

29.8.2023
SL No.28 & 29
Court No. 551
Ali

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

F.M.A.T. 695 of 2014

**IA No.:CAN/1/2014 (Old No:CAN/5954/2014)
CAN/2/2014 (Old No:CAN/12158/2014)
CAN/3/2017(Old No:CAN/758/2017)**

**The In-charge of Army Vehicle No. 10D184669 W
(12)432CL-1**

Versus

Smt. Reshma Tamang (Thing) & Ors

With

COT 58 of 2015

**IA No.: CAN/1/2023
CAN/2/2023**

Reshma Tamang (Thing) & Ors.

Versus

Union of India

Mr. Jayanta Banerjee,
Mr. Rakib Hussain,
Mr. Sandip Bandyopadhyay
...for the respondents in FMAT 695 of 2014
and appellant in COT 58 of 2015.

Mr. Indrajit Dasgupta,
Ms. Puspita Bhowmick
....for the Union of India.

The instant appeal has been preferred against the judgment and award dated 24th of February, 2011 passed by the learned Motor Accident Claims Tribunal, 1st Court, Siliguri in M.A.C. Case No. 27(11) of 2011 under Section 166 of the Motor Vehicles Act.

One Cross Objection was filed by the claimant being COT 58 of 2015. Both the appeal and the Cross Objection are taken up for hearing and for passing the judgment.

The brief fact of the case is that the Cross Objector-claimant was filed one application before the learned tribunal under Section 166 of the M.V. Act for getting compensation on the ground that the predecessor of the deceased died in a road traffic accident duly rash and negligent driving of the driver of the offending vehicle belong to the Indian Army. The in-charge of Army Vehicle contested the case before the learned tribunal by filling written statement. Evidences were adduced both oral and documentary by the parties. After hearing the parties and after perusing the evidences on record the learned tribunal has awarded compensation amounting to Rs. 7,29,500/- in favour of the claimants.

Being aggrieved by and dissatisfied with the said order the In-charge of Army Vehicle has preferred the instant appeal for setting aside the impugned award; the claimant has preferred the cross objection for enhancement of the award.

It is necessary to elaborate the factual matrix of the accident. It was stated in the claim application that on 6th of September, 2011 at about 3.00 P.M. the victim was driving the vehicle bearing No. WB-74F/9325 (Santro Car) and was coming from Kurseong to Siliguri. On that way at Shalbari near Chill Out Restaurant, the offending Army Vehicle bearing No.10D184669W/(12)432CL-1 coming from

opposite direction caused the accident by recklessly driving the offending vehicle and hitting victim vehicle on the right hand side resulting in serious injuries to the victim. After such accident the victim was shifted to the Medica North Bengal Clinic and succumbed to his injuries on the same day.

The learned advocate for the appellant submits that the rash and negligent driving of the driver of the Army Vehicle was not at all proved before the learned tribunal. He submitted before this court that the PW-1 was the widow of the deceased. Consequently, she was not the eye witnesses but the accident was proved by sole witness i.e. PW-2 to be eye witnesses of the accident. He submitted that the eye witnesses never stated about the manner of the accident and he failed to elaborate whether the offending vehicle was in high speed or not. He also argued by showing the exhibit-A which is proved by the DW-1 i.e. one Army personnel that at the time of accident there was rain consequently the speed of the Army Vehicle was not more than 22-30 KM per hour. He again argued that the accident solely occurs due to high speed rash and negligent driving of the deceased who drive the Santro Car. He again argued that from the postmortem report, the stomach of the deceased contained the smell of Alcohol. On the score, he argued that the rash and negligent driving of the driver of the offending vehicle (Army Vehicle)

was not at all proved in this case. Thus, the impugned award passed by the learned tribunal need be set aside. He also argued on the observation of the learned tribunal regarding the used of Alcohol in the person of a Hilly reason is not at all convincing.

Learned advocate appearing on behalf of the respondent/cross objector submitted before this court that the evidence of PW-2 cannot be ruled out. Moreover, a police case was registered on the basis of the self-same accident and after thorough investigation; police has submitted charge-sheet against the driver of the Army Vehicle. Prima facie, evidence of the charge-sheet cannot be ruled out at this stage. The charge-sheet specifically stated rash and negligent driving of the driver of the Army Vehicle. At this juncture, the rash and negligent driving has been sufficiently proved. Thus, the impugned order cannot be set aside.

Heard the learned advocates perused the materials on record. Learned advocate for the claimant has cited a decision of Hon'ble Supreme Court passed in ***Bimala Devi and Others V. Himachal road Trans. Crpn. And Others.*** The learned advocate for the claimant has cited paragraph 15 of the said judgment which is set out as follows:-

P-15: In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to

be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.

