

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

FMA 746 of 2012

Smt. Tanuja Paul & Anr.
Vs.
Oriental Insurance Company Ltd. & Anr.

Mr. Krishanu Banik
... For the appellants/claimants

Mr. Saswata Bhattacharyya
... For the respondent no.1/Insurance Co.

This appeal is directed against the judgment and award dated 30th June, 2011 passed by the learned Judge, Motor Accident Claims Tribunal, 1st Court, Howrah, in connection with MAC Case No.297 of 2005 whereby the learned Tribunal assessed compensation at Rs.13,77,104/- but awarded compensation to the tune of Rs.6,93,302/- to the claimants in terms of contributory negligence.

The claim petition under Section 166 of the Motor Vehicles Act, 1988 was filed on account of death of one Sanjay Kumar Paul, a person of 54 years having monthly income of Rs.3,000/-, in a motor accident occurred on 23rd February, 2005 at about 15.45 hours on Durgapur Expressway near Jougram village under Pamalpur Police Station.

According to the claimants, on the alleged date of accident and time, Sanjay Kumar Paul, since deceased,

was traveling by a Toyota Qualis car along the left side of the Durgapur Expressway towards Burdwan, near Jougram village, one Lorry, bearing registration no.WMK-6885, proceeding with high speed and in rashly manner coming from the opposite direction, suddenly dashed the said Toyota Qualis car with a great force and as a result, Sanjay Kumar Paul sustained severe fatal injuries on his persons causing his death. The accident took place due to negligent driving on the part of the driver of the lorry. That is why the claim petition was filed with a prayer for compensation to the tune of rs.15,00,000/-.

Respondent no.1/Oriental Insurance Company Limited contested the case by filing written statement denying all material averments in the claim petition contending, inter alia, that there was no fault on the part of the driver of the lorry.

To prove the case, claimants examined as many as two witnesses, namely, Tanuja Paul, widow of the deceased, as PW-1, who corroborated the entire contents of the claim petition in her examination-in-chief. One Debasis Ghosh, claimed himself to be the eyewitness to the incident, was examined as PW-2. He testified that on the alleged date of accident and time Sanjay Kumar Paul was travelling by a Toyota Qualis car, bearing registration no.WB-12-A/4040, along the left side of the Durgapur Expressway towards Burdwan from Kolkata side. At that time near Jougram village, one lorry, bearing registration

no.WMK-6885, proceeding towards Kolkata with high speed and in rash and negligent manner, dashed the said Toyota Qualis car with a great force. As a result, the accident took place and Sanjay Kumar Paul sustained fatal injuries and died.

In course of their evidence, certified copy of First Information Report, seizure list, post-mortem report, insurance policy and income tax return were filed and admitted in evidence.

On behalf of the Insurance Company, three witnesses were examined, namely, Asim Mal, an employee of Motor Vehicles Department, as OPW-1. One Amal Krishna Duary as OWP-2 who was an Income Tax Inspector who proved the income tax return for consecutive years and one Ranjan Kumar Ray Biswas as OPW-3 who was also Income Tax Inspector to prove the income tax return. In course of their evidence, driving licence, income tax returns were filed and marked as Exhibit-A, B series and C series.

Learned Tribunal after analyzing the evidence on record awarded compensation to the tune of Rs.6,93,302/- out of assessed amount of Rs.13,77,104/- due to contributory negligence on the part of the driver of the Tata Qualis car.

In this appeal, issue before this Court is whether the learned Tribunal rightly deducted half of the

compensation amount assessed due to contributory negligence on the part of the driver of the Toyota Qualis.

Mr. Krishanu Banik, learned advocate, appearing on behalf of the appellants/claimants has raised the issue of contributory negligence. He submitted that the facts and circumstances of this case do not suggest any contributory negligence on the part of Toyota Qualis car. In support of his contention, he relied on the evidence of eyewitness along with police papers and also relied on the principles laid down in **Usha Rajkhowa & Ors. v. Paramount Industries & Ors.** reported in **2009 ACJ 1314**, **United India Insurance Company Limited v. Smt. Anumita Paul** reported in **2015 ACJ 117** as well as **Rajendra Singh & Ors. v. National Insurance Company Limited & Ors.** reported in **2020 ACJ 2211**.

