26th April, 2024
(D/L No.50)
(SKB)

FMA 851 of 2018
With
CAN 1 of 2024

Mitali Misra and others
Versus
The Oriental Insurance Company Limited and another

Mr. Ashique Mondal
... for the appellants.

Mr. Rajesh Singh,
Mr. Aniruddha Singh
... for the respondents.

Re: CAN 1 of 2024

1. This application is filed by the claimants/appellants on the ground that the appellant no.4 was expired during the pendency of the instant appeal leaving behind the legal heirs duly mentioned in paragraph 9 of the application being CAN 1 of 2024.
2. Having heard the learned advocate for the appellants, the application being CAN 1 of 2024 is considered and allowed.
3. The office is directed to make necessary amendment in the cause title of the memo of appeal in view of paragraph 9 of the application.

Re: FMA 851 of 2018

4. The instant appeal is preferred against the judgment and award dated 05.06.2017 passed by the learned Judge, Motor Accident Claims Tribunal and

Additional District Judge, Fast Track 5th Court, Alipore, 24 Parganas South in M.A.C. Case No.57 of 2014.

5. The brief fact of the case is that the victim of the instant case, namely, Jayanta Misra was an employee of Calcutta Port Trust. On 09.02.2013 when he was going to the duty, he was hit by the offending vehicle bearing no. WB 41D 3026 (Tata-407) which was driving in a rash and negligent manner and dashed the victim. As a result, the victim sustained severe injuries and taken to the Port Trust Centenary Hospital where he expired on the same day.

6. The claimants being the widow mother and the children of the deceased preferred an application before the learned Tribunal under Section 166 of the Motor Vehicles Act for getting their compensation.

7. Learned Tribunal, after hearing the parties and after receiving the evidences, has awarded a sum of Rs.9,40,720/- towards the compensation of the case and has deducted an amount of Rs.6,25,880/- which the claimants have already received by virtue of a proceeding under Section 8 of the Workmen's Compensation Act wherein the Calcutta Port Trust has deposited the same amount.

8. Being aggrieved and dissatisfied with the said award, the claimants have preferred the instant appeal.

9. Mr. Mondal, learned advocate appearing on behalf of the claimants submits that the award passed by the learned Tribunal was challenged mainly on two grounds:

   i) The deduction by the learned Tribunal regarding the amount the claimants received from the Commissioner of Workmen Compensation is illegal and

   ii) The quantum as assessed by the learned Tribunal is incorrect on the basis of the Hon'ble Apex Court's decision in ***National Insurance Company Ltd. Vs. Pranay Setthi***.

10. He argued that the Insurance Company has preferred an application under Section 167 of the Motor Vehicles Act before the learned Tribunal on the ground that the claim application is not at all maintainable as the claimants have already received some compensation from the Commissioner of Workmen's Compensation Court. The said prayer was not considered by the learned Tribunal. Accordingly, the Insurance Company preferred a revision before the Hon'ble High Court and where the Hon'ble High Court had directed the learned Tribunal to dispose of the application under Section 167 of the Motor Vehicles Act on merit. He further argued that on 23.12.2016, the learned Tribunal had heard the

parties and dismissed the application under Section 167 of the Motor Vehicles Act as not applicable. Mr. Mondal has specifically argued that in passing the said order dated 23.12.2016, the learned Tribunal was of the specific view that as the claimants had not preferred an application before the Commissioner of the Workmen's Compensation Court for getting compensation and as the amount was paid by virtue of a proceeding bearing Case No. DNC 52 of 2013, thus, the claimants cannot be barred to prefer this application for compensation under Motor Vehicles Act. He further argued that at the time of passing the impugned judgment, the learned Tribunal has opined just opposite to his decision passed on 23.12.2016. He further argued that the learned Tribunal, at inner page 7 of the impugned judgment, has opined that the award received by the claimants has to be deducted. He further argued that the claimants never filed any application before the Commissioner of Workmen's Compensation Court but after the accident, the Calcutta Port Trust has *suo motu* assessed the compensation in respect of its employee and filed the compensation before the Commissioner of Workmen's Compensation Court under Section 8 of the Workmen's Compensation Act.

