

HIGH COURT OF CALCUTTA**Bench : Hon'ble Justice Ajay Kumar Gupta****Date of Decision: 2nd May 2024**

CIVIL APPELLATE JURISDICTION Appellate Side

FMA 2404 of 2014

COT 78 of 2014

National Insurance Company Limited**Versus****Rupali Ojha & Others****Legislation and Rules:**

Motor Vehicles Act, Section 166

Indian Penal Code, Sections 279, 304A

Subject: Appeals concerning compensation in a motor accident case involving the death of Shymal Ojha, with issues relating to contributory negligence, computation of compensation, and entitlement to additional damages.

Headnotes:

Motor Vehicle Accident – Compensation Awarded for Death – Appeal against Tribunal's decision by both insurer and claimants – Accident involving motorcycle and truck, leading to motorcyclist's death - Tribunal held truck driver solely liable, awarded Rs. 20,71,630 compensation plus interest - Insurance company appealed, alleging contributory negligence and error in income assessment - Claimants appealed for higher compensation considering future prospects and actual general damages - High Court upholds truck driver's sole liability, recalculates compensation including future prospects, adjusts for personal living expenses, and corrects income assessment error -

Final compensation set at Rs. 26,04,908, with directions for balance payment with interest from date of original claim till final payment [Paras 3-16]

Referred Cases:

- Sarla Verma and Others vs. Delhi Transport Corporation and Another¹ (2009) 6 SCC 121
- National Insurance Co. Ltd vs. Pranay Sethi & Others¹ (2017) 16 SCC 680
- National Insurance Company Ltd. Vs. Indira Srivastava and Others¹ (2008) 2 SCC 763; 2008 (1) TAC 424

Representing Advocates:

Mr. P.K. Pahari, Adv., for the Appellant in FMA 2404/2014 and for the Respondent No. 1 in COT 78/2014

Ms. Sima Ghosh, Adv., and Mr. Sanjoy Patra, Adv., for the Appellants in COT 78/2014 and for the Respondents in FMA 2404/2014

Ajay Kumar Gupta, J:

1. The First Miscellaneous Appeal has been filed by the Appellant/National Insurance Company assailing the judgment and award dated 3rd January, 2014 passed by the learned Tribunal Judge, Motor Accident Claims Tribunal, 1st Court, Suri, Birbhum in MAC Case No. 61/2011 on the following grounds:

(i). The learned Court below erred in law and facts and awarded a compensation only against the appellant/insurer of the alleged offending vehicle No. WGD-1535 though two vehicles were involved in the said accident. Due to head on collision of the said two vehicles and contributory negligence of the driver and rider of the motor cycle, the accident took place and ultimately victim died;

(ii). The learned Tribunal Judge erred in holding that the driver of the alleged offending vehicle No. WGD-1535 was solely responsible for the alleged accident though the evidence, brought on record, shows otherwise.

(iii). The learned Court below erred in allowing the claim application though the claimants have not made necessary parties i.e. owner and insurer of the motor cycle being Registration No. WB-54C-8565 and awarded compensation only against the present appellant to the tune of Rs. 20,71,630/- though it ought have 50% since the accident was taken place on the head of collusion and both the driver and rider of the motor cycle were equally responsible of the said accident.

(iv). Lastly, the learned Tribunal wrongly computed compensation on the basis of yearly gross income of the deceased of Rs. 2,38,550/- without deducting the income tax and professional tax.

2. On the other hand, the claimants/respondents filed a COT in the aforesaid appeal on the ground that the learned Tribunal wrongly awarded compensation to the tune of Rs. 20,71,630/- without adding future prospects and actual general damages. If future prospects and actual general damages would have been considered, the compensation amount would have more than the awarded compensation amount. The learned Tribunal Judge not awarded interest over the total compensation as prayed for from the date of filing of the claim application i.e. on 21.03.2011 till realization. Hence, both appeal and COT have come up before this Court for their disposal.

