

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

PRESENT:

THE HON'BLE JUSTICE RABINDRANATH SAMANTA

FMA 43 of 2013

With

CAN 2 of 2015(Old CAN 471 of 2015)

i) Smt. Purnima Roy
ii) Sri Swapan Kumar Roy
iii) Minor Arpita Roy
represented by her guardian
and grand-father, appellant No.2
Swapan Kumar Roy

.....Appellants/Claimants

-Vs-

i) National Insurance Company Limited
ii) United India Insurance Company Limited
iii) Mr. Surinder Singh
iv) Smt. Purnima Roy

.....Respondents

With

COT 61 of 2013

National Insurance Company Limited

**..... Cross Objector/
Respondent No.1**

-Vs-

i) Smt. Purnima Roy
ii) Sri Swapan Kumar Roy
iii) Minor Arpita Roy
represented by her guardian
and grand-father, appellant No.2
Swapan Kumar Roy

**.....Respondents/
Appellants**

iv) United India Insurance Company Limited
v) Mr. Surinder Singh
vi) Smt. Purnima Roy

.....Respondents

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Mr. Jayanta Kumar Mondal, Adv.

..... for the Appellants in FMA No. 43 of 2013 and Respondent Nos. 1 to 3 in COT 61 of 2013

Mr. Sanjoy Paul, Adv.

.....for the National Insurance Company Limited, Respondent No.1 in FMA No. 43 of 2013 and the Cross-Objector in COT No. 61 of 2013

Mr. Rajesh Singh, Adv.

.....for the United India Insurance Company Limited, Respondent No.2 in FMA No. 43 of 2013 and Respondent No. 4 in COT No. 61 of 2013

Judgment on : 13.09.2022

Rabindranath Samanta, J:-

1. Challenge in the appeal and the cross-objection is against the judgment and award dated 21.05.2012 passed by the learned Judge, Motor Accident Claims Tribunal (hereinafter referred to as the Tribunal), Special Court, Paschim Medinipur in MAC Case No. 108 of 2009. In the impugned judgment the learned Tribunal observed that the respondent No.3 Surinder Singh, the owner of the offending vehicle bearing registration No. WB-23/2141 (Truck) and the respondent No. 1, National Insurance Company Limited were jointly and severally liable to pay compensation of Rs. 13,32,747/- inclusive of Rs.2,000/- as funeral expenses and Rs.2,500/- as loss of estate to the claimants and directed the National Insurance Company Limited to pay the compensation to the claimants in equal proportion along with interest @6% per

annum from the date of the filing of the claim case on 27.03.2009. The learned Tribunal assessed the compensation at Rs. 26,56,494/- exclusive of Rs.2,000/- as funeral expenses and Rs.2,500/- as loss of estate, but due to contributory negligence on the part of the deceased/driver of vehicle No. WB-34G/6046 the compensation was reduced to Rs.13,32,747/-.

2. The appellants in the appeal assail the impugned judgment on the ground that the learned Tribunal wrongly held that the deceased contributed negligence to cause the accident and the learned Tribunal erred in not assessing compensation on the count of future prospects of the deceased who was a renowned businessman. By preferring the appeal the appellants have sought for enhancement of the compensation. On the other hand, the respondent No.1, National Insurance Company Limited, in the cross-objection assails the impugned judgment on the ground that the learned Tribunal erred in not holding that the claimants failed to prove their case and thereby committed error in not dismissing the claim case.

3. The facts which led the filing of the claim application under Section 166 of the Motor Vehicles Act and which are necessary for adjudication of the appeal and cross-objection may be adumbrated as under:

On 11.02.2009 Angsuman Roy, son of Swapan Kumar Roy of Village and P.O. Silda, P.S- Binpur, District – Paschim Medinipur, his wife Subhanita Roy and minor daughter Arpita Roy were proceeding by a Bolero car bearing No. WB-34G/6046 from Silda towards Haldia for business work along N.H.6 Road. At about 6:30 A.M while the Bolero car reached near Khemasuli Pahelwan Hotel, at that time one truck bearing No.WB-23/2141 coming with

excessive speed and driven in a rash and negligent manner suddenly dashed the Bolero car on the wrong side of the road in sheer violation of traffic rules. Owing to the accident Angsuman Roy sustained grievous injuries on his head and body. His wife Subhanita Roy also sustained grievous injuries on her person. The local people recovered both of them from the Bolero car. They were making arrangement to take Angsuman Roy to local hospital. His wife Subhanita Roy was seated on a side of the road. At that time a trailer driven in rash and negligent manner dashed her and ran over her body and as consequence thereof she died on the spot. However, the local people took Angsuman Roy to Kharagpur Sub-Divisional Hospital for medical treatment, but he expired there after some time.

