IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction

Present: -Hon'ble Mr. Justice Subhendu Samanta

F.M.A No. – 556 of 2023

National Insurance Company Limited

Vs.

Aparna Maiti & Ors.

For the Appellant/ Insurance Company : Mr. Deb Narayan Ray, Adv.,

For the Respondent /Claimants. : Mr. Krishanu Banik, Adv.
Mr. Tathagat Banik Adv.

Reserved on : 06.03.2024

Judgment on : 19.03.2024

Subhendu Samanta, J.:-

1. Instant appeal has been preferred against the judgment and award dated 20nd day of March, 2023 passed by the learned Judge Motor Accident Claims Tribunal Fast Track 1st Court Tamluk Purba Medinipur in a Motor Accident Claim Case No. 98 of 2016

2. The brief of fact of the case is that on 24.05.2016 at about 11:30 am while the victim, Nani Gopal Maity was coming after completion of day's work from Kolaghat Engineering College and waiting near ATM Gate for availing a bus then, suddenly a Maruti Omni Van bearing Registration No. WB 30 K/4300 which was coming from Kolaghat side in a high speed and negligent manner dashed the victim with great force by which the victim severely injured and died on spot.

3. The present respondent/claimant being the legal heirs of the deceased has preferred an application before the Learned Tribunal u/s 166 of the Motor Vehicles Act for getting compensation on the ground that the accident happened due to rash and negligent driving of the driver of the offending vehicle which was duly insured under the policy of the Insurance Company.

4. The claim case was contested by the Insurance Company by filing written statement. The Learned Tribunal after hearing the parties and after receiving the evidence has awarded of sum of Rs. 7,49,000/- as a compensation and directed the Insurance Company to pay the compensation.

5. Being aggrieved by and dissatisfied with the said award the Insurance Company has preferred the instant appeal. Learned Advocate Mr. Debnarayan Roy appearing on behalf of the Insurance Company submits that the award was challenged by the Insurance Company on the following grounds.

i) The offending vehicle bearing No. WB 30 K/4300 (Maruti Omni) involved in the alleged accident.

ii) The income of the deceased was calculated excessively by the Learned Tribunal.

iii) Excessive amount of compensation was awarded towards the consortium in this case.

<u>Regarding non-involvement of offending vehicle</u>

Mr. Roy submits that the Learned Tribunal has failed to appreciate the facts and circumstances of this case. He argued that FIR was lodged after the said accident at Kolaghat PS by the brother of the deceased. The FIR does not disclose the registration No. or the nature of the offending vehicle, but surprisingly during the investigation, the IO mentioned that the offending vehicle is a Maruti Omni Van having registration No. No. WB 30 K /4300. Mr Roy indicated the seizure list and argued that though alleged accident happened on 24.05.2016, the so called offending vehicle was seized on 14.06.2016. He submits that the present claimants in collusion with the police authority and the owner of the offending vehicle has implanted the so called offending vehicle in this case. He further argued that the IO of this case has deposed before the Learned Tribunal as OPW 2; who has stated that it is not ascertain from investigation whether exactly the Motor Car was guilty of the accident or not.

6. Learned Advocate appearing on behalf of the respondent/claimant Mr. Krishanu Banik submits that the grounds of Insurance Company for preferring the appeal regarding non-involvement of the vehicle is baseless. It is the general and reasonable act for the relative of the deceases to state the fact of accident to the concerned P.S. but it is the duty of the investigating officer to find out the truth. After the investigation the investigating officer has come to know that the Maruti Omni Van bearing no. No. WB 30 K /4300 is involved in the accident. The Insurance Company has no materials to prove that the claimant has colluded with the investigating agency or the owner of the offending vehicle to implant the offending vehicle in this case.

7. He further argued that the owner of the offending vehicle was called by the Insurance Company to depose and as OPW 1. OPW 1 is the owner-cum driver of the offending vehicle who specifically admitted the accident. The IO also deposed as OPW 2; who stated that during the investigation and after having knowledge from the statement of witnesses, he came to know that the Maruti Omni Van is the offending vehicle. Mr. Banik submits that plea of the Insurance Company has no ground to stand thus the instant ground of appeal is cannot be considered.

8. Heard the learned Advocate, perused the observation of the Learned Tribunal. it appears that the same plea was argued before the Learned Tribunal by the Insurance Company but the Learned Tribunal has not considered the argument of Insurance Company.

