

**IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side**

Present: - Hon'ble Mr. Justice Subhendu Samanta.

**FMA 1153 of 2011
Monoranjan Shil & Anr.
Vs.**

The New India Assurance Co. Ltd. & Anr.

**For the appellant : Mr. Subir Benerjee,
Mr. Sandip Bandyopadhyay,
Ms. Ruxmini Basu Roy,**

For the respondent : Mr. Parimal Kumr Pahari

Heard on : 24.1.2024
Judgment on : 25-1-2024

Subhendu Samanta, J.

1. The instant appeal has been preferred against the judgment and award dated May 21, 2011 passed by the learned Judge, Motor Accident Claims Tribunal, 2nd Court, Jalpaiguri , in M.A.C. case No. 456 of 2006.

2. The brief fact of the case is that the present appellant being the claimant preferred an application before the learned Tribunal under Section 166 of the Motor Vehicles Act for getting compensation from the Insurance Company on the ground that their unmarried son 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 was contested by the Insurance Company by filing written statement.

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3. After hearing the parties, the learned Tribunal has dismissed the claim case.

4. Being aggrieved by the said order of dismissal, the present appeal has been preferred by the claimants.

5. Heard the learned advocates and perused the materials on record, the learned Tribunal has dismissed the claim case on the ground that the alleged accident happened due to collusion between the two vehicles one is motor cycle(Hero Honda Splender) bearing No. WB-74G/9518 which dashed with one vehicle((Minidoor Auto Rickshaw) bearing no. WB-73A-2277(C.T. Auto). The learned Tribunal has received the evidence of P.W. 1 and one eyewitness as P.W. 2. The police papers were also produced wherein after investigation police has submitted final report showing the fact that the victim was responsible for the accident. The final report mentioned that the victim was travelling the motor cycle in rash and negligent manner. This is the reason the learned Tribunal has dismissed the claim application.

6. Learned advocate Mr. Subir Banerjee appearing on behalf of the appellant submits that the observation of the learned Tribunal is very much incorrect. The learned Tribunal could not dis-believe evidence of P.W. 1 and P.W.2 while the owner or the driver of the offending vehicle(C.T. Auto) had never appeared before the learned Tribunal to disapprove the case of the claimant.

7. In support of his contention he cited two decisions of Hon'ble Supreme Court and Division Bench of this Court are **Jiji Kuruvila & Ors. Vs. Kunjamma Mohan & Ors.**, reported in **2013 9 SCC 166**, **National Insurance Co. Ltd. Vs. Smt. Sarmistha Sikdar & Ors.** reported in 2018(4) T.A.G 295(Cal) the Hon'ble Apex Court has held that "*where the owner of the driver of the offending vehicle has not come forward to defend himself, the learned Tribunal and*

therefore this court would have no alternative but except that it was the vehicle alleged in the claim application which the offending vehicle”.

8. Mr. Banerjee, learned advocate also cited several decisions of Hon'ble Supreme Court on the principle that the plea of negligence and considering thereof by the learned Tribunal should be distinct and the proof thereof. *In a case under Section 166 of the M.V. Act is required to be proceeded on the basis of preponderance of probabilities and not on the basis of beyond reasonable doubt.* In support of his contention he also cited some decisions **of Dr. N. G. Dastane Vs. Mrs. S. Dastane** reported in **AIR 1075 SC 1534**, **A.E.G Carapiet Vs. A. Y. Derderian** reported in **AIR 1961 CAL 359**, **Dulcina Fernandes & Ors. Joaquim Xavier Cruz & Anr.** reported in **(2014) 1 SCC(Cri) 13**, **Minu Rout & Anr. Vs. Satya Pradyumna Mohapatra & Ors.** reported in **(2013) 10 SCC 695**.

9. Learned advocate appearing on behalf of the Insurance Company submits that the FIR was lodged on the self-same day of accident. On the basis of such FIR the distinct police case has been initiated. The police has investigated the case and after investigation submitted a charge-sheet. During the investigation, the police has enquired the local people and recorded their statement under Section 161 of the Code of Criminal Procedure. The learned Tribunal has considered the police final report and dismissed the claim case. The evidence of P.W. 2 who sated to be the eye-witnesses of this case has stated otherwise and his statement cannot be believed. He further argued that the observation of the learned Tribunal is quite justified and the instant appeal has got no merit.

10. Heard the learned advocates and perused the materials on record, it appears to me that the learned Tribunal has dismissed the claim case by virtue of final report submitted by the police after re-investigation. On perusing the police

report, it appears to me one has lodged complaint with the police on the self-same day of accident(13.11.2008), the de facto complainant said to be eyewitnesses of the accident who stated nothing about fact that who was responsible for the accident. On perusing the police final report, it appears that investigating officer of this case has simply opined that the driver of the motor cycle i.e. deceased of this case is responsible of the accident. There are no witnesses or supporting paper to show that how the deceased was driving the motor cycle. There are no statement of available witnesses(under Section 161 of the Code of Criminal Procedure) that the deceased was driving the motor cycle in a rash and negligent manner.

11. Considering the totality of the incident and also the observation of the Hon'ble Supreme Court as well as Division Bench of this Court it is true that to prove a case under Section 166 of the M.V. Act, required proof to be preponderance of probabilities. The rash the negligent driving is the *sina qua non* of a case under Section 166 of the M.V. Act. It is the admitted fact of the parties that the two vehicles colluded each other face to fact. It is quite unreasonable to hold that the victim was so negligent in driving that he lost his life. On the other hand there are no substantial loss on the part of the offending vehicle(C.T. Auto). However, the evidence of P.W. 2 is appears to me not shaken by the Insurance Company during his cross examination. Thus, in this case, it appears to me that both the vehicles are jointly responsible in the said accident. Considering the offending vehicle of this case and the insurer thereof is liable to pay 50% of the compensation. The learned Tribunal has failed to appreciate the entire facts and circumstances and came to erroneous finding and mis-guided himself on the basis of final report of the police. Accordingly, the impugned award passed by the learned Tribunal is hereby set aside.

12. In considering the just and proper compensation of this case, the monthly income of the deceased is calculated notionally Rs.3000/- per month. Yearly income comes to Rs.36,000/-. Add 40% future prospect the total Rs.50,400/-. The deceased was a bachelor, so 50% is deducted towards personal living expenses. So, the early dependency comes to Rs.25,200/-. The age of the deceased 26 years applicable multiplier according to the observation of the Hon'ble Supreme Court in **Sarala Verma** is 17. So, the award comes to Rs.4,28,400/-. The appellants are the parents, they are entitled to get general damages according to the observation of the Hon'ble Supreme Court in **Pranay Shethi** amounting to Rs.30,000/-. After adding all head, the award comes to Rs.4,58,400/-. Insurance Company is liable to pay 50% of the award i.e. Rs.2,29,200/-.

13. The award of the case comes to Rs.2,29,200/-. The Insurance Company is directed to pay the compensation along with interest 6% per annum from the date of filing of the case i.e. 15.12.2008 within six weeks from this date through the office of the learned Registrar General, High Court. Calcutta.

14. On such deposit, the office of the learned Registrar General, High Court, Calcutta shall disburse the amount in the name of the claimant vide two equal account payee chaques.

15. The payment of compensation is subject to the ascertainment of payment of deficit court fees, if any.

16. The learned Tribunal shall act upon the production of the certified copy of this award to receive the deficit court fees if any.

17. The LCR be sent down immediately to the office of the learned Tribunal.

18. Accordingly, FMA 1153 of 2011 is disposed of.

19. Connected applications, if any, are also disposed of.

20. All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Subhendu Samanta, J.)