

IN THE HIGH COURT, AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK.

FMA 920 OF 2021

With

COT 71 of 2018

Cholamandalam MS General Insurance Company Limited
.....Appellant

Versus

Smt. Ratnamaya Rai & Others
.....Respondents

For the Appellant: Mr Debanjan Mukherjee, Advocate

For the Respondent no.1 & 2: Mr Jayanta Banerjee, Advocate.

Ms. Ruxmini Basu Roy, Advocate.

Heard on: 13.09.2022.

Judgment on: 01.12.2022.

Bivas Pattanayak, J :-

1.The present appeal is preferred against the judgment and award dated 2 May 2018 passed by learned District Judge cum Judge, Motor Accident Claims Tribunal, Jalpaiguri in M.A.C Case no. 73 of 2016 granting compensation in favour of the claimants to the tune of Rs. 33,38,778/-under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 18 December 2015 at about 8 PM /8:30 PM while the deceased-victim was coming to his house on his motorcycle bearing no.WB-72(K)-9465 and reached near Hindupara, Gayerkata at that time the offending vehicle bearing no. WB-71A-7209 (pickup van) coming with high-speed in a rash and negligent manner dashed the motorcycle of the deceased-victim from behind, as a result of which he sustained multiple fatal injuries and died on the spot. On account of sudden demise of the deceased-victim in the said accident, the claimants being the mother and sister of the deceased filed application under Section 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs.41,15,408/- along with interest.

3. The appellant-insurance company contested the claim application before the learned tribunal. However respondent no.3-owner of the offending vehicle inspite of due service of notice did not contest the claim application before the learned tribunal and the claim application was disposed of *exparte* against him. As respondent no.3-owner of the offending vehicle did not contest the claim application before the learned tribunal hence service of notice of appeal upon the said respondent is dispensed with.

4. The claimants (respondent nos. 1 & 2 herein) in order to prove their case examined three witnesses including claimant no.1, mother of the deceased and also produced documentary evidence which is marked as **Exhibit 1 to**

11 respectively. The contesting opposite party no.2-insurance company (appellant herein) also adduced evidence of three witnesses.

5. Upon considering the materials on record as well as the evidence produced on behalf of the respective parties, the learned tribunal granted compensation in favour of the respondents-claimants to the tune of Rs. 33,38,778/-.

6. Being aggrieved by and dissatisfied with the impugned judgment and award the insurance company has preferred the present appeal.

7. In the present appeal the respondent nos. 1 & 2 (claimants) have filed a cross-objection being COT 71 of 2018 for enhancement of compensation amount.

8. Both the appeal as well as the cross-objection is taken up together for disposal.

9. Mr Debanjan Mukherjee, learned advocate for appellant-insurance company submitted as follows.

The FIR was lodged after almost a lapse of 29 days of the accident on 18 December 2015, resulting in delay which has not been explained and such aspect raises serious doubt with regard to the alleged occurrence as well as the claim made on basis of the alleged accident.

The claimant no.1 (PW1), mother of the deceased, during her examination admitted that she is not conversant with the contents of the FIR and is also

not aware of the registration number of the vehicle involved in the accident. Moreover the purported eyewitness namely PW2 examined on behalf of the claimant is not a charge-sheeted witness and as such his evidence with regard to the occurrence is to be taken with a pinch of salt. The insurance company produced three witnesses all of whom were listed in the chargesheet and they categorically deposed that neither they have any knowledge of the incident that took place on 18 December 2015 nor they were examined by the police in relation to such incident and as such the veracity of the chargesheet filed by the police is dubious and should not be relied upon. The materials on record as above clearly shows that the involvement of the offending vehicle in the said accident has not been proved to the hilt and accordingly the insurance company cannot be saddled with the liability of paying compensation.

In view of his aforesaid submissions he prayed that the appeal be allowed and the impugned judgment and award passed by the learned tribunal be set aside.

10. In reply to the aforesaid contentions raised on behalf of the appellant-insurance company, Mr Jayanta Banerjee, learned advocate for respondent nos. 1 & 2 (claimants) submitted as follows.

It is well settled that delay in lodging FIR cannot be a ground to doubt the claimant's case. The informant has given due reasons for delay in lodging the

FIR. Further there is no such indication of fabrication or concoction in the contents of the FIR and thus such delay cannot be a ground to deny justice to the bereaved. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Ravi versus Badrinarayan and Others*** reported in ***2011(1) T.A.C 867 (SC)***.

The owner was the best person to prove non-involvement of the offending vehicle or the driver of the offending vehicle could prove that such vehicle was not involved in the accident. The insurance company contested the proceedings on behalf of the insured-owner of the vehicle in terms of Section 170 of the Motor Vehicles Act, 1988 and it was the duty of the insurance company to summon the owner and the driver of the vehicle to appear as witness for disputing the allegation of the claimants regarding involvement of the vehicle. However no such steps were taken by the appellant-insurance company and therefore the court has no other alternative but to accept the allegations of the claimants and in support of his contention he relied on the decision of this Court passed in ***New India Assurance Co. Ltd versus Mita Samanta & Ors.*** reported in ***(2010) 1 WBLR (Cal) 137***.

