Hon'ble Apex Court in *Shamanna and Anr. Vs. The Divisional Manger, Oriental Insurance Co. Ltd. & Ors.* reported in *2018 SAR (Civil) 1021.*

In Shamanna, the Hon'ble Apex Court after taking note of the earlier decision of Brij Mohan (*supra)* has held that the observation of Hon'ble High Court exonerating the insurance company from its liability and making the claimants to recover the compensation from the owner of the vehicle, was set aside by the Apex Court and was directed to pay the compensation and thereafter recover the same from the owner.

"12. Interpretation of the contracts of insurance in terms of Section 147 and 149 of the Motor Vehicles Act came up for consideration recently before a Division Bench of this Court in National Insurance Co. Ltd. V. Laxmi Narain Dhut MANU/SC/1233/2007, wherein it was held:-

24. As noted above, there is no contractual relation between the third party and the insurer. Because of the statutory intervention in terms of Section 149, the same becomes operative in essence and Section 149 provides complete insulation.

25. In the background of the statutory provisions, one thing is crystal clear i.e. the statue is beneficial one qua the third party. But that benefit cannot be extended to the owner of the offending vehicle. The logic of fake licence has to be considered differently in respect of third party and in respect of own damage claims.

It was further observed:

36. It is also well settled that to arrive at the intention of the legislation depending on the objects for which the *enactment is made, the Court can resort to historical, contextual and purposive interpretation leaving textual interpretation aside.*

37. Francis Bennion in his book "Statutory Interpretation" described " purposive interpretation" as under:

A purposive construction of an enactment is one which gives effect to the legislative purpose by-

(a) following the literal meaning of the enactment where that meaning is in accordance with the legislative purpose , or

applying a strained meaning where the literal meaning is not in accordance with the legislative purpose."

Heard the learned advocates.

Perused the materials on record.

There is a fact of accident as stated by the claimants and the eyewitnesses; let me consider how far it is different to the fact stated in the inquest report.

I make it clear that the inquest report as placed before this Court, never placed earlier by the insurance company. However, in considering the entire facts in question, it is necessary to determine the fact mentioned in the inquest report.

I make it clear that the evidential value of the inquest report is only to ascertain the initial cause of death and place the dead body at the place of occurrence.

It appears from the inquest report that the inquest report was prepared by one Malay Roy, A.S.I. of Police in presence of the witness; he conducted the inquest over the dead body of the deceased and noted out the injuries on the person of the deceased.

He came to the opinion after taking the evidence of the witnesses that when the deceased was returning to his house and reached near Sanmoninathpur by that time he suffered an accident and electric poles were pelted over his body for which he succumbed to his injuries.

The fact of the claimants is that the tractor which carrying the trailer was loaded with electric poles and initially the tractor dashed the victim and thereafter died by such accident. The evidence of P.W.1 and P.W.2 both oral and in cross examination make it clear that initially the deceased was dashed by the tractor and thereafter the trailer capsized and the electric poles loaded in the trailer was pelted over the body of the deceased.

So it appears that the fact of accident and manner thereafter cause no discrepancies. The death of the victim was caused due to the accident caused by the tractor of the offending vehicle but it is also true that by such accident the electric poles loaded in the trailer was pelted over the body of the deceased.

It is quite impossible to assess that whether the death was caused due the injuries mentioned in the Post

Mortem Report that the injuries was caused by the dashing of the tractor or by pelting down of electric poles over the body of the deceased.

So in my view in this case the cause and manner of accident as stated by the claimants cannot be disbelieved.

Merely the statement of presence of one witness singly at the time of accident and other statement that other witnesses were also present cannot itself deny the entire fact of accident.

It is true that during the investigation of this case the tractor and trailer were seized by the investigating agency. The tractor of the trailer having the same owner was made party in this proceeding before the Learned Tribunal. The fact also is showing that the trailer was not covered with insurance policy. But the tractor was covered with the insurance policy by the present insurance company.

In a case under Section 166 of the Motor Vehicles Act rash and negligent driving of the driver of the offending vehicle is a "sine qua non". In this case it has been proved that the driver of the tractor was negligent in driving the tractor and thus the accident happened. The prima facie value of investigation of the police cannot be denied.

Let me consider whether the use of tractor in commercial purpose can be held liable the insurance company to pay the compensation. In this case, it has been proved that the tractor was not used for the agricultural purpose while it was carrying the electric poles.

Definitely, the terms of the insurance policy has been violated by the owner of the tractor. Accordingly, the insurance company is not liable to pay the compensation. By virtue of decision of the Hon'ble Apex Court in *Shamanna and Anr (supra)* I am of the considered view that the insurance company may initially pay the third party compensation and thereafter they are at liberty to recover the same from the owner of the offending vehicle.

In this case the learned Tribunal has awarded compensation fixing the monthly income of the deceased to be Rs.5,000/-

Mr. Roy, learned advocate appearing on behalf of the claimant submits that the number of dependants are five. So the monthly income fixing by the Learned Tribunal is not excessive.

It appears that no evidence has been adduced to show the income or the avocation of the deceased. Learned Tribunal has adopted the notional income of Rs.5,000/-.

In a number of cases, this Court has adopted that when the accident happened in the year 2011-2014 the notional income would be Rs.4,000/-. The same principle would be applicable in this case.

However, the claimants are entitled to future prospect to the tune of 40% to the established income of the deceased by virtue of the decision of Hon'ble Apex Court passed in *National Insurance Company vs. Pranay Sethy.*

However considering the facts and circumstances of this case, the award must have carry interest at the rate of 6% per annum from the date of filing of the claim application.

Considering all the aspects, the award passed by the Learned Tribunal requires modification.

Calculation of Compensation

Monthly income	Rs.4,000/-
Annual income (Rs.4,000/- x 12)	Rs.48,000/-
Less – 1/4th for personal expense	Rs.12,400/-
	Rs.36,400/-
Multiplier 15 (Rs.36,000/- x 15)	Rs.5,40,000/-
Add: 40% future prospect	Rs.2,16,000/-
	Rs.7,56,000/-
Add: General Damages	Rs. 77,000/-
	Rs.8,33,000.-
+ 6% interest.	

After calculation the awarded sum i.e. Rs.8,33,000/- shall carry 6% interest from the date of filing of the claim application, i.e. 17.03.2015.

It appears that the insurance company initially deposited the statutory amount of Rs.25,000/- on 8.9.2023 and thereafter further deposit Rs.10,27,430/-. So, the insurance company has deposited total amount of Rs.10,42,430/- with the office of the Learned Registrar General of this Court which was invested according to terms.

The office of the Learned Registrar General, High Court, Calcutta is directed to calculate the awarded sum and disburse the same to the claimants in equal sharer along with accrued interest within 4 weeks.

The claimants are at liberty to receive the same from the office of the Learned Registrar General, High Court, Calcutta.

After receiving such amount if it appears that the claimants are entitled to get some more amount in terms of the order of this Court, they shall inform along with the bank particulars so that the residue balance amount may be paid by the insurance company after receiving such information within six weeks directly to the bank account of the claimants; and after disbursing the amount by the Learned Registrar General, High Court, Calcutta, if it appears that some amount is lying in the account of the insurance company the residue shall be refunded to the insurance company on usual applications.

The payment of compensation is subject to ascertainment of payment of deficit court fees, if any.

The office of the Learned Tribunal shall act upon the certified copy of this order to receive the deficit court fees, if any.

With the aforesaid observation, the appeal is allowed.

All other applications, if pending, are also disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties on compliance of necessary formalities.

(Subhendu Samanta, J.)