4. The accident took place due to rash and negligent driving on the part of the driver of the offending truck No. WB-23/2141 and the victim Angsuman Roy died because of the accident.

5. On the allegations of rash and negligent driving on the part of the driver of the offending vehicle, an FIR was lodged at Kharagpur (Local) Police Station and the FIR was registered as Kharagpur (Local) PS Case No. 36 dated 11.02.2009 under Sections 279/304 of Indian Penal Code.

6. The victim died at the age of 29 years. He used to carry on business as a proprietor of a filling station under name and style Purnima filling station having lubricant licence being No. 27/Lub. By carrying on such business he used to earn Rs. 3,18,471.56 as gross income per year. On the sudden demise of the victim the claimant Nos. 1 and 2 who happen to be his parents received tremendous mental shock. Because of his death and the death of

her mother, claimant No.3 Arpita Roy became deprived of getting parently affection forever.

7. On the facts as above, the claimants sought for compensation of Rs.40,00,000/- with interest thereon.

8. The respondent No.1, National Insurance Company Limited contested the claim case by filing a written statement wherein it denied the allegations that due to rash and negligent driving on the part of the driver of the offending truck bearing No. WB-23/2141 the accident took place and the victim died because of the accident. It alleged that the accident took place solely due to rash and negligent driving of the Bolero car bearing No. WB-34G/6046 by the deceased. Because of this the owner and the insurer of the Bolero car were responsible for paying the compensation. On such grounds and denying the other allegations as made in the claim application the respondent No.1 sought for dismissal of the claim case.

9. On the other hand, the respondent No. 2, United India Insurance Company Limited also filed a written statement to contest the claim case wherein it stated that due to rash and negligent driving on the part of the driver of the offending truck bearing registration No. WB-23/2141 the accident took place and the deceased Angsuman Roy died because of the accident. It stated that the deceased who drove the Bolero vehicle bearing No. WB-34G/6046 had no negligence on his part in causing the accident. It further stated that United India Insurance Company Limited not being a necessary party to the claim case, the claim case against it was liable to be dismissed.

10. Upon the pleadings of the parties the following issues were framed by the learned Tribunal:

- i) Is the petition under Section 166 of the M.V. Act maintainable to its present form and prayer in accordance with law?
- ii) Had the deceased died due to rash and negligent driving of the offending vehicle bearing No. WB-23/2141?
- iii) Are the petitioners entitled to get award as prayed for?
- iv) To what other relief, if any, are the petitioners entitled to get?

11. In order to prove their case, claimant No.2 Swapan Kumar Roy got himself examined as P.W.1. The claimants examined Harendranath Mahato, an eye witness as P.W.2, Asit Kumar Bisoi, an Income Tax Inspector as P.W.3 and Amit Mondal, an U.D.A attached to District Controller, Food & Supply Office as P.W.4. The claimants relied on some documents which were marked as Exhibits 1 to 13.

12. No oral or documentary evidence was adduced on the part of any of the Insurance Companies.

13. Upon hearing the learned Advocates appearing for the parties and on consideration of the evidence on record the learned Tribunal partly allowed the claim application and awarded the compensation as indicated above.

14. The learned Tribunal in the impugned judgment has observed that the accident took place due to negligence contributed by the deceased Angsuman Roy who at the material time was driving the Bolero car bearing registration No. WB-34G/6046 as well as by the driver of the offending truck bearing registration No. WB-23/2141. The learned Tribunal on assessment of the evidence on record and

considering the other factors namely adopting the relevant multiplier etc. assessed the compensation of Rs. 26,56,494/-. But, as observed by the learned Tribunal, since the driver of the Bolero car equally contributed the negligence to cause the accident, 50% of the aforesaid compensation as assessed was reduced and the compensation was calculated at Rs.13,28,247 inclusive of Rs.2,000/- as funeral expenses and Rs.2,500/- as loss of estate. Holding that this compensation was to be paid by the respondent No.1, National Insurance Company Limited, the learned Tribunal by the impugned award directed it to pay the compensation to the claimants.

15. Learned Counsel appearing for the appellants submits that the claimants by examining the eye-witness P.W. 2 Harendranath Mahato have proved that due to rash and negligent driving on the part of the driver of the offending vehicle (truck) the accident took place. But, the learned Tribunal erred in not recording the finding that it was the driver of the offending truck for whose negligence and rash driving the accident took place. Learned Counsel by referring to a decision in the case of ***Khenyei -Vs- New India Assurance Co. Ltd and another*** reported in ***2015 (2) T.A.C. 677 (SC)*** submits that even if two vehicles are involved in causing the accident, the claimants can recover at their own option whole damages from any one of them. Learned Counsel points out that the learned Tribunal miscalculated the yearly income of the deceased by taking into consideration all the recoveries and not considering the deduction of taxes only. According to learned Counsel the learned Tribunal erred in not awarding compensation on the count of future prospects of the deceased. On such contention, learned counsel submits that the compensation as

awarded by the learned Tribunal should be enhanced by modification of the award.