In view of his aforesaid submissions he prayed for dismissal of the appeal.

11. Having heard the rival contentions raised by the parties it appears that the appellant-insurance company has thrown challenge to the case of respondents-claimants for compensation on twofold grounds *firstly* that there

was delay in lodging of the FIR and *secondly* that the offending vehicle was not involved in the accident.

11.1.As far as the first ground with regard to delay in lodging of the FIR is concerned, it is found that the information was lodged with the police station on 15 January 2016 in relation to the accident which took place on 18 December 2015. Thus there has been a delay of almost 29 days. In the written complaint (**Exhibit 1**) the informant has given explanation that on account of sudden demise of her son she was in debilitating mental condition and also for performing last rites of her deceased son there was delay in lodging the FIR. There is no indication of fabrication or concoction or exaggerations.

The Hon'ble Supreme Court in its decision passed in **Ravi (supra)** observed as follows.

“20. It is well settled that the delay in lodging FIR cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect the 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 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 Courts 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 and as in the present case at hand there is no indication of fabrication or concoction or engineering of the FIR hence the delay in lodging the FIR *per se* cannot be a ground for dismissal of the claim case. Further such delay has been duly explained in the FIR. Accordingly, the argument of the appellant-insurance company in this regard falls short of merit.

11.2. In relation to the second ground regarding whether the offending vehicle was involved or not in the said accident, it is found that claimant no.1 (PW1), mother of the deceased, in cross-examination has deposed that she has not seen the accident and cannot state the number of the vehicle. Thus evidence of PW1 is inconsequential so far as involvement of the offending vehicle in the said accident is concerned as she did not witness the accident. Be that as it may, in order to establish the fact of involvement of the offending vehicle in the said accident the claimants have adduced the evidence of one

eyewitness namely Shamsheer Limbu (PW2) as well as produced documentary evidence in the form of FIR, charge sheet and seizure list. PW2, in his examination-in-chief has categorically deposed that he has seen the accident with his own eyes and that the accident took place due to rash and negligent driving of the driver of the offending vehicle. In cross-examination he deposed that he has a business near the place of occurrence. Hence presence of this witness near the place of occurrence at the time of accident is probable and acceptable. There is no materials forthcoming in the cross-examination to disbelieve evidence of PW2.

11.2.1. The appellant-insurance company has challenged the evidence of PW2 on the ground that he is not a charge-sheeted witness. It is a fact that PW2 has not been listed as a witness in the chargesheet filed by the investigating agency. However, in cross-examination the witness deposed that he was examined by the police. Such evidence has not been rebutted by the appellant-insurance company by producing any evidence of the investigating agency. Moreover there is no hard and fast rule that only the listed witnesses in the charge-sheet can adduce evidence as eyewitnesses and none else.

11.2.2. The defence witnesses namely DW1, DW2 and DW3, who are charge-sheeted witnesses, deposed that they did not have any knowledge about the incident. Basing on such evidence it has been strenuously argued by learned advocate for appellant-insurance company that no such incident took place in

the manner involving the offending vehicle in the accident as has been claimed by the claimants. It is pertinent to note that nothing has been stated by the aforesaid witnesses that on the relevant date and time of alleged incident they were present near the vicinity where the accident allegedly took place. Further the incident may not be within the knowledge of the witnesses but that does not improbabilise such incident involving the offending vehicle. The FIR (**Exhibit 1**), seizure list (**Exhibit 2**) and charge sheet (**Exhibit 3**) clearly shows involvement of the offending vehicle in the said accident.

11.2.3. In the written statement the appellant-insurance company craved leave to take all available defences under the provisions of Section 170 of the Motor Vehicles Act, 1988. When Section 170 of the Act permitted an insurance company to contest proceedings on behalf of the insured-owner of the vehicle, 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 any steps to adduce the evidence of the owner or the driver of the offending vehicle to establish its plea 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”

Bearing in mind the aforesaid observation of this Hon'ble court, as the appellant-insurance company in spite of taking leave under Section 170 of the Act 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, hence it will be a travesty of justice to disbelieve the eyewitness namely PW2 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.

11.3. In the light of above discussion it is found that both the grounds agitated in the present appeal by the appellant-insurance company fails and thus the appeal is liable to be dismissed.

12. Now the cross objection being no. COT 71 OF 2018 filed by the respondents-claimants is taken up for consideration.

12.1. Mr Banerjee, learned advocate for the respondents-claimants submitted that the deceased-victim at the time of death was an employee of Indian Railways having gross monthly salary of Rs. 20,127/-. Such salary of the deceased less tax paid ought to have been taken into account by the learned

tribunal but it erred in taking the net salary for computing the compensation amount. He further submitted that 50% of the aforesaid income should also be taken into account towards future prospect. Moreover general damages under the conventional heads are also to be granted. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in **2017 (4) T.A.C 673(S.C)**. He further submitted as the deceased-victim at the time of accident was 25 years of age hence a multiplier of 18 is to be adopted for calculating the compensation amount. Further it is submitted that the learned tribunal instead of granting interest on the amount of compensation from the date of filing of the claim application has allowed interest on the principle sum as a default clause which needs to be modified.

