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16.12.2022

FMA 12 of 2021
With
CAN 2 of 2020 (Old CAN 2452 of 2020)

The National Insurance Co. Ltd.

Versus

Smt. Jayanti Shaw & Ors.

Mr. Sanjay Paul
... ... for the appellant
Mr. Amit Ranjan Roy
... ... for the respondents

This appeal is directed against the judgement and award dated 30th September, 2019 passed by the learned Additional District Judge-cum-Judge, Motor Accident Claims Tribunal, Fast Track, 1st Court, Asansol, Paschim Bardhaman in MAC Case No.13 of 17/101 of 2014 granting compensation of ₹72,21,130/- (Rupees seventy two lakhs twenty one thousand one hundred and thirty only) along with interest under Section 166 of the Motor Vehicles Act, 1988.

The brief facts of the case are that on 14th April, 2014 at about 3.50 a.m. while the victim was proceeding towards Asansol Station on his motorcycle bearing no.WB-38K/7014 from his residence at Khandra Colliery under P.S. Andal and when he reached near Patesaria Petrol Pump at Satgram under P.S. Jamuria on NH 2 at that time one trekker bearing no.JH-02E/6681 driven in a rash and negligent manner dashed the motorcycle from behind, as a result of which the victim sustained fatal injuries and fell down on the road. The victim was taken to Asansol S.D. Hospital by the local people where he succumbed to his injuries on the same day.

On account of sudden demise of the deceased the claimants being the legal heirs filed application for compensation of ₹55,000,00/- (Rupees fifty five lakhs only) along with interest under Section 166 of the Motor Vehicles Act.

Upon consideration of materials on record and the evidence adduced on behalf of the claimants as well as the insurance company the learned tribunal granted compensation of ₹72,21,130/- (Rupees seventy two lakhs twenty one thousand one hundred and thirty only) along with interest at the rate of 6% per annum from the date of filing of the application till realization.

Being aggrieved and dissatisfied with the impugned judgement and award the insurance company has preferred the present appeal.

By an order dated 2nd December, 2022 service of notice of appeal upon the respondent no.5, owner of the offending vehicle has been dispensed with.

Mr. Sanjay Paul, learned advocate appearing on behalf of the appellant-insurance company submits that as per the inquest report **(Exhibit E)**, held by the police soon after the accident, there is no such reflection of involvement of the offending trekker rather report reveals that relatives of the deceased including his son stated before the police during inquest that one unknown truck was involved in the accident.

He further submits that after a lapse of 8 days the FIR maker, wife of the deceased, lodged FIR indicating the offending vehicle bearing no.JH-02E/6681 in the accident which has no nexus with the alleged occurrence and the said vehicle has been implanted in the case purposefully for the sake of getting huge compensation.

Referring to the evidence of eye-witness of P.W. 2, Sanjoy Singh he submits that though in his evidence-in-chief P.W. 2 stated that he saw the accident but during cross-examination the witness categorically deposed that after hearing of the occurrence he informed the wife of the deceased and as such P.W. 2 is not an eye-witness to the occurrence and his said evidence with regard to the occurrence and involvement of the vehicle is in the nature of hearsay which is inconsequential.

Furthermore it is submitted that in order to fill up the lacuna the claimants subsequent thereto adduced the evidence of another purported eye-witness P.W. 4, Anupam Chatterjee whose evidence is to be accepted with a pinch of salt in the circumstances of the present case.

He further submits that the insurance company in order to disprove the involvement of the offending vehicle has also adduced the evidence of its investigator O.P.W. 1, Somdeb Goswami who has produced his investigation report wherefrom it will reveal that the alleged offending vehicle was not involved in the accident.

So far as the quantum is concerned Mr. Paul indicates that there is an arithmetical error in computation of the compensation amount by the learned tribunal to the extent that the tax component was deducted after adding the additional amount towards future prospect to the annual income and he submits for modification so far as calculation is concerned.

In the light of his aforesaid submission he prays that the appeal be allowed.

