

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMAT No. 206 of 2014

Maya Halder & Ors.

Vs

The National Insurance Co. Ltd. & Ors.

For the Appellants	: Mr. Jayanta Banerjee, Mr. Sandip Bandyopadhyay, Ms. Rukmini Basu Roy, Mr. Argha Bhattacharjee.
For the Respondent No.1/ National Insurance Co. Ltd.	: Mr. Rajesh Singh.
For the Respondent no. 3/ United India Insurance Co. Ltd.	: Mr. Sanjay Paul, Ms. Jaita Ghosh.
Respondent No. 2 & 4/ Owner	: None.
Hearing concluded on	: 15.07.2024
Judgment on	: 07.08.2024

Shampa Dutt (Paul), J.:

1. The present appeal has been preferred by the Claimants/Appellants against the Judgment and Award dated 03.06.2013, passed by the Motor Accident Claims Tribunal, 2nd Court, Jalpaiguri in M.A.C. Case No. 209 of 2005, **under Section 163(A) of the Motor Vehicles Act, 1988.**

2. THE FACTS :-

“On 08.05.04 at about 19 hours the victim and his friends were returning from Cooch Behar in a Maruti Van and at that time near Joy Chandpur one Pick Van bearing No. WB-73-A/2424 was coming from opposite direction with a very high speed and dashed the Maruti van and due to said accident the victim died in the Hospital.”

3. The O.P., owner has not contested the case for which the case has been heard exparte against the said opposite party.
4. The O.P., Insurance Companies have contested this case by filing separate written statements denying therein all the material allegations in the claim petition.
5. The O.P./National Insurance Company Ltd. submitted that the claim case was not maintainable in its present form and law, as the accident did not take place due to rash and negligent driving of the Pick-up van, by the driver concerned and the offending vehicle (Maruti Van) bearing No. WB-72 A/7825 was liable for the said accident and all the allegations of the claimants in this case are false. Hence, this O.P. prayed for dismissal of the case.

6. The O.P./United India Insurance Company Ltd. submitted that the case was not maintainable in its present form and the law, as the accident did not take place due to rash and negligent driving of the Maruti van by the driver concerned and that the other offending vehicle (Pick up van) WB-73A/2424 was liable for the said accident and all the allegations of the claimants in this case are false.
7. The claimants examined two witnesses and proved relevant documents, which were marked as Exhibits.
8. The Opposite Party/National Insurance cross-examined one witness.
9. **Finally the tribunal held as follows :-**

"M.A.C. Case No. 209 of 2005"

Dated: 03.06.2013

The Claimants have not produced any documentary evidence on record to show that the victim used to earn Rs. 4,000/- per month as the trainer at the time of the incident. Hence, I hold that the claimants have failed to prove it. But at present a labourer earns not less than Rs. 3000/- per month and Rs. 36,000/- per year.

As such I hold that the annual income of the victim at the time of incident was Rs. 36,000/- and after deduction of 1/3rd of the said amount towards the personal expenses of the victim, the annual income of the victim comes to Rs. 24,000/- p.a. and by applying the said multiplier of 16, the compensation amount comes to Rs. 3,84,000/-. In addition the claimants are entitled to get Rs. 2000/- as funeral expenses, Rs. 2500/- 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. 3,93,500/- as compensation.

The O.P. owner Pranab Saha and the O.P. United India Insurance Company Ltd. are

directed to pay Rs. 1,96,750/- each to the claimants in equal proportionate share as the accident took place due to head on collision between the two offending vehicles.

**Sd/-
Judge,
Motor Accident Claim Tribunal
Additional District Judge,
2nd Court, Jalpaiguri”**

10. Being aggrieved the claimants have preferred this appeal on the following grounds :-

- i) That since the incident of accident was a head on collision; both the vehicles were liable to pay compensation proportionately.*
- ii) The Learned Tribunal erred in law and in fact in directing the owner of the other vehicle to pay compensation at the rate of 50% since the driver of the said vehicle was not carrying a valid license on the date of accident.*
- iii) That the deceased was travelling as a passenger in one of the vehicles and the said deceased had no role in driving the said vehicle and accordingly the case should be categorised as a case of composite negligence and not as a case of contributory negligence.*
- iv) That the Learned Tribunal ought to have directed the United Insurance Co. to pay the entire compensation as the insurer of the Joint tortfeasors since the case of the claimants falls under the category composite negligence.*

- v) *That the Learned Tribunal also failed to grant compensation under other provisions of law to which the Claimants/Appellants are entitled.*

11. The Appellant has relied upon the Judgment in ***Khenyei vs New India Assurance Co. Ltd.& Ors., 2015 (9) SCC 273***, wherein the Supreme Court has held:-

*“14. There is a difference between contributory and composite negligence. In the case of contributory negligence, a person who has himself contributed to the extent cannot claim compensation for the injuries sustained by him in the accident to the extent of his own negligence; whereas in the case of composite negligence, a person who has suffered has not contributed to the accident but the outcome of combination 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 doer separately, nor is it necessary for the court to determine the extent of liability of each wrong doer 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 damages recoverable by him in respect of the injuries have to be reduced in proportion to his contributory negligence. The relevant portion is extracted hereunder:*

“6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong- doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons,

and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

7. Therefore, when two vehicles are involved in an accident, and one of the drivers claims compensation from the other driver alleging negligence, and the other driver denies negligence or claims that the injured claimant himself was negligent, then it becomes necessary to consider whether the injured claimant was negligent and if so, whether he was solely or partly responsible for the accident and the extent of his responsibility, that is his contributory negligence. Therefore where the injured is himself partly liable, the principle of 'composite negligence' will not apply nor can there be an automatic inference that the negligence was 50:50 as has been assumed in this case. The Tribunal ought to have examined the extent of contributory negligence of the appellant and thereby avoided confusion between composite negligence and contributory negligence. The High Court has failed to correct the said error."

