

06.07.2023
Ct. no.654
Item no.16
Sn/ab

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)**

**FMA 409 of 2022
(CAN 1/2022)**

**Pushpa Devi & Anr.
Vs.
The National Insurance Co. Ltd. Ors.**

Mr. Amit Ranjan Roy
Ms. Afrin Nahar
...for the appellants-claimants

Mr. Afroze Alam
..for the respondent no.1-insurance Co.

This appeal is preferred against the judgment and award dated 21st December, 2021 passed by the learned Additional District Judge-cum-Judge, Motor Accident Claims Tribunal, Asansol, Paschim Bardhaman in MAC case no.17 of 2017 (Old No. 141 of 2017) dismissing the application of the claimants filed under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 14th June, 2017 at about 12 hours while the victim was going to his friend's house at Kumardihi by riding motorcycle bearing registration no. WB 40U-3553 from his house at Shyamsundarpur colliery and when he reached near Shyamsundarpur Hospital (Bakola Area Hospital) under Police Station Pandaveswar the offending vehicle bearing registration no. WB 38 AF/1940 (Maruti Wagon R) dashed the motorcycle of the victim from behind in a rash and negligent

manner, as a result of which, the victim fell down on the road and sustained fatal injuries. Immediately, the local people shifted the victim to Kalla Hospital and thereafter he was taken to Mission Hospital, Durgapur on the same day. Subsequently, he succumbed to his injuries and died on 21st June, 2017 at the said hospital. On account of sudden demise of the deceased, the claimants being the widow and mother of the deceased filed application for compensation of Rs. 60,00,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

The claimants in order to establish their case examined three witnesses and produced documents, which have been marked as **Exhibits 1 to 16** respectively.

The respondent no.1-insurance Company did not adduce any evidence.

By order dated 25th January, 2023, service of notice of appeal upon the respondent no.2, owner of the offending vehicle, has been dispensed with since he did not contest the claim application.

Upon considering the materials on record and evidence adduced by the claimants, the learned Tribunal dismissed the claim application of the claimants filed 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 claimants have preferred the present appeal.

Mr. Amit Ranjan Roy, learned advocate for the appellants-claimants submits that the learned Tribunal dismissed the claim application on the sole ground that the alleged vehicle was not involved in the accident. He submits that from the evidence of eyewitness PW2 it manifest that the offending vehicle was involved in the accident. Such evidence of the eyewitness of involvement of the offending vehicle is also supported by the charge sheet submitted against the driver of the said vehicle. Further, there is no contrary evidence on record to disbelieve the evidence of PW-2, eyewitness to the accident. Thus, the finding of the learned Tribunal regarding non-involvement of the vehicle is uncalled for and not sustainable vis-a-vis the evidence on record. The assessment of income, the age of the victim by the learned Tribunal is correctly made which can be taken into account for determining the compensation amount. In the light of his aforesaid submissions, he prays for setting aside the impugned judgement of dismissal of the learned Tribunal and granting compensation in favour of the claimants.

In reply to his aforesaid submissions, Mr. Afroze Alam, learned advocate for the respondent no.1-insurance company submits that the evidence on record would show that the offending vehicle which is Maruti Wagon R vehicle was not at all damaged in the said accident and only motorcycle which the victim was driving on the relevant date was damaged in the leg-guard, headlight and visor which probabilises that the Maruti Wagon R was not involved in the said accident. He further submits that the learned Tribunal has rightly held that the victim while driving the motor cycle skidded on the road made of boulder and died. In the light of his aforesaid submissions, he prays that the order of dismissal of claim application passed by the leaned Tribunal should be affirmed.

Having heard the learned advocates for the respective parties, the only issue that has fallen for consideration is whether the offending vehicle was involved in the said accident or not.

With regard to the aforesaid issue, it is found that the claimants in order to establish the involvement of the offending vehicle has produced eyewitness, namely, Micel Kora examined as PW2. The said witness deposed in his examination-in-chief that on 14th June, 2017 while the victim was proceeding in a motorcycle bearing registration no.

WB-40U/3553 at that time the offending vehicle bearing registration no. WB 38 AF-1940 (Maruti Wagon R) in a rash and negligent manner dashed the motorcycle of the victim from behind. He further stated that the driver of the offending vehicle was responsible and he also stated that he had seen the accident. It is revealed from the cross-examination of the witness that his house is situated about 5 to 10 minutes from the place of occurrence. There is no evidence which improbabilises the presence of the witness near the place of occurrence or that he has seen the incident on the relevant date and time. Further the witness also stated in the cross-examination that the Maruti vehicle dashed the motorcycle of the victim from behind, however, he cannot state the model of Maruti vehicle. The learned Tribunal disbelieved the witness on such ground that he failed to state the model of the Maruti vehicle. Only failure to state the model of the Maruti vehicle cannot brush aside the entire evidence of the witness regarding involvement of the vehicle which is otherwise reliable. The evidence of eyewitness of the involvement of the vehicle has remained unchallenged in the cross-examination. Despite leave was granted to the insurance company under Section 170 of the Motor Vehicle Act to contest the claim application on merits, no evidence has been led by

the insurance company in the contrary to improbabilise the involvement of the vehicle.

