

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

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK.

FMA 1534 OF 2017

CAN 1 OF 2017 (Old no. CAN 3158 of 2017)

CAN 2 OF 2019 (Old no. CAN 1214 of 2019)

**National Insurance Company Limited
.....Appellant**

Versus

**Tapas Kumar Ghosh & Others
.....Respondents**

For the Appellant: Mr Rajesh Singh, Advocate

For the Respondent no.1 & 2: Mr Debabrata Acharya, Advocate.

Mr Biswanath Ghosh, Advocate.

Mr Sital Samanta, Advocate

Ms Debjani Saha, Advocate.

Heard on: 24.11.2022, 25.11.2022, 29.11.2022, 1.12.2022.

Judgment on: 10.4.2023

Bivas Pattanayak, J :-

1.The present appeal is preferred against the judgment and award dated 6 December 2016 passed by learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, 1st Court, Hooghly in M.A.C Case no. 74 of 2010 granting compensation of Rs. 21,64,500/- together with interest in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 31 August 2009 at about 11:30 AM while the victim riding on the bicycle of his friend Sanjib Hazra as pillion rider was proceeding to UIT College along the G.T Road and when they reached Bhangakuthi near Maharashtra Bank the offending vehicle bearing registration no. WB-41D/5692 (bus) in a rash and negligent manner dashed the bicycle as a result of which the victim fell down on the road and was run over by the said bus and he died on the spot. The victim at the time of accident was a student pursuing BE course at UIT, Burdwan. On account of sudden demise of the deceased-victim the claimants being the parents filed application for compensation of Rs. 30,00,000/-along with interest under Section 166 of the Motor Vehicles Act, 1988.

3. The respondent no.3-owner of the offending vehicle did not contest the claim application before the learned tribunal and the case was disposed of *exparte* against him. The notice of appeal has been duly served upon respondent no.3-owner of the offending vehicle, however he remained unrepresented.

4. The claimants in order to establish their case examined two witnesses including claimant no.1, father of the deceased victim and proved number of documents which has been marked **Exhibit 1 to 8** respectively.

5. Appellant-insurance company did not adduce any evidence.

6. Upon considering the materials on record and the evidence, oral as well as documentary, produced on behalf of the claimants, the learned tribunal granted compensation of Rs. 21,64,500/-in favour of the claimants along with interest @ 6% per annum from the date of filing of the claim application till realisation of the amount under Section 166 of the Motor Vehicles Act, 1988.

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

8. Mr Rajesh Singh, learned advocate for appellant-insurance company submitted that the learned tribunal failed to appreciate that the involvement of the alleged offending vehicle in the concerned accident was not proved beyond reasonable doubt for the reason that in the First Information Report the registration number of the offending vehicle has been mentioned as “5692” without having any prefix alphabet or any other numeral. The offending vehicle WB-41D/5692 has been seized after 25 days of accident on the basis of the FIR which only mentioned the registration number of the offending vehicle as “5692”. Hence involvement of the offending vehicle is shrouded with suspicion.

He further submitted that the learned tribunal erred in not appreciating the fact that on the relevant date of accident the deceased-victim was proceeding as a pillion rider on a bicycle on the G.T road which contributed to the

accident and therefore the percentage of contributory negligence of the deceased-victim needs to be deducted from the total compensation assessed.