16. Per Contra, learned counsel for the National Insurance Company Limited submits that the learned Tribunal on assessment of the evidence ought to have held that the claimants failed to prove their case. Learned Counsel submits that the evidence of P.W. 2 Harendranath Mahato, if analysed in proper prospective, will show that this witness did not see the accident. In support of his contention learned Counsel has cited a decision in the case of ***New India Assurance Company Limited-Vs-Yogesh Devi and Others*** reported in ***(2012) 3 SCC 613***.

17. Learned Counsel appearing for the United India Insurance Company Limited submits that since the Bolero vehicle was not involved in causing the accident, no liability is cast upon his client to pay any compensation relating to the accident.

18. As it appears from the FIR, the accident which took place on 11th February, 2009 was massive in nature which involved death of three persons. The instant claim case has been filed on the death of the deceased Angsuman Roy. It is not in dispute that on the death of his wife Subhanita Roy, another claim case was brought and the claim case was disposed of. However, the case record does not speak about initiation of any claim case on the death of the third deceased.

19. Before I advert to the evidence on record, it will be apposite to excerpt the facts/allegations in the FIR lodged by one Nageshwar Sharma, the owner of Khemasuli Pahelwan Hotel which are as under:

On 11.02.2009 at about 6:30 A.M one Bolero car bearing No. WB-34G/6046 was coming from Lodhasuli towards Kharagpur along N.H.6 Road. From the opposite direction one truck bearing No. WB-23/2141 was going towards Lodhasuli and in front of his hotel both the two vehicles driven in excessive speed and in rash and negligent manner collided with each other. One man and one woman who were in the Bolero vehicle became seriously injured. With the help of the local people those injured were recovered from the vehicle. The injured woman after being recovered was kept on a side of the road and they made arrangement for taking the injured man to hospital for treatment. At that time one trailer bearing No. NL-01D/1975 which was coming from Lodhasuli side in rash and negligent manner dashed and run over the injured woman and as a result of which she died on the spot. The trailer after dashing two cycles went towards the road which is by the side of his hotel. The trailer also dashed against a truck bearing No. CG-04JA/5503 which was stranded in front of his hotel from the back side and as a result of which the vehicle dashed the helper of the truck and the helper died on the spot. The injured man later on died at the hospital. After the family members of the deceased were informed, they came to the spot.

20. On the basis of the aforesaid FIR one Kharagpur (Local) PS Case No. 36 dated 11.02.2009 under Sections 279/304, IPC was registered against the driver of the offending truck bearing No. WB-23/2141, and the driver of the offending vehicle No. NL-01D/1975. After completion of the investigation, the Investigating Officer submitted charge-sheet against the drivers of the offending vehicle No. WB-23/2141 and NL-01D/1975. But, the I.O. made prayer for discharging the driver Dharmendra Saha of vehicle No. CG-04JA/5503 on the reasons that there was no fault on his part and

discharging Angsuman Roy, son of Swapan Kumar Roy since he died.

21. Admittedly, the claim case brought on the demise of Subhanita Roy against the owner of the offending vehicle No. NL-01D/1975 and its insurer has already been disposed of.

22. The charge-sheet as submitted by the Investigating Officer prima facie shows that due to negligence on the part of the driver of the offending truck bearing No. WB-23/2141 the accident took place and the deceased Angsuman Roy died due to the accident.

23. However, let us see on assessment of the evidence on record whether the allegations as levelled by the claimants in the claim application have stood substantiated.

