

IN THE HIGH COURT AT CALCUTTA**Civil Appellate Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****F.M.A No. – 28 of 2015****With****IA No. CAN 1 of 2019 (Old No. CAN 1692 of 2019)****IN THE MATTER OF****New India Assurance Co. Ltd.****Vs.****Moumita Paul & Ors.****For the Appellant : Mr. Soumendranath Ganguly, Adv.,
Mr. Manabendranath Bandyopadhyay, Adv.****For the Respondent/claimant : Mr. Jayanta kr. Mandal, Adv.,****Judgment on : 11.07.2023****Subhendu Samanta, J.**

The instant appeal is preferred against the judgment and award dated 12th June 2013 passed by Learned Motor Accident Claims Tribunal Additional District and Sessions Judge, Fast Track 1st Court Barrackpore in MAC No. 570 of 2009.

The present respondent preferred an application u/s 166 of MV Act before the Learned tribunal for getting compensation on the ground that their predecessor has died in a road traffic accident due to rash and negligent driving of the driver of the

offending vehicle duly insured by the present appellant. The claim case was contested by the present appellant by filing written statement. The claimants have produced 04 witnesses, on the other hand the Insurance Company had adduced 02 witnesses. After hearing the parties and after perusing the evidences on record both oral and documentary, Learned Tribunal has allowed the claim case in favour of the claimants and directed the Insurance Company to pay the award amounting to Rs 9, 37,500/- along with 06% interest per annum from the date of the filing of the claim case.

The appeal was preferred by the Insurance Company on the ground that the impugned award passed by the Learned Tribunal is erroneous. The Learned Tribunal did not consider the evidences on record and passed the award of compensation which is exorbitant.

It is the submission of the Learned Advocate for the appellant that the accident occurred due to head on collision between the two vehicles. One of them being driving the vehicle owned by the victim. The evidence of this case shows that the victim Tapas Pal since deceased was driving the Maruti Car in a rash and negligent manner. Thus there is contributory negligence on the part of the victim. In that case the amount of compensation should be apportioned. He pointed out that the so called offending vehicle has collided with the Maruti Van

driven by the victim himself. The post mortem report shows the presence some pungent liquid in the stomach of the victim thus it cannot be said that only the so called offending vehicle (Truck) is solely responsible for the accident. He further pointed out that the PW 4 appeared before the Learned Tribunal to be the eye witness of the accident. The evidence of PW 4 is not at all believable as he did not see the actual accident, moreover he said that the driver of the Maruti van sustained no injury while it is the fact that the present victim was driving the Maruti Van. It is the further case of the Learned Advocate for the appellant Insurance Company that DW 2 was the driver of the offending Truck who specifically stated before the Learned Tribunal that the Maruit van was coming from the opposite side of the truck by overtaking another 407 Truck and suddenly came infront of his truck and collided. The evidence of DW 2 is very specific regarding the fact of accident so, on the basis of such fact it is aptly proved that the victim was equally responsible for such accident. The negligence in this case is the contributory negligence by the joint tort-feasors i.e the driver of the Truck as well as the driver of the Maruti Van (victim)

Finally, the Learned Advocate for the Insurance Company submitted that the order apportionment of the claim need be

passed by modifying the impugned award passed by the Learned Tribunal.

The Learned Advocate appearing on behalf of the respondent submitted before this court that the claim application was filed before the Learned Tribunal on the basis of fatal accident of the predecessor of the claimants. The predecessor of the claimant namely, Tapas Pal died on the spot on the basis of such accident Bizpur P.S. Case No. 194 of 2009 was initiated. The investigation of police is ended in charge sheet against the driver of the offending vehicle (Truck) which was prima facie proved by the police investigation that the driver of the offending vehicle (Truck) was driving the vehicle in a rash and negligent manner and the accident caused due to recklessness of the offending driver. Finally the Insurance Company has contested the case by filing written statement, in such written statement no such averment was placed to the effect that the victim was also responsible for the accident thereafter one additional written statement was filed by the insurance company to only plead the fact that during post mortem of the victim, 100 ml pungent liquid was found at the stomach of the victim.