In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Amit Ranjan Roy, learned advocate for the respondents-claimants submits that the claimants in order to establish their claim case including involvement of the offending vehicle have adduced the evidence of two eye-witnesses namely, P.W-2, Sanjoy Singh and P.W. 4, Anupam Chatterjee both of whom has deposed of involvement of the vehicle. Further the documentary evidence in the form of FIR **(Exhibit 1)** and the charge-sheet **(Exhibit 2)** show involvement of the vehicle. There is no rebuttal evidence from the side of the insurance company to disprove the case of the claimants as regards involvement of the vehicle.

Moreover he submits that the owner or drive of the offending vehicle could have been the best witness to disprove involvement of the offending vehicle, however, the insurance company did not make any endeavour to adduce the evidence of the said witness and thus the learned Court was left with no other option but to accept the contentions of the claimants and its evidence with regard to involvement of the vehicle. In support of his contention he relied on the decision of ***New India Assurance Co. Ltd versus Mita Samanta & Ors.*** reported in ***(2010) 1 WBLR (Cal) 137.***

He further submits that delay *per se* does not make the claim case doubtful and is never fatal to the proceedings initiated under the Act. In support of his contention he relied on the decision of the Hon'ble Supreme Court passed in ***Ravi versus Badrinarayan and others***, reported in ***2011(1) TAC 867 (SC)*** and unreported decision of this Hon'ble Court in ***National Insurance Co. Ltd. versus Smt. Jaba Bhattacharya and others*** (FMA 785 of 2017).

Furthermore it is submitted that the inquest report prepared by the police under Section 174 of the Cr.P.C. is not at all a substantive piece of evidence and it is prepared with the object of ascertaining the cause of death of the deceased, nothing more and nothing less and thus the statement of the relative of the deceased showing involvement of unknown truck as indicated by the learned advocate for the appellant-insurance company in the inquest report cannot be considered as a substantive piece of evidence. In support of his contention he relied on the decision of this Hon'ble Court passed in ***National Insurance Company Limited Vs. Smt. Pinki Bhuia and others*** (FMA 1339 of 2017).

Having heard the learned advocates for both the sides, now I proceed to decide the issues involved in this appeal. Precisely, in the present appeal the appellant has raised twofold grounds *firstly,* the question pertaining to involvement of the offending vehicle and *secondly* error in the arithmetical calculation made by the learned tribunal.

With regard to the first issue relating to the question of involvement of the offending vehicle Mr. Paul, learned advocate appearing on behalf of the appellant-insurance company, mentioning to the oral and documentary evidence from the materials on record, has strenuously argued that the offending vehicle has been implanted for the sake of getting huge compensation. *Per contra*, Mr. Roy, learned advocate for the respondents-claimants has stressed on the aspect that the best witnesses have not been adduced by the insurance company to challenge the assertion of the claimants of involvement of the offending vehicle. The claimants in order to establish their case with regard to involvement of the offending vehicle have adduced the evidence of two eye-witnesses namely, P.W. 2, Sanjoy Singh and P.W. 4, Anupam Chatterjee and also produced the documents in the form of FIR **(Exhibit 1**) and charge-sheet **(Exhibit 2)**.

Although P.W. 2 stated in his examination-in-chief that he saw the accident in which the offending trekker was involved but in cross-examination this witness stated that after hearing the occurrence he informed the wife of the deceased. Thus the evidence of P.W. 2 so far as the involvement of the offending trekker is concerned is nothing but hearsay evidence and is insignificant to lend support to the case of the claimants regarding involvement of the offending vehicle. Be that as it may, turning to P.W. 4 it is found that this witness has stated in his examination-in-chief that the driver of the offending trekker bearing no.JH-02E/6681 was responsible for the accident and he saw the accident. Such evidence of P.W. 4 has remained unchallenged in cross-examination.

