

**HIGH COURT AT CALCUTTA
In the Circuit Bench at JALPAIGURI
(Civil Appellate Jurisdiction)
Appellate Side**

Present:

The Hon'ble Justice Ajay Kumar Gupta

FMA 9 of 2019

Smt. Nibha Sarkar @ Nibharani Sarkar

Vs.

United India Insurance Co. Ltd. @ Anr.

With

COT 1 of 2019

United India Insurance Co. Ltd. @ Anr.

Vs.

Smt. Nibha Sarkar @ Nibharani Sarkar

For the Appellant in FMA 9/2019

And for the Respondent in

COT 1/2019

: Mr. Gobinda Saha, Adv.
Mr. Tamal Kumar Sen, Adv.
Ms. Priyanka Dey, Adv.
Mr. Milan Ch. Laskar, Adv.
Mr. Sanghai Chowdhury, Adv.

For the Appellants in COT 1/2019

And for the Respondents

in FMA 9/2019 :Mr. Bipul Ranjan Bhattacharjee, Adv.

Heard on : 13.10.2023

Judgment on : 20.12.2023

Ajay Kumar Gupta, J.

1. Appellant/claimant has filed this appeal being FMA 9 of 2019 feeling aggrieved and dissatisfied with a judgment and award dated 28th day of June, 2019 passed by the Learned Judge-cum- 1st Motor Accident Claims Tribunal, Jalpaiguri in M.A.C. Case No. 297 of 2014 (001849/2014) thereby the learned Tribunal dismissed the claim application filed under Section 166 of the Motor Vehicles Act, 1988 on contest against OP No. 2/Insurance Company and ex parte against OP No. 1/ owner of the offending vehicle without any order as to costs.

2. At the same time, the respondent no. 1/insurance company filed memorandum of cross-objection being COT 1 of 2019 on the grounds that the deceased Anuj Sarkar was not

died due to injuries suffered in motor traffic accident. As per the PM report, he died due to injuries suffered due to impact with rough object and not by way of knocking down by the moving truck. Second ground raised by the respondents that Anuj Sarkar was a pillion rider of the motor cycle bearing registration No. WB 64J 9994 in view of the evidence of P.W. 2. However, the appellant silent about the said facts and filed claim application for compensation suppressing the real facts. Thirdly, the rider of the motor cycle had learner license so it was a clear violation of Motor Vehicle Rules, 1989. Therefore, the learned Tribunal rightly dismissed the claim application. No interference, whatsoever is required.

3. The facts giving rise to file this appeal as well as cross objection is to the effect that on 01.09.2014 at about 12.30 pm while the deceased Anuj Sarkar was proceeding towards Mathabhanga from the side of Angarkata by one Motor Cycle bearing No. WB-64J-9994, at that point of time near Baishguri under P.S.- Mathabhanga, Dist.- Coochbehar one Truck bearing Registration No. WB-25B-3625 coming at high speed

from the opposite direction and suddenly going on the wrong direction dashed the said deceased as a result the said deceased sustained serious injuries on his person and subsequently succumbed due to such injuries suffered in Motor traffic accident on the same day. The post mortem was conducted at Mathabhanga S/D Hospital, Dist.- Coochbehar. The respondent/insurance company duly appeared and filed their written statements contending therein that the respondent does not admit the involvement of the alleged vehicle being no. WB 25B-3625 (Truck) and appellant/claimant is not entitled to get compensation from the insurance company. Whereas owner of the offending vehicle (Truck) did not contest the case before the Learned Tribunal.

4. The learned Tribunal, after considering the case of both the parties as well as evidence adduced by the appellant, finally came to conclusion that deceased was not an authorized passenger on the motor cycle as such, the compensation payable, if any, should claim from the owner of the motor cycle thereof. But neither owner nor the insurer of the motor cycle

has been impleaded herein despite the exhibit 2/1 (seizure list) reveals that the tax token and the insurance certificate of the motor cycle was seized. It was further observed by the learned Tribunal, the answer regarding cause of death as road traffic accident eluded the learned Tribunal. Accordingly, the appellant/claimant has failed to prove the bundle of facts which constitutes the cause of action for her to submit the instant application under Section 166 of the Motor Vehicles Act and finally dismissed the claim application on contest against the OP No. 2/United India Ins. Co. Ltd. of vehicle No. WB 25B 3625 (Truck), ex parte against OP No. 1/ owner of the said vehicle without any order as to costs.