It is the observation of the Hon'ble Supreme Court that a claim case filed under Section 166 of the M.V. Act should be proved on the touchstone of preponderance of probability. In this case the strict proof required in criminal cases which would be the principle of proof of beyond reasonable doubt, cannot be applicable.

In this particular case, there are two ocular witnesses from either side. Claimant produced PW-2 to be an eye witness who was sitting at the time of accident at Chill Out Restaurant which is the vicinity to the spot of accident. On the other hand, the appellant i.e. the in-charge of the Army Vehicle has produced a co-driver of the so-called offending vehicle (Army Vehicle). The DW-2 has produced a document which the document is of findings of a court inquiry initiated and computed by the Army Authority. The document was marked as exhibit-A by the learned

tribunal. The postmortem report of the deceased was also placed in the paper book. After the dissection of stomach of the deceased the smell of Alcohol is found.

Let me considers whether the cases of the either parties is reliable. The PW-2 stated that the accident happened due to rash and negligent driving of the driver of the offending vehicle i.e. the Army Vehicle. It is true that the PW-2 has felt to account whether the Army Vehicle was running in high speed. It further appears that the PW-2 has felt to elaborate that whether there were any other person within the Santro Car. But the police paper i.e. FIR and charge-sheet disclosed that alongwith the deceased there are one person inside the Santro Car namely, Sarjib Chettri who sustained injuries in this accident. The DW-1 submitted that the Santro Car was running in a high speed, the court inquiry of the Army (exhibit-A) disclosed that the manner of the accident that there was rain for which the Army Vehicle was running slowly within 20-30 KM per hour and a cow was sitting over the road at the left side for which to save the cow the Army Vehicle appear in the middle of the road. At the time, the Santro Vehicle which was coming in a high speed dashed the Army Vehicle.

In considering the two versions of the two persons i.e. DW-1 and PW-2. It appears to me that the PW-2 only stated about a factum of accident. The nature and manner of accident was not specifically

stated by PW-2. He also failed to elaborate the presence of co-passenger in the Santro Car; If he had been present in the spot of accident, he must have noticed how many persons are injured in such accident. It is the fact that local persons came thereby just after the accident and took the two injured persons to the hospital. FIR was also stated the fact but surprisingly PW-2 failed to state such fact. Considering the same it appears to me that the evidence of DW-1 is more convincing regarding the manner of accident. However, the involvement of the Army Vehicle and the Santro Car is no doubt and the court inquiry of the military personnel is sufficient to demonstrate the fact that the Army Vehicle had to proceed to the middle of the road due to the presence of the cow over the road. The police papers i.e. the charge-sheet also disclosed the responsibility and negligence of the driver of the Army Vehicle. Now the presence of Alcohol is found in the stomach of the deceased. Learned tribunal is of opinion that in the hilly region the persons are prone to have to Alcohol due to such cold weather. However, the fact of drinking Alcohol during the driving of the deceased is sufficiently proved. At this juncture, I find that the accident happened due to the negligence of both the drivers of the offending vehicle as well as the deceased. Considering the fact that there were rain and the speed of the Army Vehicle was not more than

20-30 KM per hour. But also it is the fact that the Army Vehicle was proceeded to the middle of the road at the time of accident for which the Santro Vehicle dashed at the right side and the driver i.e. the deceased died due to such accident. The driver of the Army Vehicle was negligent because, he did not stop the vehicle after observing a Cow is sitting over the road and negligently proceeded to the right side of the road, instead he had on better view of approaching Santro Car. In my view, the both the vehicles are jointly negligible for the said accident.

In considering the percentage of negligence in this case, in my view, the driver of the Military Vehicle is responsible for 60% and driver of the Santro Car i.e. the deceased himself was responsible for 40% for the same accident.

In considering the grounds in the cross appeal it is the submission of the learned advocate for the claimants that the income of the deceased was stated to be Rs.13,232/-per month for the occupation of tour and travel business to substantiate such plea one officer of Income Tax Department, Siliguri appeared and filed of Income Tax Return receiving Register dated 14.07.2011. The Register was marked as Exhibit-11. Learned advocate for the claimants submitted before this court that the learned tribunal has passed the impugned award ignoring the value of Exhibit-11 and considered the income of the deceased

Rs.6,000/- per month without any valid proof. The income of the deceased was calculated by the learned tribunal on the basis of assumption and presumption in this particular case. The Exhibit-11 is the glaring evidence on the basis of which the income of the deceased can easily be calculated to be Rs. 1,58,790/- per annum.

