23.08.2023
Ct. 654
D/L 2 & 3
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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURIDICTION
APPELLATE SIDE

FMA 364 of 2023

The Reliance General Insurance Co. Ltd.
-Vs-
Mina Devi Shaw & Ors.

With

COT 40 of 2023

Mina Devi Shaw & Ors.
-Vs-
The Reliance General Insurance Co. Ltd.

Mr. Sanjay Paul,
Ms. Jaita Ghosh
… for the appellant-Insurance Company

Mr. Ashique Mondal,
Mr. Anup Kumar Bag
… for the respondent Nos. 1 to 4 -claimants

This appeal is preferred against the judgment and award dated 7th December, 2022 passed by the learned Additional District Judge-cum-Judge, Motor Accident Claims Tribunal, Fast Track, 5th Court, Alipore, 24 Parganas (South) in MAC Case No. 41 of 2015 granting compensation of Rs. 35,59,798/- together with interest in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 18th August, 2015 at about 16:30 hours while the victim was proceeding on a bicycle through C.G.R. Road and when he reached at the crossing of Nimak Mahel Road and C.G.R. Road, the offending vehicle bearing registration No. NL-02L/4761 (Trailor) dashed the bicycle of the victim in a rash and negligent manner, as a result of which the victim fell down on the road and sustained severe injuries on his person. Immediately, the victim was shifted to Bangur Institute of Neuro Science where he was declared dead by the attending doctors. On account of sudden demise of the victim, the claimants being the widow and sons of the deceased filed application for compensation of Rs. 32,00,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

The claimants in order to establish their case examined four witnesses and produced documents, which have been marked as **Exhibits 1** to **21** respectively.

The appellant-insurance did not adduce any evidence.

By order dated 13th July, 2023, service of notice of appeal upon the respondent no. 5, owner of the offending vehicle has been dispensed with since he did not contest the claim application.

Upon considering the materials on record and the evidence adduced on behalf of the claimants, the learned Tribunal granted compensation of

Rs.35,59,798/- together with interest in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal, the insurance company has preferred the present appeal.

Challenging the impugned judgment and award of the learned Tribunal, the claimants have also preferred a cross objection being COT 40 of 2023.

Both the appeal and the cross objection are taken up together for consideration and disposal.

Mr. Sanjay Paul, learned advocate for the appellant-insurance company submits that the learned Tribunal erred in determining the monthly income of the victim relying on the last salary slip for the month of July, 2015 whereas it ought to have determined the monthly income on the basis of average of the last seven months salary from January, 2015 to July, 2015 to calculate the monthly income of the victim. He also indicates that the learned Tribunal did not deduct the professional tax from the gross pay. In the light of the aforesaid submissions, he prays for modification of the impugned judgment and award.

In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Ashique Mondal, learned advocate for the respondent nos. 1 to 4 (claimants) submits that the salary for the month of July, 2015 has been rightly taken into consideration by the learned Tribunal since the victim drew such salary for the month of July, 2015 just prior to the accident. He further indicates that the basic pay of the victim has increased from Rs. 12,380/- in the month of January, 2015 to Rs. 12,760/- in the month of July, 2015 and, therefore, the increased pay should be taken into consideration. He, however, concedes that the profession tax of Rs. 150/- should be deducted from the gross pay to calculate the actual monthly income of the victim. He also submits that the deceased at the time of accident had four dependants namely wife and three sons, who are the claimants in the claim application. Since the major sons were largely dependent on the income of the deceased and, therefore, the major sons should also be considered as dependants of the victim along with the widow. Thus, since the number of dependants of the deceased is four, the deduction towards personal and living expenses of the deceased should be 1/4th instead of 1/3rd adopted by the learned Tribunal. To buttress his contentions, he relies on the decision of the Hon'ble Supreme Court passed in ***National Insurance Company Limited versus Birender And Others*** reported in ***(2020) 11 SCC 356*** and another decision of Delhi High Court passed in ***Roshni Devi & ors. versus Takdeer Singh & Ors.***

reported in ***2015 SCC OnLine Del 7334*** and the decision of Bombay High Court passed in ***Kalpana and Others versus Salim Fattubhai Shikh and Another*** reported in ***2023 SCC OnLine Bom 1464***.

Mr. Paul, learned advocate for the appellant-insurance company in reply submits that the issue of deduction towards personal and living expenses of the deceased has been precisely dealt with by the learned Tribunal holding that two sons, who are major and pursuing their respective jobs cannot be strictly said to be dependants upon their father and thus, deduction of 1/3rd of the income of the victim towards his personal and living expenses made by the learned Tribunal, does not call for interference.

Having heard the learned advocates for the respective parties, following issues have fallen for consideration. *Firstly*, whether the learned Tribunal erred in determining the monthly income of the victim at Rs. 34,415/- per month and *secondly*, whether the learned Tribunal erred in deducting 1/3rd of the income of the victim towards his personal and living expenses instead of 1/4th.