5. The learned advocate appearing on behalf of the appellant/claimant submitted that the learned Tribunal did not consider the FIR, charge-sheet and evidence of the witnesses which clearly support the case of involvement of the offending vehicle bearing No. WB 25B 3625 (Truck). The deceased Anuj Sarkar died due to the motor traffic accident. Even if he is a pillion rider, he is entitled to get compensation from the

offending vehicle, which was involved in the said accident because he is third party against that offending vehicle (truck). Furthermore, the learned Tribunal Judge ought to have given much importance regarding the opinion mentioned in Exhibit 4 (PM Report) that the deceased was died due to the effect of shock and head injury. The said injuries caused as noted by the Autopsy Doctor apparently the road traffic accident. The said Autopsy Doctor had opined that such injuries were ante mortem in nature. However, the learned Tribunal ignored the said facts and further misunderstood the ratio and principle laid down by the Hon'ble Supreme Court that the claimant can claim compensation either from both of the vehicle or any one of the vehicles, which were involved and insured. Therefore, the observation made by the learned Tribunal that the claimant did not implead the insurance company and owner of the motor cycle is not tenable on law.

In support of his contention, the learned advocate cited a judgment of **Khenyei vs. New India Assurance Co. Ltd. & Ors.**¹

¹ II (2015) ACC 657 (SC)

6. It is further submitted that the claimant being the mother of the deceased successfully established and proved all the criteria's and norms with oral and documentary evidence to satisfy the Learned Tribunal for the just compensation in the instant case filed under Section 166 of the Motor Vehicles Act, 1988. Accordingly, the impugned judgment and award is liable to be set aside and court may allow the appeal by awarding a just compensation in favour of the claimant along with interest and other compensation towards the head of general damages and future prospects in view of a larger Bench judgment pronounced by the Hon'ble Supreme Court in **National Insurance Company Ltd. Vs. Pranay Sethi²**.

7. Per contra, the learned advocate appearing on behalf of the insurance company submitted that learned Tribunal rightly dismissed the claim application filed by the appellant/claimant. From the evidence of eye witness, it is clear that the deceased was pillion rider of the motor cycle. He was not suffered any injury due to motor traffic accident because the alleged

²**2017 ACJ 2700/2017(4) TAC 673**

offending vehicle being No. WB 25B 3625 (Truck) was not involved in the said accident. It can be ascertained from the FIR which was lodged after three days that there was no any eye witness of such alleged accident. Furthermore, the rider of the motor cycle had a learner licence, which is not a valid and effective driving licence at the time of accident. Thereby the rider of the motor cycle contravened the provision of Motor Vehicles Acts and Rules framed thereunder and has committed the breach of terms and conditions of the insurance policy. Claimant did not make parties to the insurance company or owner of the motor cycle. Therefore, this appeal is liable to be dismissed with costs.

8. Having heard the submissions of both sides and on perusal of the evidence both oral and documentary adduced by the parties in the instant case, it appears it is admitted fact that the deceased Anuj Sarkar was a pillion rider of the motor cycle. It is further admitted fact that the rider of the motor cycle had learner licence.

9. Now, the following issues are emerges before this Court to decide:

- 1) Whether alleged offending vehicle bearing No. WB 25B 3625 (Truck) was really involved in the said accident?
- 2) Whether the pillion rider is entitled to get compensation from the insurance company of the said insured vehicle (Truck)?
- 3) Whether alleged accident occurred due to rash and negligent driving of the driver of the offending vehicle bearing No. WB 25B 3625 (Truck)?
- 4) Whether the appellant has proved with cogent evidence about the alleged date, time, place and manner of accident and deceased suffered multiple injuries on his person and finally succumbed to his injuries on the same day?
- 5) Whether appellant is entitled to get compensation from the insurance company of the offending vehicle (Truck)?

10. To come to final conclusion, this Court is to see how far the claimant proves the case. In this case, the claimant Nibha Sarkar @ Nibharani Sarkar, mother of the deceased examined herself as P.W. 1, Shamal Mondal, a sole eye witness as P.W. 2 to prove her case. P.W. 1 stated in her examination-in-chief that on 01.09.2014 at about 12.30 pm while her son Anuj Sarkar was proceeding towards Mathabhanga from the side of Angarkata by one Motor Cycle bearing No. WB-64J-9994, at that point of time near Baishguri under P.S.- Mathabhanga, Dist.- Coochbehar one Truck bearing Registration No. WB-25B-3625 coming at high speed from the opposite direction going on the wrong direction dashed down her son and as a result her son sustained serious injuries on his person and subsequently succumbed to such injuries on the same day. Over that accident, one complaint was lodged to the Mathabhanga P.S. which was registered as Mathabhanga P.S. Case No. 388/2014 dated 04.09.2014 under Section 279/338/304(A) IPC corresponding to G.R. Case No. 856/2014. She also produced copy of FIR, seizure list, charge-sheet, certified copy of PM report, registration certificate of offending vehicle (truck),

insurance policy, certificate of fitness, permit, tax token, driving licence of the driver of the motor cycle, trade licence of the deceased, PAN card, Aadhar Card of the deceased (Marked as Exhibits 1 to 10 respectively) to substantiate her claim that her son died due to the motor traffic accident. However, during cross-examination, she admitted that she did not implead the owner of the motor cycle in which her son was present. She also narrated that one truck bearing No. WB 25B 3625 was coming at a high speed from the opposite direction and dashed the victim.