Mr. Paul, learned advocate for the appellant insurance company relying on the inquest report prepared under section 174 of the Cr.P.C. by the police tried to impress upon the Court that such report reflects of involvement of unknown truck. Save and except the said inquest report the insurance company has not adduced the evidence of the investigating agency to disprove the involvement of the vehicle. It is pertinent to note that upon completion of investigation the investigating authority has submitted charge-sheet against the driver of the offending vehicle. I find substance in the submission of Mr. Roy, learned advocate for respondents-claimants referring to the decision of this court in ***Pinki Bhuia's Case*** that inquest report prepared by the police under section 174 of the Cr.P.C. is to ascertain the apparent cause of death of the deceased and is not a substantive piece of evidence. So far as evidence of O.P.W. 1, Somdeb Goswami, who conducted investigation on behalf of the insurance company, is concerned it is found that he has been engaged by the insurance company to hold the investigation and he came to depose as per advice of the insurance company. Thus, it goes without saying that O.P.W. 1 is an interested witness. Further it is relevant to note that in cross-examination this witness stated that he asked the duty officer of the P.S. of his intention to meet the investigating officer. However, the report does not contain any official communication with the local P.S. for such meeting and discussion with the investigating officer of the case. Fact remains that this witness never met with the investigating officer in order to ascertain the actual state of affairs. Therefore his evidence with the regard to non involvement of the offending vehicle is not at all acceptable.

The insurance company by filing application under the provisions of Section 170 of the Motor Vehicles Act, 1988 craved leave to contest the case on all available defences and the trend of cross-examination shows that insurance company has contested the claim case on all merits. In such circumstances it was incumbent upon the insurance company to summon the owner or the driver of the vehicle to appear as witness for disputing the allegation of involvement of the offending vehicle. The owner of the offending vehicle was the best person to prove non-involvement of the offending vehicle by producing either garage register or movement register of the vehicle to indicate the movement of the offending vehicle at the relevant time. Similarly, the driver could have been a necessary witness to throw light as to whether the offending vehicle was really involved in the said accident or not. The appellant insurance company did not take recourse to adduce the evidence of the owner or the driver of the offending vehicle to establish its case of non-involvement of the offending vehicle. Failure to adopt such course the court is left with no other alternative than to accept the allegations of the claimants of involvement of the offending vehicle.

This court in the case of ***Mita Samanta (supra)*** observed as follows.

> *"Therefore, the insurance company in spite of taking leave under section 170 of the Act having failed to summon the owner or the driver of the vehicle to disprove the allegation of the claimants of the involvement of the vehicle concerned or the rash and negligent driving, the court is left with no other alternative but to accept the allegation of the claimants unless there is either admission of the claimants or their witness about non-involvement of the vehicle or about contributory negligence of*

the victim in the accident or there exists other evidence of unimpeachable nature given by uninterested witness showing falsity of the allegation of the claimants. In this case, there is no such admission or evidence of that nature. In this case, driver has been chargesheeted and thus, there is no reason why the insurance company in spite of taking leave under Section 170 of the Act should not summon the said driver to give evidence for disclosing the truth. We are unable to presume collusion between the driver and the claimants when the driver has been indicted in the criminal proceedings. It will be a travesty of justice in the facts of the present case to disbelieve the eyewitness of the claimants when the owner and the driver are neither appearing nor are they even summoned by the insurance company even after taking leave under Section 170 of the Act to face cross examination at the instance of the claimants"

Keeping in mind the aforesaid observation of this Hon'ble court, in my view as the insurance company has failed to adduce the evidence of owner or the driver of the offending vehicle to establish its defence of non-involvement of the vehicle, it will be a travesty of justice to disbelieve the eyewitness namely PW4 examined on behalf of the claimants in this regard. In view of the above discussion the argument advanced on behalf of the appellant insurance company of non-involvement of the offending vehicle in the said accident does not hold good.

Mr. Paul, learned advocate for appellant-insurance company has challenged the involvement of the vehicle on the ground of delay of 8 days in lodging of the FIR. It is a fact that the incident took place on 14th April, 2014 and the FIR has been lodged on 22nd April, 2014. Thus, there is a delay of 7 days. Be that as it may, upon going through the written complaint lodged by the wife of the deceased it is found that she has given an explanation that she was busy with ritual performance of her deceased husband which led to delay in lodging FIR. The Hon'ble Supreme Court in ***Ravi's Case (supra)*** has observed as follows :

> *"20. It is well-settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a common man to first rush to the Police Station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the Police Station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the FIR with the Police. Delay in lodging the FIR thus, cannot be the ground to deny justice to the victim. In cases of delay, the Courts are required to examine the evidence with a closer scrutiny and in doing so; the contents of the FIR should also be scrutinized more carefully. If Court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the FIR, the claim case cannot be dismissed merely on that ground."*

