**CIRCUIT BENCH OF CALCUTTA HIGH COURT**
**AT JALPAIGURI**
**APPELLATE SIDE**

**05.04.2024**
**SL No.43**
**Court No. 3**
**Ali**

**FMAT 41 of 2019**

**Sanchayita Ghosh & Anr.**
**Vs.**
**The National Insurance Co. Ltd. & Anr.**

Mr. Subir Banerjee, Adv.,
Mr. Abhijit Raha, Adv.

………. for the appellant/claimant.

Mr. Hirak Barman, Adv.,
…for the respondent/Insurance Co.

The instant appeal has been preferred against the Judgment and Award dated 27th November. 2017, passed by the learned Judge, Motor Accident Claims Tribunal, Jalpaiguri, in MAC Case no. 203 of 2015.

The brief facts of the case is that the present appellant being the claimants filed an application under Section 166 of the M.V. Act, before the learned tribunal for getting compensation on the ground that their predecessor 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 by filing written statement.

Considering the submission of the parties and after receiving the evidences the learned tribunal has awarded a sum of Rs.32,02,000/- towards the compensation and directed the Insurance Company to pay the compensation.

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

The learned advocate for the appellants/ claimants submits that the learned tribunal has not considered the entire facts and circumstances of this cased and the award was passed without following the law of the land. He argued that in this case the learned tribunal has failed to consider the income of the deceased appearing in the Income Tax Return. Learned tribunal also not considered the future prospects and general damages according to the observation of the Hon'ble Apex Court in ***Pranay Sethi.***

***Income of the Deceased***

The claim application stated the occupation of the deceased to be businessman and approx monthly income was Rs.30,000/-. During the course of the hearing before the learned tribunal the claimants have submitted the Income Tax Return filed by the deceased prior to his death for the

Assessment Years 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2014-2015. Learned tribunal has adopted the income of the deceased by averaging the Income Tax Return. The income of the deceased was considered by the learned tribunal to be Rs. 3,00.000/- per year.

Learned advocate for the appellants submits that the observation of learned tribunal regarding averaging the income of the deceased appearing in the Income Tax Return is illegal. By virtue of decision of Hon'ble Apex Court in ***Shashikala & Ors. Versus Gangalakshmamma & Ors*** reported in ***(2015) 9 SCC 150*** and ***Malarvizhi & Ors. Vs. United India Insurance Company Ltd. & Anr.*** reported in ***(2020) 4 SCC 228,*** the last year income of the deceased and the income which-would be higher, has to be taken to be the just and proper income for assessment of the compensation in a case of 166 of the M.V. Act.

Learned advocate for the respondent/Insurance Company raised strong objection and submits that the learned tribunal has correctly adopted the average of the income appearing in the Income Tax Return. The claimants have failed to prove any oral and documentary evidences to prove the occupation or income of the deceased. Thus, the learned tribunal was justified in assessing the average income of the deceased.

Heard the learned advocate perused the observation of learned tribunal it appears that in the Assessment Year 2010-2011, the net income of the victim was Rs.2,62,100/- and in the Assessment Year 2014-2015 the income was Rs.4,97,320/- so the income was gradually increased. The learned tribunal has average the income appearing in the Income Tax Return and fixed the income of the deceased to be Rs.3,00,000/- per year.

In the case of ***Shashikala & Ors. (supra)*** the Hon'ble Supreme Court has held that:

> ***"8. The deceased was doing transport business of supplying newspapers from the Head Office to the other destinations as per the agreement entered into between the group of newspapers and himself. It is also not in dispute that the deceased was an income tax assessee and he has filed income tax returns for the assessment years 2005-06 and 2006-07. The claimants had filed income tax returns of the deceased for the assessment years 2005-06 and 2006-07 with gross total income of Rs.1,08,713/- and Rs.2,02,911/- respectively including the income from the house property. Total income of both the years comes to Rs.3,11,624/- and the High Court has taken the average of it which comes to Rs.1,55,812/-. High Court deducted 10% of the said amount towards income-tax and taken the balance amount to Rs.1,40,231/-. The High Court had further deducted Rs.2,400/- towards professional tax and income from the house property shown as Rs.20,000/- and the net income was calculated at Rs.1,17,831/-. Since the claimants are***

***six in numbers as per the decision in Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr[3]., one-fourth(1/4th ) deduction was made towards personal expenses. The loss of dependency was thus calculated at Rs.88,373/-. Taking the age of deceased at 45 years, the High Court adopted multiplier 14 and calculated the total loss of dependency at Rs.12,37,222/-.***

***9. The deceased was aged 45 years and was doing transport business. Though the claimants have filed income tax returns for two assessment years 2005-06 and 2006-07, as per the income tax returns for the year 2006-07, the income of the assessee was Rs.2,02,911/-. Tribunal did not take the income of the deceased for the assessment year 2006-07 on the ground that only xerox copy was filed and the claimants have failed to examine income-tax authorities to prove the same. Instead of taking the income of the deceased as per the assessment year 2006-07, the High Court has chosen to calculate the average of the income for two assessment years 2005-06 and 2006-07. Considering the age of the deceased and the nature of business he was doing, in my considered view, the High Court was not justified in so taking the average of income of the two assessment years. The deceased was aged 45 years and doing business. Admittedly, he was also owning agricultural lands. Even though agricultural income was not shown in the income tax return, it emerges from the evidence that the deceased was also doing agricultural work".***

In ***Malarvizhir & Ors. (supra)*** the Hon'ble Apex Court has also held that:

***"The tax return indicates an annual income of Rs.2,11,131/- in the relevant assessment year. Mr. Jayanth Muth Raj, learned Senior Counsel appearing on behalf of the appellant contended that other documents were***

***marked which reflected the income of the deceased. 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. To the benefit of the appellants, the High Courtj has proceeded on the basis of the income tax return for Assessment Year 1997-1998 and not 1999-2000 and 2000-2001 which reflected a reduction in the annual income of the deceased".***

It is true that the Hon'ble Apex Court has held that the last year Income Tax Return has to be adopted to fix the income of the deceased in calculating the compensation in a case under Section 166 of M.V. Act.

