29.08.2024
Aloke
ct no. 30
sl no. 11

FMA 2203 of 2016

Sri Kamalesh Mondal.

Vs.

The National Insurance Co. Ltd. & Anr.

Mr. Niranjan Maity
Mr. Saidur Rahaman
.... **For the Appellant**

Mrs. Sucharita Paul
.... **For the Respondent No. 1/ Insurance Company**

None
.... **For the Respondent No. 2/ Owner**

1. The present claim appeal has been preferred by claimant/appellant against the original order and award dated **21.09.2013** passed by the learned Judge, Motor Accident Claims Tribunal, 4th Court at Alipore, District : 24-Parganas (South), in M.A.C. Case No. 263 of 2009, **under Section 163A of the Motor Vehicles Act, 1988.**

2. Facts as stated by the claimant :-

> *"On 11.09.2005 the victim was going towards Kolkata from Diamond Harbour side travelling by a vehicle no. WB-37A-2833 (Bajaj Pick Up Van) with his business materials like electrical goods as owner of the same, by paying higher charges. While the said vehicle reached near Narayantala within Diamond Harbour P.S. the driver tried to overtake another vehicle in the same direction, had turned turtle as a result the petitioner*

> *received injury on his person,* ***causing permanent disability****. He was treated in Samrat Nursing Home at Diamond Harbour and admitted therein from 11.09.2005 to 25.09.2005. He was businessman by profession and used to earn Rs.3,000/- p.m. He is now unable to do any work properly and his movement has been restricted due to* ***permanent disability*** *caused in the accident. He was aged about 26 years at the time of accident. So, he has filed this case praying for compensation to the tune of Rs.1,80,000/- + cost and interest."*

3. O.P. no. 1, owner of the vehicle did not turn up to contest the claim case. As such, the case is heard ex-parte against him.

4. The case is being contested by O.P. No. 2 by filing Written Statement, denying the claim of the petitioner and contending, inter alia, that the case is not maintainable in its present form. Specific claim of the O.P. 2 is that the vehicle in question had no involvement in the motor accident in this case. The Insurance Policy does not cover the risk of the passengers being carried in the goods carriage. So, the Insurance Company is not liable to pay any compensation to the claimant.

5. The claimant/injured examined himself as a witness and proved relevant documents which were marked as exhibits.

6. It appears that the learned Tribunal held that the **"make (specification)"** of the vehicle was different in the FIR and the charge-sheet, though, the vehicle number was the same and thus dismissed the claimant's prayer for compensation on the said ground.

7. Being aggrieved the Claimant has preferred the present appeal on the ground:-

That the Tribunal was wrong in dismissing the claim case, even though, there were sufficient materials on record to support the case of the Claimant.

8. Considering the materials and the evidence on record, it appears that:-

i) *The claimant/inured was admittedly injured in the accident in the present case which occurred on 11.09.2005.*

ii) *It appears that the FIR* ***(Exhibit 1)*** *was lodged by the brother of the injured and it prima facie appears that he mistakenly mentioned the vehicle as 'Auto' instead of 'Pick Up Van' in the FIR, though,* ***the number of the offending vehicle being WB-37A-2833 is correct.***

iii) *From the charge-sheet* ***(Exhibit 2),*** *it appears that the said vehicle is admittedly a 'Bajaj Pick Up Van' and the same has been also stated by the Claimant/injured.*

iv) *As such, it appears that the said vehicle is a 'Pick Up Van' and the Claimant/injured was travelling in the said Van* ***as a gratuitous passenger****, the* *vehicle being a goods vehicle. The vehicle had valid insurance and other valid relevant papers.*

9. It appears that the **disability certificate** in the present case has been issued by Dr. S.K. Mandal and **not a medical board as required under the law** and, as such, the said certificate issued by Dr. S.K. Mandal **cannot be relied upon.**

10. From the discharge certificate it appears that the injury sustained by the Claimant is a *"fracture in the shaft of left femur"* and he was admitted in Samrat Nursing Home at Diamond Harbour from 11.09.2005 to 25.09.2005.

