**IN THE HIGH COURT AT CALUTTA**
**Civil Appellate Jurisdiction**

**16.01.2023**
**SL No.9 & 10**
**Court No. 654**
**Ali**

**F.M.A. 2180 of 2015**

**Smt. Manashi Maity & Ors.**
**Vs.**
**National Insurance Co. Ltd. & Anr.**
**With**
**FMA 2335 of 2014**
**National Insurance Co. Ltd.**
**Vs.**
**Smt. Manashi Maity & Ors.**

Mr. Jayanta Kumar Mandal
...for the appellants FMA 2180 of 2015
and respondents FMA 2335 of 2014.

Mr. Parimal Kumar Pahari
......for the respondents FMA 2180 of 2015.
and appellant FMA 2335 of 2014.

Mr. Amit Baran Dash
Ms. Ankana Sarkar
.....for the respondent No. 2 FMA 2180 of 2015.

Mr. Amit Baran Dash
Ms. Ankana Sarkar
.....for the respondent No. 5 FMA 2335 of 2014.

**FMA 2180 of 2015 with FMA 2335 of 2014.**

The judgement and award passed on 28th November 2013 by learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, 2nd Court, Tamluk, Purba Medinipur in M.A.C Case no.73 of 2017/ 116 of 2016 has been challenged by the claimants as well as the insurance company by preferring separate appeals.

Both these appeals are taken up together for consideration and disposal analogously.

The brief fact of the case is that on 7 May 2009 at about 2 PM while the victim was standing at Chandpur under Daspur Police station on the extreme left side of Ghatal-Panskura Pitch Road for going to Panskura on his motorcycle bearing registration no. WB-34P/6636, at that time the offending vehicle bearing registration no. WB-34S/0655 (Maruti Car) which was coming from Ghatal side in a rash and negligent manner dashed the motorcycle from behind along with the victim, as a result of which the victim fell down on the ground and sustained serious injuries and died on the spot. On account of sudden demise of the deceased-victim the claimants being the widow, children and mother of the deceased filed application under Section 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs. 48,00,000/-together with interest.

During the pendency of the claim application the mother of the deceased namely Smt Chhaya @ Chhaya Rani died and her name has been expunged by the learned tribunal vide order no. 35 dated 17.5.2013.

The claimants in order to establish their case examined three witnesses including widow of the deceased and proved number of documents which has been marked **Exhibit 1 to 17** respectively.

The insurance company also adduced evidence of two witnesses and proved documents which have been marked as **Exhibit A, B and C** respectively.

Upon consideration of the materials on record and the evidence placed before it by the respective parties the learned tribunal granted compensation in favour of the claimants to the tune of Rs. 26,18,060/- alongwith interest.

Mr. Jayanta Kumar Mandal, learned advocate for the claimants submits that the learned tribunal erred in taking into account the net income of the deceased for the month of April 2009 whereas it ought to have considered the income noted in Form-16 issued in relation to deduction of tax by the employer for the assessment year 2009-2010.

He further submits that since the deceased-victim at the time of accident was in permanent job with the Bajaj Allianze LIC Company Limited as Business Development Manager, aged 37 years hence the claimants are entitled to an amount equalling to 50% of the annual income of the deceased towards future prospect.

Moreover it is submitted that since at the time of accident there were four numbers of dependents of the deceased-victim hence 1/4th of annual income of the deceased-victim should be deducted towards personal and living expenses instead of 1/3rd. He further indicates that though the mother of the deceased died during the pendency of the claim application yet such subsequent happening of death is inconsequential since determination of extent of personal and living expenses depends on the number of dependents of the deceased at the time of accident and not on any subsequent happening. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Kirti Kumar & Anr Etc versus Oriental Insurance Company Ltd*** reported in ***2021 SAR (Civ) 147***.

He further submits that the claimants are also entitled to general damages under the conventional heads of funeral expenses, loss of consortium, and loss of estate of Rs. 15,000, Rs. 40,000 and Rs.15,000/- respectively and further an increase of 10% on the general damages since three years have elapsed.

In the light of his above submissions he prays for enhancement of the compensation amount.

Mr. Parimal Kumar Pahari, learned advocate for insurance company submits that since the victim on the relevant date was driving the motorcycle in a high speed without using helmet and holding effective driving licence hence was guilty of contributory negligence in the said accident and as such the claimants are debarred from claiming compensation to the extent of negligence of the deceased victim in the said accident.

He further submits that the driver of the offending vehicle on the relevant date of accident was not holding effective and valid license to drive such vehicle which is evident from details of driving licence **(Exhibit A)** proved by OPW1, Dealing Officer of National Insurance Company Limited. As per **Exhibit A** the licence of the driver of the offending vehicle was valid till 23.1.2003. The accident having taken place on 7.5.2009 manifest that the driver of the offending vehicle on the relevant date was not holding valid and effective driving licence and therefore the insurance company cannot be saddled with the liability to make compensation.