Furthermore, it is submitted that as per the claim application as well as the evidence of claimant no.1 (PW1), father of the deceased, the income of the deceased has been stated to be Rs. 2000/- per month, however, the learned tribunal erred in assuming the income of the deceased to be Rs. 1,80,000/- per annum. In the absence of any documentary evidence produced to prove such income the notional income of Rs. 15,000/- per annum in terms of Second Schedule to the Motor Vehicles Act should be considered for assessing the quantum of compensation. As per the evidence of the father of the deceased (PW1) at the time of accident the deceased was a student of Engineering course in Burdwan University and he used to earn Rs. 2000/-per month by giving tuitions and therefore in no stretch of imagination the income of the deceased victim could have been considered at the rate of Rs. 1,80,000/- per annum which determination is totally flawed and based on supposition and presumption. Referring to news reporting in “*Express News Service*” showing as per data of NITI Aayog 48% of engineers in the country are unemployed and another news reporting in the newspaper ‘*The Telegraph*’ dated 24th of November 2022 that 70 seats lay vacant in BTech streams in Jadavpur University, he vouched that to hold all engineers have good future, so far as their placement is concerned, will not be a correct approach and

therefore the determination of income of the deceased-victim of Rs. 15,000/- per month arrived at by the learned tribunal is short of propriety.

He further submitted the learned tribunal erred in taking into account the evidence of friend of deceased-victim namely Sanjib Hazra (PW2), who was also a student of Engineering course in the same University, and his pay structure in TATA Consultancy Services Limited (**Exhibit 8**) to come to a conclusion that the income of the deceased-victim should be 15,000/- per month which is faulty in the sense that students of similar degrees do not get similar pay packages and offers which largely depend on their subsequent performance in the interviews/examinations conducted by different Private/Public Sector Companies for their absorption. Further referring to the decision of Hon'ble Supreme Court in **Sarla Verma and Ors versus Delhi Transport Corporation and Ors** reported (2009) 6 SCC 121 he submitted that actual income of the deceased at the time of death which is Rs.2000/- per month as per claim application and evidence is to be considered.

In the light of his aforesaid submissions, he prayed for setting aside the impugned judgment and award of the learned tribunal.

9. Mr Debabrata Acharya, learned advocate for respondents-claimants, in reply to the contentions raised on behalf of appellant-insurance company, submitted that the insurance company in its written statement filed before the learned tribunal has specifically admitted the involvement of the offending

vehicle. Further the eyewitness PW2 in his evidence before the court has deposed of the involvement of the offending vehicle in the said accident which has not been rebutted in cross-examination by the insurance company. Moreover, the documents filed on behalf of the claimants namely the chargesheet **(Exhibit 1)** and seizure list **(Exhibit 2)** also reveals of involvement of the offending vehicle and therefore the challenge thrown to involvement of the offending vehicle in the said accident does not stand to reason.

He further submitted that during cross-examination of PW2, eyewitness to the occurrence, the insurance company did not put any question with regard to negligence of the bicycle in the said accident and therefore the evidence of the eyewitness PW2 with regard to the negligence of the driver of the offending vehicle in the said accident has also remained unchallenged. Further there is no material evidence adduced by the insurance company in support of contributory negligence of the victim. Thus the argument made on behalf of the insurance company regarding contributory negligence of the deceased-victim in the said accident is meritless.

Furthermore, it is submitted that admittedly the deceased-victim at the time of accident was a student of Engineering course in Burdwan University and was a good student all throughout his career and thus had a bright future which came to an abrupt end as a result of his accidental death. The evidence

of PW2 who graduated from the aforesaid University in Engineering course, his letter of appointment (**Exhibit 7**) and his pay-slip (**Exhibit 8**) gives an overview of the income and future career which could have been achieved by the deceased-victim if he would have been alive. In such circumstances the income of the deceased-victim is to be considered keeping in mind his bright future and in support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Oriental Insurance Company Limited versus Deo Patodi and Others*** reported in **(2009) 13 SCC 123**. Reference in this context has also been made to one unreported decision of Delhi High Court passed in ***Ramesh Chand Joshi & Anr. versus New India Assurance Co. Ltd. in MAC. App No.212-13/2006*** following the decision of the Hon'ble Supreme Court as aforesaid. Though the claimants in their application for compensation stated the income of the deceased-victim of Rs. 2000/- per month from giving tuitions but one should not be oblivious to the fact that the claimants have also made claim of Rs. 30,00,000/-. Moreover, in an application for compensation the tribunal has to award just compensation in terms of Section 168 of the Motor Vehicles Act and therefore the tribunal has to take into consideration the aspects necessary for awarding just compensation. Accordingly, the statement disclosing income of the deceased-victim of Rs. 2000/- per month in the claim application cannot be an obstacle in awarding just compensation. Further referring to the decision of Hon'ble Supreme Court passed in ***Kajal versus Jagdish Chand & Others*** reported

