02.08.2023
Ct. no.3
Sn/23

IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI

FMA 15 of 2023

The National Insurance Company Limited
Vs.
Smt. Swarnabala Champramary & Ors.

Mr. Hirak Barman
...for the appellant-insurance company

Mr. Gobinda Saha,
Mr. Tamal Kumar Sen
...for the respondents-claimants

By order dated 12th July, 2023, lower court records were called for. It is found that the lower courts records have not yet been received.

Mr. Hirak Barman, learned advocate for the appellant-insurance company submits that though direction was passed for calling for of lower court records but since all the relevant papers are annexed to the paper book, calling for of lower court records may be dispensed with.

Mr. Gobinda Saha, learned advocate for the claimants does not raise any objection.

Accordingly, calling for of lower court records stands dispensed with.

This appeal is preferred against the judgment and award dated 5th January, 2023 passed by the learned Judge, Motor Accident Claims Tribunal, 1st Court, Jalpaiguri in MAC case No. 40 of 2018 granting compensation of Rs.

87,00,928/- in favour of claimants under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 18th November, 2017 at about 11:00 p.m. while the victim was proceeding to his residence from Falakata by riding his motorcycle, at that time, the offending vehicle bearing registration no. WB-74X/9260 coming from opposite direction dashed the motorcycle of the victim, as a result of which the victim sustained grievous injuries on his person and died on the spot. On account of sudden demise of the deceased, the claimants being the widow and mother of the deceased filed application for compensation of Rs. 60,00,000/- under Section 166 of the Motor Vehicles Act, 1988.

The claimants in order to establish their case examined three witnesses and produced documents, which have been marked as **Exhibits 1** to **18** respectively.

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

By order dated 12th July, 2023, service of notice of appeal upon the respondent no.3, owner of the offending vehicle, has been dispensed with since he did not contest the claim application.

Upon considering the materials on record and evidence adduced on behalf of the respective parties, the learned Tribunal granted compensation of Rs. 87,00,928/- 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 of the learned Tribunal, the insurance company has preferred the present appeal.

Mr. Hirak Barman, learned advocate for the appellant-insurance company submits that involvement of the alleged vehicle in the facts and circumstances of this case is very much doubtful. The registration number of the alleged vehicle was never mentioned in the FIR and by way of subsequent General Diary Entry the registration number of alleged vehicle was disclosed to the police authorities. He further indicates that at the time of disclosing the registration number of the alleged vehicle, the maker of the FIR did not disclose the source from which he came to learn the involvement of the alleged vehicle and such fact has been supported by OPW-1, who is the investigating officer of the criminal case. The evidence on record clearly establishes that the alleged vehicle was implanted and false case has been set up to support a claim for compensation. Therefore, the claim of the claimants should be dismissed. To buttress his contention, he relies on the decision of the Hon'ble Supreme Court passed in ***Anil and Other versus New India Assurance Co. Ltd.*** reported in ***2018 (1) T.A.C. 355 (S.C.)***. Further he submits that as per FIR and the evidence on record, there was head-on-collision between the motorcycle driven by the victim and the alleged vehicle and thus the victim was guilty of contributory negligence. For such reasons of contributory negligence, the compensation amount should be apportioned. Moreover, he submits that since at the time of accident the victim was 30 years of age, the learned Tribunal ought to have adopted multiplier of 17 instead of 18, in view of the decision of Hon'ble Supreme Court passed in ***Sarla Verma versus Delhi Transport Corporation*** reported in ***2009 ACJ 1298***. In the light of his aforesaid submissions, he prays for setting aside and/or modification of the impugned judgment and award passed by the learned Tribunal.

In reply to the contention raised on behalf of the insurance company, Mr. Gobinda Saha, learned advocate for the respondent nos.1 and 2 (claimants) submits that the insurance company has not made out any specific case in the written statement challenging the involvement of the vehicle. Be that as it may, no cogent evidence of the driver or owner of the vehicle has been produced to primarily establish the non-involvement of the vehicle in the said accident and therefore, the argument advanced by the appellant-insurance company with regard to non-involvement of the offending vehicle is not at all sustainable. To buttress his contentions, he relies upon the following decisions:

i. ***New India Assurance Co. Ltd. versus Mita Samanta and Others*** reported in ***2010 (1) T.A.C. 343 (Cal.)*** and
ii. ***Ashalata Suryakant Patil and Others versus New India Assurance Company Ltd.*** reported in ***2023 (2) T.A.C. 725 (S.C.)***.

Further he submits no case of contributory negligence has been made out by the insurance company nor any evidence has been led to that effect, hence such argument has no legs to stand in the eye of law. He concedes that the multiplier to be adopted in this case should be 17 instead of 18 adopted by the learned Tribunal.

Having heard the learned advocates for the respective parties, the following issues have fallen for consideration. *Firstly,* whether the offending vehicle was involved in the accident. *Secondly*, whether the victim was guilty of contributory negligence and *lastly*, whether the multiplier should be 17 instead of 18.