11. No documents in support of the income of the injured has been produced by the Claimant, though a document has been placed issued by the Panchayat stating that the claimant does business in electrical goods. **As the incident in the present case occurred in the year 2005, the income of the claimant is taken as Rs.3,000/- per month.**

12. (a) In ***Urmila Halder Vs. New India Assurance Co. Ltd. & Ors., in F.M.A. 446 of 2010, decided on 9th August, 2018,*** the Calcutta High Court held:-

> *"9. Sub-section (1) of Section 163-A of the 1988 Act ordains that notwithstanding anything contained therein or in any other law for the time being in force, upon proof of death in an accident involving the use of a motor vehicle, compensation is payable either by the owner of such vehicle or the*

authorized insurer thereof as indicated in the Second Schedule to the legal heirs of the victim. The Second Schedule appended to the 1988 Act, referring to Section 163-A thereof, provides the structured formula for determining compensation.

11. As it stands now, the Second Schedule after its amendment by the said notification prescribes lump-sum compensation in the following manner:
1. Fatal accidents - Rs. 5,00,000.00 is payable as compensation in case of death;
2. Accidents resulting in permanent disability - Rs. 5,00,000.00 x percentage of disability as per Schedule I of the Employee's Compensation Act, 1923 (8 of 1923), provided that the minimum compensation in case of permanent disability of any kind shall not be less than Rs. 50,000.00;
3. Accidents resulting in minor injury - A fixed compensation of Rs. 25,000.00.

14. With that in view, we invited such learned advocates to address us on the following issue:
Whether, after the amendment brought about by the said notification, the new schedule would be applicable to pending claim applications under Section 163-A before the motor accident claim tribunals as well as the appeals arising out of awards delivered there under prior to May 22, 2018?

118. Therefore, the conclusion seems to be inescapable that while deciding pending claim applications/appeals post May 22, 2018, the new schedule ought to be applied by the tribunals/this Court for determining compensation payable to the legal heirs of an accident victim or to the victim himself regardless of whether the new schedule is beneficial to them or not. The issue framed in paragraph 12 is, accordingly, answered.

126. Turning to the facts in the appeal, we find that had this appeal been decided prior to May 22, 2018, the appellant would have been entitled to whatever sum were *determined as payable in terms of the old schedule. Admittedly, Rs.5,00,000.00 was not payable to the appellant by the respondent no.1 any time prior to May 22, 2018 and, therefore, she was not entitled to such sum as on date she exercised her "right of action". Therefore, in each case where the claim is pending before the tribunal or if this Court has been approached in appeal as on May 22, 2018, we feel it to be the duty of the tribunal/Court to determine the amount of compensation payable to the claimant in terms of the structured formula and award interest at such rate it considers proper thereon from the date of filing of the claim application till May 21, 2018. To avoid any charge of arbitrariness, it would be safe to award interest at the prevailing bank rate of interest on term deposits on the date the award is made. Thereafter, that is from May 22, 2018, interest on Rs.5,00,000.00 may be directed to be paid till realization as per the prevailing bank rate of interest on term deposits.*

127. To determine what the appellant could have lawfully claimed as compensation based on the old schedule, we need to look into the evidence. The version of the appellant that the victim was earning Rs.2,000.00 per month could not be dislodged by the respondent no. 1 in cross-examination. The victim being self-employed in the unorganized sector, the tribunal put an onerous burden on the appellant to produce documentary evidence to prove her monthly income. Having regard to the decision in Syed Sadiq v. United India Insurance Co. Ltd.: (2014) 2 SCC 735, we hold that it was not necessary for the appellant to prove the income of the victim by producing documentary evidence. The loss of dependency, thus, has to be worked out reckoning Rs.24,000.00 as the notional yearly income of the victim. Capitalizing it on a multiplier of 17, the resultant amount would be Rs.4,08,000.00. Deducting 1/3rd in consideration of the expenses which the victim would have incurred towards maintaining herself had she been alive, and adding Rs.4.500.00 on account of loss of