Before parting with, Mr. Banik has submitted that he has nothing to argue on the point of assessment of the compensation by the learned Tribunal but the appellants/claimants are entitled to future prospect of 10% and general damages of Rs.70,000/- and interest on the amount already received as well as enhanced amount, if any.

Mr. Saswata Bhattacharyya, learned advocate, appearing on behalf of the respondent no.1/Insurance Company has supported the judgment passed by the learned Tribunal and tried to make this Court understand that in terms of the evidence on record, it is clear that

there was contributory negligence on the part of the Toyota Qualis car who should have taken more care at the time of driving the car through an Expressway. Mr. Bhattacharyya further submits that at the time of accident, the driver of the lorry had no valid licence and in support of his contention, he referred to the evidence of OPW-1 who was an employee of Motor Vehicles Department and he proved the licence of the driver of the lorry as Exhibit-A.

After careful scrutiny of the entire evidence and documents on record, I find no reason to disbelieve the happenings of an accident between two vehicles on the alleged date of accident and time and in the accident Sanjay Kumar Paul died as well as the driver of the Toyota Qualis died on the spot. On this aspect, no argument has been advanced by either of the parties to this appeal.

Now, the question is that whether there was negligence on the part of the Toyota Qualis. Only evidence of witness (PW-2) reflects that prior to the accident, Toyota Qualis car was driving slowly through left side of the Durgapur Expressway and at that time one lorry, bearing registration no.WMK-6885, was coming with high speed from the opposite direction, dashed against the said Toyota Qualis car and as a result, Sanjay Kumar Paul died on spot. In cross-examination of PW-2 also corroborated the factum of accident. In reply to a question put to him by the learned Tribunal, he replied that it was a head on collision.

From the record, I find that after the accident, Pamalpur Police Station Case No.13 of 2005 dated 23rd February, 2005 under Sections 279/338/304A/427 of the Indian Penal Code was started and ended with charge sheet against the driver of the lorry.

It is not disputed that it was an accident between two vehicles, one is Toyota Qualis car and the other is lorry. In these circumstances, it would be relevant to recapitulate the principles laid down by the Hon'ble Apex Court in **Usha Rajkhowa** (supra) wherein the Hon'ble Apex Court dealt with an accident between a truck and a Maruti car and in that case only eyewitness (PW-3) stated that he could not say clearly as to which of the vehicle was at fault, though he denied the suggestion thrown at him during cross-examination that the accident took place because of fault of Maruti car. Hon'ble Apex Court considering that particular evidence of PW-3 expressed the following views:-

“Under such circumstances, applying the doctrine of *res ipsa loquitur*, it is clear that it was because of the negligence on the part of the truck that the accident took place. After all, the hit given by the truck was so powerful that two persons in the car died on the spot, while the third escaped with serious injuries. When we see the award of the Tribunal, as also the appellate judgment, they are astonishingly silent on these aspects. We are, therefore, convinced that there was no question of any contributory negligence on the part of the driver of Maruti car and it was solely because of

the negligence on the part of the truck that the accident took place.”

That view was also taken into account by the Hon’ble Division Bench of this Court in **Anumita Paul** (supra).

In **Rajendra Singh** (supra), the Hon’ble Apex Court dealt with a case of accident between two vehicles, i.e., horse cart and bus. In that case, the Hon’ble Apex Court took a back about application of contributory negligence while the deceased was a passenger of the horse cart which met an accident with the bus and accordingly the Hon’ble Apex Court refused to deduct 50% of the compensation towards contributory negligence.

In our case, the accident took place by the involvement of two vehicles, one is lorry and the other is Toyota Qualis car. It is also seen from the record that in the accident both the drivers and the occupant of the car, Sanjay Kumar Paul, since deceased, died. From the evidence of PW-2, it is found that he saw the Toyota Qualis plying through left side of the Durgapur Expressway towards Burdwan from the Kolkata side and that that time the offending lorry coming with high speed dashed against the Toyota Qualis car. As a result, the accident took place and Sanjay Kumar Paul died. Keeping an eye to the principle laid down by the Hon’ble Apex Court in **Usha Rajkhowa** (supra), I am of the view that the accident took place because of the negligence on the part of the lorry as

hit given by the lorry was so powerful that two persons (Sanjay Kumar Paul and the driver of Toyota Qualis) died. So the question of contributory negligence on the part of the driver of the Toyota Qualis does not arise as it was solely because of the negligence on the part of the lorry. Besides, in **Rajendra Singh** (supra), the Hon'ble Apex Court did not allow the contributory negligence on the part of the deceased who was a passenger like our case.

