

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA No. 2843 of 2015

(FMAT 125 of 2015)

Janu Dafader & Ors.

Vs

The New India Assurance Co. Ltd. & Anr.

**For the Appellants/
Claimants**

: Mr. Amit Ranjan Roy.

**For the Respondent No. 1/
Insurance Company**

: Ms. Sayanti Santra.

**For the Respondent No. 2/
Owner**

: None.

Hearing concluded on

: 15.07.2024

Judgment on

: 08.08.2024

Shampa Dutt (Paul), J.:

1. The present claim appeal has been preferred against the Judgment and Award passed on 2nd August, 2014 by Motor Accident Claims Tribunal, 3rd Court, Nadia, Krishnanagar, in M.A.C. Case No. 511 of 2008, **under Section 163A of the Motor Vehicles Act, 1988.**

2. **Facts :-**

“On 09.02.2008 at 10.45 hrs one Ankul Dafadar s/o Abul Hossain Dafadar of vill. Umarpur, P.S. Hanskhali, District-Nadia came to P.S. and submitted a written complaint to the effect that on 09.02.2008 at about 06.30 hrs his brothers Kashem Dafadar and Rafique Dafadar and his neighbours Hanif Dafadar, Easha Dafadar, Ramjan Dafadar, Ansar Dafadar, Anarul Dafadar were going in the tractor bearing Regd. No. W.B. 57-0798 to drop the soil and said tractor capsized, over those persons. As a result Kashem Dafadar expired and rest were shifted to Bagula Rural Hospital. Out of them Rafiqul Dafadar and Hanif Dafadar was referred to Saktinagar Dist. Hospital in unconscious condition and rest were released from Bagula Rural Hospital after treatment.”

3. The claimants examined **two witnesses** and proved some documents.

The O.P./Insurance Company did not examine any witness.

4. **The learned Tribunal held as follows :-**

“M.A.C. Case No. 511 of 2008

Dated: 02.08.2014

The certified copy of the Insurance Policy (Exbt.3) shows that the offending vehicle was insured with the O.P./Insurance Company at the time of the incident.

The certified copy of the postmortem report (Exbt.6) shows the death of the victim and the age of the victim as 50 years. As per the claim petition, the victim was 48 years old at the time of the incident.

The claimants have not produced and proved any document on record to show that the victim used to earn Rs.3,000/- per month as earthen pot maker at the time of the incident and accordingly I hold Rs.15,000/- per year as the notional income of the victim and by deducting 1/3rd of the said amount towards

the personal expenses of the victim, the annual income of the victim comes to Rs.10,000/- and by applying the multiplier of 13, the compensation amount comes to Rs.1,30,000/-. In addition, the claimants are entitled to get Rs.2,000/- as funeral expenses, Rs.2,500/- as loss of estate and the claimant No. 1, being the wife of the victim, will get Rs.5,000/- as loss of consortium. In all, the claimants are entitled to get Rs.1,39,500/- as compensation from the O.P./owner.

So considering the entire materials on record, I hold that the case is maintainable in its present form and law and the claimants have cause of action to file this case and they are entitled to get Rs.1,39,500/- from the O.P./owner.

**Sd/-
Judge, M.A.C. Tribunal
3rd Court, Krishnanagar, Nadia,
Motor Accident Claim”**

5. From the materials and evidence on record, it appears that :-

- i) The certified copy of the Insurance Policy **(Exbt.3)** shows that the offending vehicle was insured with the O.P./Insurance Company at the time of the incident.
- ii) The Certified Copy of the Postmortem report **(Exbt.6)** shows the death of the victim and the age of the victim as 50 years. As per the claim petition, the victim was 48 years old at the time of the incident.
- iii) From the charge sheet **(Exbt. 5)** it appears that victim was travelling in the ‘tractor’ and was thus **a gratuitous passenger.**

6. (a) In *Urmila Halder Vs. New India Assurance Co. Ltd. & Ors., in F.M.A. 446 of 2010, decided on 9th August, 2018*, the Calcutta High Court held:-

“9. Sub-section (1) of Section 163-A of the 1988 Act ordains that notwithstanding anything contained therein or in any other law for the time being in force, upon proof of death in an accident involving the use of a motor vehicle, compensation is payable either by the owner of such vehicle or the authorized insurer thereof as indicated in the Second Schedule to the legal heirs of the victim. The Second Schedule appended to the 1988 Act, referring to Section 163-A thereof, provides the structured formula for determining compensation.

11. As it stands now, the Second Schedule after its amendment by the said notification prescribes lump-sum compensation in the following manner:

- 1. Fatal accidents - Rs. 5,00,000.00 is payable as compensation in case of death;*
- 2. Accidents resulting in permanent disability - Rs. 5,00,000.00 x percentage of disability as per Schedule I of the Employee's Compensation Act, 1923 (8 of 1923), provided that the minimum compensation in case of permanent disability of any kind shall not be less than Rs. 50,000.00;*
- 3. Accidents resulting in minor injury - A fixed compensation of Rs. 25,000.00.*

14. With that in view, we invited such learned advocates to address us on the following issue:

Whether, after the amendment brought about by the said notification, the new schedule would be applicable to pending claim applications under Section 163-A before the motor accident claim tribunals as well as the appeals arising out of awards delivered there under prior to May 22, 2018?

