

02.02.2024
SL No.21
Court No. 551
Ali

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

F.M.A. 822 of 2018

**Dipika Gupta
Versus**

**The Deputy Manager (T.P. Hub)
New India Assurance Co. Ltd. & Anr.**

Mr. Ashique Mondal
...for the appellant-claimant.

Mr. Sanjay Paul,
Ms. Jaita Ghosh
....for the respondent-insurance Co.

The instant appeal has been preferred against the judgment and award dated 14th July, 2017 passed by the learned Judge, Motor Accident Claims Tribunal, Additional District Judge, fast Track, 5th Court, Alipore, 24-Parganas (South), in MAC Case No. 03 of 2014.

The brief facts of the case is that the present appellant being a claimant proceeded before the learned tribunal under Section 166 of the M.V. Act for getting compensation on the ground that she suffered bodily injuries due to rash and negligent driving of the driver of the offending vehicle on 09.09.2013 at about 11:15 hrs while she was walking over the pavement at Swinhoe Street, Kolkata.

The claim case was contested by the Insurance Company by filing written statement.

After hearing the parties the learned tribunal has held that the claimant/appellant had a contributory negligence of 50% of the said accident and by such accident her functional disability is 25%. On the basis of such observation and also on the basis of notional income of the claimant to be Rs.3,000/- per month. The learned tribunal has awarded a sum of Rs. 1,11,500/-towards the compensation.

Being aggrieved by and dissatisfied with the said award the present appeal has been preferred by the claimant for enhancement of the award.

Learned advocate, Mr. Mondal appearing on behalf of the appellant submits that the observation of the learned tribunal regarding contributory negligence on the part of the claimant is erroneous. There is no direct evidence to such contributory negligence. The learned tribunal is of erroneous view that the pleadings and the proofs of the claimant is not at par regarding the manner of accident. So, he decided that, the accident must have occurred due to the contributory negligence of the present appellant.

He argued that the learned tribunal has misread and misguided himself to assess the evidences on record and he could not appreciate the facts and circumstances of this case. He argued that there are specific pleadings that the present

appellant was walking at the footpath of the Swinhoe Street and when he reached near Cornfield Road, at the time, the driver of the offending vehicle who driving the offending vehicle in a rash and negligent manner dashed the victim, whereby the victim sustained severe injuries. During examination-in-chief of PW-1, she corroborated her entire facts of pleadings and during cross-examination her credibility was not shaken. He further argued that the police has started a specific case on the basis of the said accident being Gariahat P.S. Case No. 465 dated 09.09.2013. The investigation of the police is ended in charge sheet accusing the driver of the offending vehicle to be sole responsible for the accident. On the basis of entire facts, the learned tribunal has erroneously fixed the contributory negligence of 50% on behalf of the present appellant, which is erroneous and improper.

Learned advocate appearing on behalf of the Insurance Company submits that the learned tribunal has correctly gone through the evidences on record and after perusing the pleadings at paragraph 23 of the claim application as well as the evidence of PW-1, the learned tribunal has correctly came to a conclusion that the accident must have occurred due to fault of the present victim. He further argued that there are no eye witnesses or independent witness before the learned tribunal to

support the case of the present appellant. The claimant is interested witness who must have adduced in her favour to get the more compensation from the tribunal. So, the evidence of PW-1 cannot be believed. Learned tribunal has correctly assessed the contributory negligence on the part of the appellant to 50%.

Heard the learned advocate perused the materials on records. The fact goes to show that the victim was walking along the footpath of Swinhoe Street and the accident happened at the crossing of Swinhoe Street and cornfield Road. The fact also suggests that, at the time of accident the victim was not at the footpath. The appellant must have appeared on the crossing of the road and at the time when accident happened. If the same fact be admitted, then also the evidence of rash and negligent driving of the driver of the offending vehicle cannot be disbelieved. To prove the rash and negligent driving of the driver; the claimant has filed the claim application and it was corroborated by her oral evidence as PW-1. The police also submitted the final report containing, inter alia, that the driver of the offending vehicle was driving the vehicle in a rash and negligent manner.

Mr. Paul, learned advocate appearing on behalf of the Insurance Company indicated that the investigation of the police cannot be believed as on

the I.O. has noted that the offending vehicle to be a public bus but it is actually, a school bus.