11. P.W. 2, eye witness stated the manner of accident, date, time and place of accident as similar as P.W. 1. However, he specifically admitted that the deceased was a pillion rider of the said motor cycle. He sustained serious injuries on his person and subsequently he came to learn that the said pillion rider Anuj Sarkar died on the same day. He further stated in his evidence that the accident was occurred due to rash and negligent driving on the part of the driver of the offending vehicle bearing No. WB 25B 3625 (Truck). During cross-

examination, his evidence could not be shaken and rebutted by the insurance company. It was narrated in the cross-examination that Anuj Sarkar was proceeding towards Mathabhanga from the side of Angarkata and the offending vehicle was proceeding from the opposite direction and the accident took place at Baisguri.

12. No any witness brought or produced any documents from the side of insurance company to substantiate its case. The insurance company further failed to rebut the contention of the claimant regarding the manner of accident, date, time and place of accident though insurance company denied the involvement of the offending truck in the accident in its written statement and prayed for dismissal of the claim on that score. It was not denied by the insurance company that the deceased was not died on 01.09.2014 due to injuries as noted in the PM report (Marked Ext. 4). The Autopsy Doctor also opined that the immediate cause of the death of the deceased was due to shock and head injury and those injuries were suffered by the deceased on his person in Road Traffic Accident. It is clearly

mentioned in the PM Report by the Autopsy Doctor that it appears to be road traffic accident in the column “manner of causing injuries”. There is no doubt about the injuries suffered by the deceased was in a motor traffic accident from the evidence of eye witnesses P.W.2 and P.M. report.

13. The facts of accident and injuries were supported by the eye witness. The eye witness clearly stated the manner, date, time and place of accident as well as involvement of the offending vehicle (Truck). It is further proved by the eye witness that the said accident was due to the rash and negligent driving of the driver of the offending vehicle. Thus, oral evidence deposed by the eye witness cannot be thrown out without rebuttal or contradiction. The insurance company failed to rebut the evidence of either P.Ws. 1 or 2. Not only that they failed to contradict their statements. In addition, in the instant case charge sheet has been submitted against the driver of the offending vehicle. Copy of FIR, Charge sheet, seizure lists and Post Mortem report substantiate the facts of accident. Therefore, there is no iota of doubt remains about the accident

took place due to rash and negligent driving of the driver of the offending vehicle bearing No. WB 25B 3625 (Truck). It is stated offending truck was coming at a high speed from the opposite direction and suddenly turned to the wrong side and dashed the victim/deceased. As a result, deceased suffered serious injuries on his person. The FIR disclosed about the involvement of the vehicle which was lodged by one Bhupen Sarkar on 04.09.2014 where it was mentioned the date, time and place of occurrence are similar as stated by the P.W. 1 and P.W. 2 (eye witness). It also appears from the FIR that Lakhan Roy and Anuj Sarkar were coming from Angarkata towards their residence. Lakhan Roy died and Anuj Sarkar sustained serious injuries. It is specifically mentioned that the offending vehicle was involved in the said accident. Even after investigation, prima facie case was established against driver of the offending vehicle bearing No. WB 25B 3625 (truck).Wherefrom it also revealed that both Anuj Sarkar and Lakhan Roy succumbed to their injuries at the spot. Not only that the PM report (Exhibit 4) clearly mentioned that the deceased Anuj Sarkar died due to shock and head injury which is ante mortem in nature. The

Autopsy Doctor further opined that injuries appear to be road traffic accident in the column manner of causing of injuries.

14. So, contention of the insurance company is not at all satisfactory that the offending vehicle was not involved in the said accident without supporting oral or documentary evidence or vital contradictions.