Mr. Amit Baran Das, learned advocate for owner of the offending vehicle submits that as per the seizure list **(Exhibit 5)** the police authority seized the driving licence of the driver of the offending vehicle which shows validity of driving licence till 20 July 2009 and therefore on the relevant date of accident the driver was holding an effective driving licence. He further submits that the vehicle was covered under the insurance policy which has not been disputed by the insurer and accordingly the order of the learned tribunal directing the insurance company to make payment of the compensation amount should be affirmed.

Mr. Mandal, learned advocate for claimants, in reply to contentions raised on behalf of the insurance company, submits that nothing has been pleaded or proved by the insurance company with regard to contributory negligence and as such the argument advanced in this regard by learned advocate for insurance company is not at all tenable in the eye of law.

At the outset it is noted that during the pendency of appeal widow of the deceased expired.

Having heard the learned advocates of respective parties, I now proceed to decide the issues involved in the appeal. Before dealing with the aspect of enhancement of the compensation amount as raised by the claimants it will be apposite to deal with two-fold grounds raised by the insurance company *firstly,* the contributory negligence of the deceased victim in the said accident and *secondly,* the driver of the offending vehicle not having valid driving licence on the date of accident.

With regard to the first issue of contributory negligence of the deceased victim, it is found that the insurance company in its written statement contended that the victim was plying his motorcycle in a very high speed and in negligent manner without looking at the rearview and all on a sudden when he saw the alleged offending vehicle approaching from behind and blowing horn in order to overtake, the victim lost control of his motorcycle and fell down on the stone chips stacked on the left side of the road and got injured and died. Although OPW1, Kalobaran Das, Dealing Officer of the insurance company deposed that the victim was negligent in driving his motorcycle due to which the accident took place but in cross-examination he deposed that he has got no personal knowledge regarding the case. It is relevant to note that the said witness of the insurance company is not an eyewitness to the incident. Accordingly his evidence with regard to the manner of occurrence is inconsequential. In order to avail all defences available the insurance company filed application under Section 170 of the Motor Vehicles Act however during the proceeding before the learned tribunal it neither adduced the evidence of the driver of the offending vehicle nor of any independent eyewitness to establish the plea of contributory negligence of the victim in the said accident. The claimants adduced the evidence of one Saurabh Hait as PW3 who deposed that the accident was caused due to rash and negligent driving on the part of driver of the offending vehicle and that he has witnessed the accident. Such evidence of the eyewitness PW3 has remained unchallenged in cross-examination. Mr. Pahari, learned advocate for insurance company has strenuously argued that since the victim on the date of accident was not wearing the helmet and was without effective driving licence as such he contributed to the accident. It is relevant to note the claimants produced the driving licence of the victim **(Exhibit 10)** which shows that he was holding effective driving licence. Although no helmet was seized from the place of occurrence such aspect does not *ipso facto* prove that that the victim was without helmet in the absence of evidence of any eye-witness. Be that as it may, the aforesaid argument falls short of merit in view of the fact that the aspects indicated can at best may give rise to guilt of being party to violation of the traffic rules and regulations but that cannot make the victim guilty of contributory negligence unless it is established that his very act of moving without helmet in the motorcycle contributed either to the accident or to the impact of the accident upon the victim. To be precise there are no direct or corroborative evidence in support of contributory negligence of the victim. Therefore in the absence of any evidence to show that the wrongful act on the part of deceased victim contributed either to the accident or to the nature of injuries sustained, the victim cannot be held to be guilty of contributory negligence. ***[See Mohammed Siddique & Another versus National Insurance Company Limited & Ors*** reported in ***I (2020) ACC 345 (SC)]***. Accordingly it goes without saying that the fact of contributory negligence of deceased-victim has not been established by the insurance company before the learned tribunal.

With regard to the second issue raised by the insurance company regarding the driver of the offending vehicle not having valid and effective driving licence, it is found that two documents has been placed into service one being the seizure list **(Exhibit 5)** by the claimants and other being the particulars of driving licence of the driver of the offending vehicle **(Exhibit A)** by the insurance company. As per **Exhibit A** the driving licence being no. WB 11016606 of the driver of the offending vehicle namely Pradip Kumar Barman was valid till 23 January 2003. The seizure list **(Exhibit 5)** shows that the investigating agency seized driving licence of the driver Pradip Kumar Barman being no. WB 1101 6606 which was valid up to 20 July 2009. Although the documents produced by the insurance company **Exhibit A** shows validity of driving licence till 23 January 2003 but there are no documents to show that since thereafter the licence has expired or was never renewed. Therefore in the absence of such evidence the seizure list showing validity upto 20 July 2009 is appropriate to take into consideration which clearly shows that the driver of the offending vehicle was holding effective driving licence on the relevant date of accident on 7$^{th}$ May, 2009.

Thus it is found that both the grounds raised by the insurance company in the present appeal falls short of merit.

Now I revert to the grounds of enhancement raised by the claimants namely the determination of income, future prospect, deduction towards personal and living expenses of the deceased, amount towards general damages, and increment of such general damages.

