IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction

5.01.2024
SL No.7
Court No. 551
Ali

FMA 364 of 2021
With
IA No. CAN 1 of 2017 (Old No. CAN 10472 of 2017)
+
CAN 2 of 2023

Smt. Poly Roy
Vs.
The National Insurance Co. Ltd. & Ors.

Mr. Amit Ranjan Roy
.... for the appellant/claimant.

Mr. Saibalendu Bhowmik,
Mr. R.S. Basu
...for the respondent No. 1 Insurance Co.

The instant appeal has been preferred against the Judgment and Award dated 20th April, 2017 passed by the learned Judge, Motor Accident Claims Tribunal, Asansol, in MAC Case no. 19 of 2012/90 of 2011.

The brief facts of the case is that the present appellant being the claimant has preferred an application under Section 166 of the M.V. Act, before the learned tribunal for getting compensation on the ground that her mother was died in a road traffic accident due to rash and negligent driving of the driver of the offending vehicle duly insured under the policy of the Insurance Company.

The claim case was contested by the insurance company.

After hearing the parties and after receiving the evidences the learned tribunal has allowed the compensation in favour of the claimant to the tune of Rs. 5,51,700/-.

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

Learned advocate for the appellant submits that the impugned judgment and award passed by the learned tribunal is erroneous. He submits that it would be revealed that the deceased was aged about 56 years old and he was engaged in a Government job under DPL Company. She used to earn more than Rs.20,000/- per month as a salary. The salary of the deceased has been proved before the learned tribunal. The learned tribunal has correctly assessed the annual salary of the deceased to be Rs. 1,21,630/-. The 1/3rd from the salary was deducted towards her personal expenses and, thereafter, erroneously deducted 50% with the ground that the present appellant/claimant is a married daughter and who is settled with her husband and not dependent upon the deceased.

On that score, learned tribunal has deducted 50% of the annual income of the deceased. He submits that the observation of the learned tribunal is erroneous and beyond provisions of Law. The learned tribunal has no legal duty to deduct the

50% of the yearly salary of the deceased, on the ground that the claimant was not depended. He argued that the claimant is the sole daughter of the deceased she is the sole legal heirs. So, she is entitled to get the entire compensation.

He further argued that the learned tribunal has not considered the future prospects at the time of assessing the compensation also the general damages was awarded only Rs. 4,500/- instead of Rs.30,000/-. He submits that the appellant is entitled to get the just and proper compensation.

Learned advocate appearing on behalf of the Insurance Company Mr. Bhowmik submits twofold arguments. 1st by- the instant claim application is barred under the Law. The claim application filed by the claimant is not at all maintainable. It is a fact of this case that the alleged accident happened in a private place. According to the provisions of Section 147(b) of M.V. Act, the application for compensation cannot be entertained when the accident happened in a private place. He further argued that the public place has been specifically defined under Section 2(34) of the said Act.

In support of his contention, he submitted that the claim application was filed stating the fact that the accident happened at the Administrative building of DPL. The Administrative building is a private place so the claim application is not maintainable. He further argued that by virtue of Hon'ble Supreme Court in **Bhuwan Singh Vs. M/S Oriental Insurance Co. Ltd. & Ors. 2009 (5) SCC 136** the admitted fact need not be proved. He argued that the fact that the claimant herself has proved that the accident happened in the private place and ant in a public place, thus, the claim application is itself barred.

Secondly, Mr. Bhowmik argued that the learned tribunal has committed no error in deducting the 50% of the income of the deceased in calculating the just and proper compensation. It is the admitted fact that the present appellant/claimant is the married daughter of the deceased. It has also been proved that the married daughter is now residing with her husband. Admittedly, the married daughter is not solely depended upon the income of the deceased mother. Rather, she is dependent upon her husband. So on that score, there is no error apparent in the impugned judgment.

In support of his contention, he cited the decision of learned Division Bench of this Court passed in **Future General India Insurance Co. Ltd. V. Soumita Roy & Anr.** wherein the learned Division Bench has considered the appeal of the Insurance Company and is of view that the married brothers and sisters are not entitled to get the entire compensation as they are not dependant. In that case, the learned tribunal has awarded a sum of Rs.1,22,62,015/- and after considering the entire aspects the Hon'ble Division Bench has only awarded Rs.50,00,000/- in favour of the married siblings.

He also cited the decision of Hon'ble Supreme Court passed in **The New India Assurance Company Limited Versus Anand Pal & Ors. (arising out of SLP (Civil) No. 7805 of 2022)** wherein the Hon'ble Apex Court has held that the married siblings are not entitled to get any compensation.

He also cited another decision of Hon'ble Supreme Court reported in **Anju Mukhi and Another Versus Satish K. Bhatia and Others (2010)15 SCC 630** wherein the Hon'ble Apex Court has held that the dependency has lost when the wife got re-marriage.

Learned advocate Mr. Bhowmik argued in all cases of compensation the dependency is always a factor. According to the decision of Hon'ble Supreme Court in **Sarla Verma (Smt.),** the learned Apex Court has also considered the dependency factor. In this case, the learned tribunal has correctly considered the dependency of the instant appellant and has correctly deducted the 50% of the income.

