(2019) 08 CAL CK 0192

In the Calcutta High Court

Case No : C. Appe al From Order (FMA) No. 1800 Of 2014 With Civil Application (CAN) No. 4710 Of 2017, Cross Objection Appe (COT) No. 39 Of 2017

National Insurance Company Ltd — APPELLANT

Vs

Mitali Maity And Others — RESPONDENT

Date of Decision : 14-08-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 10, 58, 72, 86, 147(1) (b) (ii), 163A, 166, 168, 171

Code Of Civil Procedure, 1908 — Section 96, 100, Order 41 Rule 22, Order 41 Rule 33

Citation : (2019) 08 CAL CK 0192

Hon'ble Judges : Harish Tandon, J;Subhasis Dasgupta, J

Bench : Division Bench

Advocate : Sanjay Paul, Krishanu Banik

Final Decision : Disposed Of

Judgement

Harish Tandon, J

The National Insurance Company Limited ("Insurance Company") has filed the instant appeal challenging the award dated 11.12.2013 passed by the Motor Accident Claim Tribunal, Fast Track 2nd Court, Tamluk, Purba Medinipur in M.A.C.C bearing No. 16 of 2013. Before we deal with the points urged by the respective parties, it is axiomatic to narrate the salient facts of the instant application. The claimants/respondents filed an application under Section 166 of the Motor Vehicles Act, 1988 ("said Act") claiming to be the heirs of one Babrubahan Maiti (since deceased) for compensation. According to the claimants, the said victim was traveling in a trekker along-with the others and was heading towards Radhamoni site to Tamluk when the said vehicle knocked down the electric poll situated on the side of the road and subsequently, capsized on the mud portion. It is stated that the driver of the said vehicle was driving in a high speed and because of such accident, several persons got injured and the said victim died on the spot. It is disclosed that the victim was 41 years of age at the time of his death and was the only bread earner in the family. The victim was a businessman of old motor parts and was carrying on the same under the name and style of Jyotsna Enterprise. The claimants further stated that the victim was earning Rs. 9,000/- per month from such business and therefore, the compensation must be determined in commensurate with such income. The Insurance Company, the appellant, not only denied the happening of an event resulting into the accident but also stated that the victim was a gratuitous passenger and therefore, no compensation is to be paid. On the conspectus of the aforesaid facts, the parties went on trial and not only stated the income of the deceased from such business but also proved the happening of such event. The Tribunal awarded the compensation to the tune of 4,85,500/- taking into account the monthly income of the deceased at Rs. 4,000/- and also the number of dependents.

The challenge before us is basically founded on four points. The first point urged by the learned Advocate for the appellant is on the multiplier. According to the learned Advocate, the Tribunal wrongly applied multiplier 15 instead of 14 and, therefore, acted in contravention of the law laid down in Smt. Sarla Verma & Ors - Vs- Delhi Transport Corporation & Anr (2009) 6 SCC 121.

Secondly, it is submitted that the sanctioned strength to carry the passenger was 9, whereas the evidence would reveal that there was more than the sanctioned passengers travelling in the offending vehicle and, therefore, no liability could be fastened on the Insurance Company. Thirdly, it is argued that the driver of the offending vehicle did not possess his valid driving license. It is thus submitted that the driver of the offending vehicle was permitted to ply light motor vehicle (non-transport) but he was plying the said vehicle, which is same for transport. Last but not the least, the fourth point, which is argued before us, is on the rate of interest awarded by the Tribunal.

The learned Advocate appearing for the claimants candidly submitted before us that his clients have not filed any cross-objection under Order XLI Rule 22 of the Code of Civil Procedure, 1908, yet he can challenge the impugned judgment on a new/additional points which was not taken into account by the Tribunal. It is submitted that the Appellate Court enjoins an unbridled power under Order XLI Rule 33 of the Code of Civil Procedure to pass an order for ends of justice despite the fact that the cross-objection nor the appeal is filed by the claimants. It is submitted by the learned Advocate for the respondent that all the aforesaid pleas taken by the claimant are not tenable in the eyes of law. In view of the judgments pronounced by the Apex Court in this regard reliance is placed upon a judgment which we will consider in the later portion of this order, so far as the first plea is concerned. There was a divergent opinion on the application of correct multiplier in determining compensation under Section 168 of the said Act. Subsequently, the Apex Court in the case of Smt. Sarla Verma (supra) noticed the earlier judgments of the Apex Court rendered in the case of Kerala, SRTC - Vs- Susamma Thomas (1994) 2 SCC 176 and U.P.SRTC -Vs- Trilok Chandra