"18. This Court in **Challa Bharathamma & Nanjappan** (supra) has dealt with the breach of policy conditions by the owner when the insurer was asked to pay the compensation fixed by the tribunal and the right to recover the same was given to the insurer in the executing court concerned if the dispute between the insurer and the owner was the subject-matter of determination for the tribunal and the issue has been decided in favour of the insured. The same analogy can be applied to the instant cases as the liability of the joint tortfeasor is joint and several. In the instant case, there is determination of inter se liability of composite negligence to the extent of negligence of 2/3rd and 1/3rd of respective drivers. Thus, the vehicle – trailer-truck which was not insured with the insurer, was negligent to the extent of 2/3rd. It would be open to the insurer being insurer of the bus after making payment to claimant to recover from the owner of the trailer-truck the amount to the aforesaid extent in the execution proceedings. Had there been no determination of the inter se liability for want of evidence or other joint tortfeasor had

not been impleaded, it was not open to settle such a dispute and to recover the amount in execution proceedings but the remedy would be to file another suit or appropriate proceedings in accordance with law.

What emerges from the aforesaid discussion is as follows :

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

(ii) In the case of composite negligence, apportionment of compensation between two tortfeasors 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 tortfeasors 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."**

12. From the materials and evidence on record, it is evident that :-

- i) Though two vehicles have been named in the Charge Sheet being WB-72-A/7825 and WB-73A/2424, only the vehicle bearing no. W.B.-72A-7825, had valid insurance with the Opposite party/United India Insurance Company Ltd. **(Exhibit-4).**
- ii) The claim in this case is under Section 163A of the Motor Vehicles Act, wherein no rash and negligent driving is required to be proved.
- iii) Considering that two vehicles were involved in the accident, the tribunal directed the Insurance Company of vehicle no WB-72A-7825, being the United Insurance Co. Ltd. and the owner of Vehicle No. WB-73A-2424 **not having valid licence** to pay the compensation as granted in equal proportion.
- 13.** The deceased in this case was self employed and aged about **40 years**. The numbers of **claimants are three**, being the wife, son and daughter of the deceased.
- 14.** (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.”*

15. In the present appeal, the claim was decided by the tribunal on **03rd**

June 2013, thus prior to 22nd May, 2018 and total compensation of a

sum of **Rs. 3,93,500/-** was granted in terms of the old schedule. **The**

amount of compensation was to be paid in equal proportion by

the O.P./ United India Insurance Co. Ltd. and O.P. /Owner

/Respondent No. 2/Pranab Saha of the two offending vehicles to the extent of Rs. 1, 96,750/- each.

16. 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.**

17. Admittedly, the **Appellants/Claimants** have only received the amount of compensation of **Rs. 1,96,750/-** together with interest from the O.P./Insurance Company/ United India Insurance Co. Ltd. in terms of order of the learned Tribunal. Accordingly, the **Appellants/Claimants** are now entitled to the **balance amount of compensation of Rs. 1,06,500/-** along with the sum of **Rs. 1,96,750/-** (share of O.P./Owner/Respondent No. 2/Pranab Saha as directed by the tribunal) **and thus balance compensation of Rs. 3,03,250/- together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit.**

18. Taking into consideration, the amount already received by the **Claimants/Appellants**, the **O.P./Respondent No. 3/Insurance Company/United India Insurance Co. Ltd.** shall deposit the total balance amount of **Rs. 1,06,500 + Rs. 1,96,750 (outstanding) = Rs. 3,03,250/-** (share of O.P./Owner/Respondent No. 2/Pranab Saha as directed by the tribunal) along with the interest, with the learned Registrar General, High Court, Calcutta, within a period of six weeks,

who shall release the amount in favour of the **Claimants/Appellants** (wife and children of the deceased) in equal proportion, **after payment** of the amount for loss of consortium to the Appellant/wife, upon satisfaction of their identity and payment of *ad-valorem* Court fees, if not already paid.

19. 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.”*

20. Thus, in accordance with the Judgment in ***Balu Krishna Chavan vs.***

The Reliance General Insurance Company Ltd. & Ors. (Supra), the

O.P./ United India Insurance Co. Ltd is **granted leave to recover 50% of the balance amount being Rs. 53,250/- plus the outstanding amount of Rs. 1,96,750/- which equals to Rs. 2,50,000/- from the O.P./Owner/Pranab Saha by due process of law.**

21. The appeal being FMAT 206 of 2014 stands disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.

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

(Shampa Dutt (Paul), J.)