3. The brief facts of this case are as under:

3a. The claimants being the legal heirs and representatives of the deceased filed an application under Section 166 of the Motor Vehicles Act on account of death of deceased, namely, Shymal Ojha, caused due to motor traffic accident. Accident was occurred on 06.01.2011 at about 9 am when the deceased was proceeding towards Suri side from his village Gamarkundu through Suri Gamarkundu metalled road by riding a motorcycle being registration no. WB-54C-8565. When he reached at Barahitala Jangal near

Tasarkata village, at that point of time, the offending Truck being no. WGD-1535 was coming from opposite direction in wrong side and suddenly dashed the victim as a result victim sustained grievous injuries on his person and expired on the spot. The case of the claimants is that the accident took place due to sole rash and negligent driving on the part of the driver of the offending Truck as such they claimed compensation to the tune of Rs. 20 Lakhs with interest from the date of filing of the claim application i.e. on 21.03.2011 till realization.

3b. It is further contention of the claimants that the victim was a Government Contractor under the State of West Bengal. He was income tax payee. His actual income was Rs. 25,000/- per month prior to the date of accident.

3c. It is further contended by the claimants that the age of the victim/deceased was 48 years old on the date of accident. The prayer of the Appellant is to modify the impugned judgment and award as aforesaid after enhancement of compensation as the compensation awarded by the Learned Tribunal is inadequate.

4. The learned Tribunal, after considering the oral and documentary evidence brought on record by the parties, concluded and awarded a sum of Rs. 20,71,630/- against the appellant/National Insurance Company Limited along with interest @ 6% per annum from the date of filing of this claim application i.e. on 21.03.2011 to till date of judgment and award and same shall be paid within two months from the date of judgment failing which the National Insurance Company Limited shall be required to pay further interest @ 9% per annum from the date of judgment till payment. However, considering the case of the parties, this Court finds both the parties have raised several issues. Those are as follows:

(a). Whether the accident was taken place on head of collusion involving two vehicles being registration nos. WB-54C 8565 and WGD-1535?

(b). Whether both the driver and rider were equally responsible for rash and negligent driving which caused the said accident and insurer of the both vehicles are equally liable for such contributory negligence?

(c). Whether the income of the victim has been considered by the learned Tribunal Judge without deducting income tax and professional tax?

(d). Whether the claimants are entitled to get the compensation under the heads of future prospects and actual general damages i.e. Rs. 84,000/- in place of Rs. 4,500/- as awarded by the learned Tribunal?

Discussion, Analysis and Conclusion of This Court:

5. Having heard the submissions of both sides and on perusal of the judgment and award passed by the learned Tribunal, this Court finds two vehicles were involved in the said accident, one is motorcycle being Registration No. WB-54C-8565 and another vehicle i.e. Truck being Registration No. WGD-1535. It is not disputed about the involvement of the vehicles, date and time of accident. It is also admitted facts that the deceased, namely, Shymal Ojha died due to the injuries suffered by him in a motor traffic accident.

6. In the instant case, the claimants have examined P.W. 1- Rupali Ojha, wife of deceased Shymal Kumar Ojha Alias Shymal Ojha. P.W. 2- Prasanta Singha, ocular witness of the said accident, P.W. 3- Hriday Mondal, a Tikhadar by profession working under Rajnagar Panchayat Samity, where the deceased was also working as a Tikhadar. P.W. 4 is an employee of the firm namely G.C.Bardhan & Company Chartered Accountant Firm of Kolkata, P.W.5 is an employee of Bhabanipur Gram Panchayet as Skill Technical, P.W.6, Chandan Das an employee of BDO office, Rajnagar, P.W.7 is an employee of Rajnagar B.D.O office working as Junior Programming officer since, 2011. Whereas, Appellant/Insurance Company of vehicle no. WGD 1535, on the other hand, examined DW No.

