

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Bibhas Ranjan De

F.M.A 1017 of 2009

With

CAN 1 of 2011 (CAN 5700 of 2011)

Smt. Mandadari Barik & Ors.

Vs.

The New India Assurance Company Ltd. & Anr.

For the Claimant/Appellant : Mr. Amit Ranjan Roy, Advocate

For the Insurance Company/ : Ms. Gopa Das Mukherjee, Advocate
Respondent no. 1

Heard on : March 30, 2023

Judgment on : May 10, 2023

Bibhas Ranjan De, J.

1. On 20.01.2000 at about 1.00 hours (at night) when Ekbir Kumar Barik was driving the vehicle being no. WB 33/ 5208, engaged by the owner, through NH 30 near Khushrupur some

unknown person fired at said Ekbir kumar Barik. Immediately he was removed to Patna Hospital where he succumbed. Legal heirs/representatives of said Ekbir Kumar Barik approached the Motor Accident Claims Tribunal, District Judge, Midnapur by filing an application under Section 166 of the Motor Vehicles Act, 1994 claiming compensation to the tune of Rs. 4,00,000/-. At the time of death Ekbir Kumar Barik was 36 years old and used to earn Rs.200/- per day from his avocation of driver.

- 2.** The motor accident claim case was registered being no. 479 of 2001 which was transferred to the Motor Accident Claims Tribunal, Learned Additional District Judge, 5th Court, Midnapur for disposal.
- 3.** The New India Assurance Company Limited contested the claim petition by filing a written objection denying all material averments of the claim petition contending, inter alia, that death of Ekbir Kumar Barik was other than use of motor vehicle and claimants are not entitled to any compensation as prayed for.
- 4.** Learned Motor Accident Claims Tribunal (hereinafter referred to as Tribunal) framed two issues as follows:-

“ a. Is the claim case maintainable in its present form?

b. Are the claimants entitled to get the compensation as prayed for? If so, to what extent? ”

- 5.** In course of evidence, Smt. Putul Barik, widow of the deceased, was examined as PW1 who corroborated entire averments of the claim petition. In cross-examination she stated that her husband was brutally killed by the miscreants and he was taken to Jungle where the miscreants had killed him and the dead body of her husband was recovered two days after the incident.
- 6.** One Chaitannya Kuilla was examined as PW2, he being owner of the truck no. WB 33/ 5208 has testified that on 20.01.2000 his truck was going to Bihar by his permanent driver Ekbir Kumar Barik. He stated that on NH30 near Khushrupur some miscreants stop the truck and fired at his driver who was removed to Patna Hospital where he succumbed. During his cross-examination several questions were thrown at him regarding ownership of the truck and finally suggested that he was not owner of the truck.
- 7.** In course of the evidence of PW1 & PW2 copy of FIR, Post Mortem Report, Driving Licence & Insurance Policy were admitted in evidence.

8. Learned Tribunal took up both the issues together for decision.

After evaluating the evidence as well as admitted documents particularly FIR in connection with Khushrupur case no. 3/2000 dated 20.01.2000 learned Tribunal recorded that the death was due to gunshot injury and homicidal in nature. Learned Tribunal also took it for granted that deceased was the driver of the truck bearing no. WB 33/5208. Learned Tribunal also recorded that it was impossible to ascertain the reason behind murder of driver by the miscreants as there was no intention to commit any act of felonious i.e. stealing the truck or snatching away any article from the truck or from the deceased or its Khalasi. After elaborate evolution of the evidence on record learned Tribunal finally came to his opinion that claimants failed to prove the death of the driver Ekbir Kumar Barik due to accident arising out of use of the motor vehicle. Accordingly, Learned Tribunal dismissed the claim petition.

9. Feeling aggrieved claimants preferred this appeal.

10. It is pertinent to mention here that both the Learned advocate, Mr. Amit Ranjan Roy, appearing on behalf of the claimants as well as learned advocate, Ms. Gopa Das Mukherjee, appearing on behalf of the Insurance Company concentrated their

respective arguments on the issue of death of Ekbir Kumar Barik whether arose out of the use of motor vehicles or not.