With regard to the first issue, it is found that the registration number of the offending vehicle was not mentioned in the FIR at the time of lodging of the same. Subsequent thereto, after seven days the informant lodged General Diary being G.D.E. 990 dated 25th November, 2017 wherein the registration number of the offending vehicle was disclosed. Mr. Barman, learned advocate for the appellant-insurance company has raised the issue that since the registration number of the alleged vehicle was not mentioned in the FIR, the involvement of the vehicle is doubtful. In order to ascertain the issue raised challenging involvement of the vehicle, let me examine the materials on record.

The claimants in order to establish the involvement of the vehicle have examined one Sanjib Mondal (PW2), who deposed that he is an eyewitness to the occurrence. PW2 has stated of involvement of the offending vehicle in the said accident. Such facts stated by PW2 has remained unchallenged in the cross-examination. There are also no contrary evidence brought by insurance company challenging the evidence of eyewitness. The presence of PW2 near the scene of occurrence on the relevant date has also not been disputed.

Mr. Barman, learned advocate for the insurance company has pressed into service that since PW2 is not a charge-sheeted witness, hence, his evidence cannot be accepted. There is no hard and fast rule that only charge-sheeted witness can adduce the evidence in a claim case. The approach of the Court in claim cases is to analyse the materials on record for deciding whether the version of the claimant is more likely than not true. The insurance company adduced evidence of the investigating officer (OPW1) who has stated that in the FIR registration number of the vehicle was not mentioned but subsequent thereto the informant has disclosed the registration number of the vehicle. He also deposed that the complainant did not disclose the source from which he got to know of the involvement of the vehicle. It is true that the complainant has not disclosed the source of his knowledge of involvement of the offending vehicle. Be that as it may, one cannot be oblivious to the fact that upon thorough investigation the investigating agency has submitted charge-sheet against driver of the offending vehicle. That apart, the unchallenged evidence of PW2 shows involvement of the offending vehicle. Further the insurance company has not adduced any evidence of owner or driver of the offending vehicle to establish non-involvement of the 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 *Mita Samanta (supra)* 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."*

In *Ashalata Suryakant Patil (supra)*, Hon'ble Supreme Court has observed as follows:

> *"**5.** The MACT having taken note of this aspect and also having taken into consideration that the respondent No. 3 who was the driver of the vehicle in question, though was notified had not appeared. Further the Insurance Company also did not take any steps to secure and examine the said driver with regard to the accident since his evidence could have clinched the issue."*

In *Anil (supra)*, it was noted that no post-mortem was conducted. There were three persons in the tractor, all of whom had known that the driver by his negligent act run over the deceased but they did not lodge complaint which was most natural. Considering such circumstances, the High Court reversed the award granted by the learned Tribunal. The order of High Court was affirmed in appeal before the Hon'ble Supreme Court. The facts involved in the cited decision is quite dissimilar to the case at hand.

Bearing in mind the aforesaid observation of this Court as well as 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 the issue 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.

So far as the second issue relating to contributory negligence is concerned, it is found that the insurance company has pleaded that the victim was negligent in the said accident. However, no evidence in support of such plea of contributory negligence has been adduced by the insurance company. Mr. Barman, learned advocate for the appellant-insurance company, strenuously argued that since there was head-on-collision, hence it amounted to contributory negligence and there should be apportionment of compensation. PW2 eyewitness to the occurrence has categorically stated in his evidence of negligence of the driver of the offending vehicle. The charge-sheet corroborates negligence of the driver of the offending vehicle. Thus, only head-on-collision of vehicle does not *ipso facto* establish that the victim was guilty of contributory negligence. 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)].*** Thus, the argument of contributory negligence of the victim as well as for apportionment falls short of merit.

Coming to the last issue relating to multiplier, it is found that the learned Tribunal has adopted multiplier of 18. Admittedly at the time of accident, the victim was 30 years of age. Following the observation of Hon'ble Supreme Court in *Sarla Verma (supra)*, the multiplier should be 17 instead of 18 adopted by the learned Tribunal.

The other factors have not been challenged in this appeal.

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

Calculation of Compensation

Monthly income	Rs.39,958/-
Annual income (Rs.39,958/- x 12)	Rs.4,79,496/-
Add: 50% of the annual income towards future prospect	Rs.2,39,748/-

	Rs.7,19,244/-
Deduction: 1/3rd towards personal and living expenses	Rs.2,39,748/-
	Rs.4,79,496/-
Multiplier 17 (Rs.4,79,496/- x 17)	Rs.81,51,432/-
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.82,21,432/-

Thus, the claimants are entitled to compensation of Rs. 82,21,432/- together with interest @ 6% per annum from the date of filing of the claim application (11.01.2018) till payment.

The appellant-insurance company is directed to deposit the aforesaid amount of compensation together with interest by way of cheque before the learned Registrar, Circuit Bench at Jalpaiguri, within a period of six weeks from date.

The respondents-claimants are directed to deposit *ad valorem* Court fees on the amount of compensation assessed, if not already paid.

Upon deposit of the aforesaid amount of compensation and interest as indicated above, the learned Registrar, Circuit Bench at Jalpaiguri shall release the aforesaid amount in favour of the respondents-claimants in equal proportion, after making payment of Rs.40,000/- in favour of the respondent no.2, widow of the deceased towards spousal consortium, upon satisfaction of their identity and payment of *ad valorem* court fees, if not already paid.

With the aforesaid observations, the appeal stands disposed of. The impugned judgment and award 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.

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

(Bivas Pattanayak, J.)