

(2008) 03 CAL CK 0018
In the Calcutta High Court
Case No : F.M.A. No. 2449 of 2005

Sanaka Kumar and Another

APPELLANT

Vs

United India Insurance Corporation Limited and Another

RESPONDENT

Date of Decision : 20-03-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 140, 166, 170, 173
Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (2008) 3 CHN 397

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Arindam Mondal and Baisali Ghosal, for the Appellant; R.P. Banerjee and Soumendra Nath Ganguly, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal u/s 173 of the Motor Vehicles Act, 1988 is at the instance of claimants in a proceeding u/s 166 of the Act and is directed against the order dated 17th December, 2004 passed by the learned Judge, M.A.C. Tribunal, Fast Track Court, Purulia in M.A.C. Case No. 106 of 2002 thereby dismissing the claim on the ground that the claimants failed to prove that the death caused to the victim was due to rash and negligent driving of the vehicle concerned.

2. The appellants before us, the widow and the minor son of one Basudeb Kumar, since deceased, filed an application u/s 166 of the Motor Vehicles Act thereby claiming compensation of Rs. 3,00,000/- with interest on the allegation that on 1st July, 2002 the victim,, who was a sub-agent of Biri binding factory and also a cultivator, was proceeding through the National Highway No. 32 on a bicycle when one Tata 407 van bearing No. BR-20G-1.986 came from the opposite direction and dashed the victim by coming from a wrong side with a high speed, as a result, he died on the spot. The driver of the vehicle fled away from the spot and later on, for the said incident, Pindrajora PS Case No. 42 of 2002 u/s

279/337/304A of the IPC was started. The post-mortem report of the victim was conducted by Dr. Ratneswar Prasad Verma at Sub-divisional Hospital, Chas (Bokaro). The claimants, therefore, prayed for compensation of Rs. 3,00,000/- in the following manner:

1. Professional loss and loss of dependency including loss of family and service to family ... Rs. 2,50,000/-
2. Loss of consortium to the applicants ... Rs. 35,000/-
3. Loss of estate ... Rs. 10,000/-
4. Funeral Expenses ... Rs. 5,000/-

Total Rs. 3,00,000/-

3. The proceedings were contested by both the owner of the vehicles and the insurance company by filing separate written statement. In his written objection, the owner of the vehicle disputed the allegation made in the application and asserted that at the relevant point of time the vehicle in question was insured with the opposite party No. 2 and as such, the owner had no liability whatsoever to pay compensation, if any, to the applicant.

4. The insurance company categorically disputed the contentions of the applicant and according to it, there was no cause of action for filing the case and at the same time, for want of jurisdiction the claim-case was not maintainable.

5. The learned Tribunal below by Order No. 23 dated 16th January, 2004, disposed of the question on territorial jurisdiction raised by the insurance company in favour of the claimants.

6. At the time of hearing, the wife of the victim and another independent witness gave evidence in support of the claimants. PW-2, one Budheswar Kumar, claimed to be an eye-witness to the accident and he supported the claim of the appellants as made in the claim-application. The said witness stated that the vehicle was loaded with buffalo and it was driven at a high speed. He specifically asserted that the said vehicle overturned on the eastern side and the victim was thrown on the eastern side. The xerox certified copy of the FIR and the xerox certified copy of the post-mortem, report were marked as exhibits. It appears from record that the owner of the vehicle did not even cross-examine the witnesses for the claimants and it was the insurance company, who cross-examined those witnesses.

7. The learned Tribunal below held that as the name of PW-2 did not transpire in the application u/s 166 of the Motor Vehicles Act or in the evidence of PW-1, the evidence of the said witness did not inspire confidence. The learned Tribunal further held that in the absence of any other eye-witness or the maker of the FIR, it was not possible to arrive at the conclusion that due to rash and negligent driving of the driver, the victim died and consequently, the application was dismissed.

8. Being dissatisfied, the claimants have come up with the present appeal.

9. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the fact that the victim was involved in the said accident and consequently, died has been well-established by the FIR and the post-mortem report. In our view, there was no justification of disbelieving the PW-2, an eye-witness, simply on the ground that in the claim-application his name did not appear. It is not the law that in a pleading the names of the eye-witnesses should be given. We have already pointed out that PW-2 was not cross-examined by the owner of the vehicle though he filed written statement. Even the driver of the vehicle who was the best person to controvert the allegation of negligence was not brought to the witness box nor was any evidence adduced, on behalf of the owner of the vehicle, denying rash or negligent driving.

10. The insurance company not having been given leave u/s 170 of the Act was not entitled to even contend that there was no negligence on the part of the owner of the vehicle and the learned Tribunal below totally overlooked such point. The fact that the vehicle was covered by the insurance is well-established and there is no material to show that there was any violation on the part of the owner of the vehicle of the terms and condition of the insurance. In this connection, we may refer to the following observations of the Apex Court in the case of Shankarayya and Another Vs. United India Insurance Co. Ltd. and Another, , where the Apex Court in clear language laid down the consequence of not taking leave in writing of the Tribunal u/s 170 of the Act in the following words:

It clearly shows that the insurance company when impleaded as a party by the Court can be permitted to contest the proceeding on merits only if the conditions precedent mentioned in the section are found to be satisfied and for that purpose the insurance company has to obtain order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed the insurance company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined respondent No. 1- insurance company in the claim petition but that was done with a view to thrust the statutory liability on the Insurance company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170.

11. Since the insurance company did not take any leave in terms of Section 170 of the Act, Mr. Banerjee, the learned Advocate appearing on behalf of the insurance company has no right to argue on the question of negligence of the driver of the vehicle. Mr. Banerjee could not dispute before us that the vehicle was covered by a valid insurance.

12. We, thus, find that in this case, it has been well-established that the victim

died of the accident due to rash and negligent driving of the driver of the vehicle and the vehicle concerned being covered by the insurance, the insurance company was liable to pay such amount.

13. Therefore, the next question is what should be the amount of compensation. It appears from the materials on record that the victim was aged 22 years and was a sub-agent of Biri binding factory and also was a cultivator. Even if we accept the notional income of the victim to be Rs. 15,000/- per year by applying multiplier of 18, the compensation comes to Rs. 1,80,950/-.

We, accordingly, direct the insurance company to pay Rs. 1,80,500/- as compensation to the appellants; such amount should be paid with interest at the rate of 9 per cent per annum from the date of filing of the application till actual deposit of the amount. The aforesaid amount will be subject to adjustment of the amount, if paid, u/s 140 of the Act.

14. The appeal is allowed. The award impugned is set aside. The insurance company is directed to make payment within one month from today. In the facts and circumstances, there will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

I agree.