Presented On :- 16/01/2014.
Registered On :- 16/01/2014
Decided On :- 23/02/2018.
Duration :- 4 Ys. 1M. 7Ds.

IN THE COURT OF D.J.-4 & MEMBER M.A.C.T., THANE.

(Presided over by Hemant M. Patwardhan)

M.A.C.P.NO.51/2014

Exh.No.

1. Smt.Vanita Pradeep Bhosale,
Aged 36 years, Occ- Housewife,
(Wife of the deceased)

2. Mr. Akashy Pradeep Bhosale,
Aged 18 years, Occ-Student,
(Son of the deceased),

3. Master Ganesh Pradeep Bhosale,
Aged 11 years, Occ-Student,
(Son of the deceased),
All are residing at AL-4/7/8,
Ashtabhuja Apartment, Opp. Sarswati
Vidyalaya, Sector-5, Airoli, Navi Mumbai,
Dist-Thane – 400708. ...Applicants.

Vs.

Shri Vasant Shivram More,
R/o. 1] Room No.10, Akansha CHS,
PM Colony, Mhada, Mulund (East)
Mumbai- 400081.
2] 41/101, Suyash CHS, New PMG
Mhada Colony, Mulund (East),
Mumbai- 400081.
(Owners of vehicle No. MH-03/AZ-3407). ..Opp. Party

And

HDFC ERGO General Insu. Co. Ltd.
4Th floor, Lake City Mall-A, Kapurbavadi
Junction, Majiwada Naka, Thane– 400607 ...Insurer
...Opponent No.2.

Appearance:-
Shri N.J. Wathore -Advocate for Applicants.
Shri. Ramesh R. Takalkar Advocate for opponents No.1.
Shri Himanshu Thanawala-Advocate for Opponent No.2.

: JUDGMENT :
(Delivered on this 23rd dayof February 2018)

The legal representatives of the deceased have preferred this application for compensation U/s. 166 of the M.V. Act on following facts and grounds.

1] That the applicant No.1 is a widow and applicant Nos. 2 & 3 are the children of the deceased. According to the applicants, on 08/09/2013 husband of applicant No.1 and father of applicant Nos. 2 & 3 was traveling in a motor vehicle bearing No. MH-03/AZ-3407 from Mahabaleshwar towards Airoli, Navi Mumbai by Mumbai-Goa highway and his car reached near mauje Karave village at the same time one bus came from opposite direction on Mumbai-Goa highway in fast speed and the driver of the car bearing No. MH-03/AZ-3407 overtake another vehicle which was ahead of said car, at the same moment, when the bus was proceeding towards him from opposite direction and thus, the driver of the car could not control his car and dashed the bus in rash and negligent manner. According to applicants, the accident took place due to gross negligence of the car driver and husband of applicant No.1 sustained such grievous bodily injuries which resulted in his death on the spot itself. According to applicants, deceased late Shri Pradeep Kisan Bhosale was in service of Siemens India Ltd., Airoli, Navi Mumbai, Dist-Thane and was aged about 45 years at the time of accident. According to applicants, the deceased was earning an amount of Rs.28,707/- at the relevant time as monthly pay and the applicants were totally dependent on him. According to applicants, as the accident took place in the jurisdiction of Wadkhal police station, Dist-Raigad, said police have registered an offence vide C.R.No.II-54/2013 dtd. 08/09/2013 U/s. 279, 337, 338 & 304A of I.P. Code and U/s.184 of the Motor Vehicles Act against the driver of the car bearing No. MH-03/AZ-3407. According to the applicants, the vehicle in which husband of applicant No.1 was traveling was at the material time insured with opposite party No.2. Hence, the applicants have preferred this application for grant of compensation U/s. 166 of M.V. Act against opposite party Nos. 1 & 2.

2] Insurer has filed written statement at Exh.20 thereby denying all the avernments in the application. According to insurer, as per the copy of the policy filed by the applicants it was a private car, liability policy only and as the deceased was the occupant of the car, occupants are not covered under liability only policy as no separate premium is received by the insurer to cover the risk of the opponents. Hence, according to insurer, the liability, if any, is to be saddled on opposite party No.1 alone and opposite party No.2 be discharged. Without prejudice to the above defence, the insurer has also contended that the applicants are major sons of deceased, and therefore, cannot be said to be dependent on the deceased. Hence, according to insurer their claim is not tenable. Insurer has therefore, requested to reject the claim against it.

