

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA No. 518 of 2023

(FMAT No. 561 of 2013)

Smt. Radhama @ C. Radhamma

Vs

The New India Assurance Company Ltd. & Anr.

**For the Appellant/
Claimant**

**: Mr. Uday Sankar Chattopadhyay,
Mr. Rajashree Tah.**

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

: Ms. Gopa Das Mukherjee.

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

: None.

Hearing Concluded on

: 18.07.2024

Judgment on

: 09.08.2024

Shampa Dutt (Paul), J.:

1. The present appeal has been preferred by the Claimant against the Judgment/Order dated 30.11.2011 passed by Judge, MAC Tribunal, Fast Track, 2nd Court, Burdwan, in MAC Case No. 10/155 of 2007, **under Section 166 of the Motor Vehicles Act.**

2. THE FACTS :-

“Petitioner’s daughter Captain Ajita Kumari W/o – Late P. Salis Babu of Panagarh Army Base, Burdwan, sustained severe bleeding injuries in a motor accident and expired on 30.09.2003 at Alipore Military Hospital, where she was referred from Panagarh Military Hospital. The incident took place on 19.09.2003 at Panagarh-Moregram State Highway near Brahmangram under P.S. – Kanksa at 18.15 hours. On the fateful date and time the victim along with others were returning to Panagarh in a Qualis van No. PB 02 75717 along Panagarh Ilambazar Road. When they reached near Brahmangram, suddenly the offending vehicle, a Dumper bearing No. WB 41A/8069 coming from Durgapore towards Ilambazar with a high speed and in rash and negligent manner dashed against the Qualis van resulting in the accident. The persons inside the van sustained severe bleeding injuries including the victim and four other persons. The injured were shifted to Panagarh Military Hospital. The victim was referred to Alipore Military Hospital where she succumbed to her injuries on 30.09.2003.

The petitioner claimed that she is the mother of victim Captain Ajita Kumary. That the victim, her husband and only child who unfortunately were inside the said van also died in that accident. Therefore, the petitioner filed this petition claiming compensation for the sudden demise of Ajita Kumary, causing the petitioner a great loss beside sufferings from pain and mental agony.

The victim at the time of death was aged about 36 years and she was in service at Panagarh Army Base as Major/Captain under Government of India and was drawing a monthly income of Rs. 18308/- at the time of death. The vehicle involved in the accident is a

Dumper bearing No. WB 41A/8069. The owner of the vehicle is Radhakanta Ghosh and the Dumper was insured with The New India Assurance Co. Ltd. having valid Policy No. 512182/31/02/07358 and the policy was valid upto 14.01.2004. The petitioner, mother of the victim filed the petition U/s-166 of the M.V. Act claiming for a compensation to the tune of Rs. 23,50,000/- for the death of her daughter from the Insurance Company/Opposite Party.”

3. O.P. No.1/owner of the offending vehicle, a Dumper bearing No. WB 41A/8069, inspite of being sent notice and summons of this case, did not turn up, though the petitioner took steps for publication in the local newspaper.
4. The O.P./Insurance Company filed a petition U/s-170 of the M.V. Act praying for permission to contest the case taking all defences available to the insurer.
5. O.P. No. 2/The New India Assurance Co. Ltd also contested this case by filing written objection wherein it denied some of the material allegations of the claim petition and also challenged the maintainability of the case and thereby stated that the claim petition is bad and defective for non-disclosure of all material facts and particulars. That the petitioner has to prove all the allegations made against this O.P. by sufficient evidence, both oral and documentary. That the driver of vehicle Qualis Car was also liable for causing the accident for his fault, negligence and reckless driving and **it is a case of composite negligence.**

6. The claimants examined three witnesses and proved relevant documents to their case which were marked as Exhibits. The Opposite Party did adduce any evidence.
7. **Finally, the tribunal held as follows :-**

“MAC Case No. 10/155 of 2007

Dated: 30.11.2012

*Therefore, the compensation as computed Rs. 18308/- per month (income of the deceased per month at the time of death) and annual income of the victim would be Rs. 18308 X 12 = 219696/-. After deducting half of such annual income as the personal family expense of the deceased then she would have contributed to 9,154 X 12 = 109848/- per annum to her mother/petitioner. Applying multiplier ‘5’ it would be Rs. 109848 X 5 = 549240/-. In addition to this the petitioner is also entitled get compensation Rs. 2000/- towards funeral expenses and Rs.2500/- towards lost of estate. Therefore, in total the petitioners are entitled to get compensation **Rs. 5,53,740/-**.*

This tribunal has already decided that the accident occurred due to contributory negligency of both the vehicles Dumper No. WB 41A/8069 and Qualis Car No. PB 02 AC 7517, Compensation calculated hereinabove has to be apportioned to the extent of negligency contributed by both the vehicles proportionately to the extent of 50% each. Therefore, the claimant/petitioner is entitled to realise only 50% of the total compensation computed in this case, And this Tribunal is to apportion the said total claim amount to the extent of negligency contributed from the insurer of the vehicle Dumper before the court.

