

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**MACA No.492 of 2020**

**MACA Nos.492 & 820 of 2020**

***The Divisional Manager, D.O.-I,  
M/s. Oriental Insurance Co. Ltd.*** (In MACA No.492/2020)

***Jayanti Kandangel and Ors.*** (In MACA No.820/2020)

.... ***Appellants***

Mr. Adam Ali Khan, Advocate (in MACA No.492/2020)

Mr. K.K. Das, Advocate (in MACA No.820/2020)

***-versus-***

***Jayanti Kandangel and Ors.*** (In MACA No.492/2020)

***Gitanjali Biswal and Ors.*** (In MACA No.820/2020)

.... ***Respondents***

Mr. K.K. Das, counsel for Respondents 1-7 & Mr. G.P. Dutta,  
counsel for Respondent No.8 (in MACA No.492/2020)

Mr. A.A. Khan, counsel for Respondent No.3 & Mr. G.P. Dutta,  
counsel for Respondent No.4 (in MACA No.820/2020)

**CORAM:  
SHRI JUSTICE B. P. ROUTRAY**

**ORDER  
15.3.2022**

**Order No.**

**I.A. No.1171 of 2020 arising out of MACA No.492 of 2020**

**&**

**I.A. No.1474 of 2020 arising out of MACA No.820 of 2020**

05. 1. Heard Mr. A.A. Khan, learned counsel for Oriental Insurance Company Ltd., Mr. G.P. Dutta, learned counsel for New India

Assurance Company Ltd. and Mr. K.K.Das, learned counsel for claimants.

2. Having heard all the parties and considering the grounds mentioned, delay in filing the appeals is condoned.

3. Both the I.As. are disposed of.

**MACA Nos.492 & 820 of 2020**

06. 4. On the consent of all the parties both the appeals are heard analogously and disposed of by this common order.

5. The claimants filed MAC No.657 of 2007 / 312 of 2017 before learned 4<sup>th</sup> MACT, Cuttack (in short 'the tribunal') for compensation of Rs.15,00,000/- on account of death of the deceased in the motor vehicular accident dated 19<sup>th</sup> June, 2007.

6. The case of the claimants is that when the deceased was going in an Indica Car bearing registration number MP 23 LA 3199 on NH-5 near Rozalin Dhaba, the offending truck bearing registration number OR 09 C 7898 coming rash and negligently in back gear, dashed against the Indica car from the front causing death of two occupants of the car. Accordingly Tangi P.S. Case No.78 of 2007 was registered.

7. The learned Tribunal, upon adjudication, directed Oriental Insurance Co. Ltd., i.e. insurer of the offending truck to pay the total compensation by exonerating the insurer of the Indica car from the liability.

8. Oriental Insurance Co. Ltd. has come up in appeal in MACA No.492 of 2020. On the other hand the claimants being unsatisfied on the compensation amount, have come up in appeal in MACA No.820 of 2020.

9. It is contended by Mr. Khan, learned counsel appearing for Oriental Insurance Co. Ltd. that the Tribunal has failed to appreciate contributory negligence on the part of the driver of the Indica car and erred in fixing entire negligence on the part of the driver of the truck. It is submitted that as the charge-sheet in the police case has been filed against drivers of both vehicles, the contributory negligence on the part of the driver of the Indica car cannot be excluded. It is further submitted that the Tribunal has also erred in computing the compensation by accepting the monthly income of the deceased at Rs.24,380/- contrary to the pleadings and evidence of P.W.1.

10. Mr. Dutta, learned counsel appearing for New India Assurance Co. Ltd., i.e. insurer of the Indica car submits that mere filing of charge-sheet against the driver does not itself prove contributory negligence on the part of the driver of the Indica car. He further adds that such contention now raised by Mr. Khan was not pleaded in their written statement before the Tribunal. He further submits that since the contents of the F.I.R. as well as the evidence of the eye-witness (P.W.3) proves the fact of negligence on the part of the driver of the truck, the Tribunal has rightly concluded in fixing the entire liability on Oriental Insurance Co. Ltd.