24. As it is evident from the claim application as well as from the charge-sheet in connection with the aforesaid Kharagpur (Local) PS Case, it has been alleged that due to negligence and rash driving on the part of the driver of the offending truck bearing No. WB-23/2141 the accident took place and the victim Angsuman Roy sustained severe injuries on his person because of the accident and ultimately he succumbed to the injuries. The claimants in order to establish the allegations examined Harendranath Mahato (P.W.2) who witnessed the occurrence. It is in the evidence of P.W. 2 in chief that on 11.02.2009 Angsuman Roy, his wife Subhanita Roy and his minor daughter Arpita Roy were proceeding by a Bolero car bearing No. WB-34G/6046 from Jhargram side towards Kharagpur. At that time one truck bearing No. WB-23/2141 coming from Kharagpur towards Lodhasuli with a high speed and driven in rash and negligent manner dashed the driver's side of the Bolero car with a great force and as a result of which Angsuman

Roy who was in the driver's seat sustained severe bleeding injuries. He was rescued and taken to Kharagpur S.D. Hospital where he breathed his last. In cross-examination a suggestion was put to this witness on the part of the National Insurance Company that since his village Khairbani was at a distance of 14 kms from the place of occurrence, he did not see the accident to which this witness replied that on the previous day he went to Village- Jatia by a bicycle and at the relevant time he was returning home from Jatia. He started from Jatia at about 5:30 A.M and while he reached the place at the material time he saw the accident. I find that nothing has been elicited from his cross-examination to discredit his evidence as adduced in chief.

25. The Hon'ble Apex Court in the decision in the case of **N.K.V. Bros. (P) Ltd-Vs- M. Karumai Ammal and Ors** reported in **1980 ACJ 435** has observed that the road accidents are one of the top killers in our country, especially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the Courts as has been observed by this Court earlier in other cases, to draw an initial presumption in several cases based on the doctrine of *res ipsa loquitur*. In the decision in the case of **Shyam Sunder and Others -Vs- The State of Rajasthan reported in 1974 A.C.J. 296** the Hon'ble Apex Court at paragraph 9 of the judgment has held as under:

“ The maxim is stated in its classic form by Erie, C.J.L, see Scott v. London & St. Katherine Docks (1865) 3 H & C 596 “ where the thing is shown to be under the management of the defendant or his servants and the accident is such as in ordinary course of things does not happen if those who have the management has used proper care, it affords reasonable

evidence, in the absence of explanation by the defendants that the accident arose from want of care.”

26. As recorded on assessment of the evidence of P.W. 2 Harendranath Mahato, it was the act of rashness and negligence on the part of the offending truck for which the accident took place. In the decision in the case of ***Gobald Motor Service Ltd. and another-Vs-R.M.K. Veluswami and others*** reported in ***AIR 1962 SC 1959*** the Hon'ble Apex Court has held if the events that happened told their story and there was presumption that the accident was caused by the negligence of the driver, in that event it will be held that the accident took place due to negligence on the part of the driver. In an another decision in the case of ***Basthi Kasim Saheb (Dead) by Legal Representatives -Vs- Mysore State Road Transport Corporation and Others*** reported in ***1991 (1) T.A.C. 715 (SC)*** it has been held by the Hon'ble Apex Court that while the driver failed to explain the accident, the claimant's case shall be presumed to have been proved pressing the doctrine of *res ipsa loquitur* in service.

27. Despite service of notice upon the owner of the offending truck, he did not prefer to contest the claim case. However, taking permission from the learned Tribunal the Insurance Company i.e. National Insurance Company Limited placed all the defence available to the owner before the Tribunal. As the evidence on record show, the Insurance Company failed to examine the driver of the offending truck or any of the persons who witnessed the accident to establish its defence. The accident as occurred speaks of the story that the speed of the offending truck was so high that it dashed the Bolero car to such an extent that the deceased and his wife who were in the vehicle got severe injuries on their person

and the deceased Angsuman Roy succumbed to the injuries. In the absence of any evidence on the part of the defence to explain for whose cause the accident took place, this Court apart from placing reliance on the evidence of the eye-witness P.W.2 Harendranath Mahato, by pressing the principle of *res ipsa loquitur* in service may without any hesitation in mind hold that the accident took place due to the rash and negligent driving on the part of the driver of the offending truck. The Bolero car bearing No. WB-34G/6046 was also involved in the accident. However, if the evidence as adduced by the claimants is considered in proper prospective it stands proved that due to rashness and negligent act on the part of the driver of the offending truck the accident took place and the deceased died of the accident.

28. The learned Tribunal reduced the compensation to the extent of 50% recording the observation that the deceased Angsuman Roy also contributed negligence to happen the accident.

29. In the decision in the case of ***Khenyei-Vs- New India Assurance Co. Ltd and another*** reported in **2015 (2) T.A.C. 677 (SC)** the Hon'ble Apex Court has held that as liability of joint tort-feasors being joint and several, apportionment of compensation between two tort-feasors vis-a-vis claimant is not permissible and the claimant can recover at his option whole damages from any one of them.

30. In view of this legal principle enunciated by the Hon'ble Apex Court in ***Khenyei*** (supra), the deduction to the extent of 50% on the reason of contributing negligence by the deceased is not warranted by law.

