

04.09. 2023
item No.14
n.b.
ct. no. 551

FMA 466 of 2013

with

IA No. CAN 1 of 209(Old No. CAN 9087 of 2019)

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CAN 2 of 2013(Old No. CAN 947 of 2013)(not here)

+

CAN 3 of 2022(not here)

Bina Mahato & Ors.

Vs.

The Oriental Insurance Co. Ltd. & Anr.

Mr. Amit Ranjan Roy,

.....for the appellant

Mr. Sanjoy Paul,

.....for the respondent.

In Re. CAN 3 of 2023

This is an application for regarding the attainment of majority of appellant no.3 namely, Kumari Riya Mahato.

Learned advocate for the appellant submitted that the appellant no.3 was minor at the time of preferring the instant appeal and she got majority during the pendency of the instant appeal. The copy Admit Card of West Bengal Board of Secondary Education was submitted. Perused the admit card, it appears that the respondent no.3 became major.

The CAN 3 of 2023 is disposed of with a direction tht the department shall make out the correction in respect of the fact that the respondent no.3 has obtain the majority. The correction should be made within a fortnight.

Accordingly, CAN 3 of 2023 is disposed of.

Liberty is given to the learned advocate for the appellant to correct the cause title of the Memo of the appeal in respect of the name of appellant no.2.

In Re. FMA 466 of 2013

The instant appeal has been preferred against the judgment and award dated January 28, 2009 passed by the learned Tribunal, 4th Court, Paschim Medinipur in M.A. C. case No. 46 of 2008.

The brief fact of the case is that the present appellant being the claimants preferred an application before the learned Tribunal under Section 166 of the of the M.V. Act for getting compensation from the Insurance Company on the ground that their predecessor was died in the 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.

By passing the impugned award, the learned Tribunal find no materials in respect of the policy of Insurance company in respect of the offending vehicle. Thus, the Insurance Company is directed by the Court to verify whether the offending vehicle was insured at the time of accident by the respondent company. The learned advocate for the Insurance Company/respondent has submitted a report to that effect. On perusing such report, it appears that the offending vehicle was well covered

under the policy of the Insurance Company at the time of accident.

Learned advocate for the appellant submitted before this Court that the impugned awarded passed by the learned Tribunal suffers illegality; the Tribunal has mislead himself in deciding the fact in issue and the erroneous judgment was passed. He argued that the learned Tribunal has awarded a lumpsum amount of Rs. 3,00000/- in favour of the claimants with the observation that the compensation amount of the case is Rs.6,00,000/- which was deduced towards the contributory negligence. The Insurance Company is at liberty to pay only 50% i.e. Rs.3,00,000/-. He further argued that the observation of the learned Tribunal regarding the contributory negligence is not based on the correct proposition of law. He again argued that the Insurance Company is not submitted any oral or documentary evidence before the learned Tribunal to justify their plea of contributory negligence. It is specifically argued on behalf of the appellant that the evidence of P.W.2 was scanned erroneously by the learned Tribunal. He submitted that the deceased was an employee, his income was sufficiently proved including the pay slip, so the claimants are entitled to get the compensation according to the structured formula.

In support of his contention, he cited a decision of Hon'ble Division bench of this Hon'ble Court reported in **2010 (1) TAC 331(Cal.)** is quoted below:

“12. Therefore, the first question that arises for determination in this appeal is whether in the facts of the present case the appellant should be permitted to raise the question of contributory negligence of the victim when indisputably no evidence of such contributory negligence has been given in the Trial Court.

16. Therefore, the appellant in this case having failed to bring the driver or the conductor of the bus who were its employees and under its control to the witness box to give evidence and face cross-examination of the claimants, we should draw adverse inference against the appellant and will not entertain the plea of contributory negligence of the victim when the witnesses for the claimants have asserted rash and negligent driving on the part of the driver of the offending bus and in spite of such allegation, the appellant did not feel the necessity of bringing the driver as a witness to even deny the rash and negligent driving of the vehicle. The position would have been different if from the evidence given by the witnesses for the claimants themselves it would appear that there was some contributory negligence on the part of the victim or that there was any admission of such contributory negligence in the pleading of the claimants. Such being not the position, it is a fit case of drawing adverse inference against the appellant.”

