

03.07.2023
Ct. 654
D/L 6 & 7
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**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

FMA 484 of 2017

Bajaj Allianz General Insurance Co. Ltd.

-Vs-

Smt. Etirani Roy & Ors.

With

COT 23 of 2017

Smt. Etirani Roy & Ors.

-VS-

Bajaj Allianz General Insurance Co. Ltd.

Mr. Rajesh Singh
... for the appellant-insurance company

Mr. Jayanta Kumar Mandal
... for the respondent Nos. 1 to 3-claimants

This appeal is preferred against the judgment and award dated 27th June, 2016 passed by the learned Judge, Motor Accident Claims Tribunal, 3rd Court at Bankura in MAC Case No11 of 2013 (Old No. 87 of 2010) granting compensation of Rs. 27,07,572/- 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 22nd March, 2010 at about 7.30 a.m. while the victim was proceeding on his motorcycle bearing registration no. WB-68A/3319 through Bankura Gangajalghati pitch road and when he reached near Line Hotel at

Kanchanpur More, at that time the offending vehicle bearing registration no. BR17G/7451 (truck) coming from opposite direction dashed the motorcycle of the victim in a rash and negligent manner, due to which the victim fell down on the road and sustained grievous injury on his head and other parts of the body. Immediately the victim was shifted to the hospital where he succumbed to his injuries and died. On account of sudden demise of the victim, the claimants, being the widow, mother and minor son of the victim filed application for compensation of Rs. 27,00,000/- under Section 166 of the Motor Vehicles Act, 1988.

The respondent nos. 1 to 3-claimants in order to establish their case examined three witnesses and produced documents, which have been marked as **Exhibits 1 to 11** respectively.

The appellant-insurance company also adduced evidence of two witnesses and produced documents, which have been marked as **Exhibits A and B** respectively.

The owner of the offending vehicle being the respondent no. 5 herein refused to receive the summons sent from the learned Tribunal.

Upon considering the materials on record and the evidence adduced on behalf of the respective parties, the learned Tribunal granted compensation of Rs. 27,07,572/- 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, the insurance company has preferred the present appeal.

Challenging the impugned judgment and award of the learned Tribunal, the respondent nos. 1 to 3-claimants have also filed a cross objection being COT 23 of 2017.

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

Mr. Rajesh Singh, learned advocate for the appellant-insurance company submits that the claimants have failed to establish the rash and negligent act of the driver of the offending vehicle in the claim proceedings which is *sine quo non* for getting compensation under Section 166 of the Motor Vehicles Act. Referring to the evidence of P.W. 2, he submits that the witness was admittedly standing a bit away from the place of occurrence and in cross-examination, he has deposed that he reached the place of occurrence after the offending truck has left and thereby it was not possible for the witness to precisely state the registration number of the vehicle or rash and negligent act of the driver of the offending truck, which raises a serious doubt so far as the evidence of the witness is concerned. He further submits that the insurance

company has made out a specific case that on the date of accident, the offending truck did not have valid route permit to ply and such assertion has been supported by O.P.W-1, Legal Executive of the Insurance Company. Further more, the insurance company has taken much endeavour to prove documentary evidence from the transport authority but in spite of service of summons, none appeared on behalf of the transport authority and due to such predicament, the document of the transport department could not be proved. However, in such conspectus of facts, he submits that the insurance company should be granted liberty to recover the compensation amount satisfied since the learned Tribunal despite taking cognizance of the facts of the offending vehicle not having route permit did not pass order for recovery. In the alternative, he also submits for giving liberty to the insurance company to proceed against the owner of the offending vehicle in accordance with law.

In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Jayanta Kumar Mandal, learned advocate for the respondent nos. 1 to 3-claimants submits that the evidence of eyewitness P.W. 2 with regard to rash and negligent act has remained unchallenged. The insurance company has not adduced any independent evidence to refute the evidence of eyewitness P.W. 2. Thus, the arguments

advanced on behalf of the insurance company that the claimants have failed to establish rash and negligent act is without any basis. With regard to cross objection, he submits that the victim since at the time of accident was aged between 45 to 50 years and was in Government employment, an amount equivalent to 30% of the annual income of the deceased should be taken into consideration towards future prospect. Further, the claimants are also entitled to general damages of Rs. 70,000/- under the conventional heads.

Having heard the learned advocates for the respective parties, following issues have fallen for consideration. *Firstly*, whether the claimants have succeeded in proving the rash and negligent act of the driver of the offending vehicle; *secondly*, whether on the date of accident, the offending vehicle was plied without any valid route permit; *thirdly* whether the claimants are entitled to future prospect of 30% of the annual income of the deceased and *lastly*, whether the claimants are entitled to general damages.