15. Now the question arises that whether the victim was pillion rider or motor rider? It is admitted fact that the victim was pillion rider and it is also admitted by the P.W. 2 (eye witness) that he was pillion rider. So, whether pillion rider is entitled to get compensation from the insurance company of offending vehicle (Truck)? In this case, the pillion rider is also entitled to get compensation from the offending vehicle if the insurance policy and other terms and conditions of the insurance policy are fulfilled. The driving licence, though it was learner license of the motor rider, was valid on the date of accident and that driving licence being no. WB 63/LL/67621/13-14 in the name of Laxman Ray valid up to

21.07.2019 to 30.01.2015. It is true that the appellant/claimant did not implead insurer and owner of the motor cycle but there is settled law that claimant can implead both or any of the insurer or owner of the offending vehicle for compensation in case of composite negligence or contributory negligence. This Court relied on a judgment referred by the appellant reported in **Khenyei Vs. New India Assurance Co. Ltd., II (2015) ACC 657 (SC)**. Here the Hon'ble Supreme Court held as follows:

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

(ii) In the case of composite negligence, apportionment of compensation between two tort feasons 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 tort feasons 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.”

16. In the instant case, there is no question of composite or contributory negligence from the side of Motor cycle and offending truck. Holding learner license by the rider of the motor cycle, who also died in the said accident is insignificant in the instant case. Here the offending vehicle (Truck) is solely responsible for the said accident so insurer or owner of the

offending truck is liable for the compensation because the deceased Anuj Sarkar is the third party against the offending truck. So the claimant is entitled to the compensation from the insurance company of the aforesaid offending vehicle (Truck). Now, what would be the actual compensation is to be decided by this Court.

17. To prove the income of the deceased Anuj Sarkar the P.W. 1 stated in her evidence that he used to earn Rs. 15,000/- per month from the business. P.W. 1 further produced trade licence. However, no other documents produced to show the actual income of the victim. It is admitted fact that the deceased was a bachelor at the time of accident.

18. After going through the entire evidence regarding income, this Court does not find any cogent evidence to accept his income as 15,000/- per month. If this Court considers the judgment reported in **Laxmi Devi vs. Md. Tabbar and Anr.**³ Where the Hon'ble Supreme Court held that when the claimant

³ 2008 (2) T.A.C. 394 (SC)

failed to prove the income of the victim, then Rs. 3,000/- may be accepted as notional income in the year 2008. In the said judgment, the Hon'ble Supreme Court further held that even an unskilled labour could have earn Rs. 3,000/- per month. In the instant case accident took place in the year 2014, even if in respect of unskilled worker, if a sum of Rs. 200/- per day could be reasonable in the year 2020. Therefore, his income can be safely accepted as Rs. 6,000/- per month. From the evidence it is also revealed that the victim was 22 years at the time of accident and was bachelor. To prove his actual age, appellant/claimant has submitted his Aadhar Card, Voter Card. So he comes within age group of 15 to 25 years and for that multiplier would be 18.

19. Keeping in mind of the above observation, the calculation of compensation is assessed as follows:

CALCULATION OF COMPENSATION

Monthly Income	Rs. 6,000/-
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Total annual income (6,000/- X 12)	Rs. 72,000/-
Less: deduction 1/2 of the total Annual income (towards personal and living expenses)	Rs. 36,000/-
Total income after deduction	Rs. 36,000/-
Use of Multiplier as per age of 22 (Rs. 36,000/- X 18)	Rs. 6,48,000/-
Add: Loss of estate	Rs. 15, 000/-
Add: Funereal Expenses	Rs. 15, 000/-
Total Compensation	Rs. 6,78,000/-

20. Thus, the appellant/claimant is entitled to get total compensation to the tune of Rs. 6, 78,000/= (Rupees Six lakhs seventy eight thousand only) which shall carry interest @ 6% per annum from the date of filing of the claim application i.e. from 11.11.2014 till final payment.

21. The respondent no. 1-Insurance Company is directed to deposit the total compensation amount i.e.Rs. 6,78,000/-along with the interest as indicated above by way of cheque in the name of appellant before the Learned Judge-cum- 1st Motor Accident Claims Tribunal, Jalpaiguri within a period of eight weeks from date.

22. Learned Judge-cum- 1stMotor Accident Claims Tribunal, Jalpaiguri upon deposit of the amount and interest as indicated above, shall release cheque in favour of the appellant/claimant upon proper identification and subject to verification of the payment of ad valorem Court fees on total awarded amount, if not already paid.

23. The impugned judgment and award of the learned Tribunal dated 28th day of June, 2019 is hereby set aside.

24. With the above observations, the appeal being **FMA No. 9 of 2019** stands allowed. At the same time, **COT No. 1 of 2019** is hereby dismissed on contests.

25. There shall be no order as to costs.

26. All connected applications, if any, stand disposed of. Interim order, if any, stands vacated.

27. Let copy of this judgment and order along with lower court records, if received, be forwarded to the learned Tribunal for information.

28. Urgent photostat copy of this Judgment and Order be given to the parties upon compliance of all legal formalities.

[AJAY KUMAR GUPTA, J.]