9. It appears to me that the FIR stated that the accident was occurred by an unknown vehicle, during investigation police came to know that the Maruti Omni Van bearing registration No. WB 30 K / 4300 was involved in the accident. The said offending vehicle was seized during the course of investigation. It further appears to me that the PW 2 is cited as an eye witness of this case who is also cited as CS witness No. 5; who stated that the Maruti Omni Van bearing No. WB 30 K /4300 was responsible for the accident. During the cross-examination the Insurance Company could not shake the credit of the examination of PW 2.

10. More over the OPW 1 is the Owner-cum driver of the offending vehicle who appeared before the Learned Tribunal at the instance of the Insurance Company. During the examination in chief of the Insurance Company OPW 1 has admitted the accident. The evidence of OPW 1 appears to be not supporting the case of the Insurance Company; thus, the Learned Advocate for the Insurance Company on the leave of the court has declared witnesses i.e. OPW 1 as hostile witness. Surprisingly, thereafter, the Learned Advocate for the Insurance Company did not contradict the statement of OPW 1 by putting question in cross-examination. Only declared a witnesses as a hostile witness by the leave of the court cannot destroy the evidentiary value of that witness. Thus it appears to me that the owner-cum driver of the offending vehicle, who appeared before the Learned Tribunal at the instance of the Insurance Company has admitted the accident. The IO who appeared as OPW-2 on behalf of the Insurance Company has also admitted the accident.

11. Thus the evidentiary value of PW 2, OPW 1, OPW 2 itself proved that the offending Maruti Omni Van bearing registration No. WB 30 K /4300 was actually involved for the alleged accident. Thus, this ground of appeal of Insurance Company on that point cannot be entertained.

Income of the deceased

In considering income of the deceased, is appears that the claim petition stated the monthly income of the deceased to be Rs 8,219/-. The name of the employer is International Security Organization. The fact goes to show that the deceased was a night guard of Kolaghat Engineering College. To prove the income and avocation of the deceased the claimant has produced PW 3 who is the Operational Officer of International Security Organisation. He appeared before the Learned Tribunal after receiving the summons. He prove the pay slip of the deceased for the Month of April 2016 and stated that monthly income was Rs. 9,177/- wherefrom 959 was deducted and his gross salary was Rs 8,219/-. During the cross examination PW 2 has admitted that the salary was paid to the victim to his bank account through NEFT. The claimant also produced the Bank Manager of BGBB Sidhya Branch as PW 3. The bank statement was produced before the Manager who admitted that the Bank Account is standing in the name of the deceased Nani Gopal Maity. The statement was marked as Exhibit 9. The Bank Manager also admitted the joint account is standing in the name of deceased and his wife.

12. On the basis of said documentary evidences the Learned Tribunal has held that only one pay slip was produced it was marked as 'X' for identification. Thus, it was not produced as per law. The Learned Tribunal did not place reliance upon the documents and held that according to the circular of the Government of West Bengal, Office of the Labour Commissioner under the W.B. minimum wages Act, the monthly earning of unskilled worker in zone –B is Rs. 6,634/- Thus he rounded off the amount of 6,650/- to be the monthly wages of the victim.

13. Mr. Roy submits that the observation of the Learned Tribunal is not correct there is no specific document regarding the income and vocation of the deceased, so, in this case the notional income of Rs. 3,000/- per month may be adopted. Mr. Banik submits that the Learned Tribunal has committed an error in fixing the income of the deceased. The pay slips has been sufficiently proved by PW 3, but the reasons best known to the Learned Tribunal, the pay slip was marked as 'X' identification. He further argued that PW 4 is the Bank Manager who proved the statement of account which was marked as Exhibit 9, which disclosed that the deceased received Rs. 8,219/- through NEFT from the International Security Organisation as a salary. Mr. Banik further argued that in this case the Learned Tribunal has committed an error for not fixing the monthly income of the deceased to be Rs 8,219/-.

