

IN THE HIGH COURT, AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK.

FMA 4 OF 2022

With

COT 36 of 2021

United India Insurance Company Limited

.....Appellant

Versus

Smt. Sima Ghosal & Others

.....Respondents

For the Appellant: Mr Sanjay Paul, Advocate.

For the Respondent no.1 to 3: Mr Jayanta Kumar Mandal, Advocate.

Heard on: 18.11.2022.

Judgment on: 1.2.2023.

Bivas Pattanayak, J :-

1.The present appeal is preferred against the judgment and award dated 9 December 2020 passed by learned Judge, Motor Accident Claims Tribunal, Fast Track Court, Durgapur, Paschim Bardhaman in M.A.C Case no. 98 of 2018 granting compensation in favour of the claimants to the tune of Rs. 1,48,24,974/-alongwith interest under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 11 March 2018 at about 14:00 hours while the victim was proceeding towards Mihijam from Jamtara by driving his own vehicle bearing registration no. WB-40AD/5782 (Tata Safari) through the Mihijam-Jamtara Main Road and when he reached near Gorainala More at that time the offending vehicle bearing registration no. JH-04H/8054 (bus) in a rash and negligent manner dashed the victim's vehicle from opposite direction, as a result of which the victim sustained severe bleeding injuries and died on the spot. On account of sudden demise of the victim, the claimants being the widow, son and parents of the deceased filed application for compensation of Rs.1,69,46,744/-along with interest under Section 166 of the Motor Vehicles Act, 1988.

3. The appellant-insurance company contested the claim application before the learned tribunal. However respondent no.4-owner of the offending vehicle though filed written statement but subsequently did not contest the claim application before the learned tribunal and the claim application was disposed of *exparte* against him. By an order dated 10.11.2022 the service of notice of appeal upon respondent no.4-owner of the offending vehicle is dispensed with.

4. The claimants in order to prove their case examined four witnesses including claimant no.1, widow of the deceased and also produced documents which are marked as **Exhibit 1 to 10** respectively.

5. The contesting opposite party no.2-insurance company (appellant herein) also adduced evidence of one witness and proved documents marked **Exhibit A, B to B/3 and C** respectively.

6. 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. 1,48,24,974/- alongwith interest.

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

8. In the present appeal the respondent nos. 1, 2 & 3 (claimants) have filed a cross-objection being COT 36 of 2021 for enhancement of compensation amount.

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

10. Mr Sanjay Paul, learned advocate for appellant-insurance company submitted that the learned tribunal erred in taking into account the average income of the deceased pertaining to assessment years 2015-16, 2016-17, 2017-18 and 2018-19 whereas it ought to have considered the income tax return for the assessment year 2017-18 filed on 16.2.2018, prior to the accident. The income of the deceased is to be determined by deducting the tax component from the gross income and as such the income of the

deceased victim should be gross income of the deceased of Rs. 15,34,318/- less tax paid of Rs. 2,43,119/-which comes to Rs.12,91,199/-. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***V. Subbulakshmi and Others versus S. Lakshmi and another*** reported (2008) 4 SCC 224 and ***Sashikala and Others versus Gangalakshamma and another*** reported in ***2015 (2) TAC 867 (SC)***. In view of his above submissions he prayed for modification of the award.

11. In reply to the aforesaid contentions raised on behalf of appellant-insurance company, Mr Jayanta Kumar Mandal, learned advocate for respondents-claimants submitted that the income of the deceased for the assessment year 2018-19 of Rs.18,29,722/- was submitted after the death of the victim. However, as per the provisions embodied under Section 159 of the Income Tax Act where a person dies, his legal representatives is liable to pay any sum which the deceased would have been liable to pay if he had not died, in the like manner and to the same extent as the deceased and therefore the income tax return submitted by the legal heirs in terms of the aforesaid provision for the assessment year 2018-19 should be taken into consideration for determination of income of the deceased-victim. Moreover, as per Section 168 of the Motor Vehicles Act, the compensation to be assessed should be 'just compensation' and even if the claimants disclose less income such aspect would not be an hindrance for the claimants to get 'just compensation' in a proceeding under the Act and he relied on the

decision of Hon'ble Supreme Court passed in ***Rajesh & Ors versus Rajbir Singh & Ors*** reported in ***(2014) 1 WBLR (SC) 23***.

