

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

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK.

FMA 347 OF 2022

With

COT 50 of 2021

New India Assurance Company Limited

.....Appellant

Versus

Sima Singh & Others

.....Respondents

For the Appellant: Mr Parimal Kumar Pahari, Advocate.

For the Respondent no.1 & 2: Mr Jayanta Kumar Mandal, Advocate.

Mr Sayantan Rakhit, Advocate

Heard on: 09.11.2022.

Judgment on: 10.01.2023

Bivas Pattanayak, J :-

1. This appeal is preferred against the judgment and award dated 12th August 2021 passed by learned Additional District Judge, RD Court, Paschim Medinipore in M.A.C Case no. 230 of 2018 granting compensation of Rs. 32,64,384/- favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 25 August 2017 at about 1 AM while the victim was driving the truck bearing no. WB-76A/4321 to his destination at that time another vehicle bearing no. WB-37A/6723 (truck) coming from the opposite side with excessively high speed in a rash and negligent manner dashed the truck driven by the victim near village Deypara on Dherua-Midnapore pitch road as a result of which the victim sustained severe injuries all over his body and he was taken to Midnapore Medical College & Hospital wherefrom he was referred to S.S.K.M Hospital, Kolkata but as there were no vacant beds he was admitted to Medica Super-Speciality Hospital and was discharged on 28.8.2017. Thereafter he was admitted to Calcutta Medical College & Hospital but ultimately he succumbed to his injuries and died on 30.8.2017. On account of sudden demise of the deceased-victim, the claimants being his parents and dependents filed application for compensation of Rs.10,00,000/-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.3-owner of the offending vehicle though filed written statement but did not contest the claim application before the learned tribunal and the claim application was disposed of *ex parte* against him. Accordingly, service of notice of appeal upon the said respondent is dispensed with.

4. The claimants in order to prove their case examined two witnesses including claimant no.2, father of the deceased-victim and proved number of documents which have been marked as **Exhibit 1 to 10** respectively. The contesting opposite party no.2-insurance company (respondent no.1 herein) also adduced evidence of Motor Vehicle Inspector on its behalf.

5. Upon considering the materials on record and the evidence produced on behalf of the parties the learned tribunal allowed the claim application granting compensation of Rs. 32,64,384/- in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

6. Being aggrieved by and dissatisfied with the impugned judgment and award of the learned tribunal the insurance company has preferred the present appeal.

7. In the present appeal the respondent nos. 1 & 2 (claimants) have filed a cross-objection being COT 50 of 2021 for enhancement of compensation amount.

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

9. Mr Parimal Kumar Pahari, learned advocate for appellant-insurance company submitted that the deceased-victim being the driver of another truck bearing no. WB-76A/4321 was guilty of contributory negligence and as

such the claimants cannot claim compensation to the extent of the negligence of the deceased-victim.

He further submitted that the owner and insurance company of the vehicle which was driven by the deceased-victim on the relevant date of accident has not been made a party in the claim application and as such the application for compensation is bad for defect of parties. He further points out that the learned tribunal while negating the plea of the insurance company of defect of parties wrongly applied the proposition laid down in the decision of Hon'ble Supreme Court in ***Khenyei versus New India Assurance Company limited*** reported in **2015 (2) TAC 677 (SC)** wherein it was observed that the plaintiff is entitled to sue both or anyone of joint tort-feasors in a case of composite negligence and further failed take into account that the case before it was not of composite negligence but was of contributory negligence and therefore the owner and insurer of the other vehicle is a necessary party as in a case of contributory negligence the question of apportionment of compensation amount between the two vehicles comes into play. Further charge-sheet has also been submitted against the driver of the alleged offending vehicle under Sections 279/427 IPC adding Section 304A of IPC as well as the deceased-victim who was on the relevant date of accident was driving the other vehicle which clearly suggests of contributory negligence on the part of the deceased-victim. Moreover though the evidence of purported eyewitness (PW2) that on the relevant date of accident he saw the accident

from the vehicle bearing registration no. WB-37A-8393 (truck) yet he is not listed as witness in the charge-sheet. Further PW2 has admitted in cross-examination that he did not make any statement before the investigating agency or he took the victim to the hospital which improbabilises his presence near the place of occurrence on the relevant date of accident and thus his evidence is to be taken with a pinch of salt.