1, Tapan Kr. Mishra, Income Tax Inspector attached to I.T. Ward-4, Suri

Birbhum and DW.No.2, Driver of the offending vehicle No.WGD-1535

7. P.W. 1 stated about the accident and proved that her husband Shyamal Kumar Ojha alias Shyamal Ojha died due to the accident. She also filed the certified copy of FIR, Charge Sheet, Seizure List in connection with Suri P.S.

Case No. 5/11 dated 10.01.2011 u/s- 279/304A IPC, Xerox Copy of Insurance Policy, True Copy of PM Report, Death Certificate of the victim, Driving Licence of the Victim, School Certificate of the victim, Income Tax Return for the Assessment Year 2010-2011. Those are marked as Exhibits 1 to 11 respectively. At the same time, PAN Card, Voter ID Card, Statements of Account Report till 31st March, 2010 are marked as Exhibits X (1) to X (2) respectively for identification. Work Order No. 806 dated 02.06.2010 for construction of Maha Bidyalayaat Tildanga vide order work No. 80 dated 01.02.2010 cause way at Kandar Khele dated 24.09.2010 at Mouza Sundar Khele dated 24.09.2010 documents dated 08.12.2010 showing of supply marked as Exhibits X (4), X (5), X (6) and X (7) respectively for identification.

She stated during cross-examination that her husband was moving from left side of road while the truck of opposite direction came and colluded with motorcycle of her husband. She did not see the accident. The motorcycle was one of her relatives, who authorised her husband to ride the same. She further stated at the time of accident, her husband was wearing helmet and finally she stated the police did not interrogate her about the accident. She denied the suggestion put by the Insurance Company that the deceased met with an accident due to collusion between the two vehicles.

8. P.W. 2 stated in his examination-in-chief that on 06.01.2011 Shyamal Kumar Ojha @ Shyamal Ojha was proceeding towards Suri side from Village-Gamarkundu through Suri-Gamarkundu Metalled Road by a motor cycle being no. WB-54C-8565 and by this manner at about 9 am (morning) when he reached at Barahitala Jungle near Village-Tasarkata on that road at that time the offending truck being no. WGD-1535 dashed him coming in wrong side. Be it mentioned here that the victim was proceeding towards Suri side from Gamarkundu side and on the other hand the offending Truck was proceeding towards Gamarkundu side from Suri side i.e. towards opposite direction and said Shyamal Kumar Ojha sustained grievous injuries in his person and expired on the spot of accident. Due to rash and negligent driving on the part of the driver of offending Truck, the said accident took place and the driver of the offending Truck was the solely responsible for the accident and accidental death of the victim Shyamal Kumar Ojha. He stated he saw the accident from 40-45 cubit away from the spot of the accident, when he was proceeding towards Suri town from his village through Suri Gamarkundu

Road by riding his by-cycle. However, during cross-examination, he admitted he did not receive any summons from the Court to depose evidence. He admitted he did not personally make any complaint in the police station for the accident of hyamal Ojha though he knew the victim Shyamal Ojha as a co-villager. He stated police interrogated him about the accident at the spot, where he was present for about 30 minutes. Thereafter, police did not enquire him. Finally, he stated the dead body of Shyamal Ojha was lying on the left side of the road.

9. Other side, Insurance Company examined the Driver of the offending vehicle No. WGD-1535. He deposed in his evidence that an accident took place with the Motor cycle. Which was driven negligently by the Motor cyclist. The place of accident was a vacant place surrounded by jungle. At the time of accident, no other person was present there. After the accident he surrendered to the Police Station but during cross examination he admits a charge sheet was submitted against him under Section 279/304A of the IPC. He did not challenge the said charge sheet in any court to controvert the same.

