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# IN THE HIGH COURT AT CALCUTTA
## CIVIL APPELLATE JURISDICTION
## APPELLATE SIDE

**PRESENT: - THE HON'BLE JUSTICE SUBHENDU SAMANTA**

**FMA 454 of 2013**

**Soma Ghosh @ Soma Barman**
**@ Soma (Barman) Ghosh & Ors.**
**versus**
**United India Insurance Co. Ltd. & Ors.**

**For the Appellants/Claimants : Mr. Amit Ranjan Roy, Adv.**

**For the Respondent No. 2 : Mr. Rajesh Singh, Adv.**

**Hearing on : 02.02.2024**

**Judgment on : 05.02.2024**

**Subhendu Samanta, J.:-**

1. The instant appeal has been preferred against the judgment and award dated 30th June, 2012 passed by the learned Judge, Motor Accident Claims Tribunal, Purba Bardhaman, in MAC Case No. 54/2011/189/2011.
2. The brief facts of the case is that the present appellants being the claimants have preferred the claim application under Section 166 of the M.V. Act before the learned tribunal for getting compensation on the ground that their predecessor 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

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case was contested by the insurance Company and the owner of the offending vehicle.

3. After hearing the parties and after receiving the evidences, the learned tribunal has awarded a sum of Rs.3,68,550/-together with interest @ 7% per annum from the date of filling of the claim application in favour of the claimants.

   Being aggrieved by and dissatisfied with the award passed by the learned tribunal, the present appellants/claimants have preferred this instant appeal for enhancement of the award.

4. Learned advocate for the appellants submits that the award passed by the learned tribunal is palpable illegal in the eye of law. He argued that the learned tribunal has misconstrued and miss-appreciated the facts and circumstances of this case and came to an erroneous finding. The fact of the case goes to show that on 23.12.2010 at about 02.45 P.M. the victim fell down from the front gate of a bus bearing No.WB-41-3675 which was proceeding rash and negligently on Guskara Road; the victim sustained severe injuries on his person which resulted his death. He further argued that apart from the police papers there are Seven (7) witnesses on behalf of the claimant to prove the claim case but the learned tribunal has not considered the entire evidences on record. The learned tribunal has erroneously held that the deceased was responsible for the accident and there are contributory negligence on the part of the deceased as well as the driver of the bus. The portion of negligence on behalf of the deceased was assessed by the learned tribunal as 70%. More than 3 (three)

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persons of different hospitals appeared before the learned tribunal to prove the medical expenses but the learned tribunal has not considered the evidence. Thus only Rs. 2,00,000/- was awarded towards the medical expenses including non pecuniary heads. Learned tribunal also erroneous for not considered the IT return submitted by the authorised persons of concerned Income Tax Department who produced the ITR of the deceased showing the annual income. On the above score, he argued that the learned tribunal has miss-appreciated the evidences and came to an erroneous finding.

5. Learned advocate appearing on behalf of the respondent Insurance Company submits that the observation of the learned tribunal is on the basis of the facts and circumstances of this case and on the basis of the materials on record. The learned tribunal has categorically considered the evidences in respect of contributory negligence on behalf of the deceased. Thus, the award passed by the learned tribunal is correct. No reasonable or believable document was produced before the learned tribunal regarding the medical treatment of the deceased. Thus, the learned tribunal has disbelieved the evidence of the person appearing before him as a representative of the concerned nursing home. He further argued that the learned tribunal has also considered the evidence of Income Tax Department and is of view that it's a self-same ITR. So, it cannot be considered.

6. Heard the learned advocates perused the materials on record.

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7. Considering the contributory negligence of this case it appears to me that the learned tribunal has considered the FIR wherein it has been written that at the time of boarding the bus the deceased fell down from the bus. The PW-6 was cited as an eye witness of the incidents. Who deposed that the deceased entered into the bus; thereafter, due to sudden application of break by the driver of the bus, the deceased rolled down from the bus and sustained severe injuries. The learned tribunal has also considered the cross-examination of the PW-6 (eye witness) and on considering the entire fact, the learned tribunal is of view that the versions of factum of accident are contradictory to each other and he hold that the deceased must have wanted to get into the bus or he tried to board the running bus so he fell down from the bus. Learned tribunal is of view that on that score the deceased was 70% liable for the accident.
8. Let me consider, whether the observation of the learned tribunal is correct in the attending facts and circumstances of this case. The claimant has submitted the claim application containing, inter alia, that in paragraph 23 that the deceased has entered into the bus and thereafter due to rash and negligent driving of the driver he fell down from the bus. PW-6 (eye witness) deposed that he was sitting inside the bus and saw the deceased entered into the bus and took a sit. Thereafter, due to the sudden application of break he rolled down and fell down from the bus. The FIR stated that the deceased has failed down from the front gate of the bus when he was going to board the bus. The FIR also stated that due to rash and negligent driving of the