He further submitted that at the time of accident the deceased-victim had four dependents namely his wife, son and parents and there is evidence of PW1 that they were all dependent on income of deceased-victim and therefore the deduction towards personal and living expenses of the deceased should be one-fourth of annual income of the deceased instead of one-third. Although during the pendency of the claim proceedings mother of the deceased died but claims and legal liabilities crystallise at the time of accident itself and changes post thereto ought not to ordinarily affect pending proceedings and hence the deduction towards personal and living expenses of the deceased should be one- fourth as the number of dependents at the time of accident was four. In support of his contention he relied on the decision of Hon'ble Supreme court passed in ***Kirti & Anr Etc versus Oriental Insurance Company Ltd.*** reported in ***2021 SAR (Civ) 147***. In the light of his aforesaid submissions he prayed for dismissal of appeal and enhancement of the compensation amount.

12. Having heard the learned advocates for the respective parties, it is found that the appellant-insurance company has precisely challenged the award passed by the learned tribunal on the sole ground of erroneous determination of annual income of the deceased-victim. It is a fact that the tribunal/court has to decide what is 'just compensation' in a given situation

as per Section 168 of the Motor Vehicles Act as has been rightly submitted on behalf of respondents-claimants relying on the decision of Hon'ble Supreme Court passed in ***Rajesh's Case (supra)***. Thus I now proceed to decide the issue raised in this appeal.

12.1. With regard to the income of the deceased-victim, it is found from the impugned judgment that the learned tribunal while determining the annual income of the deceased victim has taken into account the average of the net income of the deceased-victim for the assessment years 2015-16, 2016-17, 2017-18 and 2018-19. In ***Sashikala's Case (supra)*** the Hon'ble Supreme Court disapproving the approach of the High Court in determining the income of the victim on the basis of average income of two assessment years held that the High Court was not justified so taking the average income of the two assessment years. Thus it goes without saying that the learned tribunal erred in taking the average income of four assessment years for determining the annual income of the deceased-victim. Mr Paul, learned advocate for appellant- insurance company had submitted that the gross income less the tax component reflected in the income tax return filed prior to the death of the deceased should be taken into account. *Per contra* refuting such proposition Mr Mandal, learned advocate for respondents-claimants referring to Section 159 of Income Tax Act submitted that since after the demise of the deceased the legal heirs deposited tax on the income of the deceased before the income tax authority for the assessment year

2018-19 hence the income shown in the income tax return for the said assessment year is to be considered. In ***Sangita Arya versus Oriental Insurance Company Limited*** reported in **(2020) 5 SCC 327** the Hon'ble Supreme Court considered the income tax return for assessment years filed prior to the death of the deceased for determining the income of the deceased-victim. In ***V. Subbulakshmi (supra)*** the Hon'ble Supreme Court endorsed the view of the High Court in not relying on the income tax return filed after the accident. Bearing in mind the aforesaid observation of the Hon'ble Supreme Court, the income tax return for the assessment year 2017-18 **(Exhibit B/2)** filed on 16.2.2018, just prior to the accident on 11.3.2018, should be taken into account for determining the income of the deceased-victim. The gross income disclosed in the income tax return for assessment year 2017-18 **(Exhibit B/2)** less tax paid should be the income of the deceased-victim which is to be considered for assessment of compensation amount. Thus gross income of Rs.15,34,318/- of the deceased- victim less tax paid of Rs.2,43,119/- comes to Rs.12,91,199/- which should be the annual income of the deceased-victim. I find substance in the submission of Mr Paul, learned advocate for appellant-insurance company in this regard.

13. Now the cross objection filed by the respondents-claimants is taken up for consideration. By filing such cross objection the respondents-claimants have thrown challenge to the award passed by the learned tribunal solely on

the ground that the learned tribunal ought to have considered the deduction of one-fourth of the annual income of the deceased-victim towards his personal and living expenses instead of one-third since at the time of accident the deceased-victim had four dependents.