However, the wrong mentioning of the employment of the bus does not disprove the entire facts of the rash and negligent driving. There is no direct evidence in favour of the driver of the offending vehicle that he was running the vehicle smoothly or not in a rash and negligent manner. But on the other hand, the pleadings and proof of rash and negligent driving of the driver of the offending vehicle has been well produced before the learned tribunal. The accident must have occurred at the crossing of two roads but to prove the negligence on the part of the appellant; it has to be proved that the she had actually suddenly appeared on the crossing violating the traffic signal. No such direct evidence is there to implicate the appellant in this case to be responsible for the accident. On that score, the observation of the learned tribunal appears to be not justified regarding assessing the contributory negligence on the part of the victim.

In considering the disability of this case it appears that the victim/appellant did not file any disability certificate of Government Hospital before the learned tribunal but one Dr., namely, Prasanta Kumar Mondal deposed before the learned tribunal as PW-2 who examined the disability of the victim and assessed to be 35%. The learned tribunal has

assessed the functional disability to be 25%. I have perused the evidence of PW-2 as well as the disability certificate issued by the Doctor.

In considering the ratio laid down by the Hon'ble Supreme Court in ***Raj Kumar Vs. Ajay Kumar***. The functional disability of a person has to be assessed in contra to the avocation of the said person. The avocation of the present appellant is stated to be service but it was not properly proved by the learned tribunal. However, in considering the entire evidence of PW-2, it appears that the claimant has only complication about the loss of sensation on a huge circumferential scar area on left thigh lower part, left knee and left leg upper part with loss of soft tissues like muscle, fascia and subcutaneous tissue (soft tissues). Thus, the present discomfort as well as the disability of the appellant is that she has lost of sensation it is never been proved before the learned tribunal how the loss of sensation of the victim lady suffered his earning of this case. Considering the same and also considering the observation of the Hon'ble Supreme Court in ***Raj Kumar Vs. Ajoy Kumar***. In my view, the observation of the learned tribunal is very much correct. The functional disability of the victim has been correctly assessed to be 25%.

In considering the income of the claimant it appears that the claimant has not proved his income

as a service; also no document of income has been produced before the learned tribunal. Accordingly, the learned tribunal has adopted the notional income of the deceased. The learned advocate for the appellant submits that the present appellant being a house wife, her income must have equated with a skilled labour as per the view of the Hon'ble Supreme court. However, this appellate Court has time and again adopted the monthly notional income of a person suffered the road traffic accident according to the date of accident. In this case, the accident happened within the year 2011-2014; so, the notional income of the claimant has to be determined to be Rs.4,000/- per month.

It appears that the learned tribunal has assessed the medical expenses of Rs. 60,000/- but it appears that, the PW-5 one of the Administrative Assistant of clinic appeared before the learned tribunal and proved the medical bills amounting to Rs. 89,211/-. So, the medical expenses of the deceased claimant can be considered on that amount. By virtue of the decision of Hon'ble Apex Court in **R.D. Hattangadi Vs. Pest Control (India) Pvt. Ltd;** the claimant is also entitled to get the damages of the non pecuniary heads including pain and suffering loss of amenities in the life, discomfort, etc. which was assessed by the learned tribunal to be Rs.10,000. In my view, the claimant is

entitled to get Rs.50,000/- towards the non-pecuniary heads.

The claimant is also entitled to get the future prospects according to the observation of the Hon’ble Apex Court in **Pranay Sethi**.

On that score, the observation of the learned tribunal regarding the compensation need be modified.

Accordingly, the just and proper compensation of this case assessed as hereunder:-

Calculation of compensation

1. Monthly Income	:Rs. 4,000/-
2. Annual Income (Rs.4,000/- 12)	:Rs.48,000/-
3. Add: Future Prospects @ 40%	<u>:Rs.19,200/-</u> :Rs.67,200/-
4. Multiplier 16 (Rs.67,200/- X 16)	:Rs.10,75,200/-
5. Disability (25%)	:Rs.2,68,800/-
6. Add: Medical Expenses	:Rs.89,211/-
7. Add: Non-pecuniary damages	<u>:Rs.50,000/-</u> :Rs. 4,08,011/-
8. Less: Amount received	<u>:Rs.1,11,500/-</u>

Compensation Rs.2,96,511/-

After calculation the award comes to Rs. 4,08,011/-. The claimant has already received the amount of Rs.1,11,500/-. The balance award comes to Rs.2,96,511/-. The insurance company is directed to pay the balance award alongwith interest @ 6% per annum from the date of filing of the claim

application within six weeks from the date of passing of this order through the office of the learned Registrar General, High Court Calcutta. On such deposit the claimant is entitled to get the said award on usual terms and conditions subject to ascertainment of payment of deficit Court Fees.

The office is directed to return the LCR immediately.

The office of the learned tribunal shall act upon the certified copy of this order to receive the deficit court fees, if any.

The instant **FMA 822 of 2018** is 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.)