118. Therefore, the conclusion seems to be inescapable that while deciding pending claim applications/appeals post May 22, 2018, the new schedule ought to be applied by the tribunals/this Court for determining compensation payable to the legal heirs of an accident victim or to the victim himself regardless of whether the new schedule is beneficial to them or not. The issue framed in paragraph 12 is, accordingly, answered.

126. Turning to the facts in the appeal, we find that had this appeal been decided prior to May 22, 2018, the appellant would have been entitled to whatever sum were determined as payable in terms of the old

schedule. Admittedly, Rs.5,00,000.00 was not payable to the appellant by the respondent no.1 any time prior to May 22, 2018 and, therefore, she was not entitled to such sum as on date she exercised her "right of action". Therefore, in each case where the claim is pending before the tribunal or if this Court has been approached in appeal as on May 22, 2018, we feel it to be the duty of the tribunal/Court to determine the amount of compensation payable to the claimant in terms of the structured formula and award interest at such rate it considers proper thereon from the date of filing of the claim application till May 21, 2018. To avoid any charge of arbitrariness, it would be safe to award interest at the prevailing bank rate of interest on term deposits on the date the award is made. Thereafter, that is from May 22, 2018, interest on Rs.5,00,000.00 may be directed to be paid till realization as per the prevailing bank rate of interest on term deposits.

127. To determine what the appellant could have lawfully claimed as compensation based on the old schedule, we need to look into the evidence. The version of the appellant that the victim was earning Rs.2,000.00 per month could not be dislodged by the respondent no. 1 in cross-examination. The victim being self-employed in the unorganized sector, the tribunal put an onerous burden on the appellant to produce documentary evidence to prove her monthly income. Having regard to the decision in Syed Sadiq v. United India Insurance Co. Ltd.: (2014) 2 SCC 735, we hold that it was not necessary for the appellant to prove the income of the victim by producing documentary evidence. The loss of dependency, thus, has to be worked out reckoning Rs.24,000.00 as the notional yearly income of the victim. Capitalizing it on a multiplier of 17, the resultant amount would be Rs.4,08,000.00. Deducting 1/3rd in consideration of the expenses which the victim would have incurred towards maintaining herself had she been alive, and adding Rs.4,500.00 on account of loss of estate and funeral expenses, we arrive at the sum of Rs.2,76,500.00.

128. In the final analysis, we hold that the appellant shall be entitled to Rs.5,00,000.00 on account of compensation under Section 163-A of the 1988 Act read with the new schedule. However, since she has received Rs. 1,14,500.00 that was awarded by the

tribunal, the respondent no.1 shall pay Rs.3,85,500.00 more to the appellant within 2 (two) months from date of service of a copy of this judgment and order on it. The appellant is further held entitled to interest as follows:

- (i) @ 9% per annum on Rs.2,76,500.00 from the date of filing of the claim application, i.e., February 8, 2005 till May 21, 2018; and
- (ii) @ 6% per annum on Rs. 5,00,000.00 from May 22, 2018 till such time payments of Rs. 3,85,500.00 and interest as in (i) above are effected in favour of the appellant.”

(b) In appeal, the Supreme Court in ***The New India Assurance Co. Ltd.***

Vs. Urmila Halder, Civil Appeal No. ____ of 2024 (@ Special Leave Petition (Civil) No. 6260 of 2019), decided on 8th February, 2024,

upheld the above judgment and held:-

“4. The short point for consideration before this Court is whether the amendment in Section 163-A of the Motor Vehicles Act, 1988, which came into effect by a Gazette Notification on 22nd May, 2018, would relate to an accident which had occurred prior to the said date.

*10. The order of the High Court is well discussed and we agree with the view taken. We may, however, add that **a beneficial legislation would necessarily entail the benefit to be passed on to the claimant in the absence of any specific bar to the same.** In the present case, the liability of the appellant-Insurance Company has not been interfered with. Only the computational mode and the modality have been further clarified, which rightly has been noted by the High Court and accordingly, the claim has been enhanced to ₹5,00,000/- (Rupees Five Lakhs). As 50% of the compensation amount was stayed by this Court, the same be paid to the respondent in terms of the impugned judgment within eight weeks.”*

- 7. In the present appeal,** the claim was decided by the tribunal on 2nd August, 2014, thus prior to 22nd May, 2018 and compensation of a sum of Rs. 1,39,500/- was granted in terms of the old schedule.