He also cited decision of Hon'ble Supreme Court in **(2020) SAR (Civ.) 384** paragraph 13 and 14 is quoted below: “13. But the above reason, in our view, is flawed. The fact that the deceased was riding on a motor cycle along with the driver and another, may not, by itself, without anything more, make him guilty of contributory negligence. At the most it would make him guilty of being a party to the violation of the law. Section 128 of the Motor Vehicles Act, 1988, imposes a restriction on the driver of a two wheeled motor cycle, not to carry more than one person on the motor cycle. Section 194 C

inserted by the Amendment Act 32 of 2019, prescribes a penalty for violation of safety measures for motor cycle drivers and pillion riders. Therefore, the fact that a person was a pillion rider on a motor cycle along with the driver and one more person on the pillion, may be a violation of the law. But such violation by itself, without anything more, cannot lead to a finding of contributory negligence, unless it is established that his very act of riding along with two others, contributed either to the accident or to the impact of the accident upon the victim. There must either be a causal connection between the violation and the accident or a causal connection between the violation and the impact of the accident upon the victim. It may so happen at times, that the accident could have been averted or the injuries sustained could have been of a lesser degree, if there had been no violation of the law by the victim. What could otherwise have resulted in a simple injury, might have resulted in a grievous injury or even death due to the violation of the law by the victim. It is in such cases, where, but for the violation of the law, either the accident could have been averted or the impact could have been minimized, that the principle of contributory negligence could be invoked. It is not the case of the insurer that the accident itself occurred as a result of three persons riding on a motor cycle. It is not even the case of the insurer that the accident would have been averted, if three persons were not riding on the motor

cycle. The fact that the motor cycle was hit by the car from behind, is admitted. Interestingly, the finding recorded by the Tribunal that the deceased was wearing a helmet and that the deceased was knocked down after the car hit the motor cycle from behind, are all not assailed. Therefore, the finding of the High Court that 2 persons on the pillion of the motor cycle, could have added to the imbalance, is nothing but presumptuous and is not based either upon pleading or upon the evidence on record. Nothing was extracted from PW 3 to the effect that 2 persons on the pillion added to the imbalance.

14. Therefore, in the absence of any evidence to show that the wrongful act on the part of the deceased victim contributed either to the accident or to the nature of the injuries sustained, the victim could not have been held guilty of contributory negligence. Hence the reduction of 10% towards contributory negligence, is clearly unjustified and the same has to be set aside.

Learned advocate for the appellant also cited a decision of Hon'ble Supreme Court passed **in Khenyei Vs. New India Assurance Co. Ltd.** reported **in (2015) 2 TAC 677 (SC)** is quoted below:

"18. This Court in Challa Bharathamma & Nanjappan (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle – trailer-truck

which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

(i) In the case of composite negligence, plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors vis a vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

(iii) In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/ extent of their negligence has been determined by the court/tribunal, in main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

(iv) It would not be appropriate for the court/tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award."

Learned advocate for the insurance company submitted that the impugned award passed by the learned

Tribunal suffers no illegality. Learned Tribunal was justified in scanning the evidence of P.W.2.

