

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

FMA 1316 of 2009

Smt. Srimati Halder & Ors.
Vs.
The Oriental Insurance Company Ltd. & Ors.

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

Mr. Parimal Kumar Pahari
... For the respondent no.1/Oriental
Insurance Company Ltd.

Ms. Gopa Das Mukherjee
... For the respondent no.2/New India
Assurance Company Ltd.

This appeal is directed against the judgment and award dated 25th September, 2008 passed by the learned Judge, Motor Accident Claims Tribunal, Additional District Judge, Fast Track, 4th Court, Malda, in connection with MAC Case No.24 of 2005 granting award of Rs.2,25,470/- out of total assessed amount of Rs.4,50,941/- in view of contributory negligence on the part of the deceased.

The claim petition was filed under Section 166 of the Motor vehicles Act, 1988 on account of death of one Girindra Nath Halder in a motor accident occurred on 29th February, 2004 at about 4.30 p.m. by the involvement of a Bus, bearing registration no.WB-61/1411. While the deceased along with two others were riding in a motor cycle, bearing registration no.WB-66-B/1838, from

Buniadpur to Kushmandi through left side of the road, the offending bus, bearing registration no.WB-61/1411, coming from Siliguri side with high speed dashed and ran over Girindra Nath Halder at Kalika More Bridge. The accident took place due to rash and negligent driving of the bus. At the relevant point of time, Girindra Nath Halder was a man of 40 years having income of Rs.51,150/- per annum. That is why the claim petition was filed with a prayer for compensation to the tune of Rs.5,20,000/-.

Owner of the offending vehicle did not contest the claim petition but the Oriental Insurance Company Limited, insurer of the bus bearing registration no.WB-61/1411, and the New India Assurance Company Limited, insurer of the motor cycle bearing registration no.WB-66-B/1838, contested the case by filing written statements denying all material averments of the claim petition contending, inter alia, that the deceased was responsible for the accident and the Insurance Companies are not liable to pay any compensation.

To prove the case, the claimants examined as many as three witnesses, namely, Srimati Halder, wife of the deceased, as PW-1. She corroborated all statements made in the claim petition, including the amount of compensation.

One Vivekananda Mondal, an employee of Income Tax Department, was examined as PW-2 who testified in

this case and proved the income of the deceased by filing Saral Form (Ext.-5). His cross-examination was declined.

One Samir Kumar Mandal claiming himself to be an eyewitness to the incident examined as PW-3. He testified that on 29th February, 2004, he was also accompanying the deceased Girindra Nath Halder in a motor cycle and Girindra Nath Halder was driving the motor cycle. They were going for some construction work, but near Kalika Bridge, one bus, bearing registration no.WB-61/1411, coming with high speed and in rash and negligent manner, dashed the motor cycle. As a result, Girindra Nath Halder died on spot and PW-3 sustained injury and lost sense. He specifically testified that the accident caused due to rash, negligent and wrongful driving on the part of the driver of the bus. During cross-examination on behalf of the Oriental Insurance Company Limited, nothing was suggested even denying rash driving on the part of the driver of the bus.

In course of their evidence, First Information Report, charge sheet, seizure list, post-mortem report, insurance policy, copy of Saral Form etc. were filed on behalf of the appellants/claimants.

Learned Judge of the Tribunal after assessing all the evidence on record, returned his finding that at the relevant point of time the deceased was driving the motor cycle along with two pillion riders. So, there was sheer negligence on the part of the deceased who was driving the

motor cycle with two pillion riders. That is why the learned Tribunal deducted 50% of the assessed amount in terms of contributory negligence on the part of the deceased.

So far as the accidental death of Girindra Nath Halder is concerned, I have gone through the unchallenged testimony of PW-3 together with the FIR, charge sheet and seizure list, I find hardly any scope to disbelieve the accidental death of Girindra Nath Halder by the involvement of bus, bearing registration no.WB-61/1411.

