

01.09.2023  
Ct. 654  
D/L 13  
Sn/KB

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURIDICITION  
APPELLATE SIDE**

**FMA 357 of 2022**

**Smt. Bula Das**

**-Vs-**

**The New India Assurance Company  
Limited & Ors.**

Mr. Saswata Bhattacharya,

... for the appellant-claimant.

Mr. Rajesh Singh

... for the respondents-insurance company.

Affidavit filed by the appellant-claimant is taken on record.

This appeal is preferred against the judgment and award dated 8<sup>th</sup> April, 2019 passed by learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, Fast Track, 4<sup>th</sup> Court, Alipore, 24 Parganas (South) in MAC Case no. 310 of 2010 dismissing the claim application of the claimants filed under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 27<sup>th</sup> December, 2005, at about 4.15 hrs. while the victim was returning to Kolkata from Vizag by the offending

vehicle bearing registration no. WB-02-N-8487 (Tata Sumo) and when the vehicle reached near Sankucha at NH-5 the said vehicle capsized on the right of the road due to rash and negligent driving by the driver of the offending vehicle. Due to the said accident, four persons including the victim travelling in the said vehicle sustained serious injuries and were taken to district hospital at Baripada, where the victim succumbed to her injuries and died on the same day. On account of sudden demise of the victim the claimant, being the mother of the deceased filed application for compensation of Rs.5,00,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

The claimant in order to establish her case examined two witnesses and produced documents which have been marked as **Exhibit 1 to 10** respectively.

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

Respondent no. 2-owner of the offending vehicle though entered appearance and filed written statement but subsequently did not contest the claim application. In the aforesaid backdrop, service of notice of appeal upon respondent no. 2-owner of the offending vehicle stands dispensed with.

Upon considering the materials on record, the learned tribunal dismissed the claim application filed under Section 166 of the Motor Vehicles Act, 1988 on the ground that the claimant failed to establish rash and negligent driving of the offending vehicle.

Being aggrieved by and dissatisfied with the judgment and award of the learned tribunal, the claimant has preferred the present appeal.

Mr. Saswata Bhattacharya, learned advocate for appellant-claimant submits that the learned tribunal erred in holding that the claimant failed to establish rash and negligent driving of the offending vehicle and did not consider the evidence of PW2, eye witness to the occurrence, who on the relevant date of accident was also travelling with the victim in the offending vehicle. The note in the charge-sheet that the accident took place due to mechanical failure of burst of tyre weighed heavily on the learned Tribunal which failed to take into account that the aspect of mechanical failure has never been proved by any of the parties. The burden of proof that the accident was due to mechanical defect is on the owner of the vehicle and it is his duty to show that he had taken all reasonable care and despite such care, the defect remained hidden resulting in accident. In support of the submission, he relies on the decision of the

Hon'ble Supreme Court passed in ***Minu B. Mehta and Ors. versus Balkrishna Ramchandra Nayan and Ors.*** reported in ***(1977) 2 SCC 441.***

So far as the quantum of compensation is concerned, he fairly submits that the monthly income of the victim could not be proved by cogent evidence and as such an amount of Rs.3,000/- per month be reasonable in the facts of the case. He further submits that the deduction towards personal and living expenses of the victim should be half and additional amount of 40% of the annual income should be taken towards future aspect. Since the victim at the time of accident was 25 years of age, the multiplier should be 18. The general damages of Rs.30,000/- under conventional heads should also be taken into account. In view of the aforesaid submissions he prays for setting aside of the impugned judgment and award and granting compensation in favour of the appellant-claimant.

Mr. Rajesh Singh, learned advocate for respondent no.1-insurance company opposing such prayer of the appellant-claimant submits that the learned tribunal rightly relying on the final report, which clearly indicates of mechanical failure, has held that the accident was not caused due to rash and negligent driving of the offending vehicle but for

mechanical defect of bursting of tyre. In an application under Section 166 of the Motor Vehicles Act, proof of rash and negligent act is *sine qua non* and since the claimant failed to establish the negligent act of the driver of the offending vehicle, the learned Tribunal dismissed the application which does not call for interference. In light of his aforesaid submission, he prays for affirming the order of dismissal of the learned Tribunal. As far as the quantum is concerned, he leaves the matter to the discretion of the Court.

Having heard learned advocates for respective parties, the only issue that has fallen for consideration is whether the accident took place on the relevant date due to rash and negligent act of the driver of the offending vehicle.

