CALCUTTA HIGH COURT CIRCUIT BENCH
AT JALPAIGURI
(Civil Appellate Jurisdiction)
<u>Appellate Side</u>

Present:

The Hon'ble Justice Ajay Kumar Gupta

FMAT (MV) 38 of 2022

Hamida Khatun

Vs.

Iffco-tokio General Insurance Co. Ltd. & Anr.

WITH

FMAT (MV) 14 of 2023

Iffco-tokio General Insurance Co. Ltd. & Anr.

Vs

Hamida Khatun

For the Appellant
in FMAT (MV) 38 of 2022 And
For the Respondents
in FMAT (MV) 14 of 2023 : Mr. Gobinda Saha, Adv.
Mr. Tamal Kumar Sen, Adv.
Ms. Priyanka Dey, Adv.
Mr. Milan Ch. Laskar, Adv.
Mr. Sanghai Chowdhury, Adv.

For the Respondents
in FMAT (MV) 38 of 2022 And
For the Appellant
in FMAT (MV) 14 of 2023 : Mr. Hirak Barman, Adv.

Heard on : 11.10.2023

Judgment on : 16.10.2023

Ajay Kumar Gupta, J.

1. Both counter appeals are taken up together for effective and proper disposal by a common judgment since the Insurance company as well as the claimant filed two separate appeals against the same judgment and award dated 31/10/2022 passed by the learned Additional District Judge-cum- Motor Accident Claims Tribunal, 3rd (Special) Court, Jalpaiguri in M.A.C. Case No. 375 of 2016, thereby the learned Tribunal awarded a sum of Rs. 38, 32,270/- together with interest @ 6% per annum from the date of filing of the claim application i.e. 18.11.2016 till realization in an application filed under Section 166 of the Motor Vehicles Act for compensation on the death of victim due to motor traffic accident.

2. Sans otiose details, the fact of the instant case to the effect that on 21/10/2016 at about 10.30 p.m. when the victim Kariul Haque was returning towards his house by one motorcycle bearing registration no. WB-72K-8617 at that time near Ghughudanga Bazar under P.S. Kotwali, District Jalpaiguri one another vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) was coming in high speed and also in rash and negligent manner suddenly dashed the victim's Motor cycle from his backside as a result victim Kariul Haque fell down and sustained grievous injuries on his person. He was removed to Jalpaiguri Sadar Hospital and there from victim was shifted to Dr. Malay's Nursing Home, Siliguri. Victim succumbed to his injuries on 27.10.2016.

3. Claimant Hamida Khatun being mother of the victim filed the claim application before the Ld. Tribunal for compensation impleading the Insurance Company as well as the owner of the offending vehicle as respondents/opposite parties. Respondent no. 1/Insurance Company duly appeared by filing written statement denying all material facts and allegations. It is further denied that offending vehicle was involved in the said accident and further contended that it was planted subsequently only to get compensation as such prayed for dismissal of the case with cost. Respondent No. 2/Owner of the offending vehicle filed his written statement denying fault and negligence on the part of the driver of the offending vehicle.

4. To prove her case the claimant has examined herself as P.W. 1 and one eye witness Mukul Haque as P.W. 2 and further filed several documents such as certified copy of formal FIR, certified copy of FIR, copy of GDE No. 221, dated 11.11.2016, certified copy of seizure lists, certified copy of final report (charge sheet), certified true copy of postmortem report, Xerox copy of insurance policy, Xerox copy of driving licence standing in the name of Shyamal Das, salary certificate of the deceased marked as Exhibits 1 to 9 respectively. However, the Insurance Company neither adduced any oral evidence nor produced any document to contradict the case of the petitioner.

5. The Ld. Tribunal after scanning and assessing the evidence adduced by the party and documents filed by the petitioner, finally held that the claimant has been able to prove her case by cogent evidence that the offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) was involved and due to rash and negligent driving of the driver, the said accident occurred on 21/10/2016. The Learned Tribunal further relied the evidence of eye witness as well as document i.e. FIR, charge sheet, PM Report for arriving at conclusion, the victim Kariul Haque suffered severe injuries and subsequently died in Dr. Malay's Nursing Home, Siliguri on 27.10.2016 due to the injuries suffered by him in a motor traffic accident, which was occurred on 21.10.2016. The offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) was very much involved in the said accident and due to the fault and negligent driving of driver of the offending vehicle, the victim died and finally awarded compensation as aforesaid.