With regard to the first issue relating to rash and negligent act of the driver of the offending vehicle, it is found that the claimants in order to establish the said fact has examined the evidence of one eyewitness as P.W. 2 Rajiblochan Rana @ Rabi and also produced certified copy of the charge sheet being **Exhibit-3**. P.W. 2 in his evidence has stated that on the date of

accident, the motorcycle driven by the victim was dashed by the offending truck in a rash and negligent manner. He also deposed that he witnessed the incident from a little distance away from the place of accident. Referring to cross-examination of P.W. 2, it has been strenuously argued that since the witness has admitted that he reached the place of occurrence after the truck has left, it was not possible for the witness to see the registration number as well as rash and negligent act. It is a fact that in cross-examination, P.W. 2 has deposed that when he reached the place of occurrence, the offending truck has left the place by that time. However, taking into consideration the evidence of the witness that he was standing at a distance away from the place of occurrence leads to corollary that he reached the place of occurrence from the place where he was standing. There is no iota of evidence in the cross-examination that from the place where the witness was standing on the date of accident, it was not possible for the witness to view the incident. The presence of the witness near the place of occurrence on the relevant date and time has not been challenged in the cross objection. Such being the position, the evidence of the eyewitness is very much acceptable so far as the involvement and rash and negligent act of the driver is concerned. Further, upon completion of investigation the investigating agency submitted charge sheet

(**Exhibit-3**) against the driver of the offending truck under Sections 279/304A/427 of the Indian Penal Code. Thus, it goes without saying that the claimants have succeeded in proving the rash and negligent act of the driver of the offending vehicle in the said accident.

With regard to the second issue relating to the question of valid route permit of the offending vehicle, it is found that the insurance company has raised the plea in the written statement that on the date of accident, offending truck did not have valid route permit. In order to establish such fact, the insurance company has examined one Tathagata Banerjee, Legal Executive of the Insurance Company as O.P.W.-1. This witness also deposed in his evidence that the offending truck on the relevant date of accident did not have valid route permit. Be that as it may, no documentary evidence has been proved to establish such fact that on the date of accident, the offending vehicle was not having valid route permit. Hence, I am not inclined to pass any order for pay and recovery. However, it is relevant to note from the lower court records that the insurance company filed requisites for examining witness from Regional Transport Authority, Dhanbad. Although such summons were delivered but none appeared to adduce evidence from Regional Transport Department. Thereafter, the insurance company filed application for issuance of warrant of arrest for securing

the attendance and examination of witness from Regional Transport Department. Since such application was not moved, it was dismissed. Thus, it is found that the insurance company has taken endeavour to adduce evidence of the Road Transport Authority. Bearing in mind the aforesaid facts, I am inclined to grant liberty to the insurance company to proceed against the owner of the offending vehicle before the appropriate civil court in accordance with law.

By order dated 2nd February, 2023, direction was passed for substituted service by paper publication since notice could not be served upon the respondent no. 5 owner of the offending vehicle. As it is already observed that no order for pay and recovery is warranted, such direction stands recalled.

So far as the entitlement of future prospect is concerned, it is found that the victim at the time of accident was between 45 to 50 years old and was an Ophthalmic Assistant attached to Mejia BPHC and was an employee of the Health Department under the Government of West Bengal. Therefore, the claimants are entitled to an amount equivalent 30% of the annual income of the deceased towards future prospect in view of the decision of Hon'ble Supreme Court passed in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in **2017 ACJ 2700**.

So far as general damages are concerned, following the principles laid down in *Pranay Shethi (supra)*, the claimants are entitled to general damages under the conventional heads of loss of estate, loss of consortium and funeral expenses of Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively.

The other factors have not been challenged in this appeal.

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

Calculation of Compensation

Annual Income	Rs.3,11,316/-
Add: 30% of annual income towards future prospect	Rs.93,394/-
	Rs.4,04,710/-
Less: 1/3 rd towards personal and living expenses	Rs.1,34,903/-
	Rs.2,69,807/-
Multiplier 13 (Rs.2,69,807 x 13)	Rs.35,07,491/-
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.35,77,491/-

Thus, the respondent Nos. 1 to 3-claimants are entitled to compensation of Rs. 35,77,491/- together with interest @ 6% per annum from the date of filing DCF (03.08.2011) till realization. It is found that the appellant-Insurance Company has deposited statutory amount of Rs.25,000/- vide OD Challan No. 2234 dated 08.12.2016 and Rs.36,10,617/- vide OD Challan No.3285 dated 09.03.2017. Both the aforesaid deposits

together with accrued interest be adjusted against the entire compensation amount.

The appellant-insurance company is directed to deposit the balance amount of compensation of Rs. 8,69,919/- together with interest @ 6% per annum from the date of filing DCF (03.08.2011) till realization by way of a cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date.

The respondent nos. 1 to 3-claimants are directed to deposit *ad valorem* court fees on the balance amount of compensation assessed, if not already paid.

Upon deposit of the balance amount of compensation and interest as above, the learned Registrar General, High Court, Calcutta shall release the compensation amount in favour of the respondents-claimants Nos.1, 2 and 3 in equal proportions after making payment of Rs. 40,000/- to respondent no.1, widow of the deceased, towards spousal consortium, upon satisfaction of their identity and payment of *ad valorem* court fees, if not already paid.

The respondent no. 1 being mother and natural guardian of the respondent no. 3 shall receive the share of the minor on his behalf and shall keep the same in a Fixed Deposit Scheme of any Nationalized Bank or Post Office till attainment of majority by the said minor.

Liberty is granted to the appellant-insurance company to proceed against owner of offending vehicle before the Civil Court having jurisdiction, in accordance with law.

With the aforesaid observations, the appeal and the cross objection stand disposed of. The impugned judgment and award of the learned Tribunal 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.

Let a copy of this order along with the 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.**)