IN THE CIRCUIT BENCH CALCUTTA HIGH COURT
AT JALPAIGURI
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE
FMA 5 of 2024
Munmun Pal & Ors.
Vs. Papi Byadh Roy and Anr.
With
FMAT (MV) 10 of 2024
Bajaj Allianz General Ins. Co. Ltd.
Vs.
Munmun Pal & Ors.

For the appellant : Mr. Uday Sankar Sarkar, Adv.

For the respondent : Mr. Hirak Barman, Adv.
Mr. Chandan Roy, Adv.

Reserved On : 01.10.2024

Judgment On : 05.10.2024

Subhendu Samanta, J.

1. Both the appeals are preferred against the Judgment and award dated 20nd December, 2023 passed by the Learned Judge, Motor Accident Claim Tribunal ADJ, 3rd Court Jalpaiguri, in MAC Case No. 97 of 2020.

2. The brief fact of the case is that one Pratik Kr. Pal died in a road traffic accident on 10.09.2019. The present petitioners being the widow and two daughters of the deceased filed an application u/s 166 of MV Act before the Learned Tribunal for getting compensation. The claim case was contested by the insurance Company by filing written statement. The Learned Tribunal after hearing the parties and after receiving evidence has allowed the compensation amounting to Rs. 1,04,66,344/- in favour of the claimants and directed the Insurance Company to pay the compensation.

3. Being aggrieved by and dissatisfied with the said award the claimants as well as the Insurance Company has preferred separate appeals. The ground for preferring appeal by the claimant is ---

i) <u>income of the deceased as assessed by the Learned Tribunal is erroneous.</u>

The Insurance Company has preferred the appeal on the grounds first there are contributory negligence on behalf of the deceased in such accident.

ii) <u>There is no loss of income in this particular case so claimants are not entitled to get any compensation.</u>

iii) <u>The income as assessed by the Learned Tribunal is erroneous.</u>

<u>Regarding the Income of the Deceased</u>

Both the claimant and Insurance Company has raised this point. Learned Counsel for the claimants submits that the learned Tribunal has erroneously considered the income of the deceased to be Rs. 12,88,803/- which is the average income of three years income appearing in the income tax return (ITR) filed by the deceased prior to his death. He submits the Learned Tribunal was erroneous in fixing the yearly income of the deceased by averaging three years income. He submits that the last year's income appearing in the ITR should be considered to be the income of the deceased. In support of his contention he cited a decision of Hon'ble apex Court in **Smt. Anjali and Ors. Vs. Lokendra Rathod and Ors.** wherein the Hon'ble Apex court has held that

> **The Tribunal and the High Court both committed grave error while estimating deceased's income by disregarding the Income Tax Return of the Deceased. The appellants had filed the Income Tax Return (2009-2010) of the deceased, which reflects the deceased's annual income to be Rs.1,18,261/-, approx. Rs.9,855/- per**

> **month. This Court in Malarvizhi & Ors. (Supra) has reaffirmed that the Income Tax Return is a statutory document on which reliance be placed, where available, for computation of annual income. In Malarvizhi (Supra), this Court has laid as under:**
>
> **'10. ...We are in agreement with the High Court that the determination must proceed on the basis of the income tax return, where available. The income tax return is a statutory document on which reliance may be placed to determine the annual income of the deceased.'**
>
> **Hence, this Court is of the opinion that the deceased's annual income be fixed at Rs.1,18,261/-, approx. Rs.9,855/- per month keeping in mind the deceased's Income Tax Return for the year 2009-2010.**

4. Learned Counsel appearing on behalf of the Insurance Company raised strong objection. He submits that there is not loss of income of the claimant's due to the death of the deceased. He argued that evidence of PW 1 clearly disclosed the claimant No. 1 being the widow of the deceased become one of the director of the said company, wherein the deceased was a director. Thus, the claimant is not entitled to get any compensation in this case. However, the income assessed by the Learned Tribunal is erroneous. He submits that the dependency is the prime factor to award compensation under the Motor Vehicles Act. In this case the claimant No. 1 has already employed so they are not dependent upon the deceased and not entitled to get any compensation.

