IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction

17.07.2023
SL No.3
Court No. 551
Ali

FMA 1194 of 2013
IA No: CAN/1/2013 (Old No:CAN/3508/2013)
CAN/2/2018 (Old No:CAN/4142/2018)

Reliance General Insurance Co. Ltd.
Vs.
Arpita Sarkar & Ors.

Ms. Gopa Das Mukherjee
...for the appellant.

Mr. Uday Sankar Chattopadhyay,
Ms. Trisha Rakshit,
Ms. Rajashree Tah
.....for the respondents-claimants.

The instant appeal has been preferred against the judgment and award dated 18th January, 2013 passed by learned Judge, Motor Accident Claims Tribunal, 2nd Court, Burdwan in M.A.C. Case no. 17/19 of 2010.

The brief facts of the case is that on 2nd of February, 2009 at about 09.00 a.m. the victim alongwith the present claimant-appellant and his son was proceeding towards the Asansol from Dumdum, Kolkata by a Maruti Wagon Car being No. WB.-38N/1042. While the said Maruti Wagon Car reached near Nababhat, G.T. Road, Burdwan, suddenly, one truck being No. W.B.41/5055 coming from Durgapur side towards Kolkata with high speed, rash and negligent manner dashed the Maruti Wagon Car face to face as a result, the victim alongwith the complainant and their son suffered

severe injuries on their persons. Initially all admitted to the nearest Burdwan Medical College & Hospital thereafter they were shifted to Rubi General Hospital, Kolkata for their better treatment and ultimately, the victim died at the said Hospital on 21.02.2009.

The claimants being the wife and the son of the victim filed the claim case before the learned tribunal under Section 166 of the M.V. Act claiming just and proper compensation. The insurance company contested the case by filing written statement.

Learned tribunal after considering the pleadings and evidences on record allowed the claim application in favour of the claimant and directed the insurance company to pay the compensation amounting to Rs.55,99,348/-.

Hence this appeal.

The insurance company has preferred this appeal on the grounds that the tribunal has failed to appreciate the facts and circumstances of this case and came to an erroneous findings. There are no eye witnesses to the accident. No one deposed before the learned tribunal to say that he saw the accident in his own eyes, instead of which learned tribunal has awarded the huge compensation to the claimants. He further pointed out that the basic principal of provision under Section 166 of the M.V. Act

regarding proof of rash and negligent driving of the driver of the offending vehicle has not been proved by the learned tribunal. He further pointed out that the FIR does not disclose the number of the offending vehicle. Surprisingly, the accident was happened on 2nd day of February, 2009 while the FIR was lodged much after the alleged accident i.e. on 18.06.2009 (after four months). He further argued that the claimant was also faced the accident alongwith the victim but surprisingly, she could not state the number of the offending vehicle. It is very unnatural to note that after four months of the accident the FIR was lodged and police investigation was started. She pointed out that though the investigation of the police is ended in charge sheet accusing the driver of the offending vehicle to be responsible for the accident but the police authority has conducted the investigation in a perfunctory manner. The investigation of the police cannot be believed at all. He again pointed out that the fact of the case shows that there are head on collision between two vehicles thus the vehicle wherein the victim was travelled also contributed the accidents. He again pointed out that the evidence of PW-1 cannot be believed as she is an interested witness.

On the basis of his submission he cited two decisions of Hon'ble Supreme Court reported in ***2015 (2) T.A.C. 677 (S.C.) (Khenyei Versus New***

India Assurance Co. Ltd. and Others) and (2003) 8 SCC 731 (Municipal Corporation of Greater Bombay Versus Laxman Iyer and Another.) She pointed out that on the basis of the above judgments of Hon'ble Apex Court the driver of the Wagon Car has also contributed of the accident so the award has to be apportioned accordingly.

Learned advocate for the insurance company further pointed out that a huge amount of compensation was awarded in favour of the claimants which are totally improper. The evidence produced before the learned tribunal being one of the employer of the victim is not proper. No reliance can be placed upon the salary certificates issued by the Eastern Coal Field Ltd. So he prayed for setting aside the award passed by the learned tribunal.

Learned advocate appearing on behalf of the claimants-respondents submitted before this court that the impugned award passed by the learned tribunal suffered no illegality. He also pointed out that the learned tribunal has considered the entire evidences on record including both oral and documentary.

Learned tribunal has considered the police paper including the investigation conducted by the police. In this case though the FIR does not disclose the number of the offending vehicle but the police investigation is very much clear to that effect that

the driver of the offending vehicle was responsible for the accident. He further pointed out that the O.P.W.-1 was the owner of the offending vehicle who deposed in support of the claimants thus at this juncture, the evidence of insurance company himself not supported the case of the insurance company. He again pointed out that the Wagon Car was not drived by the victim himself but by the another driver. During the course of investigation, police has seized the Driving Licence of the driver of the Wagon Car. The driver never called by the insurance company to depose or disclose the fact of the accident. If for the sake of argument, the claimant is taken to be the interested witnesses then also the insurance company has withhold his best witnesses i.e. the driver of the Wagon Car or the driver of the offending vehicle. At this juncture, the adverse presumption under Section 114 (g) of the Evidence Act can be inferred against the insurance company.

Learned advocate for the claimant also pointed out treat the learned tribunal has considered the computerized Pay Slip Eastern Coal Field Ltd. just prior the month of the accident. Thus there is no infirmity in passing the impugned award so he prayed for dismissal of the instant appeal.