11. Mr. Roy has contended that there is no dispute regarding death of Ekbir Kumar Barik in course of his employment particularly while he was carrying goods of the owner of the truck to Bihar. Both Mr. Roy & Ms. Mukherjee relied on the case of **Smt. Rita Devi and others Vs. New India Assurance** reported in **2000 WBLR SC 330** wherein Hon'ble Court dealt with the following facts:-

“One Dasarath Singh was a driver of an auto rickshaw owned by Lalit Singh. The vehicle in question was registered as a public carrier vehicle used for hire by the passengers. This vehicle was insured with the respondent-Insurance Company. On 22nd of March, 1995, it is stated that some unknown passengers hired the above auto rickshaw from rickshaw stand at Dimapur between 5 to 6 p.m. It is also not in dispute that the said auto rickshaw was reported stolen and the dead body of driver Dasarath Singh was recovered by the police on the next day, the auto rickshaw was never recovered”

12. Mr. Roy on behalf of the claimants has submitted that **Rita Devi** (supra) observed as follows:-

“The judgment of the Court of Appeal in Nisbets case was followed by the majority judgment by the House of Lords in the case of Board of Management of Trim Joint District School vs. Kelly (1914 AC 667). Applying the principles laid down in the above cases to

the facts of the case in hand, we find that the deceased, a driver of the auto rickshaw, was duty bound to have accepted the demand of fare paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto rickshaw and in the course of achieving the said object of stealing the auto rickshaw, they had to eliminate the driver of the auto rickshaw then it cannot but be said that the death so caused to the driver of the auto rickshaw was an accidental murder. The stealing of the auto rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto rickshaw is only incidental to the act of stealing of the auto rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing the theft of the auto rickshaw. Learned counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word death and the legal interpretations relied upon by us are with reference to definition of the word death in Workmens Compensation Act the same will not be applicable while interpreting the word death in Motor Vehicles Act because according to her, the objects of the two Acts are entirely different. She also contends on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the auto rickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts, namely, the Motor Vehicles Act and the Workmens

Compensation Act are in any way different. In our opinion, the relevant object of both the Acts are to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmens Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapter X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours we are supported by Section 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmens Compensation Act or under the Motor Vehicles Act. A perusal of the objects of the two enactments clearly establishes that Smt.Rita Devi & Ors vs New India Assurance Co.Ltd. & Anr on 27 April, 2000 Indian Kanoon - <http://indiankanoon.org/doc/1114723/> 4 both the enactments are beneficial enactments operating in the same field, hence judicially accepted interpretation of the word death in Workmens Compensation Act is, in our opinion, applicable to the interpretation of the word death in the Motor Vehicles Act also. In the case of Shivaji Dayanu Patil & Anr. vs. Vatschala Uttam More (1991 (3) SCC 530) this Court while pronouncing on the interpretation of Section 92 A of the Motor Vehicles Act, 1939 held as follows : Section 92-A was in the nature of a beneficial legislation enacted with a view to confer the benefit of expeditious payment of a limited amount by way of compensation to the victims of an accident arising out of the use of a motor vehicle on the basis of no fault liability. In the matter of interpretation of a beneficial

legislation the approach of the courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which tends to defeat that purpose. In that case in regard to the contention of proximity between the accident and the explosion that took place this Court held : This would show that as compared to the expression caused by, the expression arising out of has a wider connotation. The expression caused by was used in Sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In Section 92-A, Parliament, however, chose to use the expression arising out of which indicates that for the purpose of awarding compensation under Section 92-A, the casual relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression arising out of the use of a motor vehicle in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment. In the instant case, as we have noticed the facts, we have no hesitation in coming to the conclusion that the murder of the deceased (Dasarath Singh) was due to an accident arising out of the use of motor vehicle. Therefore, the trial court rightly came to the conclusion that the claimants were entitled for compensation as claimed by them and the High Court was wrong in coming to the conclusion that the death of Dasarath Singh was not caused by an accident involving