5. In support of his contention he cited a decision of Hon'ble Division Bench of this court reported in **Manjuri Bera Vs. Oriental Insurance Company Limited 2005 ACJ 1622.**

> **Thus, dependency is a prima facie factor for obtaining compensation even though one may be the legal representative of the victim. Unless the dependency is proved, the factors relating to the compensation would not be relevant. Even if it is held to be relevant then also one has to prove that the victim was in association with the claimant**

6. He further argued that the Co-ordinate bench of this court in **Sanjita Jain Vs. New India Assurance Company Limited (FMAT 15/2021)** has held that Learned Tribunal may fix the income of averaging three years income of the deceased

> *Having considered the facts and circumstances of the case I do not find that the Tribunal below has committed any mistake in taking into account average of the last three years income, at the time of calculation of the income of the victim specially when income of last three years more or less same and does not vary remarkably.*

7. Having the Learned Counsels also considering the materials it appears to me that the learned Tribunal has discussed the income of the deceased in page 8,9,10 of the impugned award. It appears to me that the deceased has submitted income tax return for assessment year 2017-18,2018-19,2019-20. The deceased died in a road traffic accident on 10.09.2019. the income appearing in the ITR for the assessment year 2017-18,2018-19 and 2019-20 are Rs. 8,81,630/-,Rs. 10,99,390 and Rs. 18,85,390/- respectively. Admittedly ITR for the assessment year 2019-20 was filed with the concerned department on 28.08.2019 i.e. just before the death of the deceased. It has been categorically observed by the Hon'ble Apex Court in **Malarvizhi & Ors. Vs. United India Insurance Company Ltd and Ors (2020) 4 SCC 228** that the income tax return is a statutory document and reliance has to be placed upon the annual income of the deceased on the basis of the Last ITR. It has time and again observed by the Supreme Court that the Last year's income tax return has to be considered for annual income of the deceased.

8. Furthermore it appears to me that when the deceased have filed the income tax return with the concern Department, he did not have any expectation of his death or filing of any application for compensation due to his death. It further appears that though the ITRs are self assessed returns, still then, it is the option of the party to file income tax with the authority concern, according to the provision of income tax Act. I further observed that an assesse of income tax had always an intention to demonstrate his income on lesser side to void tax liability. It is not the tendency of any person to show inflated income by which more income tax would be imposed upon him.

9. Considering the same I find that the learned Tribunal has acted illegally by averaging the income of the deceased appearing in the 03 ITRs. ITRs have been reasonably proved before the learned Tribunal through the oral evidence of IT Department thus it is the duty of tribunal to place reliance upon the last year's ITR. ITR for the assessment year 2019-20 was marked as Exhibit 10(collectively). From the said ITR, it appears that the gross annual income of the deceased is Rs. 21,00,000/- after deduction of professional tax of Rs 2,400/- and after payment of income tax amounting to Rs 3,93,242/- the annual income comes to Rs 17,04,358/-. The claimant No.

1, may have the opportunity to involve herself in a job of the same concern, wherefrom she is earning, but her earnings cannot be reckoned to assessed the loss of income of a case u/s 166 of the MV Act. Thus, the argument on behalf of the Insurance Company is turned down.

10. Regarding the contributory negligence:

Learned Advocate for the Insurance Company submits that fact of the alleged accident disclosed that the victim was sole responsible for the accident. He submits that due to the accident, Karsiang PS Case No. 142 of 2019 dated 10.09.2019 was started. The investigation of the police was ended in charge sheet. From the charge sheet it would appear that the investigating officer is of opinion that the victim while driving his car tried to overtake one vehicle, he lost his control over his vehicle hit the truck No WB-78/9779 (offending vehicle). The Learned counsel for the Insurance Company has specifically argued that the observation of the investigating officer is crystal clear to the fact that the accident solely happened due to the conduct and negligence of the victim himself. If the victim did not over take the accident would not happened. There is a head on collision between two vehicles, one of which was driving by the victim himself. So there is contributory negligence on part of the victim. He submits in case of contributory negligence, the Hon'ble Apex Court has ordered that the compensation may be apportioned to 50 : 50.