31. It is axiomatic from the Income Tax Return (Exhibit 12) duly proved by P.W. 3 Asit Kumar Bisoi, Income Tax Inspector that the gross annual income of the deceased by carrying on his business was Rs. 3,18,471.56/-. By deducting Rs.23,706 as taxes, his net income for a year was Rs. 2,94,765/- rounded off to Rs. 2,94,700/-. But, the learned Tribunal wrongly calculated his yearly net income as Rs.2,21,374/-. Admittedly, the victim died at the age of 29 years. As observed by the Hon'ble Apex Court at paragraph 42 of the decision in the case of **Sarla Verma and Others-Vs- Delhi Transport Corporation and Another** reported in **(2009) 6 SCC 121** multiplier 17 would be adopted to compute the compensation. But, the learned Tribunal erroneously used the multiplier 18 as per the second schedule of the Motor Vehicles Act. The learned Tribunal did not assess any compensation on the count of future prospects. As it is evident from the evidence on record, the victim used to carry on business as a proprietor of a filling station under name and style Purnima filling station having lubricant licence No. 27/Lub. Such being the factual matrix, he was a self-employed person. The Hon'ble Apex Court in the decision in the case of **National Insurance Company Limited -Vs- Pranay Sethi and Ors** reported in **(2017) 16 SCC 680** has held at paragraph 59.4 that in the case the deceased was self-employed or on a fix salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years. In view of this decision, 40% of the income of the deceased should be added towards his future prospects. Since the deceased had three dependants, there will be deduction to the extent of 1/3rd in view of the decision of **Sarla Verma** (supra) at paragraph 30 of the decision. Besides, the claimants are entitled to get Rs.15,000/- as loss of estate and Rs.15,000/- on the count of general damages. However, since the wife of the deceased died on the spot prior to

the death of the deceased, no spousal consortium is admissible to the claimants. Therefore, the compensation of Rs.4,500/- awarded by the learned Tribunal on such counts invites interference and modification.

32. In view of the observations as recorded above and since the claimants are entitled to get enhanced compensation, the decision cited by the learned counsel in the case of ***New India Assurance Company Limited –Vs- Yogesh Devi and Others*** reported in ***(2012) 3 SCC 613*** is not applicable to the facts and circumstances of the case on hand.

33. Therefore, in view of the above, the compensation as awarded by the learned Tribunal requires modification in the following manner:

Yearly Income of the victim (Rs.3,18,471.06-Rs.23,706 as taxes)=	Rs.2,94,765.06/- Rounded off to Rs.2,94,700/-
Future Prospects @40% of the yearly income =	Rs.1,17,880/-
Total=	Rs.4,12,580/-
Deduction to the extent of 1/3 rd = towards personal and living expenses	Rs.1,37,526/-
Total=	Rs.2,75,054/-
Adopting multiplier 17 considering = the age of the victim of 29 years (Rs.2,75,054 x 17)	Rs. 46,75,918/-
General Damages =	Rs. 30,000/-

Loss of Estate(Rs.15,000/-)
 Funeral Expenses(Rs.15,000/-)

Therefore total compensation towards
 Loss of dependency comes to= Rs.47,05,918/-

34. It appears from the case record of the learned Tribunal that the claimants have received Rs.15,85,787/- by way of three cheques. Therefore, the claimants are entitled to get further compensation of Rs. 31,20,131/-. They are also entitled to get interest @6% per annum on this further awarded amount of money from the date of filling of the claim application on 27.03.2009.

35. Therefore, as observed above, the appeal preferred by the claimants merits success and the cross-objection preferred by the National Insurance Company Limited merits dismissal and accordingly the appeal is allowed and the cross-objection is dismissed.

36. On modification of the award passed by the learned Tribunal, the respondent No.1, National Insurance Company Limited is directed to deposit Rs.31,20,131/- and interest @6% per annum on this further awarded amount of money from the date of filing of the claim application on 27.03.2009 by way of cheque in favour of the learned Registrar General, High Court, Calcutta with his office within six weeks from date. After such deposit is made the learned Registrar General shall release the amount to the claimants in equal share. The appellant No.2/claimant No.2 on receiving the compensation money on behalf of the claimant No.3 Arpita Roy as her guardian and grandfather shall invest the money in any nationalised bank in her name and this amount shall not be withdrawn till the minor attains her majority.

37. With the aforesaid directions, the appeal, cross-objection and connected application, if any, stand disposed of. No order as to costs.

38. Send down the LCR along with a copy of this judgment to the learned Tribunal for information.

39. Urgent certified website copies of this judgment, if applied for, be given to the parties upon compliance with all requisite formalities.

(Rabindranath Samanta, J.)