Furthermore it is submitted that the insurance company through its additional written statement has categorically taken the defence that the offending vehicle bearing no. WB-37A/6723 on the alleged date of occurrence did not have valid permit and such fact has been established by the evidence of Motor Vehicle Inspector, Technical, (OPW1). Thus since the offending vehicle is found to have been plied without necessary valid permit, which is a fundamental statutory infraction, the insurance company cannot be saddled with liability to compensate. However, in such a situation, as per the settled proposition laid down by the Hon'ble Supreme Court the insurer may be directed to satisfy the award, although it has no liability, and thereafter liberty be given to recover the same from the insured-owner and/or driver in accordance with law. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***National Insurance company versus Challa Bharathamma*** reported in ***2005 (1) T.A.C 4 (SC); Kamala Mangalal Vayani and others versus United India Insurance Co. Ltd and others*** reported in ***2010 ACJ 1441; Amrit Paul Singh & Anr versus TATA***

AIG General Insurance Company Ltd. & Ors reported in **2018 SAR (Civil) 768.**

He further submitted that in the claim application the claimants themselves disclosed the income of the deceased-victim to be Rs. 15,000/- per month but the learned tribunal instead of taking into account such disclosed income erroneously considered income tax returns for the assessment year 2015-16 showing the yearly income of the deceased victim to be Rs. 2,69,276/- from transport business which has not at all been proved by any cogent documentary evidence and thus such finding of the learned tribunal is erroneous and is liable to be set aside.

In view of the above he submitted that the appeal be allowed setting aside the impugned judgment and award.

10. In reply to the aforesaid contentions raised on behalf of the appellant-insurance company, Mr Jayanta Kumar Mandal, learned advocate for respondents-claimants submitted that the insurance company in its written statement as well as additional written statement did not take the plea of contributory negligence on the part of the deceased-victim in the said accident. Further no evidence has been led by the insurance company to establish the fact of contributory negligence of the deceased-victim. On the other hand the respondents-claimants adduced the evidence of one eyewitness namely Sk Allauddin (PW2), who deposed that he saw the accident

on the relevant date while seated inside the truck bearing registration no. WB-37A-8393 and he has categorically deposed that the accident took place due to rash and negligent driving of the driver of the offending vehicle bearing registration no. WB-37A/6723. Further even if the eye-witness PW2 is not listed as a witness in the chargesheet it does not impair his aforesaid truthful and unrebutted evidence in court. Save and except that the chargesheet has been submitted against the deceased-victim there is no cogent evidence to suggest that the deceased-victim contributed to the accident. The insurance company which craved leave under Section 170 of the Act to contest the proceedings by availing defences of owner of the offending vehicle failed to examine either driver of the offending vehicle or any other independent eyewitness to prove the allegation of contributory negligence on the part of the deceased-victim and thus no case of contributory negligence has been established by the insurance company. In support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Minu Rout & Anr versus Satya Pradyumna Mohapatra & Ors*** reported in ***AIR 2014 SC (Civil) 116***.

Further from the chargesheet (**Exhibit 1/a**) it is quite evident that the driver of the offending vehicle did not have to take any medical treatment whereas on the other hand death has occasioned to the victim and therefore by application of doctrine of *res ipsa loquitor* the accident clearly took place due to negligence of the driver of the offending vehicle and in support of his

contention he relied on the decision of Hon'ble Supreme Court passed in ***Usha Rajkhowa and Others versus Paramount Industries and Others*** reported in ***2009 (2) T.A.C 11 (SC)***

Relying on the decision of Hon'ble Supreme Court passed in ***Kusumlata and Others versus Satbir and others*** reported in ***2011 (2) T.A.C. 1 (SC)*** he submitted that in cases relating to motor accident claims the claimants are merely to establish their case on the touchstone of preponderance of probabilities and therefore as the materials on record does not probabilise contributory negligence of the victim hence the same is inconsequential in the facts and circumstances of the case.

He further submitted that the insurance company has also failed to establish that the offending vehicle on the date of accident was plied without valid permit.

Furthermore it is submitted that as per the settled proposition of law where the income tax return is available that should be taken into account for determination of the income of the deceased-victim as income tax return is a statutory document on which reliance can be placed for such determination and in support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Malarvizhi and Others versus United India Insurance Company Limited and Another*** reported in ***2020 (1) T.A.C 328 (SC)***; ***Sanjay Verma versus Haryana Roadways*** reported in ***2014(1) T.A.C***

711 (SC) and **Smt Sangita Arya & Ors versus Oriental Insurance Company Ltd & Ors** reported in **2020 SAR (Civ) 905**. He further submitted that the compensation as per Section 168 of the Motor Vehicles Act should be 'just compensation' and even if the claimants disclose less income such aspect would not be a hindrance for the claimants in getting '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)**.

In light of the above, he submitted that the appeal is liable to be dismissed.

