

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA 885 of 2023

(FMAT 719 of 2017)

With

CAN 2 of 2017

(Old No. CAN 7105 of 2017)

Bajaj Allianz General Insurance Co. Ltd.

Vs

Smt. Lilam Debi Sah @ Shah & Ors.

**For the Appellant/
(Bajaj Allianz General
Insurance Company Ltd.)**

: Mr. Rajesh Singh.

For the Respondent No.1 & 2

: Mr. Sayan Chattopadhyay.

**For the Respondent No.3 & 4
(Owners)**

: None.

**For the New India Assurance
Company Ltd./Respondent No.5**

: Ms. Sucharita Paul.

Hearing concluded on

: 04.07.2024

Judgment on

: 29.07.2024

Shampa Dutt (Paul), J.:

1. The present appeal by the Insurance Company/Appellant has been preferred against the award dated 17th June, 2016 passed by Ld. Judge, Motor Accident Claim Tribunal, 2nd Fast Track Court, Jalpaiguri, in M.A.C. Case No. 212 of 2008, **under section 163A of the Motor Vehicle Act, 1988.**

2. FACTS :-

“On 17.05.08 the deceased along with some other persons after completion of their marketing at Oodlabari Bazar, boarded a vehicle bearing No. WB 73B/1477 (Max Pick up) to go to Washabari along with his stationary and marketing commodities. On the way when the vehicle reached at Bagrakot Chandmari Division, at that time a truck bearing No. WB 73/6745 coming from opposite direction dashed the body of the vehicle bearing No. WB 73B/1477 on its right side and as such the victim received several multiple injuries resulting to his death. At the relevant time, the deceased was 21 years old and was a green grocer by profession having a monthly income of Rs. 3,000/-. The accident took place due to rash and negligent driving on the part of the driver of the offending vehicle.

Over such accident, Mal P.S. Case No. 614/08 dt. 17.05.08 u/s 279/337/338/304A was started against the drivers of the offending vehicles.”

3. The O.P. No.1/Owner did not appear in the case and as such the case proceeded *ex parte* against O.P. No. 1.
4. The O.P. No.2, 3 and 4 were served with notice and appeared and also filed their Written Statement in order to contest the case.
5. The O.P.’s/Owners have denied to bear any responsibility for paying the compensation as claimed by the petitioners and submitted further that,

since the vehicle concerned was properly insured, the entire liability for compensation is on the Insurance Company. It has been categorically submitted that the alleged accident took place due to laches on the part of the deceased himself and that the drivers of the offending vehicles had no negligence towards the said accident.

6. It has further been contended that the drivers of the offending vehicles were not holding valid and effective Driving License at the time of the accident and were not qualified for holding or obtaining such Driving License on the date of the alleged accident and as such, the claimants are not entitled to get any compensation.
7. The claimants examined two witnesses and proved relevant documents which were marked **Ext. 1 to 4.**
8. The Insurance Company did not adduce any evidence.
9. **The Tribunal finally held as follows :-**

“M.A.C. Case No. 212 of 2008

Dated: 17th June, 2016

This court fixes notional income of Rs. 3,000/- as the income of the deceased.

For the purpose of determining the multiplier in case of death of bachelor, I am being guided by directions contained in the judgments of Hon'ble Court wherein the age of the mother of the deceased is considered in case of death of bachelor for the multiplier. The age of the mother of the deceased has already been determined as below 40 years as aforesaid as on the date of accident. In view of the aforesaid discussion the age of the mother of the deceased is considered in case of death of bachelor, the appropriate multiplier applicable is 16. Hence, the total loss of dependency comes out to (Rs. 3,000/- X 16

X 12) X 1/2 =Rs. 2,88,000/- and the petitioner is further entitled to get funeral expenses as Rs. 2,000/- loss of estate as Rs. 2,500/- and loss of love and affection to the extent of Rs. 7,500/-. The deceased was green grocer by profession and died at the age of 21 years. He had a good future prospect and the young man did unfortunately die due to the sudden accident due to no fault on his part. Thus considering the future prospect of the deceased this tribunal is inclined to award a future sum of Rs. 40,000/- towards future prospect. That apart, the record reveals that the instant case was filed in the year 2008 and it takes another 8 years for its disposal. In view of the direction of the Hon'ble Apex Court a further sum towards interest on this amount of a compensation so far calculated is allowed to the extent of Rs. 20,000/- (rounded off) towards interest and thus the total compensation comes to Rs. 3,60,000/- and **the O.P. No. 3 & 4 being the insurer of the offending vehicles are to pay the above compensation to the petitioner.**

Sd/-
Judge, M.A.C. Tribunal
2nd F.T.C., Jalpaiguri"