in **(2020) 4 SCC 413** he submitted that the Hon'ble Supreme Court while dealing with the question of just compensation to be provided to a young child of 12 years with permanent disability having no income based the loss of future earning on the minimum wages payable to a skilled workman. Similarly in another decision of Hon'ble Supreme Court passed in ***Master Ayush versus Branch Manager, Reliance general Insurance Company Limited and Another*** reported in **(2022) 7 SCC 738** the Court as well considered minimum wages payable to skilled labour in case of an injured boy of five years of age for granting just compensation. He further submitted that as per decision of Hon'ble Supreme Court passed in ***Sarla Verma's case (supra)*** just compensation is adequate compensation which is fair and equitable to make good the loss as a result of wrong and such principle is to be followed for assessing compensation in a motor accident claims cases.

He further submitted that the learned tribunal considered the income of the deceased-victim of Rs. 15,000/- per month however failed to take into account an additional amount of 40% of the annual income of the deceased-victim towards future prospect and as such the impugned award needs to be enhanced and modified to the above extent. Though the respondents-claimants did not file any cross-appeal for enhancement yet as per Order XLI Rule 33 of the Civil Procedure Code the appellate court has power to pass appropriate order regardless of the fact that the appeal is only with respect to a part of the decree or that the appeal is filed only by some of the parties and

such provision is applicable *mutatis mutandis* to appeals preferred to the High Court under Section 173 of the Act as provided under Rule 346 Sub rule (3) of the West Bengal Motor Vehicles Rules, 1989. Thus, even if no cross-appeal for enhancement has been made by the respondents-claimants it does not debar the appellate court from enhancing compensation in an appropriate case. In this context he has also referred to the following decisions of different High courts.

(i)National Insurance Co. Ltd versus Mr Alwin Lobo & Another passed in M.F.A No.8449/2015 9 MV-I by Hon'ble Karnakata High Court;

(ii)Tamil Nadu State Transport versus Saroja passed in C.M.A (MD) No. 1897 of 2033, C.M.P No.11671 of 2003 and M.P (MD) No. 2 of 2007 by Hon'ble Madras High Court; and

(iii)The New India assurance Co. Ltd versus Bal Kishan Pawar & Ors passed in MAC. APP 246/2009, CM Nos. 7210-11/2009 by Hon'ble Delhi High Court.

10. Mr Singh, learned advocate for appellant-insurance company in reply to the proposition raised on behalf of respondents-claimants that the award passed by the learned tribunal can be enhanced without there being any cross-appeal for enhancement by them, submitted that as per decision of Hon'ble Supreme Court passed in ***Oriental Insurance Co. Ltd. versus R. Swaminathan and Ors.*** reported in ***2006(1) T.A.C 965 (SC)*** and ***Ranjana***

Prakash and Ors. versus Divisional Manger and Ors. reported in (2011) 14 SCC 639 it now settled proposition of law that there cannot be enhancement of compensation in an appeal filed by the insurance company without there being any cross-appeal by the claimants for enhancement. He further submitted that following such proposition laid down by the Hon'ble Apex Court, the Division Bench of this Hon'ble Court in ***National Insurance Company Limited versus Smt. Sulekha Das & Ors (FMA 3903 of 2015)*** while dealing with similar question whether in the absence of any cross-objection from the side of the claimants, they are entitled to enhancement by considering the provisions of Order XLI Rule 33 of the Civil Procedure Code held that an appellant cannot be worse off for filing an appeal should there be no cross-objection there against and award of the claims tribunal attains finality on claimant accepting the same without carrying it higher up. Thus, the argument advanced on behalf of respondents-claimants in this regard fall short of merit.