13.1. With regard to deduction towards personal and living expenses of the deceased- victim, it is found that the learned tribunal deducted one-third towards the personal and living expenses of the deceased. It is relevant to note that during the pendency of the claim application the mother of the deceased victim expired. Although during the pendency of the claim proceedings mother of the deceased died but claims and legal liabilities crystallise at the time of accident itself and changes post thereto ought not to ordinarily affect pending proceedings and I find substance in the submission of Mr Mandal, learned advocate for respondents-claimants in this regard relying on the decision of Hon'ble Supreme court passed in ***Kirti's Case (supra)***. In the aforesaid backdrop the mother of the deceased-victim is considered as dependent. However, in the factual background of the case it is to be seen whether the father of the deceased-victim may be considered as dependent or not. Mr Mandal, learned advocate for respondents-claimants referring to the evidence of PW1, widow of the deceased, submitted that since there is evidence of dependency of the father on the deceased-victim hence he should be considered as dependent of the deceased-victim. Before proceeding to consider the aforesaid aspect, it is pertinent to note from page

8 and page 10 of the impugned judgment that the claimants admitted for deduction of one- third of the annual income of the deceased towards his personal and living expenses which was also conceded by the insurance company and the learned tribunal upon consideration deducted one-third of the annual income of the deceased towards his personal and living expenses. Be that as it may, at this stage it would be profitable to refer to the observation of the Hon'ble Supreme Court made in ***Sarla Verma and Others versus Delhi Transport Corporation and Another*** reported in ***2009 ACJ 1298*** that subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a dependent and the mother alone will be considered as a dependent. Bearing in mind the aforesaid observation of the Hon'ble Court it is found that the only evidence is of PW1, widow of the deceased, that they were all dependent on the income of her husband (deceased). The father of the deceased did not come before the court to depose in support of his dependency by making assertion of his incapability to maintain himself. Save and except a general statement of PW1, widow of the deceased, there is no other cogent evidence in support of dependency of the father of the deceased-victim. Thus since the deceased at the time of accident was married and there were three dependents including the mother of the deceased the deduction towards personal and living expenses of the deceased should be one-third. In view of the above

discussion the argument advanced by learned advocate for respondents-claimants falls short of merit.

14. The other findings and factors namely the multiplier, future prospect, general damages has not been challenged by either of the parties. Keeping in mind the above, the calculation of compensation amount is made hereunder.

Calculation of compensation

Annual Income.....	Rs. 12,91,199/-
Add: Future Prospects @ 25% of total Income...	<u>Rs.3,22,800/-</u> (approx)
Annual loss of Income.....	Rs.16,13,999/-
Less: Deduction of 1/3 rd of the Annual Income towards personal and living expenses.....	<u>Rs.5,38,000/-</u> (approx)
	Rs.10,75,999/-
Adopting multiplier 13 (Rs.10,75,999/- X 13).....	Rs.1,39,87,987/-
Add: General Damages.....	<u>Rs.70,000/-</u>
Loss of estate....	Rs.15,000/-
Loss of Consortium....	Rs.40,000/-
Funeral Expenses.....	Rs.15,000/-
Total Compensation.....	Rs.1,40,57,987/-

15. Thus the respondents-claimants are entitled to compensation of Rs.1,40,57,987/- 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 has made statutory deposit of Rs. 25,000/- vide OD challan no. 20

dated 6.04.2021 and also in terms of order dated 1st August 2022 has deposited a sum of Rs.1,85,94,355/- vide OD challan no.1572 dated 18.08.2022 with the Registry of this Court. Accordingly both the aforesaid deposits along with accrued interest be adjusted against the entire amount of compensation and the interest thereon.

16. The appellant-insurance company 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 a period of four weeks from date.

17. Respondents-claimants are directed to deposit *ad valorem* court fees on the compensation assessed, if not already paid.

18. Upon deposit of the aforesaid balance amount, if any, learned Registrar General, High Court, Calcutta shall release the entire compensation amount along with interest in favour of respondents-claimants after making payment of Rs.40,000/- in favour of respondent no.1, widow of the deceased, towards spousal consortium, in equal proportion and on satisfaction of their identity and payment of *ad valorem* court fees, if not already paid.

19. After full satisfaction of the award, if any balance amount is left the same shall be refunded to appellant-insurance company.

20. Accordingly the appeal stands allowed on contest against respondents-claimants and *exparte* against respondent no.4-owner of the offending vehicle. The impugned judgment and award of the tribunal stands modified to the aforesaid extent. No order as to costs.

21. The cross-objection being no. COT 36 of 2021 is dismissed.

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

23. Interim order, if any, stand vacated.

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

(Bivas Pattanayak,J.)