In reply, the learned advocate for the appellant submits that the ratio decidendi of the judgment placed by the learned advocate for the appellant is not at all applicable in this case. By the decision of Hon'ble Division Bench of this Court as well as the Hon'ble Apex Court in **Anand Pal** the learned Courts have considered the compensation in respect of the married siblings. But, in the present case the appellant is the married daughter and who is the sole legal representative of the deceased so the ratio of decision of Hon'ble Apex Court as well as the Hon'ble Division Bench is not applicable in this case. He further pointed out the paragraph 31 of the decision of Hon'ble Supreme Court in **Sarla Verma (Smt.) & Ors. Versus Delhi Transport Corporation & Anr.** wherein it has been mentioned that in case of bachelor normally 50% is deducted on personal living expenses but in case of married person the deduction would out be 1/3rd or 1/4th or 1/5th considering the member of the family. He again argued that one Co-ordinate bench of this Court has decided the issue to the effect that the 50% deduction is only in respect of unmarried person.

Heard the learned advocates; perused the materials on records.

In considering the first question raised by Mr. Bhowmik regarding the maintainability of the claim application; it appears that the learned tribunal at the time of disposing of the claim case has framed as many as seven issues wherein the issue No. 1 is framed that whether the case is maintainable or not? The issue of maintainability as raised before this Court has never raised before the learned tribunal. The learned tribunal has decided the issue No. 1 in favour of the petitioner.

The Insurance Company has not filed the written statement specifically on that issue that the alleged accident happened in a private place. No question or suggestion was put to the witnesses regarding the fact that the accident happened in a private place.

By virtue of decision of Hon'ble Supreme Court in **Bhuwan Singh Vs. M/S Oriental Insurance Co. & Ors.** reported in **2009 (5) SCC 136.** It is true that the admitted fact need not be proved. Let me consider whether the fact that the accident happened in a private place is at all admitted by the parties before the learned tribunal.

In plain reading of paragraph 23 of the claim application, it appears that the accident happened on 4.01.2011 at about 3.45 P.M. when the victim was entering into the administrative building. The insurance company has contested the case by filing written statement along with an application under Section 170 of M.V. Act.

The written statement of the Insurance Company never raised the point that the alleged accident happened in a private place.

The appellant was deposed as PW-1 before the learned tribunal. During the cross examination of the appellant by the Insurance Company, she stated that the accident took place at the DPL gate in between main gate and one kilometer distance from administrative building near the railway. It has stated by the PW-1 during cross examination that both the private and public vehicle use to ply over the same place.

During the cross examination of eye witness (OPW-2) no questions were asked and/or no suggestions were put by the Insurance Company to the fact that the accident happened in a private place.

After scanning the pleadings and evidences of this case it appears to me that the question of maintainability raised by the learned advocate for the Insurance Company is a new fact which can only be determined through adducing proper pleadings and proofs. The Insurance Company has failed to adduce any pleadings and proofs before the learned tribunal regarding such issue.

The question of maintainability can be raised before the appellate Court only on two grounds- (A) when the maintainability can only on the basis of law, and (B) when the jurisdiction of the learned Trial Court is in question.

The issue raised by Mr. Bhowmik is a mixed question of Law and fact. The question cannot be re-agitated before this Court. Accordingly, I find no justification to entertain the issue at this juncture.

In considering the second issue of dependency, it appears to me that admitted by the Hon'ble Division Bench as well as the Hon'ble Apex Court has decided the issue of dependency in respect of married siblings. So, the ratio decidendi is not applicable in this case.

The paragraph 31 of **Sarla Verma (Smt.) Versus Delhi Transport Corporation & Anr.** need be set out for the said purpose:-

> **"31. Where the deceased was a bachelor and the claimants are the parents, the deduction follows a different principle. In regard to bachelors, normally, 50% is deducted as personal and living expenses, because it is assumed that a bachelor would tend to spend more on himself. Even otherwise, there is also the possibility of his getting married in a short time, in which event the contribution to the parent(s) and siblings is likely to be cut drastically. Further, subject to evidence to the contrary, the father is likely to have his own income and will not be considered as a**

> **dependant and the mother alone will be considered as a dependant. <u>In the absence of evidence to the contrary, brothers and sisters will not be considered as dependants,</u> because they will either be independent and earning, or married, or be dependent on the father".**

It has been specifically observed by the Hon'ble Apex Court that in absence of evidence to the contrary brothers and sisters will not be considered as dependents. Thus, the issue has already been decided by the Hon'ble Apex Court in several decisions.

In considering the dependency of the present appellant with the deceased, it appears that the present appellant is the married daughter of the deceased. It is true that the married daughter is staying with her husband; the appellant is the sole legal heirs of the deceased, the responsibility of mother is always running towards their child till her death. So, in that score, it is well presumed that the present appellant being the only daughter is no doubt dependent upon the properties of the deceased.

Considering the same, it appears that the learned tribunal has committed error by deducting 50% of the yearly income of the deceased.

In considering the just and proper compensation of this case, the award passed by the learned tribunal need be modified.

Calculation of compensation

1. Annual income be assessed........Rs. 1,21,630/-
2. Less: 1/3rd deduction ....Rs. 40,543/-

Rs. 81,087/-

3. Add: Future Prospects.....................Rs. 12,163/-

Rs. 93,250/-

4. Multiplier 9 .... X 9

Rs 8,39,250/-

5. Add: General Damages..................Rs. 30,000/-

Rs. 8,69,250/-

Less: Tribunal awarded.......Rs. 5,51,700/-

Balance Award...........Rs. 3,17,550/-

After calculation the award comes to Rs. 8,69,250/-. The tribunal has already awarded Rs. 5,51,700/-, the balance award comes to Rs.3,17,550/-. The insurance company is directed to pay the balance award alongwith interest @ 6% per annum from the date of filing of the claim application i.e. from 27.06.2011 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 at liberty to receive the same according to the prevalent Rules subject to the ascertainment of payment of deficit Court Fees, if any.

The instant FMA 364 of 2021 is disposed of.

All connected pending 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.)