

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction

Present: -Hon'ble Mr. Justice Subhendu Samanta

F.M.A No. – 119 of 2023

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IA No. CAN 2 of 2023

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CAN 3 of 2023

The New India Assurance Co. Ltd.

Vs.

Kamal Chakraborty & Ors.

With

COT 4 of 2023

Kamal Chakraborty & Ors

Vs.

The New India Assurance Co. Ltd.

**For the Appellant/
Insurance Co.**

: Mr. Rajesh Singh, Adv.,

**For the Respondent/
claimants**

**: Mr. Jayanta Kumar Mandal, Adv.
Mr. Saswata Bhattacharya, Adv.
Mr. R.N. Basu, Adv.
Mr. Sayantan Rakshit Adv.**

For the respondent

**: Mr. Debasish Saha, Adv.
Ms. Ruxmini Basu Roy Adv.**

Reserved on

: 04.03.2024

Judgment on

: 28.03.2024

Subhendu Samanta, J.:-

1. Instant appeal has been preferred against the judgment and award dated 18th day of November, 2022 passed by the learned Judge Motor Accident Claims Tribunal ADJ Fast Track 4th Court Alipur in a Motor Accident Claim Case No. 01 of 2017.

2. The brief fact of the case is that one judicial officer namely Pallab Chakraborty (deceased), posted as Civil Judge (Junior Division-cum Judicial Magistrate 1st) at Dinhata Court. On 26.09.2016 at about 9:20 hrs, while he was driving a Maruti/ Swift Dezire Car bearing No. WB 02AH0740 with his personal home guard namely Nilmani Roy (HG/232) met with an accident due to rash and negligent driving of a driver of a Bolero Car being registration No. WB-74TC-802 (Bolero) New Car No. WB-85-0609 By such accident the Judicial Officer suffered serious injury on his person and immediately was taken to MJN Hospital Cooch Behar, where the doctor declared him brought dead.

3. The parents of the deceased Judicial Officer preferred an application before the Learned Tribunal u/s 166 of Motor Vehicles Act for getting compensation on the ground that they lost their son due to rash and negligent driving of the driver of the offending vehicle duly insured under the policy of the Insurance Company. The owner of the offending vehicle did not contest the matter. The Insurance Company contested the claim case by filing written statement and also filed one additional written statement. Moreover, Insurance Company contested the claim case on all available grounds after obtaining a leave u/s 170 of MV Act.

4. Learned Tribunal after hearing the parties and after receiving the evidences awarded compensation of Rs. 1,05,01,625/- together with 6% interest per annum from the date of filing of the claim application. The Insurance Company was directed to pay the compensation.

5. Being aggrieved by and dissatisfied with the said award the Insurance Company has preferred the instant appeal.

Learned Advocate Mr. Rajesh Singh appearing on behalf of the Insurance Company submits that the Insurance Company has challenged the award mainly on two grounds

Firstly: there are contributory negligence on the part of the victim in such accident.

Secondly: the Insurance Company has no liability to pay the compensation.

6. The claimants also preferred a cross-appeal against the stating award on the ground that the Learned Tribunal has failed to consider pay slip of the deceased including the parks thereof to assess the monthly income of the deceased.

7. One application being No. CAN 3 of 2023 was filed on behalf of the claimants/respondents for production of additional evidence in this appellate stage on the ground that the income of the deceased/judicial officer was revised vide notification No 501-J/JD/V/3R-27/12 dated 07.02.2023. The CAN Application being 3 of 2023 is also taken up along with the hearing of its instant appeal.

Owner of the offending Bolero Car first time appeared before this Appellate Court and argued against the award.

Regarding Contributory Negligence

Mr. Singh submits that the Insurance Company has submitted one additional written statement before the Learned Tribunal contending inter alia that the accident happened due to the negligent driving of the victim it has been alleged in the additional written

statement of the Insurance Company that the victim was driving his vehicle at about the speed of 100 to 120 KM per hour. Due to the rash and negligent driving of the deceased victim the accident was happened the so called Bolero Car was not responsible for the accident. Mr. Singh further submits that at the time of the accident the victim was driving the Maruti Car/Swift Dezire while his personal Home Guard namely Nilmani Ray was sat beside the driver (victim). The Said Nilmani Ray was cited as an eye witness of this case as PW 2. During his cross-examination he admitted that he was sitting at the left side of the judicial officer (victim) during his further cross-examination he admitted that he had a statement u/s 164 Cr.P.C. before the Learned Judicial Magistrate 3rd Court Dinhata Cooch Behar. He also admitted that he stated before the Learned Magistrate voluntarily that the vehicle was running at a speed of 100 to 120 Kms per hour.

