

13.01.2023
SL No.6 & 7
Court No. 654
Ali

**IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction**

**F.M.A. 2035 of 2018
IA No: CAN/1/2018 (Old No.CAN/5751/2018)**

The New India Assurance Co. Ltd.

versus

Smt. Munni Thapa & Anr.

With

COT 72 of 2019

Munni Thapa

versus

The New India Assurance Co. Ltd. & Ors.

Mr. Parimal Kumar Pahari

...for the appellant in FMA 2035 of 2018
and for respondents in COT 72 of 2019

Mr. Jayanta Banerjee

Mr. Sandip Bandyopadhyay

Smt. Ruxmini Basu Roy

...for the appellant in COT 72 of 2019
and for respondents FMA 2035 of 2018.

This appeal is directed against the judgment and award dated 3rd May 2018 passed by learned District Judge cum Judge, Motor Accident Claims Tribunal, Jalpaiguri in M.A.C Case no. 43 of 2018 granting compensation of Rs 54,23,600/-favour of the claimant under Section 166 of the Motor Vehicles Act,1988.

With the consent of the parties preparation of informal paper books is dispensed with.

The brief fact of the case is that on 26th of June 2015 at about 10 PM while the victim was proceeding towards Telepara from Gairkata on a motorcycle taking left side of the road in a normal speed at that time the offending vehicle bearing

registration no.WB-57C/0098 (truck) coming from the opposite direction in a rash and negligent manner dashed the motorcycle of the victim as a result of which the victim sustained severe injuries all over his body and was immediately taken to Birpara State General Hospital where the attending doctor declared him dead. On account of sudden demise of the deceased victim the claimant being the mother of the deceased filed application for compensation of Rs. 38,00,000/-under Section 166 of the Motor Vehicles Act, 1988.

The claimant in order to establish her case examined three witnesses including the claimant and proved documents which have been marked as **Exhibits 1 to 11** respectively.

The appellant-insurance company did not adduce any evidence.

Upon considering the materials on record and the evidence adduced by the claimant both oral and documentary the learned tribunal granted compensation of Rs 54,23,600/-favour of the claimant.

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

The respondent-claimant also filed cross-objection against the impugned judgment and award of the learned tribunal being COT 72 of 2019.

Mr Parimal Kumar Mandal, learned advocate for appellant-insurance company submits that on the relevant date of accident the victim along with two pillion riders was driving the motorcycle which contributed to the accident which is evident from the fact disclosed in the first information report as well as chargesheet and therefore as the victim was himself guilty of contributory negligence hence the claimant is debarred from claiming compensation to the extent of negligence of the deceased-victim. He further submits that at the time of accident the deceased victim was 26 years of age and as such the multiplier should be 17 instead of 18 adopted by the learned tribunal. Furthermore he submits that the learned tribunal erred in deducting $1/3^{\text{rd}}$ of annual income of the deceased-victim towards his personal and living expenses which ought to have been $1/2$ since the deceased died a bachelor. In light of his aforesaid submissions he prays for modification of the impugned judgment and award.

In reply to the contentions raised on behalf of appellant-insurance company, Mr Jayanta Banerjee, learned advocate for respondent no.1-claimant submits that the insurance company has neither made out any case of contributory negligence before the learned tribunal nor has led any evidence to establish such fact and therefore the aspect of contributory negligence of the victim as

argued on behalf of appellant-insurance company is far-fetched since it has not been proved in accordance with law.

He further submits that gross pay of Rs 27,387/-per month appearing in the salary slip of May 2015 which is the last salary drawn by the victim just prior to the accident in the month of June 2015 ought to have been considered however the learned tribunal erroneously considered the net pay. Moreover he submits that the claimant is entitled to general damages of 30,000/- under the conventional heads of funeral expense and loss of estate. He further indicates that the learned tribunal has not granted any interest on the compensation amount from the date of filing of the claim application till realisation rather the interest has been granted as a default clause which needs to be modified. In the light of above he prays for appropriate order.

In spite of due service of notice of appeal respondent no.2-owner of the offending vehicle did not appear to contest the appeal.

Having heard the learned advocates of the respective parties, it is found that the appellant-insurance company has precisely thrown challenge to the impugned judgment and award on three-fold grounds *firstly* that the victim was guilty of contributory negligence in the said accident;

secondly the learned tribunal erred in adopting multiplier 18 instead of 17 and *lastly* the deduction towards personal and living expenses of the deceased-victim should be 1/2 of the annual income of the deceased instead of 1/3rd.