11. Having heard the learned advocates of the respective parties, it is found that in the present appeal following issues have fallen for consideration, *firstly* whether the offending vehicle was involved in the accident; *secondly*, whether the deceased-victim contributed to the accident; *thirdly*, whether the learned tribunal erred in taking into account the income of the deceased-victim of Rs. 15,000/- per month and *lastly* whether in the absence of cross-objection from the side of the claimants, they are entitled to enhancement of

compensation invoking provisions of Order XLI Rule 33 of the Civil Procedure Code.

12. As far as the first issue with regard to the involvement of the offending vehicle is concerned it appears that the appellant-insurance company has thrown challenge to the involvement of the offending vehicle in the said accident on twofold grounds *firstly*, that in the First Information Report the registration number of the offending vehicle has been mentioned as “5692” without having any prefix alphabet or any other numeral and *secondly*, the offending vehicle WB-41D/5692 has been seized after 25 days of accident on the basis of the FIR which only mentioned the registration number of the offending vehicle as “5692”.

12.1. From the written complaint dated 31st of August 2009 it is found that the registration number of the vehicle has been mentioned as “5692” without any prefix alphabet or any other numeral. The seizure list dated 25 September 2009 **(Exhibit 2/1)** shows seizure of the offending vehicle bearing registration no. WB-41D/5692 after 25 days. Be that as it may, upon conclusion of investigation the investigating agency submitted charge sheet **(Exhibit 1)** against the driver of the offending vehicle bearing registration no. WB-41D/5692. It has been strenuously argued on behalf of the insurance company that seizure after 25 days indicates of implanting of the offending vehicle. However, it is relevant to note that there are no such attending

circumstances showing implanting of the offending vehicle. The delay *per se* in making seizure of the offending vehicle does not in all cases lead to necessary implication of implantation of the offending vehicle in the absence of other attending circumstances. Further it is pertinent to note that the insurance company has not taken any defence plea of non-involvement of the offending vehicle in the said accident rather on going through paragraph no. 12 & 13 of the written statement it is found that the insurance company has impliedly accepted the involvement of the offending vehicle as has been rightly indicated by learned advocate for respondents-claimants.

12.2. In order to establish the fact of involvement of the offending vehicle the claimants adduced the evidence of one Sanjib Hazra as PW2 who on the relevant date of accident was riding the bicycle on which the victim was proceeding as a pillion rider and was an eyewitness to the accident. He deposed that the offending vehicle bearing registration no. WB-41D/5692 (bus) dashed the bicycle from behind as a result of which both of them fell down and the victim was a run over by the offending vehicle (bus). Moreover, he stated that the driver of the offending vehicle was solely responsible for the accident. The aforesaid evidence of PW2 has remained unchallenged in cross-examination.

12.3. The appellant-insurance company filed a petition under Section 170 of the Motor Vehicles Act, 1988 which was accepted by the learned tribunal.

When Section 170 of the Act permitted an insurance company to contest proceedings on behalf of the insured-owner of the vehicle, it was incumbent upon the insurance company to summon the owner or the driver of the vehicle to appear as witness for disputing the allegation of involvement of the offending vehicle. The owner of the offending vehicle was the best person to prove non-involvement of the offending vehicle by producing either garage register or movement register of the vehicle to indicate the movement of the offending vehicle at the relevant time. Similarly, the driver could have been a necessary witness to throw light as to whether the offending vehicle was really involved in the said accident or not. The appellant-insurance company did not take any steps to adduce the evidence of the owner or the driver of the offending vehicle to establish its plea of non-involvement of the offending vehicle. Failure to adopt such course the court is left with no other alternative than to accept the allegations of the claimants of involvement of the offending vehicle. This court in the case of ***New India Assurance Co. Ltd versus Mita Samanta & Ors.*** reported in ***(2010) 1 WBLR (Cal) 137*** observed as follows.