14. Heard the Learned Advocate perused the evidences on record. It appears that in response to the summon issued by the Learned Tribunal, PW 3 appeared and deposed, he identified the pay slip issued by the said organisation in favour of the deceased. It appears that during the evidence the Learned tribunal has failed mark the pay slip though it has been sufficiently identified by the PW 3. The pay slip issued by the said organisation has got reliance by Exhibit 9 where it appears that Rs. 8,219/- was credited to the bank account of deceased directly through NEFT from the said organisation. The Learned Tribunal has committed an error by fixing the monthly income of the deceased according to the circular of the Government of West Bengal under the minimum wages Act, in spite of sufficient evidence and materials regarding income and avocation of victim. So considering the materials, it appears to me that the Learned Tribunal should have fixed the monthly income of the deceased to 8,219/-

15. Mr. Roy submits that in an appeal filed by the Insurance Company, the award passed by the Tribunal cannot be enhanced without any cross appeal by the claimants. He argued, in this case the income of the deceased was fixed by the learned Tribunal on the basis of the minimum wages Act, Now if the income is enhanced, the award may be modified In the higher side, which is not permissible under law. Mr. Banik submits that by virtue of decision of Hon'ble Apex Court in **Sulekha and Ors. Vs. Santosh and Ors**, the appellate Court has the power to award just and proper compensation in absence of cross- appeal.

16. Heard the Learned Advocates, the same question was arose before the Hon'ble Apex Court in **Oriental Insurance Company Limited Vs. R. Swaminathan, Ranjana Prakash and Ors** and also in **Ranjana Prakash Vs**. **Divisional Manager and Ors.** The Hon'ble Division Bench of this Court in **National Insurance Company Limited Vs. Smt. Sulekha Das and Ors.** following **R. Swaminathan and Ranjana Prakash,** has specifically dealt with this matter and is of opinion that, in an appeal filed by the Insurance Company an award passed by the Learned Tribunal cannot be enhanced in absence of any cross appeal, by exercising power by Appellate Court under order XLI Rule 33 CPC. The Principle laid down by the Hon'ble Apex Court in **Ranjana Prakash and R. Swaminathan (supra)** has not been set aside by Apex Court till today, thus the same principle may be applicable here. I am of a view that in an appeal filed by the Insurance Company the award of compensation passed by the Learned Tribunal cannot be enhanced.

The excess consortium

Mr. Roy submits that in this case the total consortium was awarded for four(4) claimants of Rs. 1,76,000/-. He further submits that the claimant No. 1 i.e. widow of the deceased is only entitled to get consortium according to the decision of Hon'ble Apex Court in **National Insurance Company Vs. Prany Sethi.** Mr. Banik submits that the Learned Tribunal has correctly awarded the consortium in favour of 4 dependents.

17. Heard the Learned Advocate perused the observation of Hon'ble Apex Court in **Pranay Sethi.** It appears that the Hon'ble Supreme Court in **Pranay Sethi (supra)** has held that the wife of the deceases is only to get the consortium. In this case the claimant No. 1 is the widow of the deceased but the Learned Tribunal has awarded an amount of Rs. 1,76,000/- towards the consortium. In this case the widow only entitled to get the consortium of Rs 44,000/-Thus the award required to be modified on that score.

18. Considering the all aspect the ward passed by the Learned Tribunal is modified hereunder.

ASSESSMENT OF COMPENSATION

1. Monthly Income be assessed as Rs.	Rs. 8,219/-
2. Monthly Income (8,219 X 12)	Rs. 98,628/-
3. 10% Future Prospect	Rs. 9,863/-
4. Total	Rs. 1,08,491/-
5. 1/3rd Deduction (Rs. 1,08,491-36,164)	Rs. 72,327/-
6. Multiplier as per age of 9 (Rs. 72,327/-X 9)	Rs. 6,50,943/-
7. General damages	Rs. 77,000/-
8. Total	Rs. 7,27,943/-

19. After calculation just and proper compensation comes to Rs. 7,27,943/-. The award appears to be less than the award passed by the Learned Tribunal. So the observation of the Hon'ble Apex Court in **Ranjana Prakash** and **R. Swaminathan (Supra)** is followed properly.

20. The award shall carry 6% interest per annum from the date of filing of the claim application it appears the Insurance Company has deposited the statutory amount of Rs. 25,000/- on 12.06.2023 and thereafter again deposited a sum of Rs 10,44,550/-.

21. The office of the Learned Registrar General High Court, Calcutta is directed to calculate the award passed by this court and disburse the same to the claimants equally within 04 weeks. It appears that there should be some residue in the account of Insurance Company, the office of the Learned Registrar General shall refund the same to the Insurance Company on usual terms and conditions.

22. The payment of compensation is subject to the ascertainment of payment deficit Court fee, if any.

23. The office of the Learned Tribunal Shall act upon the certified copy of this order to receive the deficit court fee, if any.

24. FMA Connect CAN applications are disposed of.

25. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)