11. Having heard the learned advocates of both the sides, it appears that the insurance company through the present appeal has assailed the impugned judgment and award on three-fold grounds *firstly* the deceased-victim was guilty of contributory negligence in the accident, *secondly* the offending vehicle did not have valid route permit to ply on the relevant date of accident and *lastly* that the learned tribunal erred in determining the annual income of the deceased-victim by considering income tax return for assessment year 2015-16 in the absence of necessary documents of business.

11.1. With regard to the aspect of contributory negligence, at the outset on going through the written statement and the additional written statement filed by the appellant-insurance company it is pertinent to note that the insurance company in its defence did not take any specific plea of

contributory negligence of the deceased-victim in the accident. From the written statement as well as trend of cross-examination it appears that the insurance company in the proceedings before the learned tribunal took all available defences however it failed to adduce evidence of the driver of the offending vehicle or any independent eyewitness to establish contributory negligence of the deceased-victim. Thus the insurance company has also not led any cogent evidence to establish the fact of contributory negligence. PW2, Sk Allauddin deposed that he saw the accident on the relevant date while seated inside the truck bearing registration no. WB-37A-8393 and that the accident took place due to rash and negligent driving of the driver of the offending vehicle bearing registration no. WB-37A/6723. The aforesaid evidence of PW2 has not been rebutted in cross-examination. Hence the presence of the witness near the scene of occurrence and his probability to witness the accident is very much acceptable. The appellant-insurance company has challenged the evidence of PW2 on the ground that he has neither been examined by the police nor been listed as a witness in the chargesheet. PW2 in cross-examination had admitted that he did not make any statement before the police or to any other authority. Be that as it may, such fact does not lead to necessary implication that PW2 did not witness the accident. Further even if the name of PW2 has not been listed in the chargesheet his evidence cannot be ignored solely on such ground in the absence of attending circumstances. Moreover, there is no hard and fast rule

enshrined in procedure that only the listed witnesses in the chargesheet are to be examined in proceedings under the Motor Vehicles Act. Mr Pahari, learned advocate for appellant insurance company drew the attention of the court that the chargesheet has also been filed under Sections 279/427 IPC adding Section 304A of IPC against the deceased-victim, who on the relevant date of accident was driving the other vehicle, which clearly suggests of contributory negligence on the part of the deceased-victim. Upon going through the chargesheet it appears that it has also been submitted against the deceased-driver under the aforesaid provisions of law. Be that as it may, charge-sheet is a report filed on conclusion of investigation and not a substantive piece of evidence. Further is relevant to note that the driver of the offending vehicle who has also been chargesheeted on being approached by the investigating agency for getting the injury report informed them that he did not take any medical treatment. Thus such aspect manifests that the driver of the offending vehicle did not sustain any such notable grievous injuries prompting for medical assistance. On the other hand it is found that the deceased-victim sustained injuries in the said accident and died. The Hon'ble Supreme Court while dealing with a similar situation in ***Usha Rajkhowa's Case (supra)*** observed as follows.

“ Under such circumstances, applying the doctrine of res ipsa loquitor, it is clear that it was because of the negligence on the part of the truck that the accident took place. After all the hit given by the

truck was so powerful that two persons in the car died on the spot, while the third escaped with serious injuries. When we see the award of the tribunal, as also the appellate judgment, they are astonishingly silent on these aspects. We are, therefore, convinced that there was no question of any contributory negligence on the part of the driver of the Maruti car and it was solely because of the negligence on the part of the truck that the accident took.”

Bearing in mind the aforesaid observation of the Hon'ble Court and applying the doctrine of *res ipsa loquitor* to the facts of the present case as it is found that the driver of the offending vehicle did not sustain any injuries whereas on the flip side the victim who was driving the other vehicle sustained injuries and died, the probabilities suggests that the accident has taken place due to negligence on the part of driver of the offending vehicle. I find substance in the submissions advanced by Mr Mandal, learned advocate for respondents-claimants relying on ***Kusumlata's case (supra)*** that in the case relating to motor accident claims the claimants are merely to establish their case on the touchstone of preponderance of probabilities. Contributory negligence only means the failure by a person to use reasonable care for safety of either himself or his property, so that he become blameworthy in part as an author of his own wrong. In the absence of any evidence to show any wrongful act or omission on the part of the deceased-victim which have contributed either to the accident or to the nature of injuries sustained, the

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)]].** Further from the scene of accident one can suggest or presume the manner in which the accident was caused but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the deceased-driver. **[[See Jiju Kuruvila and others versus Kunjamma Mohan and Others alongwith other batch of civil appeals reported in (2013) 9 SCC 166].** I also find substance in the submissions of learned advocate for respondents-claimants relying on the decision of Hon'ble Supreme Court in **Mina Rout's Case (supra)** that in the absence of legal evidence the court cannot hold contributory negligence.