> *estate and funeral expenses, we arrive at the sum of Rs.2,76,500.00.*
>
> *128. In the final analysis, we hold that the appellant shall be entitled to Rs.5,00,000.00 on account of compensation under Section 163-A of the 1988 Act read with the new schedule. However, since she has received Rs. 1,14,500.00 that was awarded by the tribunal, the respondent no.1 shall pay Rs.3,85,500.00 more to the appellant within 2 (two) months from date of service of a copy of this judgment and order on it. The appellant is further held entitled to interest as follows:*
> *(i) @ 9% per annum on Rs.2,76,500.00 from the date of filing of the claim application, i.e., February 8, 2005 till May 21, 2018; and*
> *(ii) @ 6% per annum on Rs. 5,00,000.00 from May 22, 2018 till such time payments of Rs. 3,85,500.00 and interest as in (i) above are effected in favour of the appellant."*

13. In the present appeal, the claim was decided by the tribunal on 21st September 2013, prior to 22nd May, 2018. However, no compensation was granted to the Claimant/Injured, as the claim case was dismissed by the tribunal.

14. Thus, applying **para 11(3)** in ***Urmila Halder Vs. New India Assurance Co. Ltd. & Ors. (Supra)***, the Claimant (injured) is **entitled to a sum of Rs. 25,000/-** as the claimant suffering injuries, due to the accident in this case has been proved, and as, no valid disability certificate in accordance with law has been proved.

15. The appellant/claimant filed “Talabana”/requisites in 2016, to effect service upon the respondents.

16. Admittedly, the **Appellant/Claimant/Injured** has not received any amount of compensation in terms of order of the Learned Tribunal. Accordingly, the **Appellant/Claimant** is now entitled to the total amount of compensation of **Rs. 25,000/- together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit.**

17. The **Respondent No. 1/Insurance Company**, thus is directed to deposit the total amount and the interest as indicated above, by way of cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date. The **Respondent No. 1/ Insurance Company,** shall also pay the interest upon the **sum of Rs. 25,000/- at the rate of 6% till deposit, within the period as specified above.**

18. Upon deposit of the aforesaid amount along with interest, learned Registrar General, High Court, Calcutta shall release the amount in favour of the **Appellant/Claimant**, upon satisfaction of his identity and payment of *ad-valorem* Court fees, if not already paid.

19. **The Respondent No. 1/Insurance Company / The National Insurance Co. Ltd. has now prayed for leave to recover** the compensation from the

Owner/Respondent no. 2 of the offending vehicle (being a pick up van) bearing no. **WB-37A-2833** (insured with the **Respondent No. 1**) on the ground that the deceased was **a gratuitous passenger** in the said goods vehicle and there has thus been a clear violation of the policy conditions. ***(Balu Krishna Chavan vs. The Reliance General Insurance Company Ltd. & Ors., in SLP (C) No. 33638 of 2017, on 3rd November, 2022)***

20. **It is proved from the charge sheet (Exbt. 2)** that the deceased was travelling as a **gratuitous passenger** in one of the offending vehicles being a 'pick up van', bearing No. **WB-37A-2833,** insured with the Respondent No. 1/Insurance Company /The National Insurance Co. Ltd. and thus there being a violation of the condition of the rules in the policy, the Respondent No. 1 is entitled to recover the total compensation paid, **by due process of law** from the owner of vehicle no. **WB-37A-2833**, the Respondent no. 2 herein.

21. **The appeal being FMA 2203 of 2016 is allowed.** The impugned judgment and award dated 21.09.2013 passed by the learned Judge, Motor Accident Claims Tribunal, 4th Court at Alipore, District : 24-Parganas (South), in M.A.C. Case No. 263 of 2009, under Section 163A of the Motor Vehicles Act, 1988, **is set aside.**

22. No order as to costs.

23. All connected applications, if any, stand disposed of.

24. Interim order, if any, stands vacated.

25. Copy of this order be sent to the Learned Tribunal, along with the trial court records, if received.

26. Urgent photostat certified copy of this order, if applied for, be given to the parties on usual undertaking.

(Shampa Dutt (Paul), J.)