“ Therefore, the insurance company in spite of taking leave under section 170 of the Act having failed to summon the owner or the driver of the vehicle to disprove the allegation of the claimants of the involvement of the vehicle concerned or the rash and negligent driving, the court is left with no other alternative but to accept the allegation of the claimants unless there is either admission of the

claimants or their witness about non-involvement of the vehicle or about contributory negligence of the victim in the accident or there exists other evidence of unimpeachable nature given by uninterested witness showing falsity of the allegation of the claimants. In this case, there is no such admission or evidence of that nature. In this case, driver has been chargesheeted and thus, there is no reason why the insurance company in spite of taking leave under Section 170 of the Act should not summon the said driver to give evidence for disclosing the truth. We are unable to presume collusion between the driver and the claimants when the driver has been indicted in the criminal proceedings. It will be a travesty of justice in the facts of the present case to disbelieve the eyewitness of the claimants when the owner and the driver are neither appearing nor are they even summoned by the insurance company even after taking leave under Section 170 of the Act to face cross examination at the instance of the claimants”

Bearing in mind the aforesaid observation of this Hon’ble Court, as the appellant-insurance company in spite of taking leave under Section 170 of the Act has failed to adduce the evidence of owner or the driver of the offending vehicle to establish its defence of non-involvement of the vehicle, hence it will be a travesty of justice to disbelieve the eyewitness namely PW2 examined on behalf of the claimants in this regard. In view of the above discussion the argument advanced on behalf of the appellant-insurance

company of non-involvement of the offending vehicle in the said accident does not hold good.

13. The second issue involved in the present appeal relates to question of contributory negligence of the deceased-victim. It has been vociferously argued on behalf of the appellant-insurance company that the deceased-victim on the relevant day by travelling as pillion rider on the bicycle is guilty of contributory negligence. However, in its written statement the insurance company has rather taken a different stance by stating that the driver of the offending vehicle had no fault on his part and it was the victim who was solely responsible for his accidental death. Even if for the sake of argument, the aforesaid pleadings in the written statement are considered as pleading of contributory negligence it is relevant to note that the insurance company has not led any cogent evidence to establish that the deceased-victim was guilty of contributory negligence. On the other hand, PW2, Sanjib Hazra who is an eyewitness to the occurrence and on the relevant date of accident was driving the bicycle deposed in clear terms that the driver of the offending vehicle was solely responsible for the accident for reason of his rash and negligent driving. Such evidence of PW2 has remained unchallenged in cross-examination. Further the investigating agency upon completion of investigation has submitted chargesheet (**Exhibit 1**) against the driver of the offending vehicle under Sections 279/304/427 of IPC. Therefore, the evidence on record clearly indicates that the accident took place on the relevant date

due to rash and negligent driving on the part of driver of the offending vehicle. There are no materials to show any wrongful act on the part of the deceased-victim to have contributed to the said accident and hence the deceased-victim cannot be held guilty of contributory negligence. **[(See Mohammed Siddique & Another versus National Insurance Company Limited & Ors reported in I (2020) ACC 345 (SC))]**. Only because the deceased-victim on the relevant date of accident was travelling as pillion rider on the bicycle cannot be a ground to hold him guilty of contributory negligence in the absence of direct or corroborative evidence and no conclusion can be drawn as to whether there was negligence on the part of the deceased-victim. **[(See Jiju Kuruvila and others versus Kunjuamma Mohan and Others alongwith other batch of civil appeals reported in (2013) 9 SCC 166)]**. In the light of above discussion, the ground of contributory negligence of the deceased-victim in the said accident falls short of merit.