(1996) 4 SCC 362 and New India Assurance Co. Ltd. -Vs- Charlie & Anr (2005) 10 SCC 720 held that:-

"41. Tribunals/courts adopt and apply different operative multipliers. Some follow the multiplier with reference to Susamma Thomas [set out in Column (2) of the table above]; some follow the multiplier with reference to Trilok Chandra, [set out in column (3) of the table above]; some follow the multiplier with reference to Charlie [set out in Column (4) of the table above]' many follow the multiplier given in the second column of the table in the Second Schedule of the MV Act [extracted in Column (5) of the table above]; and some follow the multiplier actually adopted in the Second Schedule while calculating the quantum of compensation [set out in Column (6) of the table above.] For example if the deceased is aged 38 years, the multiplier would be 12 as per Susamma Thomas, 14 as per Trilok chandra, 15 as per Charlie, or 16 as per the multiplier given in Column (2) of the Second Schedule to the MV Act or 15 as per the multiplier actually adopted in the Second Schedule to the MV Act. Some Tribunals, as in this case, apply the multiplier of 22 by taking the balance years of service with reference to the retiring age. It is necessary to avoid this kind of inconsistency. We are concerned with cases falling under Section 166 and not under Section 163-A of the MV Act. In cases falling under section 166 of the MV Act, Davies method is applicable."

After holding so, the Hon'ble Supreme Court in Smt. Sarla Verma (supra) laid down that the multiplier to be used depending upon the age of the victim to be: -

"42. We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying Susamma Thomas, Trilok Chandra and Charlie), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, M-16 for 31 to 35 years, M- 15 for 36 to 40 years, M-14 for 41 to 45 years, and M- 13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M- 7 for 61 to 65 years and M- 5 for 66 to 70 years."

Though there appears to be a dissent on the age of the victim as according to the claimants he was 41 years of age at the time of death but the Tribunal after noticing the document produced in this regard held that he was between the age of 42 and 43 years. Even if, we proceed on the basis of the fact that the deceased was aged about 41 years at the time of his death, it does not bring any remarkable changes on the application of multiplier as held in Smt. Sarla Verma (supra). It has been succinctly laid down in Smt. Sarla Verma (supra) that multiplier 14 should be applied if the age of the victim at the time of his death is within the age bracket of 41 to 45 years. We thus find that the Tribunal has wrongly applied multiplier 15 and therefore, the contention of the appellant in this regard is found to be correct.

Taking the second point urged before us, it is not in dispute that the victim was travelling in a trekker, which was carrying passenger more than sanctioned strength. The point, which felt for consideration before us, is whether such fact can exonerate the Insurance company of its liability to the owner of the policy. The aforesaid plea has been set at rest by the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. -Vs- Anjana Shyam (2007) 7 SCC 445 in these words: -

"16. The position is reinforced by Section 72 of the Act, which deals with grant of stage carriage permits. Sub-section (2) provides that when a permit is decided to be granted for a stage carriage, the Regional Transport Authority can attach to the permit one or more of the conditions specified therein. Clause (vii) is the condition regarding the maximum number of passengers that may be carried in a stage carriage. Overloading also invites a consequence which can be termed penal. Section 86 of the Act provides for cancellation of a permit if any condition contained in the permit is breached. Therefore, the apparent wide words of Section 147(1) (b) (ii) of the Act have to be construed harmoniously with the other provisions of the Act, namely, sections 58 and 72 of the Act."

What can be gathered from the findings quoted above is that it does not absolve the Insurance Company from absolute liability to pay compensation in the event the claim petition is filed by persons more than the sanctioned strength. The liability of the Insurance Company shall be restricted to the sanctioned strength and higher of the sanctioned strength award so made, shall be deposited as a lump sum and thereafter, the Tribunal will distribute the money proportionally to all the claimants. Our endeavor has failed to find from the pleading as well as the evidence adduced before the Tribunal that apart from the present claim, any other claim petition has been filed by other passengers of the said trekker who suffered injuries. Even before us, the learned Advocate for the Insurance Company showed his inability to disclose such fact and therefore, we can safely proceed that a single claim petition is filed. In view of the ratio laid down in the said report since the sanctioned strength was 9 and a sole claim petition has been filed, the Insurance Company cannot get away from his responsibility to pay compensation.