Bearing in mind the aforesaid observation of the Hon'ble Supreme Court delay *per se* in lodging FIR cannot be a ground to doubt the claimant's case. It is pertinent to note that there are no such evidence showing indication of fabrication or concoction or engineering in lodging of such FIR. Similar observation has been made by this Hon'ble court in ***Smt. Jaba Bhattacharya's Case (supra).*** Accordingly, argument with regard to delay in lodging FIR does not hold good.

For the reasons as above, the ground advanced on behalf of the appellant-insurance company with regard non-involvement of the offending vehicle does not stand to reason.

Accordingly, it is found that the claimants have sufficiently established and proved the involvement of the offending vehicle by producing cogent evidence.

Mr. Paul, learned advocate appearing for the appellant-insurance company has indicated that the learned tribunal has made an arithmetical error in calculating the compensation amount.

Mr. Roy, learned advocate for the respondents-claimants also concedes to the aforesaid submission.

It is found from the impugned judgment that the learned tribunal after adding the amount of future prospect deducted the tax component. It is clarified that such calculation is an arithmetical error arrived at by the learned tribunal. The tax component should have been deducted from the gross salary while assessing the actual income of the deceased. Thus, ₹4,91,630/ (gross annual income) less tax component ₹20,082/- and professional tax of ₹2,250/- which comes to ₹4,69,298/ is the actual annual income of the deceased.

The other findings with regard to multiplier, future prospect, deduction towards personal living expenses as well as general damages has not been challenged in this appeal.

Now the calculation of compensation amount is made hereunder :

Calculation of Compensation

Annual income	₹4,91,630/-
Less tax component	₹22,332/-
Total annual income	₹4,69,298/-
Add: 50% towards future prospect	₹2,34,649/-
Total loss of annual dependency	₹7,03,947
Less: 1/3rd towards personal and living expenses	₹2,34,649/-
Multiplier 15 (age 37 years)	₹4,69,298/- × 15
	₹70,39,470/-
General damages	₹70,000
Loss of Estate.... ₹15,000/-	
Loss of consortium... ₹40,000/-	
Funeral Expenses.... ₹15,000/-	₹71,09,470/-

Thus, the claimants are entitled to compensation of of ₹71,09,470/- (Rupees seventy one lakhs nine thousand four hundred and seventy only) together with interest at the rate of 6% per annum from the date of filing of the claim application, i.e. on and from 14th July, 2014 till deposit. It is found that the appellant-insurance company in terms of order of this Court dated 31st August, 2022 has deposited a sum of ₹1,07,22,091/- (Rupees one crore seven lakhs twenty two thousand and ninety one only) vide OD challan no.1797 dated 8th September, 2022 and statutory deposit of ₹25,000/- (Rupees twenty five thousand only) vide OD challan no.2679 dated 14th February, 2020. The aforesaid deposits along with accrued interest shall be adjusted against the entire compensation amount and the interest thereon.

The appellant-insurance company is directed to deposit balance amount, if any, with the learned Registrar General, High Court, Calcutta by way of a cheque within a period six weeks. Upon deposit of the balance amount, if any, learned Registrar, High Court, Calcutta shall disburse the entire amount of compensation together with interest in favour of the respondents claimants, after making payment of ₹40,000/- to respondent no.1 (widow of the deceased) towards spousal consortium, in equal proportion subject to satisfaction of their identity.

The respondents-claimants are directed to deposit the *ad valorem* court fees on the amount of compensation assessed, if not already paid.

Any excess amount, if any, left after full satisfaction of the award shall be refunded to the appellant-insurance company.

Appeal stands allowed in part on contest against the respondents-claimants and *exparte* against respondent no.5, owner of the offending vehicle.

The impugned judgement and award stands modified to the aforesaid extent.

No order as to costs.

With the aforesaid observations, the appeal stands disposed of.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

Let a copy of this order along with lower court records be forwarded to the learned tribunal for information.

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

(Bivas Pattanayak, J.)