8. Mr. Singh submits that the sole eye witness of the accident has specifically admitted before the Learned Tribunal that the deceased was driving the car in a speed of 100/120 Km per hour. The rash and negligent driving and ever speeding in riding the vehicle by the victim has been well proved. So the victim was solely responsible for the accident. Mr. Singh further argued that the statement of Nilmani Ray u/s 164 Cr.PC. was recorded in judicial proceeding in connection with Kotwali PS case No. 1093/16 dated 26.09.2016. The nature of the voluntary statement recorded by the Learned magistrate itself proved that when the victim was driving towards the Dinhata and at about 9:05 am, when they reached Balamari suddenly a flock

of sheep appeared over the road, to save those sheep the judicial officer suddenly turned the car towards the right and when he again tried to go straight at the time one Bolero Car dashed Martuti Car. He further admitted that the Maruti Car was running at a speed of 100/120 Km per hour at the time. Mr. Singh further argued that the Learned Tribunal has failed to appreciate the facts and failed to appreciate the contributory negligence on the part of the victim. The observation of the Learned Tribunal is erroneous so in this case the Insurance Company i.e. the insurer of the Bolero Car is not liable to pay the compensation.

9. In support of his contention Mr. Singh cited some decisions reported in

i) Ravi Vs. National Insurance Company Limited 2024 (ITAC 9) (SC)

ii) Vijay Kumar Dugar Vs. Baidya Nath Dutta reported in **(2006) ACJ 1058**

iii) Nisan Sing and Ors Vs. Oriental Insurance Company limited reported in **(2018)6SCC 765**

iv) Renuka Devi and ors Vs. Bangalore Metropolitan Corporation reported in **2008 ACJ 11 88**

10. Learned Advocate for the owner/respondent no. 3 submits that there is no evidence before the Learned Tribunal that the driver of the Bolero Car was driving the vehicle in rash and negligent manner, rather it has been proved through the eye witnesses that the deceased was driving the Maruti Swift Dezire Car in a speed of 100 to 120 km per hour. No negligence has been established by documentary or oral

evidence against the driver of the Bolero Car; thus the driver of the Bolero Car is not responsible for the accident. He further argued that as a Judicial officer has expired in the accident, the police without properly investigated the case has submitted perfunctory charge sheet against the driver of the Bolero Car.

11. Mr. Saswata Bhattacharya Learned Advocate, appearing on behalf of the claimant/respondent submits that the Insurance Company has raised the points of contributory negligence before the Learned Tribunal. the Learned Tribunal has considered the evidences of PW 2 and after perusing the materials on record, has observed that the plea of contributory negligence cannot be entertained. Mr. Bhattacharya further argued that the Insurance Company has not filed a single document to show that the deceased was driving the Maruti Swift Dezire in a rash and negligent manner. The negligence as raised by the Insurance Company has not been sufficiently proved by producing the driver or owner of the Bolero Car to contradict the evidentiary value of the claimants. He further argued that the Hon'ble Division Bench of this court in **New India Assurance Company Limited Vs. Mita Samanta** has categorically observed that when the Insurance Company has contested the proceeding after taking leave u/s 170 of the MV Act, they have the liability to disprove the fact of the claimant by producing the owner or the driver of the offending vehicle before the Learned Tribunal.

12. Mr. Bhattacharya further argued that in this case the owner of the offending vehicle though summoned, not contested the matter by filing written statement. The Insurance Company after obtaining

leave u/s 170 of MV Act has contested the matter on behalf of the owner, the Insurance Company did not call the driver of the Bolero Car as a witness before the Learned Tribunal thus the plea of contributory negligence as submitted by Mr. Singh cannot be entertained.

He further submits that from the evidence of PW 2 it would be revealed that he has no experience regarding the actual speed and movement of a vehicle on road. He also affirmed before the Learned Tribunal that as a flock of sheep suddenly appeared on the road the deceased had to turn the vehicle to the right side of the road.