In the light of above discussion the ground of contributory negligence of the deceased-driver in the said accident falls short of merit. At the same time the argument that the claim application is bad for defect of parties since owner and insurer of the vehicle which was driven by the deceased-victim on the relevant date of accident has not been made a party, does not stand to reason

11.2. With regard to the second issue relating to question of valid route permit of the offending vehicle, relying on the evidence of OPW1, it has been strenuously argued on behalf of the appellant-insurance company that on the date of accident the offending vehicle did not have valid route permit

leading to statutory violation of terms and conditions of the insurance policy and hence the insurance company cannot be saddled with the liability of making compensation. At paragraph no.3 of the additional written statement filed by the insurance company there is specific assertion that the insurance company collected some material documents through its investigator wherefrom it is found that the offending vehicle bearing no.WB-37A/6723 did not have valid permit. In order to establish the aforesaid fact that the offending vehicle not having valid permit on the relevant date, the insurance company examined one Mani Changdar, Motor Vehicle Inspector, Technical at Asansol R.T.O office as OPW1. In his evidence before the court OPW1 deposed that the office maintains the records of permits issued to a particular vehicle but the route permit of the offending vehicle could not be produced before the court as specific serial number was not supplied to them. Thus the evidence of OPW1 as to whether the offending vehicle on the relevant date of accident had valid permit becomes inconsequential. The insurance company subsequent thereto has not taken any endeavour to call for further records from the office of the road transport by providing specific serial number and other particulars of the concerned documents. The averments in the additional written statement show that the investigator collected documents and placed report however neither the investigator nor the documents or reports were placed before the court by the insurance company in support of its plea that on the relevant date of accident the

offending vehicle did not have valid route permit. Thus the insurance company also failed to establish the fact of absence of valid route permit of the offending vehicle on the date of accident. Mr Pahari, learned advocate for appellant insurance company, relying on several decisions of Hon'ble Supreme Court passed in ***Challa Bharathamma's (supra); Kamala Mangalal Vayani's case (supra) and Amrit Paul Singh's case (supra)*** pressed for passing an order for pay and recovery as there was statutory violation of terms and conditions of the insurance policy for the reason of offending vehicle not having valid route permit on the relevant date of accident. However, since the absence of valid route permit of the offending vehicle on the relevant date of accident could not be established by cogent evidence hence the proposition laid down in the aforesaid decisions of the Hon'ble court does not apply in the present case.

11.3. With regard to third issue relating to determination of the income of the deceased-victim, it is found from the impugned judgment that the learned tribunal has considered the gross income of the deceased as per income tax return for the assessment year 2015-16 (**Exhibit 7/a**) amounting to Rs. 2,69,276/-. Such income of the deceased-victim has been challenged on the ground that since the claimants have disclosed the income of the victim in the claim application as Rs. 15,000/- per month the tribunal ought to have determined the income on such assertion. At the outset I concur with the submissions of Mr Mandal, learned advocate for respondents-claimants

that the tribunal is to assess 'just compensation' relying on the decision of Hon'ble Supreme Court in **Rajesh's Case (supra)**. The Hon'ble Supreme Court in its decision passed in **Malarvizhi's Case (supra)** held that the income tax return is statutory document on which reliance may be placed to determine the annual income of the deceased. Further the Hon'ble Supreme Court in the decision of **Sanjay Verma's Case (supra)** as well as **Smt Sangita Arya's Case (supra)** has also proceeded to rely on the income tax return of the victim for assessing the income. Thus as per settled proposition income tax return is to be taken into account for determining the income of the deceased and therefore the argument advanced by the learned advocate for appellant-insurance company in this regard does not hold good. The gross income of the deceased-victim appearing in the income tax return for the assessment year 2015-16 (**Exhibit 7/a**) is Rs. 2,69,276/-. It is placed on record that net tax payable on the aforesaid gross income is zero. Thus the annual income of the deceased-victim should be considered at Rs. 2,69,276/-. In the aforesaid backdrop the income of the deceased-victim determined by the learned tribunal does not call for interference.

11.4. In view of the above discussion the grounds of appeal advanced as above on behalf of the appellant-insurance company falls short of merit and the appeal is, therefore, liable to be dismissed.