After considering the entire facts and circumstances of this case it appears that the occupation of the deceased i.e. business has been sufficiently proved by the Income Tax Return. A person who would have no income is not possibly bound to file the Income Tax Return for the consecutive years. Moreover, at the time of filing of the Income Tax Return it is the general nation of the public that he must file the Income Tax Return showing the less of income so that the tax liability may not be imposed upon him. Moreover, at the time of filing of the returns of the deceased has no prospect of the death. Accordingly, I find no justification to consider the submission of the learned advocate for the Insurance Company.

Moreover, the fixing income of the deceased by averaging income of the deceased appearing in the ITRs was, discouraged by the Hon'ble Apex Court in ***Shashikala & Ors.*** Accordingly, I find that the income assessed by the learned tribunal is erroneous. In this case, the Assessment year 2014-2015 discloses the income of the deceased to be Rs.5,97,319/-. The Tax liability of Rs. 28,564/- has to be deducted. Accordingly, the applicable income of the deceased for the purpose of this case of compensation would be Rs.5,68,755/-.

***<u>Future Prospects and General Damages</u>***

Learned advocate for the appellant submits that the learned tribunal has not awarded the future prospects, and general damages of Rs.2,000/- was awarded towards the funeral expenses. He submits that by virtue of the decision of Hon'ble Apex Court in ***National Insurance Company Ltd. Vs. Pranay Sethi.*** The claimants are entitled to get the future prospects which would be 40% upon his establish income. He also submits that the general damages of Rs. 70,000/- has to be awarded in this case and the claimants are entitled to get the 10% enhancement of the general damages as per observation of the Hon'ble Apex Court in ***Pranay Sethi.***

Learned advocate appearing on behalf of the Insurance Company submits that by virtue of the decision of Hon'ble Apex Court in ***Divisional Manager, Oriental Insurance Co. Ltd. V. Swapna Nayak and Others*** reported in ***2017 ACJ 697*** and by virtue of decision of Division Bench of the Calcutta High Court in ***National Insurance Co. Vs. Mainak Ghosh and Other*** reported in ***(2017) ACK 986***, the payment of the appellant cannot be considered.

He further submits that the learned tribunal has assessed the just and proper compensation of this case. Without specific evidence the future prospects cannot be awarded.

Heard the learned advocates.

The Hon'ble Apex Court in ***Pranay Sethi (supra)*** has held in a constitution Bench that there are several decisions of awarding future prospects throughout the India; to solve the dispute the Hon'ble Apex Court in Constitution Bench (Five Judges Bench) has held that in all pending cases and appeals the general damages and future prospects has to be awarded according to the schedule mentioned in the judgment of ***Pranay Sethi.*** In this case, in my opinion, the observation of

Hon'ble Apex Court in ***Swapna Nayak*** as well as the judgment of Divisional Bench of this case in ***Mainak Ghosh*** and Others. has no effect as the matter has been decided by the Hon'ble Apex Court in ***Pranay Sethi***. The Constitution Bench in this Case as its overriding effect above all the judgment in the same principle. Accordingly, in this case, I am of the view that the claimants are entitled to get the future prospects which would be 40% to be establish income of the deceased and general damages of Rs. 77,000/-has to be awarded.

Considering the all aspects the award passed by the learned tribunal need be modified.

**<u>Calculation of compensation</u>**

| | |
|---|---|
| 1. Annual Income | :Rs. 5,68,755/- |
| 2. Add: 40% Future Prospects | :<u>Rs. 2,27,502/-</u> |
| | :Rs. 7,96,257/- |
| 3. Less:1/3rd deduction | :<u>Rs.2,65,419/-</u> |
| | :Rs. 5,30,838/- |
| 4. Multiplier 16 (Rs.5,30,838/- X 16) | :Rs.84,93,408/- |
| 5. Add: General Damages (Rs.70,000/- + Rs.10,000) (10% enhance amount after three (3) years) | <u>:Rs.77,000/-</u> |
| | :Rs.85,70,408/- |
| Less: Tribunal awarded | :<u>Rs. 31,95,000/-</u> |
| **Enhance awarded amount** | **Rs.53,75,408/-** |

After calculation, the award comes to Rs. Rs. 85,70,408/-. The learned tribunal already granted Rs.31,95,000/-. The balance award comes to Rs. 53,75,408/-. The Insurance Company is directed to pay the balance awarded sum together with interest

@ 6% per annum from the date of filing of the claim application till its actual payment. The Insurance Company is further directed to deposit the above mentioned award through the office of the learned tribunal in the name of the claimants by paying two equal account payee cheques within six weeks. On such deposit, the claimants are at liberty to receive the same according to the general norms subject to the ascertainment of payment of deficit Court Fees, if any.

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 **FMAT 41 of 2019** is disposed of.

LCR be sent down immediately.

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.)**