13. Mr. Bhattacharya further argued the evidence of PW 2 has justifiably proved that he did not have any knowledge regarding the speed of the vehicle on road, furthermore, the forensic report of the Maruti Car was not placed before the Learned Tribunal to ascertain the alleged over speed of the deceased at the time of accident. He finally submits that the Learned Tribunal has committed no error by disbelieving the argument of Insurance Company regarding the contributory negligence. He further argued that in a case u/s 166 of MV Act. The claimants are required to prove the case under the principle of touchstone of preponderance of probabilities; the principle of the Hon'ble Apex Court in **Bimala Devi And Ors Vs. Himachal Road Transport (2009) 13 SCC 530** followed by the Division Bench of this court in the case of **National Insurance Company Limited Vs. Subhasis Manna.**

In support of his contention he cited some decisions of Hon'ble Apex Court in-

i) Menu Rout and Anr. Vs. Sattya Pradyumna Mohapatra AIR 2014 SC (C) 116

ii) Pramod Kumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak & Ors.

14. Heard the Learned Advocates perused the materials on record and also perused the evidence of PW 2. The plea of contributory negligence has been raised before the Learned Tribunal. The Learned Tribunal has framed issues No. 3 and 4 to assess the contributory negligence. After examining the evidence of PW 2 namely Nilmani Ray and also after perusing the statement of PW 2 recorded u/s 164 Cr.P.C., the Learned Tribunal is view that the PW 2 admitted during the examination that he did not have any experience regarding the actual speed and movement of the vehicle on road and also observed that though the police has seized both vehicles after the accident but neither any mechanical inspection report or forensic study was placed from which the speed of the Maruti Swift Dezire at the time of accident can be ascertained; So he decided the issues against the Insurance Company.

15. Let me consider whether the observation of the Learned Tribunal is justified in the facts and circumstances of this case. I have carefully gone through the evidence of PW 2; during his evidence he admitted that he was sitting on the left side of the deceased and the deceased (judicial officer) was driving his own car. After the examination or PW 2, he was recalled, during his re-examination, he admitted that he has given a statement before the Learned Judicial Magistrate 3rd Court, Dinhata, Cooch Behar, which was recorded u/s

164 Cr.P.C. P.W 2 also admitted that the statement was made voluntarily before the Learned Magistrate. During his re-examination PW 2 admitted that at the time of accident the deceased was driving the vehicle at a speed of 100 to 120 km per hour, during the examination he also admitted that during the accident, all on a sudden, a flock of sheep appeared over the road from a slope.

16. I have also examined the statement of PW 2 Nilmani Roy recorded u/s 164 Cr.P.C. on 03.10.2016 i.e. within 10 days of the accident. During his examination Nilmani Roy has stated before the Learned jurisdictional Magistrate that at the time of accident suddenly a flock of sheep appeared over the road, to save them the deceased turned his car to the right side and thereafter when he tried to straight the car at the time of one Bolero car which was coming in a high speed from opposite direction dashed the car at the right side. He admitted during his statement that at that time the Maruti Car was running at a speed of 100 to 120 k.ms per hour.

17. On entire appreciation of the facts and evidences of PW 2, it appears to me that the statement of PW 2 recorded u/s 164 Cr.P.C. cannot be disbelieve. The statement of PW 2 was recorded within 10 days of the accident and he admitted before the Learned Tribunal that he made the statement voluntarily. The statement made u/s 164 Cr.P.C. was sufficiently corroborated by him during the trial. Thus the evidentiary value of the statement cannot be ruled out. The Learned Tribunal has erroneously not considered the value of the evidence of PW 2 entirely. It is true that the investigation of the police ended in charge sheet against the driver of the Bolero Car regarding the prima

facie commission of offence punishable u/s 279/338/304A/427 IPC namely Biswajit Barman. Merely, not naming the deceased in the charge sheet cannot exonerate the deceased for his negligence for the accident. Moreover, it is the principle of Criminal Law that criminal charges abated after the death of the accused; so legally it is not possible for the IO to submit charge-sheet against the deceased.

18. However, it has been proved the driver of the Bolero Car was not produced by the Insurance Company to disprove the evidentiary value of eye witness of this case but it appears from entire examination of evidence of eye witness(PW 2), that he specifically admitted during his examination in chief that the accident happened due to rash and negligent driving of the driver of Bolero Car but at the same time he also admitted that the deceased was driving the car in a speed of 100 to 120 km per hour at the time of accident the deceased suddenly took right turn to save a flock of sheep.