11. In support of his contention he cited several decisions they are :

i) **United India Insurance Company Limited Vs. Jana Bai 2003 ACJ 350**

ii) **Surindar Kumar Arora Vs. Dr. Manoj Bishal AIR 2012 Supreme Court 1918**

iii) **Bajaj Allianz General Insurance Company Vs. Gaddam Swami Reddy 2013 (4) TAC 579**

iv) **New India Assurance Company ltd. Vs. Pazhaniammal 2012(1) TAC 618**

v) **Rajrani And Ors. Vs. Oriental Insurance Company Ltd 2009 (4) TAC 385**

vi) **Renuka Debi H Vs. Banagalore Metropolitan Transport Corporation AIR 2008 Supreme Court 1967**

vii) **New India Assurance Company Ltd Vs. Renuka Sharma 2019 (3) TAC 777**

12. Learned Counsel for the appellant submits that the Insurance Company has not pleaded the contributory negligence in the written statement. Moreover, they have not filed any evidence to substantiate the said contributory negligence. He submits that only reliance cannot be placed upon the finding of IO of this case. He further submits that the head on collision does not itself proved the contributory negligence on the part of the victim. He cited a decision of **UP State Transport Corporation Vs. Rukshana 2015(1) TAC 719.** He further argued that the burden of prove of contributory negligence is upon the Insurance Company which they could not prove before the Learned Tribunal. He cited a decision of **Laxmi and Company Vs. Sabitri Devi Agarwal** reported in **2019 (20 TAC 51**.

13. Heard the Learned Advocates.

14. I have perused the observation of the Hon'ble Apex Court has referred by the Insurance Company.

15. In **Janabai (supra)** the deceased was driving a scooter at the time of taking U turn, he applied break and could not control the same and failed down from scoter and died. In that case the Hon'ble Bombay High Court is of opinion that both the scooterist is died to his own negligence.

16. In **Surindra Kr. Arora (Supra)** the Hon'ble Supreme Court has rejected the claim case filed by the claimant in absence of the cogent evidence.

17. In **Gaddam Swami Reddy (supra)** the claimant has not proved that he was a third party and claimant himself while driving the car has dashed in a tree. Thus the Hon'ble Andhra Pradesh High Court exonerate the Insurance Company to pay the compensation.

18. In **Pazhaniammal (supra)** the Hon'ble Kerala High Court has observed that the charge sheet is prima facie sufficient evidence of negligence.

19. In **Rajrani (supra)** one truck was parked in the middle of the road without any parking light, at the time the deceased who was driving a vehicle in a rash and negligent manner dashed the backside of the parked truck. In that case the Hon'ble Supreme Court has held that the victim must have noticed the parked truck, in that case the Hon'ble Supreme Court has fixed 50% contributory negligence on behalf of the victim.

20. In the case of **Renuka Debi (Supra)** Hon'ble Supreme Court has held that the driver of a scooter was negligent that is why the 50% contributory negligence was assessed.

21. In case of **Renuka Sharma** the Hon'ble Delhi High Court without the evidence of the eye witness has considered same photographs of the scene and has assessed the negligence on behalf of the victim driver.

22. It appears that the Learned Counsel for the Insurance Company has demonstrated some instances where the Hon'ble Apex Court as well as the different High Court has considered contributory negligence of victim driver.

23. In the present case the Insurance Company pleaded that the IO has opined that the incident occurred when the victim driver tried to over take another vehicle for which there was a head on collision. Let me assess the argument of the Insurance Company by virtue of the observation of the IO in the CS.

> During investigation of the case it is learnt that both the vehicle bearing No. WB 739779 and WB 74 AE 6224 are plying with excessive speed. When deceased Pratik Kumar Pal driver of WB 74AE6224 tried to overtake one vehicle he discontrol his vehicle and hit the truck WB 739779 in face to face which was (truck) coming from opposite direction. As a result Pratik Kr. Pal had expired on the spot. During investigation it also

established of negligent driving of WB 739779 Vehicle.