10. Being aggrieved, the Insurance Company has preferred this appeal on the following grounds:-

- i) That the Ld. Judge failed to appreciate that the deceased victim was a gratuitous passenger in a Goods Carrying vehicle (Mahindra Maxx Pick Up Van No. WB-73B/1447) and therefore in terms of the Motor Vehicles Act, 1988 and in terms of the Judgments of the different Hon'ble Courts, its Insurance Company is not liable to make payment of any compensation at all.
- ii) That the Ld. Judge failed to appreciate that in absence of any evidence to substantiate the fact that the deceased victim who at the material time of the accident was travelling in the Goods carrying Mahindra Maxx Pick Up Van No. WB – 73B-1447, was either the owner of the goods being carried in the said vehicle, or one of the representative of the said owner of the goods, the Insurance Company of the said vehicle should not have been saddled with the liability of paying compensation to the claimants, and the owner of the said offending Van should have

been made responsible to satisfy the award for violating the policy conditions.

- iii) *That the Learned Judge failed to appreciate that compensation under the head of 'Non-pecuniary expenses' should have been limited to Rs.9,500/- only as provided under Section 163A of the Motor Vehicles Act, 1988.*
- iv) *That the Ld. Judge erred in law in allowing a sum of Rs. 40,000/- as 'future prospect', and Rs. 7,500/- as 'loss of love and affection', when the compensation amount of Rs. 2,92,500/- was already assessed as 'pecuniary loss' for the accidental death of the victim.*

11. From the materials on record, the following is evident –

- a) The deceased a bachelor and aged **21 years**.
- b) There being no documents in support of income of the deceased, the income is fixed at **Rs. 3,000/- per month** (Accident occurred in the year 2008).
- c) **Multiplier of 16** was used considering the age of the mother as the deceased was a bachelor.
- d) **The seizure lists does not show that the Driving Licences (2) seized were not valid.**
- e) The charge sheet (Exhibit 1/3) shows that the deceased was a **gratuitous passenger** in respect of vehicle no. WB-73B/1477.

12. (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.”*

13. In the present appeal, the claim was decided by the tribunal on **17th**

June 2016, thus prior to 22nd May, 2018 and compensation of a sum of

Rs. 3,60,000/- was granted in terms of the old schedule. **The amount of compensation was to be paid in equal proportion by the two Insurance Companies of the two offending vehicles.** It appears that charge sheet has been filed against the drivers of both the vehicles.

14. **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 Respondents no. 1 & 2/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.**
15. Admittedly, the **Appellant and Respondent No. 5/Insurance Companies** have deposited the amount of compensation of Rs. 3,60,000/- in terms of order of the Learned Tribunal. Accordingly, the **Respondent No. 1 & 2/Claimants** are now entitled to the total amount of compensation of Rs. 5,00,000/- together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit, on the total compensation amount.
16. Taking into consideration, the amount already deposited by the **Appellant and Respondent No. 5/Insurance Companies**, the **Insurance Companies** shall deposit the **balance amount of Rs. 1,40,000/-** along with the interest on the total compensation amount **in equal proportion** with the learned Registrar General, High Court, Calcutta, within a period of six weeks, who shall release the amount in favour of the **Claimants/**

Respondent No. 1 & 2 (mother and father of the deceased) in equal proportion, upon satisfaction of their identity and payment of *ad-valorem* Court fees, if not already paid.

- 17. The Appellant/Insurance Company/Bajaj Allianz General Insurance Co. Ltd. has now prayed for leave to recover** the compensation from the owner/respondent no. 3 of the offending vehicle (being a pick up van) bearing no. WB 73B/1477 (insured with the appellant) on the ground that the deceased was a gratuitous passenger in the said vehicle.
- 18. 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.”*

- 19. It is proved from the charge sheet (Exbt. 1/3)** that the deceased was travelling as a **gratuitous passenger** in one of the offending vehicles being a pick up van, bearing No. **WB 73B/1477**, insured with the Appellant/Insurance Company/ Bajaj Allianz General Insurance Co. Ltd. and thus there being a violation of the condition of the rules in the

policy, the Appellant is entitled to recover his share of compensation paid, by due process of law from the owner of vehicle no. WB 73B/1477, the respondent no. 3 herein.

20. The appeal being FMA 885 of 2023/FMAT 719 of 2017 stands disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.

21. No order as to costs.

22. All connected applications, if any, stand disposed of.

23. Interim order, if any, stands vacated.

24. Copy of this Judgment be sent to the Learned Tribunal, along with the trial court records, if received.

25. Urgent photostat certified copy of this judgment, if applied for, be given to the parties on usual undertaking.

(Shampa Dutt (Paul), J.)