10. After considering the case of the parties and appreciation of evidence brought on record, the learned Tribunal found the claimants are entitled to get compensation from the Appellant/Insurance Company of offending Truck No. WGD 1535 only. This Court also does not find any supporting evidence either oral or documentary towards the claim of contributory negligence of the Driver and motor cyclist, which caused accident. The Driver (DW-1) did not state the mode and manner of the accident. He simply stated the accident took place due to negligent riding of the motor cycle. It is not fully convincing after considering the surrounding facts and circumstance of the case. Charge sheet has been submitted against the Driver of the offending vehicle No. WGD-1535. It may be the place, where accident took place was surrounded by jungle and at the time of accident no other person was present there but the P.W.2 eye witness deposed that he saw the accident from 40-45 cubit away from the spot of the accident, when he was proceeding towards Suri town from his village through Suri Gamarkundu Road by riding his bicycle. He further stated due to rash and negligent driving on the part of the driver of offending Truck, the said accident took place and the driver of the offending Truck was the solely responsible for the accident. Such oral evidence has not

been rebutted by the appellant/Insurance Company. Accordingly, contention of contributory negligence is not acceptable without sufficient oral or documentary evidence. Consequently, the appellant is liable to pay compensation as it is proved by the claimants/respondents that the driver of the offending vehicle no. WGD 1535 was solely responsible for the said accident.

11. The learned Tribunal also came to a conclusion that deceased was 48 years old on the date of accident considering the School Certificate (Ext.10). If that be so, the actual age of the victim was 48 years old on the date of accident. In view of observation made in Sarla Verma and Others vs. Delhi Transport Corporation and Another¹ and later, Larger Bench of the Hon'ble Supreme Court affirmed the manner of selection of multiplier in National Insurance Co. Ltd Vs. Pranay Sethi & Others² by indicating therein that the selection of multiplier is correct as indicated in the paragraph in Sarla Verma's case as inter alia as follows: -

M-18 for (15 to 25 years)

M-17 for (26 to 30 years)

M-16 for (31 to 35 years)

M-15 for (36 to 40 years)

M-14 for (41 to 45 years)

M-13 for (46 to 50 years)

M-11 for (51 to 55 years)

M-9 for (56 to 60 years)

M-7 for (61 to 65 years)

The age of the victim was 48 years old as such he falls in the age group of 46 to 50 years and for that, multiplier would be 13. The family members of the deceased are three in number as such deduction would be 1/3rd for his

¹ (2009) 6 SCC 121

² (2017) 16 SCC 680

personal living expenses, if he would have alive in view of the judgment reported in Pranay Sethi's Case (supra).

12. Now the question arises regarding whether the learned Tribunal has assessed the income of the victim correctly?

So far as the income is concerned, the claimants have stated in their claim application and also stated by oral evidence that prior to the accident that the deceased was a "A" Class Government Contractor under the Govt of West Bengal having earning of Rs. 25,000/= per month. To prove the contention of the claimants, P.Ws. 1, 3, 4, 5, 6 and 7 have fully corroborated that he was a contractor by way of oral and documentary evidence marked as Exhibits No. 16, 17 and 18 respectively. D.W.1 also Exhibited Income Tax Return for the assessment year 2008-09, 2009-10 and 2010-11 marked as Exts. A/1, A/2 and A/3 respectively. Accident took place on 06.01.2011. From perusal of evidence and Income Tax Return, it reveals Rs. 2,38,515/- was his gross income for the assessment year of 2010-2011. It further reveals from the statement of accounts and Audit Report (Exhibit 15) that income tax had been paid Rs. 5513/= and Rs. 300/= as professional tax but this amount has not been deducted from the gross income of the deceased as such the learned Tribunal Judge was wrong in calculation of the actual income of the deceased. It is settled law that the statutory amount of tax payable towards Income Tax and professional tax must be deducted from the gross income of the deceased. This Court places reliance a judgment passed by Hon'ble Supreme Court in National Insurance Company Ltd. Vs. Indira Srivastava and Others³. If it would be deducted then actual income of the deceased would be [Rs. 2,38,515/- minus Rs. 5,813/- (Rs. 5,513/- + Rs. 300)] = Rs. 2,32,702/- per year. Make it round off to Rs. 2,32,700/- for the better calculation. The income tax return is a statutory document on which reliance may be placed to determine the annual income of the deceased.