6. Both the claimant and the Insurance Company feeling aggrieved and dissatisfied with the aforesaid judgment and award dated 31/10/2022 filed two cross-appeals separately.

7. First appeal has been filed by the claimant/appellant Hamida Khatun being FMAT (MV) No. 38 of 2022 seeking for enhancement of the compensation amount and another appeal has been filed by the Insurance Company/ appellant being FMAT (MV) 14 of 2023 against the aforesaid same judgment and award dated 31/10/2022, praying for setting aside the judgement and award as aforesaid on the grounds as set forth in the Memorandum of appeal.

8. At the time of argument, learned advocate appearing on behalf of the claimant/petitioner submitted two fold issues:-

Firstly, the Learned Tribunal has wrongly assessed the actual income of the victim by deducting Rs. 1,264/- as HRA, Rs. 3,450/- as risk allowance and Rs. 2,961/- as RN and came to conclusion that the victim's salary was Rs. 24,590/- at the time of accident though it is settled principle of law that only income tax and professional tax could be deducted from the net salary. He also relied a judgment reported **National Insurance Company Ltd. Vs. Indira Srivastav and Others reported in 2008 ACJ 614 ; (2008) TAC 424(SC) ; (2008) ACC 162 (SC)** to support his contention that the actual salary would be calculated only after deduction of Income and professional tax.

Secondly, interest ought to be awarded @ 9% per annum over the assessed compensation amount from the date of filing of the claim application on and from 18.11.2016 till the date of realization.

9. Ld. advocate further submitted no awarded compensation amount has been paid by the Insurance Company to the claimant till date.

10. Per contra, learned advocate appearing on behalf of the Insurance Company vehemently argued and submitted that the learned Court below erred in finding that the offending vehicle was involved in the said accident. Actually, offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) has been subsequently planted for getting compensation from the insurance company. Actually alleged offending vehicle was not at all involved in the said accident. Initially, FIR was lodged without mentioning the number of offending vehicle and manner of accident was stated differently but subsequently, another FIR lodged implicating the offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) in connivance with the owner of the offending vehicle after delay of eight days.

11. It is disclosed by the complainant in the second FIR that he came to know about the number of offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) from another person But he has not examined by the claimant in the instant case to prove that the offending vehicle was involved in the said accident. During investigation his name was also not transpires. No cogent evidence brought before the Ld. Tribunal to prove that the offending vehicle was involved in the said accident. When the vehicle was not involved, question of payment of compensation by the insurance company does not arise. Eye witness examined as P.W. 2 brought by the claimant is not at all reliable because it is the specific case of the claimant that complainant came to know about the number of the vehicle from another person but claimant failed to bring him to prove the case. There was 8 days delay in lodging second FIR but no such delay has been explained. Accordingly, the learned

Tribunal ought to have discarded the second FIR, which was subsequently lodged after delay of eight days and even no statement of eye witness were recorded by the I.O during investigation. So eye witness brought before the Ld. Tribunal is not reliable. In such a situation, this case is totally based on practicing fraud upon the learned Tribunal. Accordingly, the judgment and award dated 31/10/2022 is required to be set aside.

12. Ld. Advocate further raised another issue that the victim was a bachelor at the time of accident and her mother filed this case as such she is not entitled to get compensation under the head of consortium.