3] The matter was then proceeded and even the evidence of applicant No.1 was initially recorded. Later on opposite party No.1 though appeared before the Tribunal but has failed to file written statement. However, it is apparent that opposite party No.1 and the insurer both have adduced the evidence on the factual circumstances of the accident. Parties have filed written notes of argument and the matter was then posted for judgment as well. During the preparation of the case for judgment, it was noticed that the matter inadvertently was proceeded without framing issues. Hence, order was passed dtd. 05/10/2017 below Exh.1 that such inadvertent mistake be rectified and issues be framed. Opportunity was also granted to the parties to adduce the evidence, if any, after framing of the issues, which were remained to be framed inadvertently. However, even though, the order was passed on 05/10/2017 neither parties nor their advocates appeared before the Tribunal for adducing any further evidence. Hence, the Tribunal deem it fit to proceed on the next stage of the case and thus, the matter was proceeded for judgment.

4] The applicant No.1 has adduced her evidence below Exh.24 and has substantiated her avernments in the application. She has also relied upon the certified copies of FIR, P.M. report, spot panchanama and salary certificate of the deceased issued by the Simens Company. Insurer did not cross-examine the witness in view of the specific contentions in the written statement. At the relevant time, the opposite party No.1 was proceeded ex-parte, therefore, there was no question of their conducting any cross-examination of the said witness. The matter was then proceeded on the next step. Again during the pendency of the matter, at that stage opposite party No.1 has appeared before Court through another advocate and has requested the Court to conduct cross-examination of applicant No.1. However, the Court did not feel it necessary to recall the said witness as she was not eye witness of the incident. That order was not challenged by the opposite party No.1, and thus, has become final.

5] After that order, opposite party No.1 has again preferred an application for addition of M.S.R.T.C. as necessary party. However, after the application was filed by the previous advocate, he himself has remained absent on various dates and as per the settled principle of law, the claim can be filed against any of the vehicle as per the choice of the applicant. Court does not feel necessary to allow the application and to add M.S.R.T.C. as necessary party. Needless to mention, all the police papers were against the driver of vehicle in which the deceased was traveling. Thus, that point is also considered by the Court in deciding that application. Even after that, opposite party No.1 has adduced evidence of the driver in order to point out that accident did not occured due to his fault. After that, rival parties have filed written notes of arguments.

6] The sum and substance of the written notes of argument filed by applicants' advocate are that the deceased had lost his life due to the rash and negligent act of the driver of opposite party No.1 and thus, he has requested to direct the opposite parties to pay compensation of Rs. 36,00,000/-. Per contra, it was the categorical submission of insurer that as the policy was 'act only' policy, the insurer is not liable for payment of any compensation as the occupant of the car is not covered within the meaning of 'third party' as no separate premium is paid to cover the liability.

7] Ld. Advocate of opposite party No.1 has also filed written notes of argument thereby pointing out that accident was not occurred due to his driver but it was occurred due to negligence of bus driver. According to him, it is his case that accident was occurred due to rash and negligent act of the bus driver, he has preferred application for addition of M.S.R.T.C. as one of the parties but the Court has not passed any order on it. He has also pointed out that though the policy is act only policy, by various decisions of Bombay High Court and Apex Court at the relevant time, the insurer cannot avoid the liability as occupant is covered within the meaning of third party as well. Hence, according to him, even if, any liability is saddled it should be joint and several. He has relied upon the judgment of Hon'ble Bomay high Court in case of New India Assurance C. Ltd. Vs. Minguel Lourenco Correia and others 1986 ACJ 646, National Insurance Co. Ltd. Vs. Rajat Kumar Jain and others, [2009 ACJ 1793], Ajay Ramesh Bhoir Vs. Avinash Shantaram Jadial & Anr., [2004 (10) T.A.C. 832 (Bom.)], New India Assurance Co. Vs. Satpal Singh and others, [2000 (1) T.A.C. 403 (S.C.)].