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driver of the bus, the deceased fell down. The learned tribunal is confused about the two statements, one is of FIR and another is of eye witness. The FIR stated that when the deceased boarded the bus the driver suddenly accelerate the speed. On the other hand, PW-6 stated the driver suddenly applied the break that is why the deceased rolled down from the bus. It appears that the FIR was lodged by the brother-in-law of the deceased who was not present at the time of accident. Moreover, the PW-6 was present at the time of accident. So, the evidence of PW-6 is more reliable then the de-facto complainant. Moreover, it appears from the record that the owner of the offending vehicle contested the case by filling written statement and all along participated in the trial. He cross-examined all the witnesses of the claimants. The driver of the offending bus, happens to be the employee the owner. Who never appeared/produced before the tribunal to contradict the version of the PW-6. The driver of the offending bus has never produced by the owner of the offending vehicle before the learned tribunal who is the best witness in this case. When the best evidence/witness is not placed withheld, the Court may hold the adverse presumption under Section 114(G) of the Evidence Act, that if the evidence is at all produced that will not support the case of the owner. So, in that score, in my view, the learned tribunal has not considered the evidences on record but has proceeded hypothetically and assessed the contributory negligence on the part of the deceased. The investigation of the police is ended in charge sheet accusing the driver of the offending vehicle to be

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responsible for the accident. Charge-sheet is prima-facie evidence which can be disbelieved. Only on the version of the FIR, the observation of the learned tribunal, appears to me not justified and beyond the evidence on record.

9. The Hon'ble Supreme Court in ***Jiju Kuruvila & Ors. Versus Kunjujamma Mohan & Ors*** reported in ***(2013 SAR (Civil) 864*** has held that :

> ***"24. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc. depends on number of factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual".***

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10. The Hon'ble Supreme Court in ***Basthi Kasim Saheb V. Mysore State Road Transport Corporation and Others*** reported in ***AIR (1991) SC487*** has held that:

> ***"8. The Evidence in the case indicates that there was no traffic on the road at the time of the accident. No untoward incident took place like sudden failure of the brakes or an unexpected stray cattle coming in front of the bus and still the vehicle got into trouble. In absence of any unexpected development it was for the driver to have explained how this happened and there is no such explanation forthcoming. In such a situation the principle of resipsa loquitur applies. The petitioner, in the circumstances, could not have proved the actual cause of the accident, and on the face of it was so improbable that such an accident could have happened without the negligence of the driver that the Court should presume such negligence without further evidence. The burden in such a situation is on the defendant to show that the driver was not negligent and that the accident might, more probably, have happened in a manner which did not connote negligence on his part, but the defence has failed to produce any evidence to support such a possibility. We, therefore, agree with the finding of the trail court on this issue and set aside the judgement of the High Court.***

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11. The law laid down by the Hon'ble Apex Court on the above citation and ratio thereof is that when there is no direct evidence of negligence on the part of the deceased. The tribunal cannot assess the negligence on behalf of the deceased.

*12.* To refute the contention of the appellant regarding the contributory negligence the Insurance Company has cited two decisions of Hon'ble High Court of Madras reported in ***The Managing director, Metropolitan Transport Corporation Limited, (MTC) Division-II Vs. V. Balamurugan and Tamil Nadu State Transport Corporation Ltd. Vs. N. Chitra and Ors.,*** I have perused the observation of Hon'ble Madras High court wherefrom it appears that the facts of the cited case goes to show there are direct evidence of negligence on the part of insurer/deceased. Thus, the observation of Madras High Court is not applicable in this case. In my view, the driver of the offending vehicle is solely negligent for the rash and negligent driving of the driver that there is no contributory negligence on the part of the deceased.