Learned advocate for the Insurance Company read out the cross-examination of P.W.2. He argued that the cross-examination of P.W.2 was based by the learned Tribunal in passing the impugned judgment. The evidence(P.W.2) produced by the claimants himself, who stated before the learned Tribunal that the accident may not happen if the motorcycle driver stopped driving. He again argued that the learned Tribunal has correctly discarded the prima facie evidence of charge-sheet. He argued that charge-sheet is a prima facie evidence of criminal case it is not a conclusive proof in respect of findings in the charge-sheet. He argued that charge-sheet may have a corroborative value but without final judgment passed by the learned Magistrate, the evidentiary value of the charge-sheet cannot be looked into. On such observation, he has cited a decision of Hon'ble Supreme Court passed in **Kamlesh & Ors. Vs. Attar Singh & Ors.** reported in **(2015) 4 TAC 611 (SC)**. is quoted below:

"8. We have heard learned counsel for the parties and perused, inter alia, the evidence on record of Ram Parshad PW2 and Devender PW.3. The method and manner in which the accident has taken place leaves no room for doubt that it was a case of composite negligence of drivers of both the vehicles, that is the driver of Maruti car and driver of tempo. Though Police has registered a case against driver of the tempo Attar Singh and has filed a chargesheet but the same cannot be said to be conclusive."

Learned advocate for the appellant also referred to a decision of Hon'ble Supreme Court passed in Usha

Rajkhowa & Ors. Vs. M/s. Paramount Industries & Ors;

relevant paragraph is quoted below:

10. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvergi Tak and Ors. Reported in 2002(6) SCC

455. That was also a case of collusion in between a Car and a truck. It was observed in para 8:-

“The question of contributory negligence arises when there has been some act or omission on the claimant’s part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as ‘negligence’. Negligence ordinarily means breach of a legal duty to care, but when used in the expression “contributory negligence”, it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an “author of his own wrong.”

This Court further relied on the observation of High Court of Australia in Astley Vs. Austrust Ltd. Reported in 1999(73) ALJR 403 to the following effect:-

“a finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case, In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owned may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff’s share of responsibility for the damage suffered; and in yet other cases, the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or per person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owned by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.”

Keeping these principles in mind, we find that there was absolutely no evidence to suggest that there was any failure on the part of the Car driver to take any particular care or that he had breached his duty in any manner. Such breach on his part had to be proved by Insurance Company as it was its burden and for that, the Panchanama of the spot, showing tyre marks caused by breakes, the Panchanama of the damaged car and the truck could have

been brought on record. The Insurance Company has obviously failed to discharge its burden. We, therefore, respectfully follow the above mentioned judgment.”

Heard learned advocates for the parties and also perused the observations and the findings of the learned Tribunal in this case, it is true that the learned Tribunal is awarded the compensation on lumpsum basis. The application was filed before the learned Tribunal under Section 166 of the M.V. Act. The learned Tribunal is duty-bound to pass the award in terms of structured formula as guided by the Supreme Court and according to the 2nd schedule under Section 163A of M.V. act as well as directions of Hon’ble Supreme Court in **Sarala Verma**. In that score, whatever may be the compensation that should be in structured formula.

In considering the contributory negligence by the Motorcycle involved in the accident; it is a fact that the owner of the insurer of motorcycle has not made party in which the deceased was a pillion rider. In the written statement, the insurance company has denied all allegations raised against them, it was not specifically pleaded that the driver of the motorcycle was responsible for the accident. However, the Insurance Company has filed an application under Section 170 of the M.V. Act, which was allowed by the learned Tribunal. In that score, the Insurance Company have the right to contest the claim on that available grounds. P.W.1 was one of the claimants to state the manner of accident. P.W.2 appears

as an eye witness; in his examination-in-chief he has stated the manner of accident and it is specific evidence in his chief that the driver of the dumper was responsible for the accident as the driver was running the vehicle in a rash and negligent manner. During his cross-examination, the P.W.2 has some specific statement. It is the specific statement of the P.W.2 that there was head on collision of two vehicles; the road was narrow; the driver of the motor vehicle has noticed the dumper was coming. It is the statement that if the driver of the motor cycle stopped the driving, the accident may have avoided. He also denied the suggestion of the Insurance Company during his cross-examination that the driver of the truck was no fault.