14. As regards the third issue relating to determination of income of the deceased-victim it is found that the learned tribunal has determined the income of the deceased-victim at the rate of Rs. 15,000/- per month taking into consideration the performance graph of the deceased-victim in the examinations he appeared during his lifetime. Mr Singh, learned advocate for insurance company has thrown challenge to such findings of the learned tribunal on the grounds that the claimants themselves have stated in the claim application as well as in the evidence that at the time of accident the

deceased-victim used to earn Rs. 2000/- per month by giving tuitions which should be accepted following the observation of Hon'ble Supreme Court in **Sarla Verma's case (supra)**. *Per contra* Mr Acharya, learned advocate for respondents-claimants argued that the deceased-victim at the time of accident was pursuing Engineering course and was a good student having bright future and as such there was every possibility of deceased to make a reasonable earnings. Further even though such income of Rs. 2000/- per month is stated in the claim application yet that cannot be an embargo for granting just compensation in terms of Section 168 of the Motor Vehicles Act, 1988, which a tribunal is duty bound under law to grant.

14.1. On going through the claim application at column no.6 it is found that the monthly income of the deceased-victim has been stated as Rs. 2000/- per month plus further prospective income of Rs. 15,000/-per month. PW1, father of the deceased-victim deposed in court that his deceased son earned Rs. 2000/- per month from private tuitions. Although it has been argued on behalf of the appellant-insurance company that the learned tribunal erred in taking into account the evidence of friend of deceased-victim namely Sanjib Hazra (PW2), who was also a student of Engineering course in the same University, and his pay structure in TATA Consultancy Services Limited **(Exhibit 8)** to come to a conclusion that the income of the deceased-victim should be 15,000/- per month yet such argument is inadequate in view of the fact that the learned tribunal has not taken into account the earnings of PW2

in order to determine the income of the deceased rather it has considered the performance and marks obtained by the deceased-victim in the examinations he appeared during his lifetime to come to a finding that the income of the deceased-victim to be Rs. 15,000/- per month. It is to be seen as to how far such determination of income of the deceased-victim is reasonable. Referring to the observation of Hon'ble Supreme Court in ***Sarla Verma's case (supra)*** Mr Singh, learned advocate for appellant-insurance company argued that the income at the time of accident is to be considered. It is relevant to note that the Hon'ble Court held at paragraph no.11 that where the deceased was self-employed or was on a fixed salary (without provision of annual increments etc), the courts will usually take only the actual income at the time of death. In the case at hand the deceased-victim was neither on self-employment nor on fixed salary but was a student who used earn meagre sum of Rs. 2000/- per month by giving tuitions as stated in the claim application and evidence of PW1 (father of the deceased). In ***Ramchandrapa versus Manager, Royal Sundram Allaince Company Limited*** reported in ***(2011) 13 SCC 236*** the Hon'ble Supreme Court observed that the tribunal may proceed to determine the possible income by resorting to some guesswork, which may include the ground realities prevailing at the relevant point of time. Therefore, where there is no yardstick to determine the income of the deceased-victim hypothetical guesswork can be resorted to determine the possible income of the deceased-victim which should be reasonable in the facts of the case. Now

reverting back to the fact of the case it is an admitted position that the deceased-victim at the time of accident was a student pursuing Engineering course under Burdwan University and the claimants produced his certificate of Madhyamik Examination and Mark Sheet of Second Semester Examination wherefrom it reveals that he passed Madhyamik Examination in first division and his Semester Credit Point Average (SCPA) is 74.1. Thus, it goes without saying that the academic performance of the deceased-victim appears to be good in the context of the present consideration. The academic performance of the deceased-victim probabilises that there was a fair possibility and likelihood that the deceased-victim, if alive, could have secured a service with a reasonable income. The learned tribunal taking into consideration all the aspects has determined the income of the deceased-victim at the rate of Rs. 15,000/- per month which in my opinion is reasonable for a person with engineering background does not call for interference.