It is the submission of the Learned Advocate, for the respondent that the fact was not at all proved by the Insurance Company, more over the fact of contributory negligence and the

evidence of the driver of the offending Truck (OPW 2) is not at all believable. The OPW 2 is the accused of the criminal case so he is interested witness in this case. It is the further submission of the Learned Advocate for the respondent that the appellant Insurance Company has filed the case only to delay the payment of compensation, the appeal need be dismissed.

Heard the Learned Advocate perused the materials on record also perused the paper book. It appears from the additional W.S. of the Insurance Company that the plea was taken by the Insurance Company regarding the contributory negligence of the victim in the alleged accident. On the basis of the fact that some 100 ml was pungent liquid was found at the stomach of the victim in post mortem report. The vicera was sent by the post mortem doctor for chemical analysis of stomach along with the portion of liquid to the FSL for chemical analysis. But no such chemical analysis report is produced by the insurance Company before the Learned Tribunal or before this Appellate Court though about a decade has elapsed after the accident. At this juncture it is quite impossible for this court to put emphasis upon the pleading of the Insurance Company that the 'pungent' liquid influenced the victim to drive the vehicle in a negligent manner.

The evidence of OPW 2 is carefully perused. The driver of the offending Truck has given the statement that at that particular place there was a turn, the Maruti Van over took one 407 Truck and suddenly came in front of the offending Truck and collided. The Insurance Company has the strength of only evidence of driver of the offending Truck to challenge the impugned award passed by the Tribunal. On the other hand there are prima facie investigations of the police which ended in charge sheet against the driver (OPW 2). While a person is entangled in a criminal case of some alleged offence; no doubt he shall not admit is guilt before any forum of law, because such statement may be sued against him in the criminal trial. Thus in my view the driver of the offending Truck is must be an interested witness. In considering the judgment of Hon'ble Supreme Court passed in **Khenyei Vs. New India Assurance Company Limited & ors.** reported in **2015 (2) T.A.C. 677 S.C.** It has been held

in paragraph 14 of the **Khenyei**, it has been formulated by the Hon'ble Apex Court "there is a difference between contributory and composite negligence in case of contributory negligence a person who is himself contributed to the extent can not claim compensation for injuries sustained by him in the accident to the extent of his own negligence whereas in the case of composite negligence, a person who is suffered has not

contributed to the extent but the outcome of confusion of negligence of two or more other persons. This court in **T.O. Anthony v. Karvarnan & Ors, 2008 (3) SCC 748**, has held that in case of contributory negligence, injured need not establish the extent of responsibility of each wrong doers separately nor it is necessary for the court to determine the extent of law of each wrong doers separately. It is only in the case of contributory negligence that the injured himself has contributed by his negligence in the accident. Extent of his negligence is required to be determined as damage recoverable by him in respect of injuries has to be reduced in proportion to his contributory negligence.”

By virtue of the above principles it appears to me that the Insurance Company has himself pleaded before the tribunal that at the time post mortem the victim had have 100 ml of pungent liquid at her stomach. Perhaps the Insurance Company wanted to prove that victim was under the influence of liquor; thus he drove the Maruti Van certainly in a rash and negligent manner under the influence of the liquor at the time of the accident. But subsequently, the Insurance Company has stopped establishing such pleading and place the driver of the offending vehicle before the Court with a new fact of reckless driving. The report of chemical analysis is the best evidence to prove the fact that the victim was under influence of liquor

while driving the Maruit Van. Such best evidence was not placed before the Learned Tribunal by the Insurance Company. Considering the conduct of the Insurance Company, adverse presumption u/s 114 (g) of the Evidence Act may be inferred i.e. if the document be produced, it would be un-favourable for the Insurance Company. Considering analogy it appears to me that the Insurance Company has failed to make out the point of appeal before this Appellate Court. The appeal became meritless and dismissed.

The impugned award passed by the Learned Tribunal is hereby affirmed.

Insurance Company is directed to comply the order of the Learned Tribunal if no already complied with, within 06 weeks from the date.

The pending CAN applications, if any are also disposed of.

Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)