*13.* In considering the income of the deceased it appears to me that the PW-4 is one of the Inspector of Income Tax Department, Hooghly having its office at Chinsurah deposed before the learned tribunal and submitted the ITR of the deceased for the financial year 2008-2009 and 2010-2011. The ITR are marked as exhibit-11 before the learned tribunal. The learned tribunal has perused the evidence of PW-4 but he is of view that the ITR submitted by the deceased was self –assessed; so it cannot be believed. The observation of the

tribunal is erroneous by virtue of law laid down by the Hon'ble Supreme Court in several decisions on that point; they are ***Calpanaraj and Ors. versus Tamil Nadu State Transport Corporation*** reported in ***(2015) 2 SCC 764***, and another decision passed in ***Malarvizhi & Ors. versus United India Insurance Company Limited & Anr.*** reported in ***(2020) 4 SCC 228***; wherein the Hon'ble Apex Court has held that the ITR is a statutory document and the income of a deceased can be very well calculated on the basis of such ITR. Hon'ble Apex Court further in ***Sangita Arya versus Oriental Insurance Company Limited*** reported in ***(2020) 5 SCC 327*** has held that the ITR for the assessment year filed prior to the death of the deceased is to be considered for determining the income of the deceased victim in this case. The observation of the learned tribunal is contrary to the law laid down by the Hon'ble Supreme Court. Furthermore, it appears that all the ITR were submitted by the deceased prior to his death. At the time of filing ITR the deceased must not have had any prior indication of his death in an accident; rather it is tendency of the people to show less income in the ITR to evade tax liability. The last return was submitted on 9$^{th}$ August, 2010 while he died in a road traffic accident on 23.12.2010. According to the observation of the Hon'ble Apex Court, the ITR submitted by the deceased for the assessment year 2010-2011 is to be considered to be the annual income of the deceased. By such return the gross total annual income of the

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deceased appears to be Rs. 2,63,784/-; that should be taken as an annual income of the deceased in this case.

*14.* However, the learned tribunal has not considered the medical expenses incurred by the claimants due to the treatment of the deceased in various nursing home/hospital. It appears from the evidence that the Medical bills proved on behalf of Ruby General Hospital is Rs. 2,73,134/-. The bill of Kamala Ray Hospitals (PW-3) is Rs. 77,380/- and the bill of Belur Shramjibi Swasthya Prakalpa Samity is Rs. 23,095/-The LCR is produced before this Court. I peruse the bills it appears that the bills are placed in the LCR though they are not in original but the authorized person has deposed after receiving the summons from the Court; so it is quite unnatural to disbelieve their statement. Accordingly, I am of the view that the claimants are entitled to get the medical expenses in this case according to the bills. On the above observation, the award passed by the learned tribunal need be modified.

15. The just and proper compensation of this case is calculated as hereunder:-

**Calculation of Compensation**

| | |
|---|---|
| i) Yearly Income | :Rs.2,63,784/- |
| ii) Add: 40% future prospects | :Rs.1,05,513/- |
| Total yearly loss of income | :Rs.3,69,297/- |
| iii) Less: 1/3rd personal expenses | :Rs.1,23,099/-<br>:Rs. 2,46,198/- |
| iv) Multiplier 16<br>(Rs.2,46,198/- X 16) Age-35 years | :Rs.39,39,168/- |

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| | |
|---|---|
| v) Add: General Damages | :Rs.70,000/- |
| (Rs.15,000/-+Rs.40,000/-+Rs.15,000/-) | :Rs.40,09,168/- |
| vi) Add: Medical Expenses | :Rs.3,73,069/- |
| | :Rs.43,82,237/- |
| vii) Less: Already awarded | :Rs. 3,73,550/- |
| | **:Rs.40,08,687/** |

16. After calculation the just and proper compensation comes to Rs.43,82,237/-. The learned tribunal has already awarded a sum of Rs. 3,73,550/- so the balance award comes to Rs.40,08,687/- the award shall carry interest @ 6% per annum from the date of filing of the claim application (15.07.2011).

*17.* The Insurance Company is directed to pay the compensation together with the interest through the office of the learned Registrar General High Court, Calcutta within six weeks from this date.

*18.* After such deposit the office of the learned Registrar General High Court, Calcutta shall disburse the same amount in the name of the claimant Nos. 1 [viz.-Soma (Barman) Ghosh] 2 and 3 vide three equal account payee cheques.

19. The payment of compensation is subject to the ascertainment of payment of deficit Court Fees, if any.

20. The office is directed to return the LCR immediately.

21. The learned tribunal shall act upon the certified copy of this order to receive the deficit Court Fees, if any.

22. The instant **FMA 454 of 2013** is disposed of with the above observation.

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23. All connected applications, if any, stand disposed of.

24. Interim orders, if any, stand vacated.

25. Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

**(Subhendu Samanta, J.)**