With regard to the first issue relating to determination of income of the victim, it is found that the learned Tribunal has determined the income of the victim at Rs.34,415/- per month on the basis of last drawn gross salary for the month of July, 2015

(Exhibit-19 collectively). Mr. Paul, learned advocate for the appellant-insurance company has strenuously argued that the average of last seven months salary from Janaury, 2015 to July, 2015 should be considered for determining the monthly income of the victim. Upon perusal of the salary slips, it appears that from June, 2015, there is increase in the basic pay of the victim. Such being the position, the last drawn gross pay for the month of July, 2015 less professional tax of Rs.150/- would be appropriate to determine the actual monthly income of the victim at the relevant time of accident, as has been rightly argued on behalf of the respondents-claimants. Thus, the actual monthly income of the victim comes to Rs. 34,265/- [Rs. 34,415/- (gross pay) less Rs. 150/- (professional tax)].

With regard to the second issue relating to deduction toward personal and living expenses, it is found that the learned Tribunal has deducted 1/3rd of the annual income of the victim towards his personal and living expenses. Though Mr. Mondal, learned advocate for the respondents-claimants relying on *Birender (supra*), *Roshni Devi (supra*) and *Kalpana (supra*) has argued that the major sons should be considered as dependants and the deduction towards personal and living expenses of the victim should be 1/4th, however, from the evidence of P.W.1, Vishal Shaw, youngest son of the deceased, it is manifest that two sons of the victim namely Dipak Shaw, aged about 32 years is working in a godown and Gopal Shaw, aged about 31 years is a driver by profession. There is no positive evidence that the aforesaid two sons of the victim were precisely dependent on the income of the victim. That apart, P.W.1 also did not state in clear terms that his elder brothers were dependent on the income of his deceased father. P.W.1, other son of the deceased, though major and has studied up to B. Com. 1st year, but there is no evidence of his avocation or employment. In view of the aforesaid materials on record, I am of the view that the learned Tribunal has rightly deducted 1/3rd of the annual income of the victim towards his personal and living expenses.

In the report *of Birender (supra*), the evidence on record would suggest that the claimants were working as agricultural labourers on contract basis and were earning a meagre income and the Hon'ble Court observed that they were largely dependent on the earning of the deceased whereas in the case at hand, there are no evidence that other two sons were largely dependent on the income of their deceased father. The facts of the cited decision is distinguishable.

The report of *Kalpana (supra*) followed the proposition made in the *Birendra (supra*) wherein it is found that the family was dependent on agriculture income from joint cultivation and the Court observed that the young claimants were largely dependent on the father who was a Karta/Manager of the family. The facts of the cited decision is distinct and different from case at hand.

In the report of *Roshni Devi (supra)*, the Court considered major sons as dependants on the parents till they settle in their life. There is no evidence that the other two sons namely Dipak Shaw and Gopal Shaw were dependents on the income of their deceased father. The facts are thus distinguishable.

The other factors have not been challenged in this appeal.

Bearing in mind the above factors, calculation is made hereunder:

Calculation of Compensation

Monthly salary	Rs.34,415/-
Less: Professional tax	Rs.150/-
Actual monthly salary	Rs.34,265/-
Yearly income (Rs.34,265/- x 12)	Rs.4,11,180/-
Add: 15% of the yearly income towards future prospect	Rs.61,677/-
	Rs.4,72,857/-
Less: 1/3rd towards personal and living expenses	Rs.1,57,619/-
	Rs.3,15,238/-
Multiplier 11 (Rs.3,15,238/- x 11)	Rs.34,67,618/-
Add: General damages Loss of estate: Rs.16,500/- Loss of consortium: Rs.44,000/- Funeral expenses: Rs.16,500/-	Rs.77,000/-
Total compensation	Rs.35,44,618/-

Thus, the claimants are entitled to total compensation of Rs. 35,44,618/- together with interest @

6% per annum from the date of filing of claim application (01.10.2015) till payment.

It is found that the appellant-insurance company has deposited a sum of Rs. 44,09,317/- and another sum of Rs. 2,18,630 *vide* OD Challan No. 568 dated 22nd November, 2022 and also an amount of Rs.25,000/- towards statutory deposit vide OD Challan No. 3725 dated 07.02.2023 before the registry of this Court. All the aforesaid deposits together with accrued interest be adjusted against the entire compensation amount and the interest on such amount.

The respondent nos. 1 & 4-claimants are directed to deposit *ad valorem* Court fees on the amount of compensation assessed, if not already paid.

Learned Registrar General, High Court, Calcutta shall release the aforesaid amount of compensation and interest in favour of the respondent nos. 1 to 4 (claimants), after making payment of Rs.44,000/- in favour of the respondent no.1, widow of the deceased, towards spousal consortium, in the proportion that respondent nos. 1 and 4 shall receive 30% each of the compensation amount and respondent nos. 2 and 3 shall receive 20% each of the compensation amount, upon satisfaction of their identity and payment of *ad valorem* Court fees, if not already paid.

After satisfaction of the entire compensation amount, if any amount is left over, the same shall be refunded to the insurance company

With the aforesaid observations, the appeal as well as the cross objection stand disposed of. The impugned judgement and award is modified to the above extent. No order as to costs.

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

Interim order, if any, stands vacated.

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

(**Bivas Pattanayak, J**.)