19. After considering the material and evidence it can be visualise that though the actual speed of the Maruti Car could not be correctly assessed by the PW 2 but he admitted that the deceased was driving the car in an excessive speed. He also admitted the Bolero Car was also in a high speed at the time when the deceased/judicial officer had no option but to save the flock of sheep he turned right side of the road and when again he tried to straight his car at the time the Bolero car which was coming in a high speed dashed at the right side of that Maruti Car. After assessing the entire evidences I am of a view that though the Insurance Company has not produced the driver of the Bolero Car before the Learned Tribunal as a witness but the

evidence of sole eye witnesses (PW2) supported the case of the Insurance Company regarding contributory negligence on the part of the deceased judicial officer. The Hon'ble Apex Court in **Pramod Kumar Rasikbhai Jhaveri (supra)** has defined the contributory negligence as follows:

8. The question of contributory negligence arises when there has been some act of omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong.

9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of defendant's negligence is decided. The standard of reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case.

20. In this case the deceased judicial officer who was driving the car in a very high speed was negligent and also not taken care properly by controlling the speed of the vehicle to save the flock of sheep thus the facts of this case goes to show that the deceased himself contributed to his own loss of failing to take reasonable care of his persons and property. In this circumstances I also make it clear that the driver of the Bolero Car was also responsible for the accident

because he could not control the speed over the car and due to his excessive speed he could not stop the car and dashed the Maruti Car of the deceased. In this case it appears that the deceased had no option at the time of accident but to turn right to save the flock of sheep but the Bolero Car has the option to stop the car before happening of the accident. On that score in my view the driver of the Bolero Car is more responsible for the accident than the deceased. So the contributory negligence assessed **on behalf of the deceased is 25%**. Accordingly, the first point is decided partly in favour of the appellant Insurance Company.

Whether the Insurance Company is liable to pay the compensation :

Mr. Singh submits that the Insurance Company has no liability to pay the compensation the offending Bolero Car was insured under the policy of the Insurance Company. The offending Bolero car is a commercial vehicle, it is necessary for commercial vehicle to have a route permit to ply the vehicle of a particular route. After the accident the Bolero Car was seized by the police, police has prepared seizure list and it is appeared that no route permit was seized by the police. To substantiate this plea the Insurance Company has produced one witness (DW 1) from the motor vehicle department Mathabhanga who deposed that no route permit was issued from RTO Cooch Behar against the Bolero Vehicle No. WB 74TC-802 (new No. WB 85 0609). Mr. Singh submits that the owner of the offending vehicle had violated the terms of the policy, thus the Insurance Company is not liable to pay the compensation.

21. The owner of the Bolero Car submits that the Bolero Car was a new Car and just came out from the showroom, the Insurance Company has admitted that the car was under the policy of the Insurance Company. To make a route permit the vehicle has to appreciate to the concerned RTO but before that, the accident was happened. In this case the Insurance Company is liable to pay the compensation.

22. Learned Advocate for the claimants submits that as the offending Bolero Car was covered under the policy of the Insurance Company so the third party may not be denied to receive the compensation from the Insurance Company.

23. Heard the Learned Advocate perused the materials on record also perused the evidence of DW 1. Considering the entire facts it appears to me that the offending Bolero Car had no route permit at the time of the accident. The owner did not substantiate his place before the Learned Tribunal by filing written statement or by producing oral or documentary evidence on his behalf. So, the argument of the owner of the Bolero Car cannot stand alone. Thus, the owner of the offending Bolero Car must have violated the terms of the policy, on that score the Insurance Company is not liable to pay the compensation. However, by virtue of the decision of Hon'ble Apex Court in **National Insurance Company Vs. Swaran Singh and The National Insurance Company Vs. Cholla Bharatamma**, the claimants being the third party cannot be denied to the compensation of this case. Accordingly, the Insurance Company is directed to pay the compensation of this case to the claimants and thereafter they are

at liberty to recover the same amount from the owner of the offending Bolero Car according to the law laid down by the Hon'ble Apex Court in **Swaran Singh (Supra)**.

24. Thus this point decided in favour of the Insurance Company.

Computation of compensation

Mr. Bhattacharya Learned advocate for the claimants submits that the pay of the deceased has been revised and increased by the notification of the Judicial Department dated 07.02.2023. The claimants are entitled to get the compensation by fixing the monthly income of the deceased on the basis of said notification. In support of his contention he cited the decision of Hon'ble Apex Court reported in **Sinom Akra Alias Silamm Thoma and Ors Vs. New India Assurance Company Limited 2023 (1) TAC 118 SC**

25. The Insurance Company has admitted that if the pay of the deceased has been revised by the notification of the Judicial Department, the claimants are entitled to get the compensation on that revised pay structure.