8] After having heard the rival advocates and after having perused the documents filed in support of the case, issues which are framed below Exh.60 are hereinafter reproduced by me and I record my findings against each of them for the reasons stated below :-

Sr.No.	Issues	Findings.
1.	Do the applicants prove that accident was occurred on 08/09/2013 at 6.30 hrs. due to rash and negligent act of motor vehicle No. MH-03/AZ-3407 in which deceased has lost his life?	..Yes.
2.	Are applicants entitled for compensation? If yes, at what rate?	..Yes. Rs.38,69,964.8/-
3.	What award?	Allowed as per final order.

: R E A S O N S :

As to Issue Nos.1 & 2:-

9] All these issues are inter-linked with each other and consider at once. In the present matter, the applicants being widow and children of deceased have claimed compensation on the ground that deceased has lost life due to the rash and negligent act of the driver of the car in which he was traveling. According to applicants they are totally dependent on the deceased at the relevant time of accident, and thus, have requested the Tribunal to grant fair compensation to them. According to them, the deceased was serving at Siemens Company at the relevant time and was earning around Rs.28,707/- per month. Hence, they have claimed compensation. In order to substantiate the facts, applicant No.1 has adduced evidence at Exh.24. Her evidence remained unchallenged as insurer did not cross-examin the witness and opposite party No.1 was proceeded ex-parte. Though later on, opposite party No.1 has attempted to recall said witness, but after rejection of said application, no further steps were taken by opposite party No.1. Thus, order rejecting application becomes final. Hence, it is apparent that evidence of applicant No.1 remained unchallenged and same can be considered as it is.

10] As per the said deposition, the accident was caused due to rash and negligent act of the driver of opposite party No.1. No doubt, later on the opposite party No.1 has adduced evidence of his driver in order to challenge the testimony of applicants, however, merely because the driver of the opposite party No.1 has claimed that the accident was caused due to rash and negligent act of the bus driver in itself is not sufficient to establish the said fact. The Tribunal has to consider the various documents on which the parties have placed their reliance. As a matter of fact, all the police documents on which the reliance is placed by the applicant viz. FIR, spot panchanama and other documents clearly goes to show that the accident was caused due to rash and negligent driving by the driver of opposite party No.1. The documents relied upon by applicant No.1 were never challenged by the opposite party No.1 either before this Court or even before any other competent Authority and those documents were in itself are sufficient to establish that the accident was caused due to rash and negligent act of the driver of opposite party No.1.

No doubt, during his examination-in-chief, driver of opposite party No.1 has alleged that as he was hospitalized at the relevant time, he was not aware as to what had actually noted down in FIR or in other police papers. However, even if the said submissions are considered as it is, then also he has got every opportunity after he himself was recovered from injuries sustained by him, at the relevant time and after the recovery as well, he did not make any attempt either to make complaint that the documents are falsely prepared, before the Court or even before any competent authority. The said fact itself goes to show that he had no grievance against particular document, therefore, only no such grievance is put-fourth by him before any such authorities. Hence, merely because he has stated on oath that documents are falsely prepared cannot be considered because deposition of the applicant No.1 coupled with the documents establishes particular facts that the accident occurred due to rash and negligent act of the driver of the car in which husband of applicant was traveling. Opponent party No.1 has failed to establish said issue by adducing cogent, consistent and convincing evidence. Hence, I hold that accident took place due to fault on driver of car in which the husband of applicant was traveling.

11] Applicant has claimed that deceased was working with Siemens Company and earning Rs.28,707/-. He has also filed salary slip of deceased for the month of August 2013 wherein it has been categorically stated that his total pay was Rs. 28,707/-. No doubt the witness from the employer was never produced before the Court to substantiate that he was really gainfully employed with said Siemens Company. However, as particular fact has been categorically stated by applicant No.1 in her deposition and as the deposition remained unchallenged on record, said fact as well can be considered in favour of applicants. Hence, it is considered that the deceased was employee of Siemens Company and was earning salary from the said Company.