With regard to the determination of income it is found that the learned tribunal has taken into consideration the payslip for the month of April 2009 and taken into account the net pay revealing therefrom amounting to Rs 21,739/-. Be that as it may Form-16 **(Exhibit 16)** which is issued on 30th April 2009, just prior to the death of the deceased, in the month of May 2009 shows details of salary of the deceased and tax paid for the assessment year 2009-2010. The certification under the income tax act being a statutory document should be taken into consideration ***[(See Malarvizhi and Others versus United India Insurance Company Limited and Another*** reported in ***2020 (1) T.A.C 328 (SC)].*** The actual income of the deceased-victim is to be determined by deducting the tax component from the gross income. As per Form 16 **(Exhibit 16)** the gross income of the deceased-victim is Rs.4,83,662/- and the income tax paid is Rs.49,854/- and tax on employment is Rs.1,650/-.Thus the actual income of the deceased-victim should be Rs.4,83,662 less Rs. 49,854/-and Rs.1,650/- which comes to Rs.4,32,158/-.

Further since the deceased-victim at the time of accident was a permanent employee and was aged 37 years hence following the observation of Hon'ble Supreme Court in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in ***2017 (4) T.A.C 673(S.C)*** an amount equalling to 50% of the annual income of the deceased should also be taken into account towards future prospect.

As far as the deduction towards personal and living expenses of the deceased-victim is concerned it is found from the impugned judgment that the learned tribunal deducted $1/3^{rd}$ of the annual income of the deceased towards his personal and living expenses. It is relevant to note that during the pendency of the claim application one of the dependents namely the mother died. However, such subsequent death after the accident is inconsequential since determination of extent of personal and living expenses depends on the number of dependents of the deceased at the time of accident and not on any subsequent happening. I find substance in the submissions of Mr Mandal, learned advocate claimants relying on the decision of Hon'ble Supreme Court passed in ***Kirti Kumar's case (supra)*** in this regard. Since the number of dependents of the deceased at the time of accident is four hence following the observation of Hon'ble Supreme Court in ***Sarla Verma and Others versus Delhi Transport Corporation and Another*** reported in ***2009 ACJ 1298*** the deduction towards personal and living expenses of the deceased should be $1/4^{th}$ instead of $1/3^{rd}$.

So far as the general damages are concerned in view of ***Pranay Sethi's case*** the claimants are entitled to general damages under the conventional heads of loss of estate, loss of consortium and funeral expenses of Rs. 15,000/-, Rs. 40,000/-, and Rs. 15,000/- respectively. The claimants are also entitled to an increase of 10% on the general damages since three years have elapsed following the priciples laid down in the above decision of the Hon'ble Supreme Court.

Bearing in mind the above factors the calculation for compensation amount is made hereunder.

**Calculation of compensation**

| | |
|---|---|
| Annual Income<br>{Rs. 4,83,662/- less Rs.49,854(I.Tax) and Rs.1,650/-(P.Tax)} | ....Rs. 4,32,158/- |
| Add: Future Prospects<br>@ 50% of total Incom | ..Rs.2,16,079/- |
| Annual loss of Income | ...Rs.6,48,237/- |
| Less: Deduction 1/4th of the Annual Income towards personal and living expenses | .... Rs.1,62,059/- |
| | Rs.4,86,178/- |
| Adopting multiplier 15<br>( Rs.4,86,178/- X 18) | ... Rs.72,92,670/- |
| Add:General damages | ...Rs.70,000/- |
| Loss of estate | ....Rs.15,000/- |
| Loss of consortium | ...Rs.40,000/- |
| Funeral Expenses | ....Rs.15,000/- |
| Add: 10% increase<br>on conventional heads | ...Rs.7,000/- |
| Total Compensation | ...**Rs.73,69,670/-** |

Thus the total compensation comes to Rs.73,69,670/-. Admittedly no amount has been received by the claimants. Accordingly the claimants are entitled to compensation of Rs. 73,69,670/- along with interest at the rate of 6% per annum from the date of filing of the claim application till deposit.

Insurance Company is directed to deposit the compensation amount of Rs.73,69,670/- along with interest at the rate of 6% per annum from the date of filing of the claim application till deposit by way of cheque with the Registrar General, High Court, Calcutta within a period of six weeks from date.

Claimants shall deposit *ad valorem* court fees on the compensation assessed, if not already paid.

Learned Registrar General, High Court, Calcutta shall release the amount of compensation in favour of the claimant no.2 and 3 in equal proportion upon satisfaction of their identity and payment of *ad valorem* court fees, if not already paid.

Claimant no.2, elder sister of minor claimant no.3, shall receive the share of the minor on his behalf and shall keep the share of the minor in fixed deposit scheme of any Nationalised Bank or Post Office till attainment of majority by the minor.

The amount of Rs 25,000/- deposited by the insurance company vide OD challan no.3286 dated 14.3.2014 before the Registry of this Court shall be refunded to the insurance company alongwith accrued interest.

In the light of above discussion the appeal being no. **FMA 2335 of 2014** stands dismissed.

The appeal being no. **FMA 2180 of 2015** stands allowed. The impugned judgment and award of the learned tribunal stands modified to the above extent. No order as to cost.

All connected applications, if any stands disposed of.

Interim orders if any stands vacated.

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

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

**(Bivas Pattanayak, J.)**