14.2. In ***Sarla Verma's case (supra)*** the Hon'ble Supreme Court held '*Just compensation*' is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. It is not intended to be a bonanza, largesse or source of profit. Thus, the income of the deceased-victim has to be determined on the touchstone of its reasonability and acceptability in the facts and circumstances of the case and not on its face value.

14.3. Mr Singh, learned advocate for appellant-insurance company referring to news reporting of ‘*Express News Service*’ which shows that as per data of NITI Aayog 48% of engineers are unemployed in the country and another news reporting in the newspaper ‘*The Telegraph*’ dated 24th of November 2022 that 70 seats in Jadavpur University in BTech streams lay vacant, strenuously argued that the determination of income of the deceased-victim of Rs. 15,000/- per month by learned tribunal is totally absurd and is not at all acceptable. Needless to mention that it is settled principle of law that news items published in the newspapers are only hearsay evidence and no judicial notice can be taken of news items which are in the nature of hearsay secondary evidence, unless proved by evidence. It is placed on record that the news items as above have not been proved by any cogent evidence and those have only been placed during the course of hearing of the appeal. In this context it would be profitable to refer to the decision of the Hon’ble Supreme Court passed in ***Laxmi Raj Shetty versus State of Tamil Nadu*** reported in ***AIR 1988 SC 1274*** wherein the Hon’ble Court has considered the question of admissibility of news items appearing in the press report in the newspaper and opined as follows:

“We cannot take judicial notice of the facts stated in a news item being in the nature of hearsay secondary evidence, unless proved by evidence aliunde. A report in a newspaper is only hearsay evidence. A newspaper is not

one of the documents referred to in Section 78(2) of the Evidence Act, 1872 by which an allegation of fact can be proved. The presumption of genuineness attached under Section 81 of the Evidence Act to a newspaper report cannot be treated as proved of the facts reported therein. It is now settled that the statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in absence of the maker of the statement appearing in court and deposing to have perceived the fact reported.”

Bearing in mind the aforesaid observation of the Hon'ble Supreme Court the newspaper reporting placed by the appellant-insurance company in support of prevalent status relating employment of engineering students is inconsequential.

14.4. So far as the decision of Hon'ble Supreme Court passed in ***Deo Patodi's Case (supra)*** cited on behalf of respondents-claimants is concerned, it is found that the deceased while doing his Business Administration course in the UK was also doing a part-time job with World Bank on a monthly salary of Rs. 80,000/-and he was offered an employment in the capacity of EU Controller in GOA LLC, a company registered in the USA at an annual remuneration of Rs.18 lakhs per annum approximately (\$ 41,600). The facts

before the Hon'ble court are quite dissimilar to the case at hand and therefore stand distinguished.

14.5. In ***Kajal's case (supra)*** as well as in ***Master Ayush's case (supra)*** the Hon'ble Supreme Court in case of minor-injured considered the Minimum Wages payable to a skilled labour as the income for computation of compensation amount. The facts involved in the said cases are distinguishable from the case at hand and further the cases arose out of injury.

14.6. Similarly, the decision of Hon'ble Delhi High Court in ***Ramesh Chand Joshi's Case (supra)*** does not apply to the case at hand of it having dissimilar facts.

14.7. In view of the above discussion the income of Rs. 15,000/- per month assessed by the learned tribunal does not call for interference and thus the ground taken challenging such determination of income of the deceased-victim by the learned tribunal falls short of merit.