13. Heard submissions advanced by the parties and on perusal of the entire record meticulously, it appears that two FIRS were lodged by Masabul Alam and in the first FIR, there was no reflection about the number of the offending vehicle. But subsequently after delay of eight days, another FIR was lodged. In the said FIR, the number of the offending vehicle as well as name from whom he got information regarding involvement of the vehicle was mentioned. At the time of trial, the claimant has examined herself as P.W. 1 and one eye witness, namely Mukul Haque, as P.W. 2 and produced several documents to support his case including charge sheet and P.M report. The Ld. Tribunal came to conclusion that the victim Kariul Haque died in a road traffic accident on 27.10.2016 within the jurisdiction of Kotwali police station, District Jalpaiguri. The P.W. 1, claimant and P.W. 2 being eye witness proved the rash and negligent driving on the part of the driver of the offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift).

14. P.W. 2 specifically narrated in his evidence that on 21.10.2016 at about 10.30 pm while he was returned back to his residence from Ghughudanga Bazar under P.S. Kotwali, District Jalpaiguri one vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) which was coming in high speed from the side of Jalpaiguri and going towards Haldi Bari dashed one motorcycle bearing registration no. WB-72K-8617 from the back side as a result the rider of the said motorcycle hit his motorcycle against a tree and sustained severe injuries in his person. Subsequently, he came to learn that the said deceased died on 27.10.2016. He was crossexamined by the respondent but failed to rebut his evidence rather he stated in cross-examination that the distance between Ghughudanga Bazar and his house is about 10 Kms. In the cross-examination, only suggestions were put to P.W. 1 and P.W. 2. Apart from that, no contradicted statements transpire. Insurance Company failed to contradict/shake their statement. In this case charge sheet has been filed and during investigation, the I.O. found prima facie case against the driver of the offending vehicle bearing registration no. WB-74AH-4598 (Maruti Swift) and started a case under Section 279/304A IPC. Autopsy doctor opined that the death was due to ante mortem injuries as noted by the P.M. report.

15. It reveals from the oral evidence as well as documents that there is no doubt about the involvement of the vehicle and its rash and negligent driving of the driver of the vehicle, the accident was taken place and finally the victim died due to injuries suffered by him. In addition, complainant who lodged the FIR was not an eye witness, so question of giving or not giving details of the vehicle and manner of accident in 1st FIR does not arise. He came to know about the manner of accident and number of vehicle involved from other person subsequently and inform the same to the police station. It is trite law that the FIR is not an encyclopedia. So, ground raised by the learned advocate appearing on behalf of the Insurance Company is feeble and without justification.

16. So far as the salary of the victim is concerned, it appears from the record that the victim has exhibited the pay slip issued by Accounts Officer, G.C, CRPF, Bantalab (Jammu) as he used to work as CT/GD under Central Reserve Police Force and the said certificate was marked as Exhibit 9 without objection from the side of the Insurance Company. So there is no difficulty in taking into account that the salary certificate has been proved by the claimant. That apart, Salary certificate issued by the Government of India and it is not disputed that he was not a Government employee. It reveals from the salary certificate for the month of October, 2016 that his gross salary was Rs. 29,325/- after deduction of Rs. 2942/- towards GPF/DCES/RDF/GPIS/CWF/WF/GIS and his Net salary was shown as 32,265/-. It is settled principle of law that only professional tax and income tax would be deducted from the gross salary of the victim. This Court also relies judgments reported in

i). 2008 (1) TAC 428 (SC)--- National Insurance Co. Ltd. vs. Indira Srivastava & Ors.

The Hon'ble Supreme Court held in this case as inter alia:

"*the Tribunal can make only statutory deductions such as Income Tax and professional tax and any other contribution, which is not repayable by the employer, from the salary of the deceased person while determining the monthly income for computing the dependency compensation. Any contribution made by the employee during his life time, form part of the salary and they should be included in the monthly income, while computing the dependency compensation*".

17. In that event, the net salary would come to Rs. 32,065/- only after deduction of Rs.200/- towards Professional tax because the learned Tribunal has erred in deducting Rs. 1264/- as HRA, Rs. 3450/- risk allowance and Rs. 2961/- RN. Those deductions would not be deducted from the salary. Apart from that, the victim was not come under taxable income. So question of deduction of income tax does not arise at all. The victim worked under Central Reserve Police Force. No any deduction made by the department towards Income tax. As per submission made by the Ld. Advocate appearing on behalf of the Petitioner his professional tax Rs.200/- per month may be deducted. Deduction towards professional tax if made his income can be safely accepted as Rs. 32,065/- per month.