Mr. Parimal Kumar Pahari, learned advocate, appearing on behalf of the Oriental Insurance Company Limited has tried to make this Court understand that there was contributory negligence on the part of the driver of the motor cycle as it was a case of head on collision. In support of his contention, he relied on a case of **Manoka Mondal & Ors. v. Oriental Insurance Co. Ltd.** reported in **2015 (3) TAC 612 (Cal)** wherein the Hon'ble Division Bench of this Court disallowed the prayer for compensation on the ground that motor cyclist had violated the provisions contained in Section 128 of the statute. It was further observed the Hon'ble Division Bench that we should not ignore the provisions in the statute, otherwise it would amount to approving an illegal act committed by the motor cyclist.

In opposition to that, Mr. Krishanu Banik, learned advocate, appearing on behalf of the appellants/claimants, submitted that the case in our hand has no application of

contributory negligence. He has referred to the evidence of PW-3, eyewitness to this case. In support of his argument, Mr. Banik relied on a case of **Mohammed Siddique & Anr. v. National Insurance Company Limited. & Ors.** reported in **1 (2020) ACC 345 (SC)** wherein the Hon'ble Apex Court handed down the following ratio in paragraph 13:-

“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 194C 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. ...”

In the aforesaid view of the matter, I find hardly any scope to agree with the learned Tribunal regarding contributory negligence on the part of the driver of the motor cycle/deceased. Even if the deceased Girindra Nath

Halder was driving his motor cycle along with two other pillion riders but that does not mean that he has made any contributory negligence to the accident in absence of any specific evidence to that effect. It is needless to mention that the Insurance Company did not adduce any evidence in this regard.

In this case PW-3 has specifically deposed that the accident took place due to rash and negligent driving of the bus. PW-3, being a pillion rider, his evidence remained unchallenged through out the cross-examination. That apart, FIR and charge sheet also corroborated the factum of accident due to rash and negligent driving of the bus.

In these circumstances, I do not find any reason to discuss further on this issue. Before parting with, it would be profitable to refer the case of **Usha Rajkhowa & Ors. v. Paramount Industries & Ors.** reported in **2009 ACJ 1314**, relied on behalf of Mr. Banik, learned advocate for the appellants/claimants. In **Usha Rajkhowa** (supra), the Hon'ble Apex Court dealt with the case of two vehicles, one is truck and another is Maruti car. In that case the Hon'ble Apex Court took the assistance of evidence of eyewitness who testified that accident took place due to rash and negligent driving of the truck and also took assistance of principle of "*res ipsa loquitur*".

Relying on the ratio of **Usha Rajkhowa** (supra), I am of the humble opinion that in our case compensation

amount cannot be reduced on the plea of contributory negligence.

In the aforesaid view of the matter, I determine the compensation in terms of settled principle laid down by the Hon'ble Apex Court as follows:-

Annual Income (Rs.51,150/- – Rs.215)	Rs. 50,935/-
Add: Future prospect (@ 25%)	Rs. 12,733/-

	Rs. 63,668/-
Less: 1/3 rd Deduction (personal expenses)	Rs. 21,222/-

	Rs. 42,446/-
Multiplier by 13 (as per age of the deceased)	x 13
	Rs.5,51,798/-
Add: General Damages	Rs. 70,000/-

Total	Rs.6,21,798/-
Less – Awarded by Id. Tribunal	Rs.2,25,470/-

ENHANCEMENT	Rs.3,96,328/-

For the reasons, it is seen that the appellants/claimants are entitled to the total compensation to the tune of Rs.6,21,798/-. It is reported that the appellants/claimants have already received Rs.2,25,470/- as awarded by the learned Tribunal.

Therefore, the appellants/claimants are entitled to the balance amount of Rs.3,96,328/- along with interest @ 6% per annum from the date of filing of the claim petition, i.e., on 7th February, 2005 till the deposit of the amount.

Accordingly, the respondent no.1/Oriental Insurance Company Limited is directed to deposit the

enhanced amount of Rs.3,96,328/- along with interest @ 6% per annum from the date of filing of the claim petition, i.e. on 7th February, 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 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.1,01,798/- (Rs.6,21,798/- – Rs.5,20,000/-) before the learned Tribunal.

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

With the above observations, the appeal, being FMA 1316 of 2009, 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.)