26. Heard the Learned Advocate, perused the notification No 501-J/ JD/V/3R-27/12 dated 07.02.2023. I have also perused the general notification of the Judicial Department Government of West Bengal regarding the revised pay and perks of the Judicial Officer dated 28th October 2022 being GO No. 3129-J/JD/V/2A-03/2020. The Learned Tribunal has fixed the monthly income of the deceased on the basis of Exhibit 38 as follows:

The relevant contents of Ext. 38 is produced as under for better appreciation.

From	Substantive pay	Dearness	Medical	Total
			Allowance	Allowance
01.08.2016	30,780/-	40,630/-	1,000/-	72,410/-.

The pay slip further states that "In addition he will be entitled to draw house rent allowance and sumptuary allowance".

A deceased was also awarded Rs 1,500/- towards the sumptuary allowance thus the monthly salary of the deceased was calculated as 72,410/- + 1,500/- = 73,910 as on 01.08.2016. From Exhibit 38 it appears that no amount was attributed towards house rent, so it can be assumed that the deceased was stayed any Government Accommodation for which no house rent is payable. So after the revision of pay of the Judicial Officer through Second National Judicial Pay commission the pay structure of deceased can be assessed as follows:

From	Substantive Pay as per fixation of order of Judicial Dept. Govt. of WB No. 501J	Dearness Allowance Ref. G.O No. 3129-J/JD/V/2A-03/2020 Dt. 28th October, 2022 Annexure-II	Medical Allowance As per Ext.38	Sumptuary Allowance As per Ext. 38	Total
01.08.2016	JD/V/3R-27/12 Dated 07.02.2023	2% from 01.07.2016 to 31.12.2016			
	87,620/-	1,752/-	1,000/-	1,500/-	91,872/-

27. Upon the above mentioned calculation the annual income of the deceased is calculated as Rs. 91,872/- X 12 = 11,02,464/-.

Tax Liability Calculation

Annual salary	11,02,464
Deductions:	
Sumptuary allowance-18,000/-	
(1,500X12)	
Professional Tax- 2,400/-	
Statutory Deduction – 1,50,000/-	

Total deduction-	1,70,400/-
 Taxable Income	 9,32,064/-
Tax payable	
Upto 2,50,000/-	NIL
2,50,001/- to 5,00,00/- @ 10%	25,000/-
5,00,001/- to 9,32,064/- @ 20%	86,413/-
Total Tax on Income	1,11,413/-
Education Cess on Tax @ 3%	3,342/-
Total Income Tax	1,14,755/-
P.Tax- 2,400/-	
Total Tax liability-	1,17,155/-
Yearly Salary after deduction of tax liabilities-	9,85,309/-

Calculation

Annual Income	9,85,309/-	
Future Prospects (50%)	4,92,654.50/-	

	14,77,963.50/-	
Half deduction towards		
personal Living expenses-	7,38,981.75/-	
Multiplier (17)	X 17	

	1,25,62,689.75/-	
	+	
General Damages -	33,000/-	

	1,25,95,689.75/-	

28. After calculation the award comes to Rs. 1,25,95,689.75/- paisa. The 75% of the said compensation has to be paid by the Insurance Company. Accordingly the Insurance Company has the liability to pay the compensation amounting to Rs. 94,46,767.31/- paisa. The Insurance Company is directed to pay the compensation together with 6% interest per annum from the date of filing of the claim application i.e. from 23.12.2016 till payment.

It appears that the Insurance Company has deposited the statutory deposit amount to Rs. 25,000/- thereafter deposited a sum of Rs. 1,43,26,261 on 03.02.2023, thus, the Insurance Company has deposited total amount of Rs 1,43,51,261/-

29. The office of the Learned Registrar General High Court Calcutta is directed to calculate the award passed by this court and disburse the amount in favour of the claimants equally within 04 weeks. After such deposit if there are some residue in the account of the Insurance Company, the same may be refunded with accrued interest to the Insurance Company on proper application.

30. The payment of compensation is subject to ascertainment of payment of deficit court fee, if any.

31. The Learned Tribunal shall act upon the certified copy of this order to receive the deficit Court Fee, if any.

32. After such payment the Insurance Company is at liberty to recover the entire awarded sum from the owner of the offending vehicle WB-74TC-802 (Bolero) New Car No. WB-85-0609 according to the law laid down by the Hon'ble Apex Court in **Swaran Singh (Supra)**.

33. FMA 119 of 2023 with COT 4 of 2023 is disposed of Connected CAN Applications if any is also disposed of.

34. 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.)