11. He further argued that the amount received by the claimants through the office of the Commissioner,

Workmen's Compensation Court cannot be deducted. He further argued that the instant claim case is filed against the owner and the insurer of the offending vehicle bearing No. WB 41D 3026 (Tata-407). The amount received by the claimants earlier from the employer i.e. the Port Trust cannot be deducted from the compensation of this case. In support of his contention he cited some decisions reported in

1) ***National Insurance Co. Ltd. Vs. Mastan and another reported in (2006) 2 SCC 641***
2) ***National Insurance Company Limited Versus Rekhaben and others reported in (2017) 13 SCC 547,***
3) ***New India Assurance Co. Ltd. Vs. Mahebubanbibi reported in 2002 ACJ 1017.***

11. He argued that in the above citations, the Hon'ble Apex Court decided the issue that the amount received by the dependants of the deceased from the employer could not be deducted from the compensation as assessed under Section 166 of the Motor Vehicles Act.

12. Heard the learned advocate and perused the observations of the Hon'ble' Apex Court.

13. In ***Rekhaben*** (supra) the salary received by the dependant/claimant for the compassionate appointment due to the victim's death is not ordered to be deducted from the compensation

assessed in a case under Section 166 of the Motor Vehicles Act. In ***Mehebubanbibi*** (supra) the Hon'ble Apex Court has held that "if the employer has paid the amount due by way of remuneration on provident fund, gratuity or any other dues payable under the service conditions or even ex-gratia, they would not be compensation paid under the provisions of the Workmen's Compensation Act or for personal injury".

14. Mr. Mondal also cited a decision reported in ***(2013) 9 SCC 406 [Oriental Insurance Company Limited Vs. Dyamavva and others]***.

15. He argued that in a case of ***Dyamavva*** (supra), the Hon'ble Apex Court has specifically on the similar facts and circumstances of a case has held that the amount received by the legal heirs which was deposited *suo motu* was not at the behest of the claimants but was based on unilateral *suo motu* determination of the employer under Section 8 of the Workmen's Compensation Act. Finally, he submitted that the learned Tribunal has committed error in law while he decided the issue by disposing the application under Section 167 of the Motor Vehicles Act, thereafter, again the said matter was considered at the time of passing of the judgment by deducting the amount. He further submitted that the amount should not be deducted which the

claimants had received in a *suo motu* proceeding under Section 8 of the Workmen's Compensation Act.

16. Mr. Singh, learned advocate appearing on behalf of the Insurance Company submits that the victim of the case was one of the employee of the Calcutta Port Trust and the Calcutta Port Trust being the employer has assessed a compensation due to the death of the victim during employment.

17. Mr. Singh further argues that if the compensation assessed by the learned Tribunal was given entirely, that would be a double benefit. He submitted that according to the provision of Section 167 of the Motor Vehicles Act, the claimants are precluded of filing separate application before the two forums but there may have option to the claimants to choose any of the forums.

18. In this case, the award passed by the learned Tribunal under Motor Vehicles Act is well determined and the claimants have preferred or chose to adopt the forum under the Motor Vehicles Act but, in the amount of compensation, if the amount which they have already received as determined by the Calcutta Port Trust is given along with the amount assessed by the learned Tribunal under Motor Vehicles Act, that would be a bonanza and it would be a double benefit to the

claimants. However, Mr. Singh also argued by referring the paragraph 19 of the Hon'ble Apex Court's decision in ***Dyamavva*** (supra) wherein the Hon'ble Apex Court has taken note of the fact that the deduction of *suo motu* determination by the employer was held correct.

19. Heard learned advocate and perused the entire facts.

20. It appears to me that the learned Tribunal, in view of an application under Section 167 of the Motor Vehicles Act, has determined that the prayer under Section 167 of the Motor Vehicles Act by the Insurance Company is not at all maintainable. It is the prayer before the learned Tribunal by the Insurance Company that the claimants cannot file further case of compensation after receiving an amount of Rs.6,25,880/- from the Commissioner of Workmen's Compensation Court.

21. In deciding such issue, the learned Tribunal is of the view that the payment received by the claimants from the learned Commissioner of Workmen's Compensation Court is under a proceeding being case no. DNC 52 of 2013 and it was not initiated on behalf of the claimants.