18. With regards to the compensation awarded towards the head of consortium to the mother should not be allowed by the Ld. Tribunal as raised by the learned advocate appearing on behalf of the respondent, this Court found no convincing submission made by learned advocate for the Insurance company because the learned Tribunal has assessed Rs. 40,000/- as Filial consortium towards parents in respect of compensation under the head of loss of love, affection, care and companion of the deceased child on the basis of judgment reported in **2018 (4) TAC 345 (SC)**. Wherein the Hon'ble Supreme Court has pleased to hold that the parents are also entitled to get filial consortium if they lost their children in case of accidental death. Here the claimant is a mother of the victim. The Hon'ble Apex Court further held that an accident leading to death of child caused great shock and agony to the parents and the family of the deceased during their lifetime. The children play a vitol role towards love and affection, companion in the family. Accordingly, this Court does not convince to interfere with the finding of the learned Tribunal regarding filial consortium. In my considered view the mother of the victim child is also entitle to get filial consortium.

Thus Ld. Tribunal rightly allowed compensation, which needs no interference by this court.

19. In the light of above discussions, the claimant is entitled to get compensation from the insurance company because on the date of accident the Insurance policy was valid and respondent did not raise any disputes with regard to the validity of Insurance policy of the offending vehicle No. WB-74AH-4598 (Maruti Swift). Victim age was between 26 to 30 years as such actual multiplier would be 17.

20. Keeping in mind of the above observation, the calculation of compensation is assessed as follows:

CALCULATION OF COMPENSATION

Monthly Income	Rs. 32,065/-
Annual Income (Rs. 32,065/- X 12)	Rs. 3,84,780/-
Add: Future prospect @ 50 % of the income of victim	Rs. 1,92,390/-
Total Income	Rs. 5,77,170/-

Less: deduction 1/2 of the total Annual income (towards personal and living expenses)	Rs. 2,88,585/-
Total income after deduction	Rs. 2,88,585/-
Total loss of Dependency Rs. 2,88,585/- X 17 (Multiplier)	Rs. 49,05,945/-
Add: Loss of estate	Rs. 15, 000/-
Add: Funereal Expenses	Rs. 15, 000/-
Add: Loss of filial consortium	Rs. 40, 000/-
Total compensation	Rs. 49,75,945/-

21. Thus, the appellant/claimant is entitled to get total compensation amount comes to Rs. 49, 75,945/= (Rupees forty nine lakhs seventy five thousand nine hundred forty five) only which shall carry interest of 6% per annum from the date of filing of the claim application i.e. from 18.11.2016 till final payment.

22. The respondent no. 1-Insurance Company is directed to deposit the total compensation amount i.e. Rs. 49,75,945/= along with the interest as indicated above by way of cheque before the learned Additional District Judge-cum- Motor Accident Claims Tribunal, 3rd (Special) Court, Jalpaiguri within a period of eight weeks from date as it has been informed that no any compensation amount received by the claimant till date.

23. Learned Additional District Judge-cum- Motor Accident Claims Tribunal, 3rd (Special) Court, Jalpaiguri upon deposit of the amount and interest as indicated above, shall release cheque in favour of the appellant/claimant upon proper identification and subject to verification of the payment of ad valorem Court fees on the awarded amount, if not already paid.

24. With the above observations, the appeal being **FMAT (MV) No. 38 of 2022** stands allowed and disposed of and **FMAT (MV) No. 14 of 2023** stands dismissed

25. There shall be no order as to costs.

26. The impugned judgment and award of the learned Tribunal dated 31.10.2022 is modified to the above extent.

27. All connected applications, if any, stand disposed of. Interim order, if any, stands vacated.

28. Let copy of this judgment and order along with lower court records, if received, be forwarded to the learned Tribunal for information.

29. Urgent photostat copy of this Judgment and Order be given to the parties upon compliance of all legal formalities.

[AJAY KUMAR GUPTA, J.]

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