12. Now the cross objection being no. COT 50 of 2021 filed by the respondents-claimants is taken up for consideration.

12.1. Mr Jayanta Kumar Mandal, learned advocate for respondents-claimants argued that as per the decision of Hon'ble Supreme Court in ***Sarla Verma and Others versus Delhi Transport Corporation and Another*** reported in **(2009) 6 SCC 121** the multiplier should be 18 instead of 17. It is found from the impugned judgment that the learned tribunal after referring to several documents of the deceased-victim held that the age of the deceased was more than 20 years but less than 25 years. Therefore, keeping in the mind such age of the deceased-victim and following the observation of Hon'ble Supreme Court in ***Sarla verma's Case (supra)*** the multiplier should be 18 instead of 17.

12.2. Mr Pahari, learned advocate for the appellant-insurance company opposing enhancement of compensation indicated that as per settled position of law only spouse is entitled to receive compensation under the conventional head of loss of consortium but the learned tribunal erroneously granted such compensation to the claimants who are the parents of the deceased-victim hence it requires modification. From the impugned judgment it is found that the learned tribunal has granted compensation of Rs. 40,000/-under loss of consortium to the claimants herein who are the parents of the deceased-victim. As per observation of Constitution Bench of Hon'ble Supreme Court in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in **2017 (4) T.A.C 673(S.C)** the head under 'loss of consortium' is confined only to the spouse and thus the claimants being the

parents of the deceased-victim are not entitled to receive compensation under such conventional head of loss of consortium. I find substance in the submission of the learned advocate for appellant-insurance company and thus to such extent the order of the learned tribunal requires to be modified.

12.3. Mr Mandal, learned advocate for respondents-claimants submitted that the claimants are entitled to increase in the amount under the conventional heads by 10% as three years have already elapsed. Following the observation of Hon'ble Supreme Court in ***Pranay Sethi's case*** the claimants are entitled to increase in the amount of conventional heads by 10% and thus I concur with the submissions advanced by learned advocate for respondents-claimants in this score.

12.4. Mr Mandal, learned advocate for the respondents-claimants have argued that the learned tribunal ought to have allowed interest on the compensation amount from the date of filing application rather than allowing the same as a default clause which requires to be modified. It is found from the impugned judgment that the learned tribunal allowed interest as a default clause. Be that as it may, the claimants are entitled to receive interest on the compensation amount from the date of filing of the claim application till deposit.

12.5. As far as the quantum of compensation is concerned the other findings of the learned tribunal namely the deduction towards personal and living

expenses of the deceased, and amount towards future prospect has not been challenged in this appeal.

13. Now keeping in mind the above aspects, the compensation is calculated hereunder.

Calculation of compensation

Annual Income.....	Rs. 2,69,276/-
Add: Future Prospects @ 40% of total Income...	<u>Rs.1,07,710/-(approx)</u>
Annual loss of Income.....	Rs.3,76,986/-
Less: Deduction 1/2 of the Annual Income towards personal and living expenses.....	<u>Rs.1,88,493/-</u>
	Rs.1,88,493/-
Adopting multiplier 18 (Rs.1,88,493/- X 18)...	Rs.33,92,874/-
Add: General Damages.....	<u>Rs.30,000/-</u>
Loss of estate....	Rs.15,000/-
Funeral Expenses.....	Rs.15,000/-
Add: 10% increase on conventional heads.....	Rs.3,000/-
Total Compensation.....	Rs.34,25,874/-

14. Thus the respondents-claimants are entitled to compensation of Rs.34,25,874/- along with interest @ 6% per annum from the date of filing of the claim application till deposit.

15. The Appellant-New India assurance Company Limited is directed to deposit the aforesaid amount of compensation of Rs.34,25,874/- along with

interest @ 6% per annum from the date of filing of the claim application till deposit by way of cheque with the learned Registrar General, High Court, Calcutta within the period of four weeks from date.

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

17. The learned Registrar General upon deposit of the aforesaid compensation amount shall release the said amount in favour of respondents-claimants in equal proportion on satisfaction of their identity as well as payment of *advalorem* court fees, if not already paid.

18. It appears that the appellant-insurance company has made statutory deposit of Rs.25,000/- with the Registry of this Court vide OD challan no. 786 Dated 7.10.2021. Learned Registrar General, High Court, Calcutta is directed to refund the aforesaid amount together with accrued interest to the insurance company.

19. In view of the above discussion, the appeal thus stands dismissed.

20. With the aforesaid observations the cross-objection being COT 50 of 2021 stands disposed of. The impugned judgment and award of the learned tribunal stands modified to the aforesaid extent. No order as to cost.

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

22. Interim order, if any, stands vacated.

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

(Bivas Pattanayak,J.)