the use of motor vehicle. This leaves us to consider the second point raised before us by the counsel for the appellant. It is argued on behalf of the appellants that the appeal preferred by the Insurance Company purported to be under Section 173 of the Motor Vehicles Act was not maintainable because prior permission of the Court as required was not obtained by the appellants. In support of this contention of the appellants, reliance is placed on a judgments of this Court in the case of Shankarayya & Anr. vs. United India Insurance (Co.Ltd. & Anr. 1998 3 SCC 140). In the said judgment a Division Bench of this Court held : The Insurance Company when impleaded as a party by the Court can be permitted to contest the proceedings on merits only if the conditions precedent mentioned in Section 170 are found to be satisfied and for that purpose the Insurance Company has to obtain an order in writing from the Tribunal and which should be a reasoned order by the Tribunal. Unless that procedure is followed, the Insurance Company cannot have a wider defence on merits than what is available to it by way of statutory defence. It is true that the claimants themselves had joined Respondent 1 Insurance Company in the claim petition but that was done Smt. Rita Devi & Ors vs New India Assurance Co.Ltd. & Anr with a view to thrust the statutory liability on the Insurance Company on account of the contract of the insurance. That was not an order of the Court itself permitting the Insurance Company which was impleaded to avail of a larger defence on merits on being satisfied on the aforesaid two conditions mentioned in Section 170. Consequently, it must be held that on the facts of the present case, Respondent 1 Insurance

Company was not entitled to file an appeal on merits of the claim which was awarded by the Tribunal. We respectfully agree with the ratio laid down in the above case and in view of the fact admittedly the Insurance Company had not obtained leave from the tribunal before filing the above appeal. We are of the opinion that the appeal filed by the Insurance Company before the High Court was not maintainable in law. For the reasons mentioned above, this appeal succeeds, the judgment and order of the High Court dated 9.3.1998 is set aside and that of the Tribunal dated 24.6.1996 is restored. The appellants are entitled to costs in all the counts.”

13. Mr. Roy has further relied on a case of **Shivaji Dayanu Patil and another Vs. Smt. Vatschala Uttam More** reported in **1991(3) SCC 530** wherein court ruled as follows:-

“33. In Samick Lines Co. Ltd. v. Owners of the Antonis P. Lemos [(1985) 2 WLR 468] the House of Lords was considering the question whether a claim for damages based on negligence in tort could be regarded as a claim arising out of an agreement under Section 20(2)(1)(h) of the Supreme Court Act, 1981 and fell within the Admiralty jurisdiction of the High Court. The word “any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship” in Section 20(2)(1)(h) were held to be wide enough to cover claims, whether in contract or tort arising out of any agreement relating to the carriage of goods in a vessel and it was also held that for such an agreement to come within paragraph (h), it was not necessary that the claim in question be directly connected with some agreement of the kinds referred to in it. The words “arising out of” were not construed to mean “arising under” as in Union of India v. E.B. Aaby's Rederi A/S [1975 AC 797 : (1974) 2 All

ER 874] which decision was held inapplicable to the construction of Section 20(2)(1)(h) and it was observed by Lord Brand-on:

“With regard to the first point, I would readily accept that in certain contexts the expression ‘arising out of’ may, on the ordinary and natural meaning of the words used, be the equivalent of the expression ‘arising under’, and not that of the wider expression ‘connected with’. In my view, however, the expression ‘arising out of’ is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression ‘connected with’. Whether the expression ‘arising out of’ has the narrower or the wider meaning in any particular case must depend on the context in which it is used.”

Keeping in view the context in which the expression was used in the statute it was construed to have the wider meaning viz. “connected with”.

34. *In the context of motor accidents the expressions “caused by” and “arising out of” are often used in statutes. Although both these expressions imply a causal relationship between the accident resulting in injury and the use of the motor vehicle but they differ in the degree of proximity of such relationship. This distinction has been lucidly brought out in the decision of the High Court of Australia in Government Insurance Office of N.S.W. v. R.J. Green case [(1965) 114 CLR 437] , wherein Lord Barwick, C.J. has stated : (CLR p. 433)*

“Bearing in mind the general purpose of the Act I think the expression ‘arising out of’ must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words ‘caused by’. It may be that an association of the injury with the use of the vehicle while it cannot be said that that use was causally related to the injury may yet be enough to satisfy the expression ‘arise out of’ as used in the Act and in the policy.”

35. *In the same case, Windeyer, J. has observed as under : (CLR p. 447)*

“The words ‘injury caused by or arising out of the use of the vehicle’ postulate a causal relationship between the use of the vehicle and the injury. ‘Caused by’ connotes a ‘direct’ or ‘proximate’ relationship of cause and effect. ‘Arising out of’ extends this to a result that is less immediate; but it still carries a sense of consequence.”