12] On perusal of pay slip, it is apparent that amount of Rs.2,365/- and Rs.79/- is referred under heading of medical benefit advance and joint saving scheme and Rs.**130**/- under personal pay. However, in my opinion, though these categories cannot be said to be categories of allowances of permanent nature, therefore, I am not inclined to consider those amounts as regular allowances under regular pay. Thus, those amounts are required to be deducted from the total basic of Rs.28,707/- and after deduction of those, his total salary can be considered to be Rs.26,133/-. The deceased, as per the facts stated in the application, was 44 years old and therefore, as per settled prepositions of law 30% of the salary has to be considered as future prospectus and that amount will come to Rs.7,839.9/-. After addition to that future prospects total salary which is to be considered as monthly salary will be Rs.33,972.9/-.

13] However, as per settled preposition by law, 1/3rd amount is to be deducted from the said amount towards personal expenses, having considered that there are three applicants in the present matter. After deduction of that 1/3rd amount towards personal expenses an amount of dependency will be Rs.22,648.6/- per month and amount of Rs.2,71,783.2/- as yearly amount. The deceased was 44 years old as per the facts stated by the applicant. Hence, as per the law laid down in the case of "Sarla Verma & Ors.

Vs. Delhi Transport Corporation and another",[2009 ACJ 1298], multiplier 14 to be made applicable and after application of that, amount of dependency will be Rs. 38,04,964.8/-. Applicant no 1 being widow is also entitled for the amount of Rs.40,000/- towards consortium and an amount of Rs.25,000/- towards funeral expenses. Thus, total amount for which applicants are entitled is Rs.38,69,964.8/-. Accordingly, I record my findings against Issue No.2 in favour of the applicants.

14] Now turning to the apportionment in the present matter applicant being widow is undoubtedly entitled for the compensation of maximum share. The applicant Nos.2 & 3 are children. However, applicant No.2 has attained the age of majority and applicant No.3 is at the verge of attaining majority, hence, in my opinion, they are not in that sense dependent on the deceased. However, being legal representatives of deceased and his estate, some portion is required to be granted to them as well. In my opinion, a share of 60% to widow-applicant No.1 and 20% each to the children i.e. applicant Nos. 2 & 3 would be proper apportionment.

15] Now the material point of liability to pay the said amount is to be considered. In the present matter, insurer has categorically denied the liability on the ground that the policy was 'act only', without payment of any additional premium towards it. No doubt, opposite party No.1 has claimed by relying on aforesaid judgments that insurer is still liable to pay the amount of compensation jointly and severally. However, all those citations relied upon by the applicants now cannot be considered in view of the Hon'ble Apex Court judgment in the case of National Insurance Company Limited V/s. Balkishan and another reported in MANU/SC/0987/2012 equivalent AIR 2013 Supreme Court 473 wherein the Hon'ble Court has categorically considered the aspect of liability under comprehensive policy and 'act only' policy and has held that occupant of the car is not covered under 'act only' policy. Therefore, if that judgment is considered, this Court has to discard the authorities relied upon by the applicants' advocate and has to held that insurer cannot be saddled liability of payment of compensation. Hence, entire compensation is require to be recovered from the opposite party i.e. admittedly owner of the vehicle in which the deceased was traveling. Having said so, I do not hesitate to record my finding against point No.3 partly in favour of the applicants and the insurer and against opponent party No.1. Thus, the order.

: O R D E R :

1. Application is allowed.

2. Opposite party No.1 owner of the car bearing No. MH-03/AZ-3407 only shall pay the amount of Rs.38,69,964.80 ps. including NFL alongwith interest at the rate of 7% p.a. from the date of application till its realization.

3. Application is dismissed against insurer.

4. On receipt of the amount as above or payment of the amount as above, said amount be disbursed to the applicants as per their respective share mentioned in aforesaid paragraphs as 60% to applicant No.1 and 20% to applicant Nos. 2 & 3 each alongwith interest accrued by account payee cheques on proper identification.

5. Award be drawn accordingly, on payment of court fees, if any.

Date- 23/02/2018.
Thane.

(Hemant M. Patwardhan)
D.J.-4 and Member, M.A.C.T., Thane.