With regard to the aforesaid issue, it is found that the claimant in order to establish the rash and negligent act of the driver of the offending vehicle has examined one Smt. Baisakhi Das as PW2 who deposed in her examination-in-chief that the accident took place due to rash and negligent driving on the part of the driver of the offending vehicle and such driving was the sole and direct cause of the pathetic accident. She further deposed that the accident could have easily been avoided had the driver been cautious and taken

reasonable care. From her cross-examination, it is apparent that on the date of accident she was travelling in the said vehicle along with the victim. The presence of the said witness in the offending vehicle with the victim on the date of the accident has not been disputed. The evidence of PW2 eye witnesses to the occurrence remained unchallenged in cross-examination. There is no contrary evidence led by the insurance company to disbelieve the evidence of PW2. It is true that after completion of investigation final report has been submitted noting that the Motor Vehicle Inspector opined the cause of accident due to mechanical failure on the sudden burst of rear left tyre. The owner of the offending vehicle entered appearance and filed written statement. Upon perusal of the written statement filed by the owner of the offending vehicle, it is seen that no case has been made out of accident having taken place due to mechanical failure. No evidence of any Motor Vehicle Inspector has been led on the part of the owner of the offending vehicle to establish that the accident occurred due to mechanical failure due to the sudden burst of tyre. That apart, the insurance company has also not adduced any evidence of the Motor Vehicle Inspector to establish such fact of mechanical failure of the vehicle. I find substance in the submission of Mr. Bhattacharya, learned advocate

for appellant-claimant, relying on *Minu B. Mehta (supra)* in this regard that the owner of the offending vehicle has to prove mechanical defect which is lacking in the case. Further, the final report is not a substantive piece of evidence. Considering unchallenged evidence of PW-2, eyewitness to the occurrence, who was travelling with the victim at the time of accident of the offending vehicle, that the accident took place due to rash and negligent driving of the driver of the offending vehicle, the same is acceptable as proof of negligence of driver in the said accident.

Coming to the aspect of quantification of compensation amount, it is found that the claimant has claimed income of the victim at Rs.5,000/- per month from private tuition and classical dance. However, the said income has not been proved by any supportive evidence. Since the accident has taken place in the year 2005, bearing in mind the economic factors prevailing at the relevant point of time the income is considered at Rs.3,000/- per month. As per admit card of the victim issued by West Bengal Board of Secondary Education (**Exhibit 8**), her date of birth is 13.04.1980. Thus on the date of accident on 27.12.2005, the victim was aged 25 years 8 months. Considering the aforesaid age of the victim, multiplier should be 18. Further since the victim was 25 years 8 months old on the date

of accident and was self-employed, the claimant is entitled to 40% of annual income of the victim towards future prospect. The deduction towards personal and living expenses of the victim should be half. The claimant is also entitled to general damages under the conventional heads towards loss of estate and funeral expenses to the tune of Rs.15,000/- each.

The other factors have not been challenged in this appeal.

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

**Calculation of Compensation**

|                                                                                      |               |
|--------------------------------------------------------------------------------------|---------------|
| Monthly income                                                                       | Rs.3,000/-    |
| Annual income<br>(Rs.3,000/- x 12)                                                   | Rs.36,000/-   |
| Add: 40% of the annual income<br>towards future prospect                             | Rs.14,400/-   |
|                                                                                      | Rs.50,400/-   |
| Less: 50% towards personal<br>and living expenses                                    | Rs.25,200/-   |
|                                                                                      | Rs.25,200/-   |
| Multiplier 18<br>(Rs.25,200/- x 18)                                                  | Rs.4,53,600/- |
| Add: General damages<br>Loss of estate: Rs.15,000/-<br>Funeral expenses: Rs.15,000/- | Rs.30,000/-   |
| Total                                                                                | Rs.4,83,600/- |

Respondent no. 2-owner of the offending vehicle in his written statement has stated that the claimant has also filed a case for compensation before Mayur Bhanj Court being M.A.C. 15 of 2006 which has been disposed of. However, the claimant has submitted affidavit stating that she has not filed any case being

M.A.C. 15 of 2006 before the learned Tribunal Mayur Bhanj and has also not received any compensation amount.

Accordingly, the claimant is entitled to compensation of Rs. 4,83,600/- together with interest @ 6% per annum from the date of filing of claim application (05.04.2007) till payment.

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

Appellant-claimant is directed to deposit *ad valorem* Court fees on the amount of compensation assessed, if not already paid.

Upon deposit of the compensation amount and the interest as indicated hereinabove, learned Registrar General, High Court, Calcutta shall release the aforesaid amount of compensation and interest in favour of the appellant-claimant, upon satisfaction of her identity and payment of *ad valorem* court fees, if not already paid.

With the aforesaid observations, the appeal stands disposed of. The order of dismissal of the learned Tribunal is 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 the Lower Court Records be sent to the learned Tribunal below for information in accordance with the rules.

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

**(Bivas Pattanayak, J.)**