12.2. Mr Mukherjee, learned advocate for the appellant-insurance company in reply submitted that the observation of the Hon'ble Supreme Court made in ***Pranay Sethi's Case (supra)*** is to be followed and further he submitted that as the deceased-victim died a bachelor hence an amount equalling to $\frac{1}{2}$ of the income of the deceased is to be deducted towards his personal and living expenses however the learned tribunal erred in deducting $\frac{1}{3}$ rd of the income of the deceased towards his personal and living expenses.

12.3. With regard to the income of the deceased-victim though in the claim application the income of the deceased-victim has been stated as Rs.20,127/- per month from his employment in the Indian Railways yet no document showing such income has been produced. Be that as it may, as per the salary statement **(Exhibit 11)** produced by the claimants the gross pay of the deceased-victim is Rs. 19,995/-and net pay is Rs.15,448/-. The learned tribunal has taken into consideration the net pay of the deceased-victim. In view of the observation of Hon'ble Supreme Court made in ***Pranay Sethi's Case (supra)*** that income means actual income less the tax paid, the income of the deceased-victim in the case at hand would be Rs.19,995/- less Rs.130/- paid as professional tax. Thus the income of the deceased-victim would be Rs.19,865/-.

12.4. As the deceased-victim at the time of accident was 25 years of age, hence in view of the observation of Hon'ble Supreme Court made in ***Sarla Verma & Others versus Delhi Transport Corporation and another*** reported in ***2009 ACJ 1298*** the multiplier to be adopted would be 18.

12.5. Further as the deceased victim had a permanent job with the Indian Railways and was aged 25 years at the time of death an addition of 50% of actual salary be taken into account towards future prospects as per observation of Hon'ble Supreme Court in ***Pranay Sethi's Case (supra)***.

12.6. It appears that the learned tribunal has made deductions of 1/3rd of the income towards personal and living expenses of the deceased victim. It is pertinent to note that the deceased-victim died bachelor. There is no case of the claimants that the family of deceased-victim was large comprising of widowed mother and large number of younger non-earning sisters or brothers. Rather the claimants are the widow mother and sister. Therefore considering the aforesaid as the deceased-victim died bachelor ½ (half) of the income of the deceased is to be deducted towards personal and living expenses in view of the observation of Hon'ble Supreme Court made in ***Sarla Verma's Case (supra)***.

12.7. The learned tribunal has imposed interest as a default clause however the interest on the principal amount should have been allowed from the date of filing of the claim application till realisation of the amount.

12.8. As the respondents-claimants are the widow mother and unmarried sister of the deceased-victim hence they are entitled to general damages towards loss of estate and funeral expenses amounting to Rs.15,000/- each under the said heads respectively.

13. Now taking into consideration the aforesaid aspects the compensation amount is calculated as hereunder.

Calculation of compensation

Monthly Income...(Rs.19,995/- less Rs.130/-).....	Rs.19,865/-
Annual Income.....(Rs.19,865/- X 12).....	Rs 2,38,380/-
Add: Future Prospects @ 50% of total Income.....	<u>Rs.1,19,190/-</u>
Annual loss of Income.....	Rs.3,57,570/-
Less: Deduction $\frac{1}{2}$ of the Annual Income towards personal and living expenses.....	<u>Rs.1,78,785/-</u>
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Adopting multiplier 18 (Rs.1,78,785/- X 18).....	Rs.32,18,130/-
Add: General Damages.....	<u>Rs.30,000/-</u>
Loss of estate....	Rs.15,000/-
Funeral Expenses.....	Rs.15,000/-
Total Compensation.....	Rs.32,48,130/-

14. Thus the respondents-claimants are entitled to compensation of Rs.32,48,130/- along with interest @ 6% per annum from the date of filing of the claim application till deposit. It is found that the appellant-insurance company in terms of order dated 6 April 2022 deposited a sum of Rs.33,38,778/- vide OD challan no.177 dated 18.04.2022 and has also made statutory deposit of Rs. 25,000/- vide OD challan no. 620 dated 21.06.2018 with the Registry. Accordingly both the aforesaid deposits along with accrued interest be adjusted against the entire amount of compensation and the interest thereon.

15. The appellant- Cholamandalam MS General Insurance Company Limited is directed to deposit the balance amount, if any, and the interest as indicated above by way of cheque with the learned Registrar General, High Court, Calcutta within the period of four weeks from date. The learned Registrar General, High Court, Calcutta upon deposit of the aforesaid balance amount, if any, shall release the entire compensation amount along with interest in favour of respondents-claimants on satisfaction of their identity in the same proportion as indicated in the order of the learned tribunal.

16. Accordingly the appeal stands dismissed on contest against respondents - claimants and *exparte* against respondent no.3-Owner of the offending vehicle. The cross-objection being no. COT 71 of 2018 is also disposed of and the impugned judgment and award of the tribunal stands modified to the aforesaid extent. No order as to costs.

17. All connected applications, if any, stand disposed of.

18. Interim order, if any, stand vacated.

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

(Bivas Pattanayak,J.)