13. In addition, the claimants are also entitled to get compensation towards the heads of future prospects and general damages in view of the aforesaid judgment passed in Pranay Sethi's Case (supra). Deceased's age was 48 years old at the time of accident. It is proved by documentary evidence before the learned Tribunal. If it is considered his age is 48 years, it would be above the age of 40 years on the date of accident. If the age is above 40

³ (2008) 2 SCC 763; 2008 (1) TAC 424

years, the actual future prospects should be considered as 25% of the total yearly income of the deceased.

14. It is submitted by the parties that the claimants have received 50% of the total awarded compensation from the office of Learned Registrar General from total deposit by the Insurance Company. Rs. 20,46,630/vide OD Challan No. 1715 dated 27.10.2014, Rs. 4,45,649/- vide OD Challan No. 1795 dated 29.10.2014 and statutory deposit Rs. 25,000/- vide OD Challan No. 141 dated 22.04.2014 have already been deposited by the Insurance Company.

15. In the light of the above observation, the calculation of compensation is assessed as follows:

CALCULATION OF COMPENSATION

Total Annual Income	Rs. 2,32,700/-
1/3 rd Deduction of personal and living expenses	Rs. 77,567/-
Total income after deduction	Rs. 1,55,133/-
Add Future Prospect @ 25% of total income	Rs. 38,783/-
Total income after adding future prospect	Rs. 1,93,916/-
Multiplier 13 (Rs. 1,93,916/- X 13)	Rs. 25,20,908/-
General Damages Loss of estate and funeral expenses	Rs. 84,000/-

Total Compensation	Rs. 26,04,908/-
Less: Claimants received 50% of award	Rs. 10,35,815/-
Total compensation receivable	Rs. 15,69,093/-

16. Thus, the respondents/claimants are entitled to get balance compensation amount to the tune of Rs. 15,69,093/- (Rupees Fifteen Lakhs Sixty-Nine Thousand and Ninety-Three Only) which shall carry interest @ 6% per annum from the date of filing of the claim application i.e. from 21.03.2011 till final payment.
17. The Appellant/Insurance Company is directed to deposit the balance compensation amount along with the interest as indicated above by way of cheque in the name of respondents/claimants before the Office of Learned Registrar General, High Court, Calcutta within a period of eight weeks from date.
18. Learned Registrar General, High Court, Calcutta upon deposit of the amount and interest as indicated above, shall release cheque in favour of the respondents/claimants in the same mode and manner as directed by the learned Tribunal upon proper identification and subject to verification of the payment of ad valorem Court fees on total awarded amount, if not already paid.
19. Amount deposited earlier after deduction of Rs. 10,35,815/- to be returned to the Insurance Company together with interest accrued therein, if any.
20. The impugned judgment and award of the learned Tribunal dated 3rd January, 2014 is modified to the above extent.

21. With the above observations, the appeal being FMA No. 2404 of 2014 and COT No. 78 of 2014 are hereby disposed of on contest without order as to costs. Connected applications, if any, are also, thus, disposed of.

22. Interim order, if any, stands vacated.

23. The legal guardian and mother of the minor claimants shall deposit the compensation amount as per their share in a fixed deposit scheme in any nationalised bank or post office in their respective name till attaining their majority and deposit the receipt of the same within one month from the date of receiving aforesaid compensation amount before the office of the learned Registrar General, High Court, Calcutta.

24. Let a copy of this judgment and order along with Lower Court Records, if received, be forwarded to the learned Tribunal for information.

25. All parties shall act on a server copy of this judgment and order uploaded from the official website of High Court at Calcutta.

26. Urgent photostat copy of this Judgment and Order be given to the parties upon compliance of all legal formalities.

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