8. **Now, in terms of the guidelines** of the Courts, in the judgments, ***Urmila Halder Vs. New India Assurance Co. Ltd. & Ors.(Supra)*** and ***The New India Assurance Co. Ltd. Vs. Urmila Halder (Supra)***, the Appellants/Claimants are entitled to compensation of a total sum of **Rs. 5,00,000/- under section 163A of the 1988 M.V. Act read with the new schedule.**
9. The **Appellants/Claimants** have not received the amount of compensation in terms of order of the Learned Tribunal. Accordingly, the **Appellants/Claimants** are now entitled to the total amount of compensation together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit.
10. **The Respondent No. 1/ Insurance Company**, thus is directed to deposit the total amount and the interest as indicated above, by way of cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date. The **Respondent No. 1/Insurance Company**, shall also pay the interest upon the **sum of Rs. 5,00,000/-** at the rate of 6% till deposit if not already paid, within the period as specified above.
11. Upon deposit of the aforesaid amount and the interest, learned Registrar General, High Court, Calcutta shall release the amount in favour of the **Appellants/Claimants** (Wife and Children of the deceased) **in equal proportions**, upon satisfaction of their identity and payment of *ad-valorem* Court fees, if not already paid.
12. **The Respondent No. 1/Insurance Company/The New India Assurance Co. Ltd. has now prayed for leave to recover** the

compensation from the Owner/Respondent no. 2 of the offending vehicle (being a Tractor) bearing no. WB 57/0798 (insured with the Respondent No. 1) on the ground that the deceased was a **gratuitous passenger** in the said vehicle.

13. The Hon'ble Supreme Court in **Balu Krishna Chavan vs. The Reliance General Insurance Company Ltd. & Ors., in SLP (C) No. 33638 of 2017, on 3rd November, 2022**, held as follows **Para 8 to 14:-**

“8. Hence, the only aspect for our consideration herein, is as to whether in the facts and circumstances of the present case, an order to direct the Insurance Company to “pay and recover”, is required to be made. On this aspect, the law is well settled that if the liability of the Insurance Company is decided and they are held not to be liable, ordinarily, there shall be no direction to “pay and recover”. However, in the facts and circumstances arising in each case, appropriate orders are required to be made by this Court to meet the ends of justice.

*9. In the instant case, the appellant has relied on the judgment dated 21.02.2017 passed by this Court in Civil Appeal No.(s). 3047 of 2017 titled as “**Manuara Khatun & Ors. Vs. Rajesh Kr. Singh & Ors.**”. In the said case also, a Bench of this Court, having referred to the earlier decisions in Para-15 and 16 of that Judgment, has concluded that normally, there would be no order to “pay and recover”. However, in the said facts, this Court, to meet the ends of justice, had taken into consideration the fact situation though, the claimant therein, was a ‘gratuitous passenger’ and had kept in view that the benevolent object of the Act and had directed the payment by the Insurance Company and to recover the amount.*

10. Therefore, on the legal aspect, it is clear that in all cases such order of “pay and recover” would not arise when the Insurance Company is not liable but would, in the facts and circumstances, be considered by this Court to meet the ends of justice.

11. If this aspect of the matter is kept view, in the instant facts, it is noticed that the appellant, as on the date of the accident, was aged about 19 years and due

to the injuries suffered in the accident by him, his left leg was amputated below the knee.

12. *Even, if the contention that the appellant was in the vehicle getting trained to be as a cleaner, is not taken into consideration, the fact remains that any other avocation that is to be undertaken by the appellant would involve physical labour which the appellant will not be able to perform and in such circumstance, if the appellant is not able to realize the amount of compensation awarded in his favour at this stage from the owner of the vehicle, the appellant would be prejudiced. However, the Insurance Company, if ordered to pay to the appellant and recover it from the owner of the vehicle, it would not be prejudiced to that extent.*

13. *Therefore, keeping all aspects in view, and not making this case as a precedent, but, only to serve the ends of justice in the facts of this case, we direct that respondent no. 1 (Insurance Company) to deposit the compensation amount before the MACT within eight weeks from the date of the receipt of a copy of this judgment, whereupon, the MACT shall disburse the amount of compensation to the appellant.*

14. The respondent no. 1 (Insurance Company) is reserved the liberty to recover the compensation from the owner of the vehicle.”

14. It is proved from the charge sheet (Exbt. 5) that the deceased was travelling as a **gratuitous passenger in one of the offending vehicles being a **Tractor**, bearing No. **WB 57/0798**, insured with the Respondent No. 1/Insurance Company/The New India Assurance Co. Ltd. and thus there being a violation of the condition of the rules in the policy, the Respondent No. 1 is entitled to recover his share of compensation paid, by due process of law from the owner of vehicle no. WB 57/0798, the Respondent no. 2 herein.**

15. The appeal being FMA 2843 of 2015/FMAT 125 of 2015 stands disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.

- 16.** No order as to costs.
- 17.** All connected applications, if any, stand disposed of.
- 18.** Interim order, if any, stands vacated.
- 19.** Copy of this Judgment be sent to the Learned Tribunal, along with the trial court records, if received.
- 20.** Urgent photostat certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

(Shampa Dutt (Paul), J.)