*Therefore, the petitioner is entitled to get 50% of the said compensation that is **Rs. 276870/-** from the O.P. No. 2/Insurer of the Dumper. The claim petition filed by petitioner for Rs. 23,50,000/- is considered excessive in amount. The Issue No. 5 is thus decided in affirmative.*

As the offending vehicle Dumper No. WB 41A/8069 was insured with O.P. No.2 The New India Assurance Co. Ltd. for the period on 15.09.2003 to midnight of 14.01.2004 and the accident took place

on 19.09.2003. I have no hesitation to say that the insurance policy of the Dumper was valid at the time of accident. As such O.P. No.2 is bound to indemnify the owner of the offending vehicle.

Sd/-
Judge, M.A.C.C Tribunal, F.T.,
2nd Court, Burdwan”

8. From the materials and Evidence on record, the following is evident :-

- i) The Claimant/Petitioner is the sole legal heir of her daughter, the deceased. **All other legal heirs died in the same accident.** (Documents proved support the said facts, **Exhibit 7** is the dependant – I-card).
- ii) From the evidence and documents proved, it is seen that the deceased in this case was aged **36 years** at the time of accident. So **multiplier 15** will be applicable. **(Sarla Verma (Smt) & Ors. Vs. Delhi Transport Corporation and Anr. (2009) 6 SCC 121)**
- iii) **Exhibit 10**, is the last pay certificate of deceased, who was a captain in the military (nursing). It shows that the total pay was Rs. 18,308/- per month. There is no deduction of any tax. **Thus the income be taken as Rs. 18,308/- per month.**
- iv) **Future prospect** will be **50% of salary/Income.** **(National Insurance Co. Ltd. Vs. Pranay Sethi & Ors., (2017) 16 SCC 680)**

- v) Claimant being only **one (mother)** deduction will be **1/3rd** of the income (established). **(Sarla Verma & Ors. Vs. Delhi Transport Corporation and Anr. (Supra))**
- vi) General damages of Rs. 70,000/- under the conventional heads of loss of estate, loss of the only child (daughter) and funeral expenses **(National Insurance Company Ltd. Vs Pranay Sethi & Ors.,(Supra))**. General damages to be enhanced at the rate of 10% every three years. So 10% every three year since 2017 on 70,000/- will be Rs. 84,000/-. (Being 20%).

9. Thus, the “Just Compensation” in this case would be as follows:-

<i>Monthly Income</i>	<i>Rs. 18,308/-</i>
<i>Annual Income (18,308 x 12)</i>	<i>Rs. 2,19,696/-</i>
<i>Less : 1/3rd towards personal and living expenses</i>	<i>Rs. 73,232/-</i>
	<i>Rs. 1,46,464/-</i>
<i>Add : Future prospects @ 50% of the annual income of the deceased</i>	<i>Rs. 73,232/-</i>
	<i>Rs. 2,19,696/-</i>
<i>Multiplier x 15 (2,19,696 x 15)</i>	<i>Rs. 32, 95, 440/-</i>
<i>Add: General damages Loss of estate: Rs.15,000/- Loss of the only child (daughter): Rs.40,000/- Funeral expenses: Rs.15,000/. (Rs. 70,000 + 20% = Rs. 84,000)</i>	<i>Rs. 84,000/-</i>
<i>Total amount:-</i>	<i>Rs. 33, 79, 440/-</i>

- 10.** Admittedly, the Claimant has received the amount of compensation of **Rs. 2, 76, 870/-** together with interest in terms of order of the learned Tribunal. Accordingly, the claimant is now entitled to the **balance amount of compensation of Rs. 31, 02, 570/- together with interest**

at the rate of 6% per annum from the date of filing of the claim application till deposit.

11. Taking into consideration the amount already received by the Claimant/Appellant, the Respondent No. 1/Insurance Company shall deposit the balance amount, along with the interest, with the learned Registrar General, High Court, Calcutta, within a period of six weeks, who shall release the total amount in favour of the claimant, upon satisfaction of his identity and payment of *ad-valorem* Court fees, if not already paid.

12. **Next is the issue of contributory negligence.** The tribunal inspite of its finding as follows, held :-

*“After hearing submission of both sides and on perusal of evidence of P.W.1 and the documents exhibits, FIR, final report and considering the surrounding circumstances, this tribunal can safely conclude that the **accident took place due to contributory negligence of the drivers of both the vehicles.** They were not vigilant, careful and cautious to avoid accident. The issue No.4 is, therefore, answered accordingly held that the insurance Company /O.P. 1 of the dumper would pay half the amount of the award the compensation”*

13. **Though the driver of the ‘Qualis’ was also named in the charge sheet, the owner/insurer of the ‘Qualis’ were not made party to the claim case.**
14. The claimant would then have to initiate a separate proceeding to realize the balance 50% of the compensation awarded.

15. In ***Khenyei vs New India Assurnace Co. Ltd.& Ors., 2015 (9) SCC***

273, the Supreme Court has held:-

*“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.”

- 16. Thus, this being a beneficial legislation, the Respondent No. 1 /Insurance Company/ The New India Assurance Company Ltd. shall pay the total amount to the claimant and shall be at liberty to recover 50% of the total amount, from the Insurance Company of the ‘Qualis Car’ by due process of law.**
- 17. The appeal being FMA 518 of 2023/ FMAT 561 of 2013 stands disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.**
- 18. All connected applications, if any, stand disposed of.**
- 19. There will be no order as to costs.**
- 20. Interim order, if any, stands vacated.**

- 21.** Copy of this Judgment be sent to the Learned Tribunal, along with the trial court records, if received.
- 22.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)