Mr. Alam, learned advocate for the insurance company has strenuously argued that since the offending vehicle was not damaged in the said accident, its involvement is questionable. In view of unchallenged evidence of eyewitness and absence of any contrary evidence against the claim of the claimants of the involvement of the vehicle, such argument does not stand to reason. The learned Tribunal basing on the evidence of P.W. 1, who is not an eyewitness to the occurrence, presumed that since the road was made of boulder, the motorcycle might have skidded resulting in death of the victim, which is not at all in consonance with the facts emanating from the evidence and the materials on record. Further, upon completion of investigation, the investigating agency has submitted charge sheet against the driver of the offending vehicle under Sections 279/304A/427 of the Indian Penal Code. Though there is delay of 18 days in lodging the FIR but it appears that the delay has been explained in the written complaint. There is no evidence of fabrication or concoction or engineering of the FIR. In the absence of such evidence, delay *per se* cannot be a ground to reject the claim of the claimants. In the light of the aforesaid discussions, it is found that the

claimants proved the involvement of the offending vehicle by cogent evidence. Thus, the order of dismissal of claim applicable by the learned Tribunal is liable to be set aside.

Now, the claim of compensation is to be considered.

So far as income of the deceased is concerned, the claimants adduced the evidence of one Pallav Khastagir, Personal Manager, Shyamsundarpur Colliery as PW3, who produced the pay slips for 10 months of the deceased, preceding his death. In cross-examination, he stated that the months of pay slips that were available in the computerised system is produced in Court. Further the victim was a daily rated general mazdoor and his payment used to vary as per his attendance. Thus, it can be presumed from the above evidence of PW3 that victim did not receive any salary for the missing months. Learned advocate for the appellants-claimants also concedes that since income of two months are missing, the income of the deceased of 10 months determined by the learned Tribunal may be taken into account as the annual income of the deceased. For the sake of computation of compensation, the income of the victim for 10 months preceding his death disclosed in pay slips (**Exhibit 15-series**) is taken into account as the annual income of the deceased. Considering the

pay slips (**Exhibit 15-series**), the gross pay of 10 months comes to Rs. 2,95,480/-. The income tax paid is Rs.7,225/- and professional tax is Rs.1470/-. Thus, the actual income of 10 months comes to Rs.2,86,785/-.

Admittedly, the victim at the time of accident was 25 years 8 months and 13 days and thus following the observations of the Hon'ble Supreme Court made in **Sarla Verma and Others versus Delhi Transport Corporation and another** reported in **2009 ACJ 1298**, the multiplier to be adopted in this case should be 17.

So far as entitlement towards future prospect is concerned, it is found from the evidence of P.W.3 Pallav Khastagir, Personal Manager, Shyamsundarpur Colliery that the victim, at the time of accident, was a permanent employee of the said colliery. Admittedly at the time of accident, the victim was more than 25 years of age. Accordingly, following the observation of Hon'ble Supreme Court in **National Insurance Company Limited versus Pranay Sethi and Others** reported in **(2017) 16 SCC 680**, the claimants are entitled to an amount equivalent to 50% of the annual income of the deceased towards future prospect.

Since the number of dependants is two, deduction towards personal and living expenses of

the deceased should be 1/3rd in view of *Sarla Verma (supra)*.

The claimants are also entitled to general damages under the conventional head of loss of estate, loss of consortium and funeral expenses of Rs. 15,000/-, Rs. 40,000/- and Rs. 15,000/- respectively.

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

Calculation of Compensation

Annual income	Rs. 2,86,785/-
Add: 50% of annual income towards future prospect	Rs. 1,43,392/-
	Rs. 4,30,177/-
Less: 1/3 rd towards personal and living expenses	Rs. 1,43,392/-
	Rs. 2,86,785/-
Multiplier 17 (Rs.2,86,785/- x 17)	Rs. 48,75,345/-
Add: General damages Loss of estate: Rs.15,000/- Loss of consortium: Rs.40,000/- Funeral expenses: Rs.15,000/-	Rs. 70,000/-
Total amount	Rs. 49,45,345/-

Thus, the appellants-claimants are entitled to Rs. 49,45,345/- together with interest @ 6% per annum from the date of filing of the claim application (24.08.2017) till payment.

The respondent no. 1- insurance company is directed to deposit the aforesaid amount of compensation together with interest indicated above, by way of a cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date.

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

Upon deposit of the amount of compensation and interest as above, the learned Registrar General, High Court, Calcutta shall release the compensation amount in favour of the appellants-claimants, in equal proportion, after making payment of Rs.40,000/- to appellant no.1, widow of the deceased towards spousal consortium and upon satisfaction of their identity and payment of *ad valorem* court fees, if not already paid.

With the aforesaid observations, the appeal stands allowed. The impugned judgement and award of the learned Tribunal is hereby set aside. No order as to costs.

All the 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 sent to the learned Tribunal in accordance with rules.

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

(Bivas Pattanayak, J.)