The third point taken by the Insurance Company also does not appear to be legally sustainable in view of the judgment rendered by the Hon'ble Supreme Court in Mukund Dewangan-Vs- Oriental Insurance Co. Ltd. (2017) 14 SCC 663 and Ram Chandra Singh-Vs- Rajaram & Ors (2018) 8 SCC 799. In case of Mukund, the Larger Bench of the Hon'ble Supreme Court was considering the reference as to whether a driver who is having the license to drive light motor vehicle but is driving the transport vehicle of the same class requires additional endorsement to drive the transport vehicle? Such reference was made because of the conflicting decisions rendered in case of Ashok Gangadhar Maratha-Vs- Oriental Insurance Co. Ltd. (1999) 6 SCC 620, S. Iyyapan-Vs- United India Insurance Company Limited and Anr (2013) 7 SCC 62 and Nagashetty vs. United India Insurance Co. Ltd. & ors. (2001) 8 SCC 56: 2001 SCC (Cri) 1408. The

Larger Bench after noticing the definition of the light motor vehicle given in the said Act held that it includes the transport vehicle as well provided unladen weight does not exceed 7,500 kgs. It is succinctly held that Section 10 of the said Act mandates the driver to possess the license with respect to a class of a vehicle and not with respect to a type of vehicle in these words: -

"46. In Prabhu Lal, this Court has taken a contrary view and held that when a driver was holding the valid licence to ply only light motor vehicle, and no endorsement was made on the licence enabling him to drive a transport vehicle, it was held to be a breach by the owner and he could not claim any indemnification from the insurer. It was held that the goods carrier would be a transport vehicle. The accident took place on 17-4-1998. The District Forum held that the goods carrier was a transport vehicle whereas the State Commission held that it was a light motor vehicle relying on the gross weight of the vehicle. This Court set aside the order of the Commission and affirmed the finding of the District Forum."

The law enunciated by the Larger Bench of the Apex Court is reiterated in a subsequent decisions rendered in Ram Chandra Singh (supra) with the caveat that if the Insurance Company proves by convincing material that the owner of the vehicle was aware that the driver is not holding the license to drive the particular type of vehicle yet allowed him to drive it, the liability would be shifted upon the owner and the Insurance Company shall be absolved of the payment of compensation in these words: -

"11. Suffice it to observe that it is well established that if the owner was aware of the fact that the licence was fake and still permitted the driver to drive the vehicle, then the insurer would stand absolved. However, the mere fact that the driving licence is fake, per se, would not absolve the insurer. Indubitably, the High Court noted that the counsel for the appellant did not dispute that the driving licence was found to be fake, but that concession by itself was not sufficient to absolve the insurer.

12. As aforementioned, in the present case, neither the Tribunal nor the High Court has bothered to analyse the pleadings and evidence adduced by the parties on the crucial matter. Be that as it may, in this appeal, the limited grievance of the appellant-owner of the vehicle is about unjustly absolving the insurer merely on the finding that the driving licence of the driver (respondent 6) was fake. No other aspect has been raised by the appellant nor do we intend to analyse or consider the same."

What can be gathered from the above-mentioned decisions is that mere holding of an invalid license to apply a particular type of vehicle cannot absolve the Insurance Company to pay compensation unless it is proved by cogent evidence that the owner, despite having knowledge of such invalidity of the license, allowed the driver to ply the light motor vehicle meant for transport.

We, therefore, do not find any merit in the said point nor it appears to us to be legally sustainable. Last but not the least, the fourth point urged before us relates to the rate of interest awarded by the Tribunal. It appears from the impugned award that the Tribunal awarded an interest at the rate of 9% per annum from the date of filing of the application till its actual payment. Section 171 of the said Act provides for an interest to be awarded on the compensation so determined by the Tribunal. The language therein leaves no ambiguity that the said provision is discretionary in nature. The discretion ordinarily is discernment of what is right and proper depending upon knowledge and prudence. The discretion must be sound, logical and reasonable depending upon several factors like exercise of judgment, skill or wisdom as distinguished from faulty thinking or whist. The exercise of discretion, which appears to be arbitrary, irrational and unreasonable, cannot be allowed to occupy the space in judicial dispensation and thus, implies vigilance circumspection and care thereby, imposing more and onerous responsibility. If the discretion has been exercised by the Court which cannot be impinged on the grounds as enumerated above, the Appellate Court should seldom interfere with such discretionary order/judgment. We, therefore, do not find that the rate of interest granted by the Tribunal needs any interference or can be assailed on the exception as indicated above. This route us to another point urged by the claimants/respondents before us when we invited our attention to the provision contained under Order XLI Rule 33 of the Code of Civil Procedure, 1908. It is urged by the respondent that though no cross objection nor a cross appeal is filed by him yet the Court can grant further relief in exercise of such power clothed upon the Appellate Court in the said provision. It is no longer res integra that an appeal lies against a part of decree by which the relief is declined by the Court against the party. The legislature was conscious of the fact that it would be burdensome on the person to file an independent appeal against a part decree and bestowed a right by way of cross-objection by incorporating Order XLI Rule 22 of the Code of Civil Procedure, 1908 though it is construed as cross-objection but in fact stated as a cross-appeal and no fetter has been put on the Court to consider the observations or the relief declined to such respondent by the subordinate authority. Order XLI Rule 22 of the Code clearly postulates that the respondent who has not filed an appeal from any part of the decree may not only support the decree which is in his favour but may also challenge the findings in respect of any issues which according to him ought to have been made in his favour. However, Order XLI Rule 33 of the Code operates in a different field and is neither controlled nor regulated by Order XLI Rule 22 of the Code. The said contention is discretionary in nature and based upon the principle of ex debito justitiae. The Co-ordinate Bench in National Insurance Company vs. Sulekha Das & ors. (2018) 3 WBLR (Cal) 583 elaborately discussed and took note of the various judgments rendered on Order XLI Rule 33 of the Code and held that:

"...

40. Having said so, it cannot be overlooked that the provision in Order XLI Rule 33 of the CPC although not part of the substantive law relating to appeals (under

Section 96 and 100 of the CPC) quite unusually confers wide powers on an appellate court. The marginal note of Rule 33 says "Power of Court of Appeal". The wide expanse of power conferred on a court of appeal authorizes it to pass or make such further or other decree or order as the case may require (underlining for emphasis by us). Importantly, this power is available to be exercised by the Court notwithstanding that the appeal is as to part only of the decree and in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection (underlining for emphasis by us).

41. There is a perception that if a party who has been declined part of several relief claimed in a suit does not challenge that part of the decree declining relief but, in an appeal by a defendant, is granted such part of the relief in course of appellate proceedings, much of Order XLI Rule 22 conferring power on an aggrieved party to file cross-objection would be dead letter. At first blush, it might seem attractive but on closer reading it does not appear so. The power conferred on a court of appeal by Order XLI Rule 33 is discretionary and no relief thereunder can be claimed as of right, as can be claimed if a cross-appeal or a cross-objection were filed. The words in Order XLI Rule 33 must be given the widest possible amplitude to serve the purposes of the legislation, viz. appellate court's power to do justice between the parties by making any decree or order that the case may require notwithstanding that a cross appeal/objection may not have been filed, which the provision itself has conferred. It has most appropriately been pointed out by the Supreme Court in Mahant Dhangir (supra) that no liberal interpretation is required, for the rule itself is liberal enough.

...."

In view of the above, we do not find that the discretion conferred by such provision is of wide amplitude and consists of all the situations in returning the finding in favour of a respondent who has not filed cross-objection under Order XLI Rule 22 of the Code, though the said provision is discretionary in nature yet it has to be circumscribed with certain limitations as the legislature never bestowed unfettered and unbridled powers ignoring the provision of Order XLI Rule 22 of the Code.

We, thus feel inclined to modify the amount of compensation already granted from Rs.4,84,500/- to Rs. 4,52,500/- [(Rs.4000 x 12=Rs.48,000-16000 =32,000/- x 14 (multiplier) = Rs.4,48,000/- + 4,500 (being funeral expenses)] by allowing the appeal in part. Together with this amount, the respondent/ claimant are entitled to get 9% interest from the date of filing this petition, till the date of recovery, as already granted by the Tribunal.

The Insurance Company/appellant is directed to pay Rs. 3,34,000/- along with interest at the rate, mentioned hereinabove, to claimant No.1/wife of the deceased till the recovery and Rs.1,18,500/-along with interest at the rate, till the recovery to claimant No.2/, the widow mother of the deceased, as per distribution, made by the Tribunal, which would, however, go unaltered.

The appellant/insurance company is accordingly directed to deposit two cheques in the name of claimants, shown hereinabove, within two months from the date of this order with the Registrar General of this Court. Upon such deposit being made by the appellant within the period, mentioned hereinabove, the appellant/ insurance company would be at its liberty to withdraw the statutory deposit of Rs.25,000/- taking order of the Registrar General of this Court.

With this observation and direction, the appeal is thus disposed of. In view of the disposal of the appeal, the connected application being C.A.N no. 4710 of 2017 and the cross-objection being C.O.T 39 of 2017 are accordingly disposed of.

Urgent certified copy of this order, if applied for, be given to the appearing parties as expeditiously as possible upon compliance with all necessary formalities.

I agree.