22. On the basis of such observation, the learned Tribunal has dismissed the prayer of the Insurance

Company that the later case filed before the learned Tribunal under Motor Vehicles Act is maintainable.

23. At the time of deciding the entire case, the learned Tribunal is of the view that as the claimants have get some compensation on account of death of the deceased, the amount should be deducted from the award passed by the learned Tribunal.

24. It is true and a trite law that the payment of the legal heirs of the deceased from the employer towards gratuity, retiral benefit or any claim under the Life Insurance Corporation of India and also the payment on compassionate appointment to any of the legal heirs of the deceased cannot be deducted from the amount which they entitled to receive under the provision of Section 166 of the Motor Vehicles Act.

25. It appears that the fact of the case of ***Dyamavva*** (supra) is squarely similar to the case of this case. The determination of the Hon'ble Apex Court in the ***Dyamavva*** (supra) is at paragraphs 15 to 19, which are set out hereinbelow:

> "15. Having perused the aforesaid provisions and determined their effect, it cleanly emerges that the Port Trust had initiated proceedings for paying compensation to the dependants of the deceased Yalgurdappa B. Goudar "suo motu"under Section 8 of the Workmen's Compensation Act, 1923. For the aforesaid purpose, the Port Trust had deposited a sum of Rs.3,26,140 with the Workmen's Compensation Commissioner on 4-11-2003. Thereupon, the Workmen's Compensation Commissioner having issued noticed to the claimants (dependants of the deceased Yalgurdappa

B. Goudar), fixed 20-4-2004 as the date of hearing. On the aforesaid date, the statement of the widow of Yalgurdappa B. Goudar, namely, Dyamavva Yalgurdappa ws recorded, and thereafter, the Workmen's Compensation Commissioner by an order dated 29-4-2004 directed the release of a sum of Rs.3,26,140 to the shared by the widow of the deceased and his daughter in definite proportions.

16. The issue to be determined by us is, whether the acceptance of the aforesaid compensation would amount to the claimants having exercised their option to seek compensation under the Workmen's Compensation Act, 1923.

17. The procedure under Section 8 aforesaid (as noticed above) is initiated at the behest of the employer "suo motu", and as such, in our view cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. The position would have been otherwise if the dependants had raised a claim for compensation under Section 10 of the Workmen's Compensation Act, 1923. In the said eventuality, certainly compensation would be paid to the dependants at the instance (and option) of the claimants. In other words, if the claimants had moved an application under Section 10 of the Workmen's Compensation Act, 1923, they would have been deemed to have exercised their option to seek compensation under the provisions of the Workmen's Compensation Act. Suffice it to state that no such application was ever filed by the respondent claimants herein under Section 10 aforesaid. In the above view of the matter, it can be stated that the respondent claimants having never exercised their option to seek compensation under Section 10 of the Workmen's Compensation Act, 1923, could not be deemed to be precluded from seeking compensation under Section 166 of the Motor Vehicles Act, 1988.

18. Even though the aforesaid determination concludes the issue in hand, ambiguity if at all, can also be resolved in the present case on the basis of the admitted factual position. The first act at the behest of the respondent claimants for seeking compensation on account of the death of Yalgurdappa B. Goudar was by way of filing a claim petition under Section 166 of the Motor Vehicles Act, 1988 on 30-5-2003. The aforesaid claim petition was the first claim for compensation raised at the hands of the respondent claimants. If the question raised by the appellant has to be determined with reference to Section 167 of the Motor Vehicles Act, 1988, the same is liable to be determined on the basis of