During investigation of the case the prima facie charge u/s 279/304A IPC has been well established against the driver Aita Singh Pradhan. As such I do hereby submit charge sheet by Karshiang PS. CS No. 143/19 dated 30.11.2019. u/s 279/304 IPC against accused driver Aita Singh Pradhan (31 years) son of Rambur Pradhan at Najcok Forest Basti, P.O. Santhar, PS & Dist. Kalimpang to face the trial in the open court of law. there is sufficient proves and evidences in this witness will proved the case during trial.

24. So, it appears that the IO has observed the offending truck was driving in a rash and negligent manner. If it is considered to be true regarding the fact of accident, it is not unnatural for a driver of a vehicle to over take another vehicle in a high way if he finds, there is a sufficient space to overtake. The IO of this case is of specific opinion that the accident was happened due to rash and negligent driving of the driver of the truck and the truck driver made an accused in this case. So it appears that the stray observation of the IO in that particular case cannot be said to be the sole cause of accident. Moreover, the IO was not present at the time of the accident. PW 2 who was present at the time of accident, has deposed before the Learned tribunal regarding the fact of accident. The evidence of

PW 2 and credibility thereof was not shaken during his cross-examination. Furthermore the Insurance Company has the option to produce the IO or the CS witness from whom the IO has received such information during investigation. In this case the Insurance Company has not opted such procedure. Moreover the contributory negligence has not been specifically pleaded by the insurance Company at the time of filing written statement and that was not proved by producing cogent evidence.

25. Merely because of a head on collision, it cannot be said that the victim's vehicle was responsible for the accident. The judgment referred by the learned Counsel for the Insurance Company are factually different. No reliance can be placed upon them. More over in all the cited cases, it has been specifically proved before the Hon'ble Supreme Court and High Court that the victim driver was negligent. But in this case negligence on part of the victim driver has not been properly proved, neither on the principal of "beyond reasonable doubt" nor on "preponderance of probabilities".

26. In a Criminal case charge sheet is not a piece of evidence. It is an opinion of investigating officer regarding prima facie occurrence of a Crime. The prima facie finding in C.S. can never be treated as documentary evidence. The evidence of C.S witnesses in the trial can only be relied on as sufficient piece of evidence.

27. The prima facie observation of the IO in CS has to be corroborated before it being used as evidence. In this case the Insurance Company has failed to prove the opinion of the IO by way of corroboration.

28. Under the above observation the plea of contributory negligence as raised by the Insurance Company is turned down.

29. It has already discussed earlier that the employment of the claimant No. 1 in the said concern cannot be construed to be the income of the family. The Claimant No. 1 is earning by using her labour and capability in the said concern. The loss of income as provided under the Provision of Motor Vehicles Act for the death of a deceased cannot be equated or decreased due to the later employment of any of the claimant with the said concern. Thus the argument on behalf of the Insurance Company regarding " no loss of Income" is not justifiable.

30. Under the above observation the award passed by the learned Tribunal required modification

31. <u>Just and Proper Compensation annual income</u>

Annual Income	Rs. 17,04,358
1/3 deduction for personal living expenses	Rs. 5,68,119/-
	Rs. 11,36,239/-
Multiplicand X 11 (Multiplier-11) Rs. 11,36,239/- X 11	Rs. 1,24,98,629/-
Add Future Prospects @ 10%	Rs. 12,49,862/-
Add Loss of Estate	Rs. 15,000/-
Add Funeral Expenses	Rs. 15,000/-
Add los of consortium	Rs. 40,000/-
Add 20% of Gen. Damages (Pranay Sethi)	Rs. 14,000/-
Total	Rs. 1,38,32,491/-

32. After calculation the just and proper compensation of this case comes to Rs 1,38, 32, 491/-. The Insurance Company is directed to pay the compensation together with 6% per annum from the date of filing of the claim application till its actual realization.

33. The Insurance Company is directed to pay the compensation through the office of the Learned Tribunal within 06 weeks from the date of passing of this order by issuing three equal Account Payee Cheques in the name of the claimants.

34. The cheque of minor claimant if any, should be received by her natural guardian mother / Claimant No. 1 and she shall follow the direction of the tribunal. The payment of compensation is subject to ascertainment of payment of deficit Court fee, if any.

35. Connected applications if pending, are also disposed of.

36. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[Subhendu Samanta, J.]