I have perused the Exhibit-11 placed in the paper book. It appears to me that the Exhibit-11 is the return receiving Register of the ITO Ward- No.3(1) Siliguri. The return shows that the deceased has submitted the return on 14.7.2011 stating his annual income to be Rs.1,58,790/-. The return was submitted prior to the two months of the accident. The return was submitted by the deceased himself. Thus, in this juncture, the probative value of the Exhibit-11 cannot be denied. The learned tribunal is of view that the business of tour and travel of a particular season may not run in every months very smoothly and there may have some dry season but the instant statement is for the annual income of the deceased; so the good season as well as dull season cannot come into play. Thus, in my view, the observation of the learned tribunal regarding the average monthly income of the deceased Rs.6,000/- per month is erroneous. The learned tribunal should have considered the Income Tax statement filed by the deceased himself prior to the accident. The

deceased would have no interest to file the Income Tax and at the time when there were no chance of getting any money in lieu of showing such return. Thus, in this case, I think it necessary that the income of the deceased should be calculated annually Rs. 1,58,000/-.

The age of the deceased was stated in the postmortem report to be 42 years and the age of the deceased according to the Voter Identity Card the age of the deceased 40 years at the time of accident. Learned advocate for the claimant has cited some decisions passed in ***Sri Paritosh Saha & Ors. Vs. The Oriental Insurance Co. Ltd. and Anr*** also the judgment of a Co-ordinate Bench of this Court passed in FMAT 1197 of 2016. This court also in several occasions adopted the same view passed by the division Bench of this court on the earlier occasion. It is the view of this court that the Voter Identity Card of a person was prepared adopting a proper procedure by the government Officers. The age of the person was calculated either by self-assessment or by view of some document at the time of initiation of the proceeding of preparation of Voter Identity Card. There is no chance to manipulate such date as it is general rule that a person in the Voter Identity Card shall have stated true date of birth. On the other hand, when a dead body appears before the autopsy Doctors, the Doctors usually and mechanically stated

the name of age of the deceased as they are placed in the record of the Hospital. At the time of the age of the deceased was calculated approximately. So in this case, it is better to observe finding regarding the age of the deceased on the basis of Voter Identity Card. According to the Voter Identity Card, the age of the deceased was 40 years. So in this case, the applicable multiplier would be 15. Considering the dependency of this case it appears that there are four claimants at the time of filing the claim application. The claimant No. 4 is the father of the deceased, the father is appeared to be in class-II legal heirs of the deceased and claimant Nos. 1, 2 & 3 are the class I according to Section 8 of the Hindu Succession Act. Thus, in my view, the three claimants are there and deduction towards personal expenses of the deceased would be 1/3. Considering the age of the deceased at the time of accident and also considering the fact that the deceased self-employed, according to the view of the Hon'ble Supreme Court passed in ***Pranay Sethi***, the claimants are entitled to the future prospects which would be added to be 25% of his establish income.

The present claimants are the wife, son and daughter of the deceased so they are entitled to the general damages to the tune of Rs.70,000/-.

Thus, the just and proper compensation of this case, it is necessary to recast as follows:-

Calculation of compensation

1. Yearly Income be assessed as.....Rs.1,58,000/-
2. Add: Future prospect @ 25%.....Rs.39,500/-
Rs. 1,97,500/-
3. 1/3rd deduction on account
of personal expenses..... Rs.65,833/-
Rs. 1,31,667/-
4. Multiplier 15
(Rs.1,31,667/-X 15).....Rs.19,74,990/-
6. Add: General Damages.....Rs.40,000/-
Loss of Estate.....Rs.15,000/-
Loss of Funeral Expenses.....Rs.15,000/-
Total...Rs. 20,44,990/-

So after calculation the total assessment comes to Rs. 20,44,990/-the in-charge of the Army Vehicle is responsible for 60% of such compensation so the 60% of the said amount comes to Rs. 12,26,994/- it appears that at the time of filing the instant appeal the appellant the in-charge of Army Vehicle has deposited the statutory amount of Rs.25,000/- vide OD Challan No. 1514 OD dated 22nd September of 2015 the said amount must have carried some interest. The appellant in-charge, of Army Vehicle is directed to deposit the rest amount of **Rs.12,01,994/-** alongwith interest @ 6% per annum from the date of filing of the claim application i.e. from 5th November, 2011 within 24th of November, 2023 vide three equal account payee cheques in the name of the claimants with the office of the learned Registrar General, High Court,

Calcutta. The cheque in the name of the minor claimant should have received by claimant No. 1 being her natural guardian mother. The claimant No. 1 is directed to deposit the said cheque in a Nationalized Bank in a Fixed Deposit Scheme in the name of the minor so the amount may be utilized after attaining her majority. On such deposit the claimants are at liberty to receive the same from the office of learned Registrar General, High Court, Calcutta on usual terms and conditions.

The instant FMAT 695 of 2014 alongwith COT 58 of 2015 are disposed of.

All connected applications, if any, stand disposed of.

Interim orders, if any, stand vacated.

Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)