With regard to the issue of contributory negligence at the very outset it is found that the insurance company neither has taken the plea of contributory negligence of the deceased-victim in the written statement nor has led any direct or corroborative evidence to establish such fact. Mr Pahari, learned advocate for appellant-insurance company has strenuously argued that since the first information report and the chargesheet discloses that on the date of accident three persons were moving in the motorcycle including the victim hence he is guilty of contributory negligence which fact has to be taken into account. It is a fact that as per the written complaint and the chargesheet on the date of accident the victim and two persons were moving in the motorcycle. Be that as it may, the first information report or the chargesheet is not substantive evidence. The fact that on the relevant date three persons including the victim were moving in the motorcycle at best may give rise to guilt of being party to violation of the traffic rules and regulations but that cannot make the victim guilty of contributory negligence unless it is established that

his very act of moving alongwith two others in the motorcycle contributed either to the accident or to the impact of the accident upon the victim. It is not the case of insurance company that the accident itself occurred as a result of three persons riding on the motorcycle or that the accident could have been averted if three persons were not riding on the motorcycle. On the hand the evidence of eyewitness PW2, Ratiram Oraon clearly shows that driver of the offending vehicle was negligent in the said accident which has remained unchallenged in cross-examination. Therefore in the absence of any evidence to show that the wrongful act on the part of deceased victim contributed either to the accident or to the nature of injuries sustained, the victim cannot be held to be guilty of contributory negligence. **[See Mohammed Siddique & Another versus National Insurance Company Limited & Ors reported in I (2020) ACC 345 (SC)]**. Accordingly it goes without saying that the fact of contributory negligence of deceased-victim has not been established by the appellant-insurance company in the proceeding before the learned tribunal by cogent evidence.

The other two issues raised by the appellant-insurance company namely with regard to multiplier and deduction towards personal and living expenses

shall be dealt with later on while dealing with cross-objection.

Now the cross objection is taken up for consideration.

As far as the multiplier is concerned it is found that the learned tribunal adopted multiplier of 18. However keeping in mind the observation of Hon'ble Supreme Court passed in ***Sarla Verma and Others versus Delhi Transport Corporation and Another*** reported in ***2009 ACJ 1298*** as on the date of accident the victim was 26 years of age hence a multiplier of 17 is to be adopted for computation of compensation amount as has been rightly argued by learned advocate for appellant insurance company.

With regard to deduction towards personal and living expenses of the deceased it is found from the impugned judgment that learned tribunal has deducted 1/3rd towards personal and living expenses of the deceased. However following the observation of Hon'ble Supreme Court in ***Sarla Verma's case*** since the deceased died bachelor hence an amount equalling to ½ of annual income of the deceased should be deducted towards his personal and living expenses.

So far as income of the deceased is concerned the learned tribunal has considered the net pay of the deceased-victim for the month of May 2015. The actual income is the income determined

upon deducting the tax component from the gross pay. It is relevant to note that the gross pay of the victim for the month of May 2015 is Rs. 27,387/- and the income tax payable is zero. Accordingly the actual income of the deceased-victim just prior to the accident is Rs. 27,387/-which should be taken into account.

Further the learned tribunal has not granted any interest on the compensation amount. However the claimant is entitled to interest at the rate of 6% per annum on the compensation amount from the date of filing of the claim application till deposit.

Now the calculation of compensation is made hereunder.

Calculation of compensation

Monthly Income.....	Rs.27,387/-
Annual Income.....(Rs.27,387/- X 12).....	Rs3,28,644/-
Add: Future Prospects @ 50% of total Income..	<u>Rs.1,64,322/-</u>
Annual loss of Income.....	Rs.4,92,966/-
Less: Deduction of 1/2 of the Annual Income (towards personal and living expenses).....	<u>Rs.2,46,483/-</u> Rs.2,46,483/-
Adopting multiplier 17 (Rs.2,46,483/- X 17)..	Rs.41,90,211/-
Add: General Damages.....	<u>Rs.30,000/-</u>
Loss of estate.....	Rs.15,000/-
Funeral Expenses.....	Rs.15,000/-
Total Compensation.....	Rs.42,20,211/-

Thus the claimant is entitled to get compensation of Rs. 42,20,211/-along with interest at the rate of 6% per annum from the date of filing of the claim application (27.1.2017) till deposit. It is found that the appellant insurance company has

deposited statutory amount of Rs. 25,000/- vide OD challan no. 1112 dated 31.7.2018 and has also deposited an amount of Rs.62,18,380/- vide OD challan no. 1592 dated 1.10.2018 in terms of order dated 7 September 2018 with the Registry of this Court. Accordingly both the aforesaid amounts together with accrued interest shall be adjusted against the entire awarded sum and the interest thereon.

Respondent-claimant is directed to deposit *ad valorem* court fees on the compensation assessed, if not already paid.

Learned Registrar General, High Court, Calcutta shall release the amount of compensation in favour of the claimant upon satisfaction of her identity and payment of *ad valorem* court fees if not already paid.

The balance amount, if any, left over after full satisfaction of the award shall be refunded to appellant-insurance company.

With the aforesaid observation the appeal and cross objection stands disposed of. The impugned judgment and award of the learned tribunal stands modified to the above extent. No order as to cost.

All connected applications, if any stands disposed of.

Interim orders if any stands vacated.

Let a copy of this order along with the lower court records be sent to the learned tribunal for information.

Urgent photostat certified copy if applied for be supplied to the parties upon compliance of all necessary legal formalities.

(Bivas Pattanayak, J.)