> the aforesaid claim application filed by the respondent claimants on 30-5-2003. The compensation deposited by the Port Trust with the Workmen's Compensation Commissioner for payment to the respondent claimants was much later, on 4-11-2003. The aforesaid deposit, as already noticed above, was not at the behest of the respondent claimants, but was based on a unilateral "suo motu"determination of the employer (the Port Trust) under Section 8 of the Workmen's Compensation Act, 1923. The first participation of Dyamavva Yalgurdappa in the proceedings initiated by the Port Trust under the Workmen's Compensation Act, 1923 was on 20-4-2004. Having been summoned by the Workmen's Commissioner, she got her statement recorded before the Commissioner on 20-4-2004. But well before that date, she (as well as the other claimants) had already filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, on 30-5-2003. Filing of the aforesaid claim application under Section 166 aforesaid, in our view constitutes her (as well as that of the other dependants of the deceased) option, to seek compensation under the Motor Vehicles Act, 1988. The instant conclusion would yet again answer the question raised by the appellant herein under Section 167 of the Motor Vehicles Act, 1988 in the same manner, as has already been determined above.
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> 19. In the aforesaid view of the matter, we hereby affirm the determination rendered by the Motor Accidents Claims Tribunal, Bagalkot and the High Court in awarding compensation quantified at Rs.11,44,440 to the claimant. The Motor Accidents Claims Tribunal, Bagalkot, as also the High Court, ordered a deduction therefrom of a sum of Rs.3,26,140 (paid to the claimants under the Workmen's Compensation Act, 1923). The said deduction gives full effect to Section 167 of the Motor Vehicles Act, 1988, inasmuch as, it awards compensation to the respondent claimants under the enactment based on the option first exercised, and also ensures that the respondent claimants are not allowed dual benefit under the two enactments."

26. According to the observation of the Hon'ble Apex Court, it appears to me that in the case of ***Dyamavva*** (supra) the Hon'ble Apex Court has decided the issue that the amount received by the claimant who is the dependant of the deceased vide a *suo motu* application towards compensation

under Section 8 of the Workmen's Compensation Act is required to be deducted from the compensation assessed by the learned Tribunal under Motor Vehicles Act.

27. a) Considering the aspect of this case, I am of the view that the observation of the learned Tribunal is not at all incorrect. I further hold that the order dated 23.12.2016 passed by the learned Tribunal is not at all de hors the award passed by the learned Tribunal. Accordingly, this issue is decided against the claimant.

b) In deciding the compensation of this case, it appears to me that the law laid down by the Hon'ble Apex Court in ***Pranay Setti*** (supra) was not pronounced at the time of passing of the impugned judgment. So in my view, the claimants are entitled to get the future prospects and general damages according to the observation of the Hon'ble Apex Court in ***Pranay Setti*** (supra).

28. In this case, the deceased was at the age of 50 years and he was on contractual appointment. So the claimants are entitled to get the 25% of established income of the deceased as future prospects. It further appears that at the time of filing of the instant claim application, there are four dependants/claimants, though during the pendency of the instant claim application, mother

of the deceased died, but considering the fact that at the time of initiating the cause of action and since number of claimants are four, the deduction towards the personal and leaving expenses of this case is 1/4th in stead of 1/3rd. It further appears that the learned Tribunal has awarded Rs.25,000/- towards the general damages. According to the observation of the Hon'ble Apex Court in **Pranay Setti** (supra), the general damages would be 70,000/-.

29. Considering the above observations, the award passed by the learned Tribunal requires modification.

Monthly income		Rs. 8,805.00
Annual income Less: Personal expenses (1/4) Add: 25% future prospects Multiplier (x 13)	Rs.8805 x 12	Rs. 1,05,660.00 Rs. 26,415.00 Rs. 79,245.00 Rs. 19,811.00 Rs. 99,056.00 13
Add: Non-pecuniary days		Rs.12,87,728.00 Rs. 70,000.00 Rs.13,57,728.00

30. Accordingly, after calculation, the entire award comes to Rs.13,57,728/-. The claimants have already received through the Commissioner of Workmen's Compensation Court an amount of Rs.6,25,880/-. After such deduction, the award comes to Rs.7,31,848/-. The learned Tribunal has already awarded an amount of Rs.3,14,840/-. So

the balance award comes to Rs.4,17,008/-. The balance award shall carry 6% interest per annum from the date of filing of the claim application till its actual payment. The Insurance Company is directed to deposit the awarded amount, as calculated, through the office of the learned Registrar General, Calcutta High Court within six weeks from today. On such deposit, the claimants/applicants are entitled to get the same from the office of the learned Registrar General, Calcutta High Court equally. The payment of compensation is subject to ascertainment of payment of deficit court fees, if any. The office of the learned Tribunal shall act upon the certified copy of the award to receive the deficit court fees, if any.

31. Accordingly, F.M.A.851 of 2018 is, thus, disposed of. Connected applications, if pending, are also disposed of.

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

(Subhendu Samanta, J.)