Heard the learned advocate perused the materials on record also perused the paper books

and the LCR. In considering the submission of the appellant-insurance company regarding the implantation of the offending vehicle in this case,it appears to me that the FIR does not disclose the registered number of the offending vehicle. It appears that one relative of the victim has lodged the FIR. Admittedly, he was not at the place of accident. Thus, it is not possible to him to say the registered number of the offending vehicle. It is true that all the family members of the victim including the victim and the claimants has suffered the accident and admittedly they were admitted to the Hospital of Burdwan thereafter they were shifted to Rubi General Hospital, Kolkata. The fact of prolonged treatment is also there including sad demise of the victim. Thus the delay which was mentioned in the FIR appears to me not fatal in the case of the claimants.

In considering the deposition of PW-1 who is the claimant in this case. It appears that she stated before the court that she could not see the registered number of the offending vehicle. It is true that when a person suffered an accident of such a fatal nature, it is not possible for her to see the number of the offending vehicle when accident is very much sudden. In her examination-in-chief, she stated that it was not possible for her to see the number of the offending vehicle. I find there is

truthfulness in the evidence of PW-1. During the course of investigation, police has collected the registered number of the offending vehicle and it was seized according to law. From the charge sheet it appears that the police has employed his source and after collecting the statement of evidence the number of the offending vehicle was traced. I find no infirmity in the investigation conducted by the police. OP-1 is the owner of the offending vehicle who deposed as called for by the insurance company before the learned tribunal. He specifically stated that he had knowledge of the accident but subsequently he came to know that a police case was registered. Thus the evidence of OPW-1 i.e. the owner of the offending truck is appears to be believable. He also stated that he disclose the fact of accident to the investigator of Insurance Company.

Considering the same and considering the entire aspects I find no materials or evidences to justify the argument of the insurance company. The grounds of appeal as advanced by the insurance company in this appeal regarding the implantation of the vehicle is appeared to me not justifiable.

In considering the contributory negligence in this case it is true that the vehicles i.e. one Maruti Wagon Car and one truck was involved in the accident. It is also true that there were head on collusion between two vehicles.

The insurance company has submitted that as there were head on collusion so the driver of the Wagon must have contributed some portion of the accident. In perusing the judgment of Hon'ble Supreme Court passed in ***Khenyei*** it appears that the Hon'ble Supreme Court is of clear view that **on proof of contributory negligence** on the part of the victim the extent of claim of compensation has to be deducted.

In the judgment of Hon'ble Supreme Court in ***Municipal Corporation of Greater Bombay*** that it appears that the Hon'ble Supreme Court is of view on facts that the victim himself contravene the traffic regulation and suffered accident. For that reason the compensation is apportioned on the ground of contributory negligence. The facts mentioned in the ***Khenyei*** as well as the ***Municipal Corporation of Greater Bombay*** is very much different to the fact that of the present case. So the argument by the insurance company regarding contributory negligence appears to be not good. There are no scrap of paper to show that the driver of the Wagon was also reckless in driving the Wagon vehicle and for which the accident so occurred. In absence of any such corroborating materials on the record held the submission of insurance company regarding the contributory negligence is turned down.

In considering the monthly income of the deceased it appears to me that the learned tribunal has considered the monthly income of the deceased on the basis of the computerized Pay Slip of Eastern Coal Field Ltd. in the month of January, 2009 (page-45 of Paper Book). The total earning of the said Pay Slip was mentioned as Rs.63,521/- total deduction was Rs.19,870/- and net pay was Rs.43,651. Learned tribunal has passed the award holding the monthly income of the deceased to be Rs.63,521 (total earning).

By virtue of the judgment of the Hon'ble Supreme Court in ***Shyamwati Sharma and Others Versus Karam Singh and Others*** reported in ***2010 (4) T.A.C. 29 (S.C.)*** the deduction shown in the salary certificate towards the GPF, life insurance premium, repayment of loan, etc. should not be excluded from the income. But it has been specifically observed by the Hon'ble Supreme Court in the said judgment that appropriate deduction has to be made towards the income tax. It appears from the salary certificate (Exhibit-11) that Rs. 11,722/- was deducted towards the income tax and Rs.200/- was deducted towards the professional tax, thus in my view, in calculating the monthly income of the deceased for the purpose of compensation the tax component should be deducted from the total earning. Other deduction towards GPF, benevolent

fund, mutual fund, etc. cannot be deducted. In my view, the award passed by the learned tribunal should be modified. Thus the appeal filed by the insurance company is appeared to be justified only on the quantum of monthly income. The just compensation of this case is recasted hereunder:-

Monthly Salary.....Rs.63,521/-
Less: Income Tax.....Rs.11,922/-
Rs.51,599/-
Annual Income...(Rs.51,599/- X 12).. Rs.6,19,188/-
Less: 1/3rd Deduction Rs2,06,396/-
Rs.4,12,792/-
Adopting multiplier 11(Rs.4,12,792/- X 11).Rs.45,40,712/-
Add: General Damages.....Rs.70,000/-
(according to Pranay Sethi)
Total Compensation.....Rs.46,10,712/-

The insurance company is directed to pay the compensation alongwith interest @ 6% per annum from the date of filing of this case (from 15.01.2010). It appears from the record that the insurance company has already deposited Rs.28,00,000/- with the office of learned Registrar General, High Court, Calcutta on 03.06.2013; the amount must have carrying some interest thereon so the insurance company is directed to deposit the balance amount if any, within eight weeks to the office of learned Registrar General, High Court, Calcutta. On such deposit the claimants are at liberty to withdraw the same according to law.

The instant FMA is disposed of.

All connected 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.)