Learned Tribunal has considered the evidence of P.W.2 (cross-examination) and was a view that the driver of the motorcycle was solely responsible for the accident. Learned Tribunal is also of a view that the driver of the truck was not in negligent.

Let me consider whether the scanning evidence of P.W.2 by the learned Tribunal is justified in the eye of law or not. It is true that the contributory negligence was not pleaded by the Insurance Company. The insurance company only pleaded that the truck was not responsible for the accident. It is true that no driver or anybody placed before the learned Tribunal by the Insurance Company for giving evidence to substantiate the claim

that the truck was not responsible for the accident. The learned Tribunal has taken entire evidence on record and only pick up the cross-examination of P.W.2 to decide the issue. The Tribunal has not categorically denied the evidence of P.W.2 in chief and pleadings of the claimant as well evidentiary value of P.W.1; Final report of the police after the completion of investigation of the criminal case arising out of the said accident was also not taken into consideration.

The observation of the Hon'ble Supreme Court in **Kamalesh Vs. Akhtar Singh** is very specific in respect of contributory negligence, wherein the Hon'ble Supreme Court is of the view that the value of charge-sheet cannot be looked into in assessing the contributory negligence.

In **Usha Rajkhowa & Ors(supra)** the Hon'ble Supreme Court is of a specific view that the observation of the High Court on the basis of specific witness cannot be decisive factor,

In this case it appears to me that observation of the learned Tribunal and the finding thereof is only based on the cross-examination of P.W.2. It is the fact that the statement of P.W.2 is in respect of presumption, which not actually happened. What happened has been stated specifically in his examination in chief, the presumption opinion as P.W.2 under the fire of cross-examination regarding the happenings if the driver of the motorcycle stopped the driving, cannot be a decisive factor.

Moreover, it appears to me that the plea of the insurance company regarding the contributory negligence has not been sufficiently proved by adducing or producing any oral or documentary evidence.

The specific ground that the Insurance Company to deny the claim of the claimants must have to be adopted from the very beginning of this case by taking the proper plea and it has to be substantiated by sufficient oral or documentary evidence. In this case, there are no sufficient or direct oral or documentary evidence to substantiate the plea of the insurance company regarding the contributory negligence. In that view, I am of the opinion that the observation of the learned Tribunal regarding the contributory negligence and by placing 50% of the contributory negligence upon the learned Tribunal of the motorcycle is not correct.

In considering the monthly income of the deceased, it appears to me that in pay slip for the month of October, 2007 and November, 2007, the gross salary appears to be Rs.6768/- and Rs.7255/- respectively.

Considering such variation of the gross pay amounts, the average monthly income of the deceased appears to me Rs.7011/- . The tax component of Rs.50/- deducted towards the gross salary. So, the average gross monthly income of the deceased is taken to Rs.7000/-. The claimants are entitled to get the future prospect

according to the observation of the Hon'ble Supreme Court
in **Pranay Shetti**.

1. Monthly income	Rs.7,000/-
2. Annual income (7,000X12)	Rs.84,000/-
3. Add 50% future prospect	<u>Rs.42,000/-</u> Rs.1,26,000/-
4. Less 1/3 rd personal & Living Exp	<u>Rs.42,000/-</u> Rs.84,000/-
5. Multiplier 16 (84,000X16)	Rs.13,44,000/-
6. General Damages	<u>Rs.70,000/-</u>
Total	Rs.14,14,000/-

Insurance Company is directed to pay the above mentioned award amount to the claimant through the office of Registrar General, High Court, Calcutta along with 6% interest per annum from the date of filing of the claim application i.e. from February 13, 2008 within eight weeks from the date of passing of the order. On such deposit, the claimants are at liberty to receive the same subject to ascertainment to the payment of requisite court fees.

Accordingly, 466 of 2013 is disposed of.

Connected applications, if any, are also disposed of.

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

(Subhendu Samanta, J.)