In the aforesaid view of the facts and circumstances, I am of the opinion that deduction towards contributory negligence on the part of the Toyota Qualis was not correct. The appellants/claimants are entitled to entire compensation.

That apart, the appellants/claimants are also entitled to future prospect of 10% and the general damages of Rs.70,000/- pursuant to the principle laid down by the Hon'ble Apex Court in **National Insurance Co. Ltd. v. Pranay Sethi & Ors.** reported in **(2017) 16 SCC 680 = 2017 ACJ 2700** and to add to that, the appellants/claimants are also entitled to interest under Section 171 of the Motor Vehicles act, 1988, on the compensation amount. Accordingly, I modify the award as follows:-

Annual Income	Rs. 2,58,207/-
Add: Future prospect (@ 10%)	Rs. 25,820/-

	Rs. 2,84,027/-
Less: 1/3 rd Deduction (personal expenses)	Rs. 94,675/-

	Rs. 1,89,352/-
Multiplier by 9 (as per age of the victim)	$\frac{x}{9}$ Rs.17,04,168/-
Add: General Damages	Rs. 70,000/-
Total Compensation	Rs.17,74,168/-
Less – Awarded by ld. Tribunal already recd.	Rs. 6,93,302/-
ENHANCEMENT	Rs.10,80,866/- -----

For the reasons, it is seen that the appellants/claimants are entitled to the total compensation to the tune of Rs.17,74,168/-. It is submitted by the learned advocate for the appellants/claimants that have already received the awarded amount of Rs.6,93,302/- from the learned Tribunal but no interest was received on that amount.

Therefore, the appellants/claimants are entitled to the balance compensation amount of Rs.10,80,866/- along with interest @ 6% per annum from the date of filing of the claim petition, i.e., on 2nd May, 2005, till the deposit of the amount. The appellants/claimants are also entitled to interest @ 6% per annum on the amount of Rs.6,93,302/- from the date of filing of the claim petition, i.e., on 2nd May, 2005 till 26th August, 2011.

Accordingly, the respondent no.1/Oriental Insurance Company Limited is directed to deposit the enhanced compensation amount of Rs.10,80,866/- along with interest @ 6% per annum from the date of filing of the claim petition i.e., on 2nd May, 2005, till the actual deposit

of the amount before the office of the learned Registrar General of this Court, within six weeks from the date of this order.

The respondent no.1/Insurance Company is also directed to deposit interest @ 6% per annum on the amount of Rs.6,93,302/-, which was deposited by the Insurance Company and already withdrawn by the claimants from the date of filing of the claim petition, i.e., on 2nd May, 2005 till 26th August, 2011, before the office of the learned Registrar General of this Court, within six weeks from date.

The appellants/claimants are entitled to withdraw the balance award amount with interest, subject to payment of additional *ad valorem* court fees on the amount of Rs.2,74,168/- (Rs.17,74,168/- – Rs.15,00,000/-) before the learned Tribunal.

In view of the submission and evidence adduced by OPW-1 together with Exhibit-A, it is found that at the relevant point of time of accident, the driver of the lorry had no valid licence. Therefore, the respondent no.1/Oriental Insurance Company Limited is at liberty to recover the entire awarded sum with interest from the owner of the vehicle, bearing registration no.WMK-6885, through execution proceeding in terms of the observations of the Hon'ble Apex Court in **Shamanna & Ors. v. The Divisional Manager, The Oriental Insurance Co. Ltd. & Ors.** reported in **AIR 2018 SC 3726** and **Oriental**

Insurance Co. Ltd. v. Nanjappan & Ors. reported in **AIR 2004 SC 1630 : (2004) 13 SCC 244.**

The learned Registrar General is requested to disburse the amount with interest to the appellants/claimants in equal share on proper identification and proof.

With the above observations, the appeal, being FMA 746 of 2012, is disposed of.

All pending applications, if there be any, stand disposed of.

Records of the learned Tribunal along with a copy of this order be transmitted back immediately.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Bibhas Ranjan De, J.)