11. Mr. Das, learned counsel for the claimants while supporting the submissions of Mr. Dutta contends that the evidence brought on record before the Tribunal has not been rebutted sufficiently to shift any negligence on the driver of the car. He further submits that in the appeal filed by the claimants they have prayed for enhancement of the compensation amount on the ground that the Tribunal has erroneously deducted 1/3<sup>rd</sup> towards personal expenses of the deceased instead of 1/5<sup>th</sup> despite number of dependants are six. After death of one of the sons of the deceased, still five dependants are remaining. But the Tribunal taking claimant Nos.2, 4 and 5 as major has excluded their dependency for the purpose of calculation of personal expenditure.

12. Coming to the first contention about contributory negligence on the part of the driver of the Indica Car, it reveals from the evidence of P.W.3 that he has categorically said in his evidence about movement of the truck in back gear in a rash and negligent manner without any indication to cause the accident. A thorough perusal of his evidence, a copy of which is produced in course of hearing, does not lend any support the contention of Mr. Khan to attribute any negligence on the part of the driver of the Indica Car. Such categorical evidence of P.W.3 remains unshaken in his cross-examination. Submission of charge-sheet by police against both the drivers would no-way help to sustain the contention of Mr. Khan that the driver of the Indica Car was equally negligent for the accident. It is for the reason that the charge-sheet is mere opinion of the investigating officer which itself is not evidence. The Supreme Court in *National Insurance Company Ltd. vs. Chamundeswari and others*, 2021 SCC OnLine SC 849 have

held that, if any evidence before the Tribunal runs contrary to the contents in the First Information Report, the evidence which is recorded before the Tribunal has to be given weightage over the contents of the First Information Report. Moreover, as per the recitals of the F.I.R. under Ext.-1, the truck dashed against the car and not otherwise. Therefore, the finding of the Tribunal in fixing the negligence entirely on the part of the driver of the truck is confirmed.

13. With regard to quantum of compensation, the reasoning of the Tribunal to deduct 1/3<sup>rd</sup> towards personal expenses instead of 1/5<sup>th</sup> does not seem proper. As per the decision of the Apex Court in the case of *National Insurance Company Ltd. v. Birender and Others*, (2020) 11 SCC 356, wherein has been held that, even the major married and earning sons of the deceased being legal representatives have a right to apply for compensation and it would be the bounden duty of the Tribunal to consider the application irrespective of the fact whether the concerned legal representative was fully dependant on the deceased and not to limit the claim towards conventional heads only. As such the right proportion should be 1/5<sup>th</sup> for deduction towards personal expenditure. Accordingly the compensation amount is modified to Rs.32,30,707/-, i.e Rs.29,60,707/- towards loss of dependency and Rs.2,70,000/- towards general damages including spousal consortium and parental consortium.

14. In the result both the appeals are disposed of with a direction to the Appellant in MACA No.492 of 2020, i.e. Oriental Insurance Company Ltd. to deposit the enhanced compensation amount of

Rs.32,30,707/- (Thirty-two lakh thirty thousand seven hundred seven) before the tribunal along with interest @ 6% per annum from the date of filing of the claim application, i.e. 1<sup>st</sup> October, 2007 within a period of two months from today; where-after the same shall be disbursed in favour of each of the claimant – Respondents on such terms and proportion to be decided by learned Tribunal. It goes without saying that the default interest of 12% as directed by the Tribunal is waived.

15. The statutory deposit made by the appellant – Oriental Insurance Co. Ltd. before this court along with accrued interest be refunded to the Appellant - insurer on proper application and on production of proof of deposit of the awarded amount before the tribunal.

16. Both the appeals are disposed of.

17. An urgent certified copy of this order be issued as per rules.

( **B.P. Routray** )  
**Judge**