15. The last issue involved in the present appeal is whether in the absence of cross-objection from the side of the claimants, they are entitled to enhancement of compensation invoking provisions of Order XLI Rule 33 of the Civil Procedure Code. Mr Acharya, learned advocate for respondents-claimants submitted that the claimants are entitled to an additional amount of 40% of the annual income of the deceased-victim towards future prospect

and the compensation amount requires to be enhanced. Relying on the decisions of different High courts and also referring to Rule 346 Sub Rule (3) of West Bengal Motor Vehicles Rules, 1989 he submitted that the compensation amount can be enhanced taking recourse to the provisions of Order XLI Rule 33 of the Civil Procedure Code even in the absence of cross appeal. Refuting such contention Mr Singh, learned advocate for appellant-insurance company relying on the decision of Hon'ble Supreme Court passed in ***R. Swaminathan's Case (supra)*** and ***Ranjana Prakash's Case (supra)*** as well as decision of Division Bench this Hon'ble court in ***Smt. Sulekha Das's Case (supra)*** submitted that the compensation amount cannot be enhanced in the absence of cross-appeal filed by the claimants for enhancement.

15.1. At the very outset it is placed on record that the respondents-claimants have not filed any cross-objection for enhancement of the compensation amount. For the convenience of discussion Rule 33 of Order XLI of Civil Procedure Code is reproduced hereunder.

“33. Power of Court of Appeal-*The appellate court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and*

maybe exercise favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection and may, where there have been decrees in cross-suits or where or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees.....”

The aforesaid provision deals with the power of the court of appeal to pass an appropriate order in the case regardless of the fact that the appeal is only with respect to a part of the decree or that the appeal is filed only by some of the parties and such power may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. Rule 346 sub rule (3) of West Bengal Motor Vehicles Rules, 1989 makes the provisions of Order XLI of the Civil Procedure Code applicable to appeals preferred to High Court under Section 173 of the Motor Vehicles Act, 1988. Now the question which requires consideration is whether the compensation amount can be enhanced in the absence of cross-objection.

15.2. In ***R. Swaminathan’s case (supra)*** the Hon’ble Supreme Court negated the enhancement granted by the Division Bench of the High Court despite the fact that award of the tribunal was not challenged by the claimant

and held that the High Court wholly erred in increasing the compensation amount beyond the amount awarded by the tribunal in the appeal filed by the insurance company.

15.3. In ***Ranjana Prakash's case (supra)*** the Hon'ble Supreme Court while dealing with the similar question observed as hereunder.

“This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other orders as the case may require, even if the respondent had not filed any appeal or cross objection. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief.

It further held that the High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation.

15.4. Considering the ratios laid down in the aforesaid decisions of the Hon'ble Supreme Court, the Division Bench of this Court in **Smt. Sulekha Das's Case (supra)** accepted the position of law that an appellant cannot be worse off for filing an appeal should there be no cross-objection there against and the award of the claims tribunal attains finality on the claimant accepting the same without carrying it higher up.

15.5. In view of the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid two decisions as well as the decision rendered by this Court as above, it is needless to state that there cannot be enhancement of compensation amount in an appeal filed by the insurance company challenging the compensation granted by the learned tribunal (in the absence of cross-objection of the claimants).

15.6. For the reasons as above the decisions of Karnataka High Court in **Mr Alwin Lobo (supra)**, Madras High Court in **Saroja (supra)** and Delhi High Court in **Bal Kishan Pawar (supra)** is inapplicable.

16. In view of the above discussion the appeal stands dismissed. The impugned judgment and award of the learned tribunal is affirmed. No order as to cost.

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

18. It is found that the appellant- insurance company pursuant to order of this Court dated 23 November 2017 deposited a sum of Rs. 31,36,879/- *vide* OD challan no. 2427 dated 18.12.2017 and also statutory deposit of Rs. 25,000/-*vide* OD challan no.38 dated 6.4.2017. The learned Registrar General, High Court, Calcutta is directed to release the aforesaid amount alongwith accrued interest in favour of respondents-claimants in equal proportion on satisfaction of their identity and payment of *ad valorem* court fees on the compensation assessed, if not, already paid.

19. All connected applications, if any, stands disposed of.

20. Interim order, if any, stands vacated.

21. Let a copy of this judgment be forwarded to the learned tribunal along with lower court records for information.

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

(Bivas Pattanayak,J.)