14. In **Shivaji** (supra) Hon’ble Apex Court came across the following facts:-

“ 2. The Judgment of the Court was delivered by S.C. AGRAWAL, J. The questions raised for consideration in this petition for special leave to appeal involve the interpretation of the expression "arising out of the use of a motor vehicle" contained in section 92A of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act'). On October 29, 1987, at about 3 A.M., there was a collision between a petrol tanker bearing Registration No. MKL- 7461 and a truck bearing Registration No. MEH-4197 on the National Highway No. 4 near village Kavatha, in District Satara, Maharashtra. The petrol tanker was proceeding from Pune side to Bangalore whereas the truck was coming from the opposite direction. As a result of the said collision, the petrol tanker went off the road and fell on its left side at a distance of about 20 feet from the highway. As a result of the overturning of the petrol tanker, the petrol contained in it leaked out and collected nearby. At about 7.15 A.M., an explosion took place in the said petrol tanker resulting in fire. A number of persons who had assembled near the petrol tanker sustained burn injuries and a few of them succumbed to the said injuries. One of those who died as a result of such injuries was Deepak Uttam More. The respondent Shivaji Dayanu Patil & Anr vs Smt. Vatschala Uttam More on 17 July, 1991 Indian Kanoon -

http://indiankanoon.org/doc/712469/ 6 ent is the mother of Deepak Uttam More. Petitioner No. 1 is the owner of the said petrol tanker and Petitioner No. 2, the insurer of the same.”

15. Ms. Mukherjee, also relied on the ratio of **Rita Devi** (supra) as follows:-

“Thus it is clear, if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle then they will be entitled for payment of compensation. In the present case, the contention of the Insurance Company which was accepted by the High Court is that the death of the deceased (Dasarath Singh) was not caused by an accident arising out of the use of motor vehicle. Therefore, we will have to examine the actual legal import of the words death due to accident arising out of the use of motor vehicle. The question, therefore, is can a murder be an accident in any given case ? There is no doubt that murder, as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts . The difference between a murder which is not an accident and a murder which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.”

16. It is not disputed that the Hon'ble Apex Court in ***Rita Devi*** (supra) dealt with a case of a murder of driver of auto rickshaw which was reported stolen. Therefore, auto rickshaw driver was murdered for the purpose of stealing of the said auto rickshaw. In ***Shivaji Dayanu*** (supra) there was a collision between two vehicles on the national highway no. 4 and one of the vehicle was a petrol tanker. As a result of collision petrol tanker over turned and petrol contained in it leaked out. Subsequently, explosion took place inside the petrol tanker resulting in fire. Persons assemble the petrol tanker sustained burn injuries and few of them succumbed to injuries.

17. But, in our case, FIR (exhibit 1) suggested no such intention of the miscreants. According to FIR miscreants travelling by a truck followed the truck bearing no. WB 33/5208 which was being driven by Ekbir Kumar Barik and finally obstructed Ekbir Kumar Barik and one of the assailants fired at him and fled away from the spot with the truck.

18. In ***Rita Devi*** (supra) Hon'ble Apex Court ruled as follows:-

“In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended

and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.”

19. From the first information report which was already discussed above as well as the deposition of widow of the deceased (PW1) particularly during cross-examination I, by no stretch of imagination, can hold that the fact of case in hand relates to any accidental murder. In our case, considering the entire facts enumerated in the FIR suggests that dominant intention of the Act of felony is to kill Ekbir Kumar Barik and for that reason, relying on the ratio of ***Rita Devi*** (supra), such killing cannot be termed as accidental murder but is a murder simplicitor.

20. Thus, I am unable to interfere with the judgement impugned passed by Learned Additional District Judge, (Motor Accident Claims Tribunal) 4th Court, Paschim Medinipur, passed on 03.05.2018. Accordingly, the judgement passed in Motor Accident Claims Case No. 479 of 2001 in connection with an application under Section 166 of the Motor vehicles Act stands affirmed.

21. The instant appeal being no. FMA 1017 of 2009 stands dismissed without any order as to costs.

- 22.** Let the records of Tribunal along with copy of the judgement be transmitted back immediately.
- 23.** Pending applications, if there be any, stand disposed off.
- 24.** Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

[BIBHAS RANJAN DE, J.]