

IN THE HIGH COURT AT CALCUTTA**Civil Appellate Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****FMA 1356 of 2022****In the Matter of****National Insurance Co. Ltd.****Vs.****Smt. Ganga Mallik & Ors.****For the Appellant/
Insurance Company : Mr. Rajesh Singh Adv.****For the Respondent/
Claimants : Mr. Ashique Mondal, Adv.,
Mr. Subhankar Mondal Adv.****Reserved on : 26.04.2024****Judgment on : 20.06.2024****Subhendu Samanta, J.**

1. The instant appeal has been preferred against the judgment and award dated 20nd of March, 2021 passed by the Learned Judge Motor Accident Claims Tribunal ADJ 3rd Court Dakshin Dinajpur, in MAC Case No. 139 of 2017.

2. The Insurance Company has preferred the instant appeal against the award.

The brief fact of the case is that on 7th October 2017 at about 21:00 hours the victim of this case namely Sushanta Mallick was returning from Patiram by travelling a Maruti Car being No. WB 66Y/2625. When the Maruti was proceeding over high way, at the place of occurrence, a Track bearing No. WB 65/1998 was parked

over the road without any parking light or indicator; at the last moment the driver of the Maruti Car saw the stationary track and tried to swerved his vehicle on the right side but the left side of the car strucked against the standing track thereby left front side of the Maruti Car was badly damaged and the victim who was sitting at the left front side of the Maruti Car, sustained severe injuries and succumbed to his injuries on spot.

3. The widow, two minor children and the mother of the deceased filed an application u/s 166 of MV Act before the Learned Tribunal for getting compensation. The Insurance Company contested the claim case by filing written statement. Learned Tribunal after hearing the parties and after receiving the evidence awarded a sum of Rs. 74,94,600/- as compensation and directed the Insurance Company to pay the compensation to the claimants together with 6% interest per annum from the date of the filing of the claim application.

4. Being aggrieved by and dissatisfied with the said award the Insurance Company has preferred the instant appeal.

5. Learned Advocate Mr. Rajesh Singh, appearing on behalf of the Insurance Company submits that the award passed by the Learned Tribunal is erroneous. The driver of the Maruti Car was also responsible for the accident. He further argued that there are contributory negligence of the driver of the Maruti Car but the Learned Tribunal has erroneously not considered the plea as raised by the Insurance Company through their written statement. Mr. Singh further argued that the Track was standing at the PO (at the

left side of the road). The Maruti Car was driving so rashly that he could not control the speed of the vehicle and dashed the standing vehicle from behind. Mr. Singh Further argued that there are evidences to show that the driver of the Maruti Car was also responsible for the accident. He again argued that the negligence on the part of the driver of the Maruti Car may be assessed as 50%.

6. Mr. Singh cited several judgments of Hon'ble Apex Court and argued that on the similar incident the Hon'ble Apex Court had apportioned the compensation to be 50:50 between the standing vehicle and the running vehicle. The cited authorities are as follows:

i) Rajrani and Ors. Vs. Oriental Insurance Company Limited and Ors. MANU/SC/0943/2009

ii) Lachoo Ram And Ors. Vs. Himachal Road Transport Corporation and Ors. MANU/SC/0059/2014

iii) Anjanaben Hasmukh Chandra Sha Vs. Bholanath Pannalal Jain. MANU/MH/1492/2005

iv) Shail Shrivastava Vs. Harish Chauksi and Ors. MANU/MP 0948/2006

v) Mohammed Mumtaz & Ors. Vs. S. Ravindranatha & Ors. MANU/KA/0686/2003

vi) Reshmi Chhabra Vs. Vijay Kumar Ahuja and Ors. MANU/PH/0656/1995

7. Learned Advocate Mr. Mandal appearing on behalf of the claimants/respondents submits that the instant appeal is not entertainable. The truck was standing on the road without parking light. Mr. Mandal Submits that there is a specific provision in the

MV Act regarding parking track on the High Way. Section 170, Section 122 and Section 126 of MV Act deals with the provisions. He submits that parking track on the high way in disobedience of the specific provision and itself a negligent act on behalf of the track driver. He further argued that as per rules of 109 of Central motor Vehicles Rules 1989, a proper direction has to be given during parking by blinking parking light of a vehicle when it parks over the road. Mr. Mandal argued that there is a specific violation of Central Motor Vehicles Rules 105 and 109 by the driver of the offending track thus the negligence has been sufficiently proved in this case. Mr. Mandal argued that Learned Tribunal has committed no error in deciding is issues. He further submits that the Insurance Company has not placed a single evidence to prove contributory negligence on the part of the driver of the Maruti Car. Thus the instant appeal has no merit to entertain.

8. Mr. Mandal further argued that in order to prove contributory negligence, of the Hon'ble Supreme Court has held specific guidelines to be followed. In this case the Insurance Company produced no corroborative or satisfactory evidences thus the instant appeal has got no merit at all.

9. Mr. Mandal cited the following citations.

i) Nita Narendra Nath Gowda Vs. M.S. Garuda Carriage Shipping (P) Ltd.

ii) Mohini Moharao Salunke Vs. Ramdas Hanumant Jadhav

iii) National Insurance Company Limited Vs. Sohna Singh and Ors. 2019 SCC Online CAL 8283

iv) Bajaj Allianz General Insurance Company Limited Vs. Anjali Mandal & Anr (2018) 2 TN MAC 691 (DB).

v) Archit Saini & Anr. Vs. Oriental Insurance Company Ltd.

vi) Kumari Kiran Vs. Sajjan Sing and Ors.(2015) 1 SCC 539

vii) K. Anusha Vs. Regional Manager Sriram General Insurance Company (2021) SCC Online SC 3339

viii) Soma Ghosh And Ors Vs. United Insurance Company Ltd.(2024) SCC Online Cal 1236

ix) Pramod kumar Rasikbhai Jhavery Vs. Karmasey Kunvargi Tak & Ors. (2002) 6 SCC 455

x) Jiju Kuruvila and Ors. Vs. Kunjujamma Mohan & Ors (2013) 9 SCC 166

xi) Lakshmi Devi Alias Lichhi Vs. Mehboob Ali.

10. Mr. Singh submits that the judgment cited by the Mr. Mandal are distinguishable from the following reason

a. Jiju Kuruvila - SC - both vehicles running head-on collision of deceased's car and bus-Owner/driver of bus did not deny the fault of bus - Bus held responsible

b. Pramodkumar Rasikbhai Javeri SC both vehicles running - car driven by deceased collided with truck coming from opposite direction, which was overtaking another car truck held responsible

c. K Anusha- SC- both vehicles running- Lorry going in front, suddenly stopped without any signal or indicator, car hit it from behind - Lorry held responsible

d. Kumari Kiran - SC- both vehicles running Motorcycle of deceased collided head- on with Tractor - Tractor held responsible

e. Archit Saini- SC- Car driver could not see due to flash light It hit the tanker parked in the middle of road - Tanker held responsible (Raj Rani not considered)

f. Anjali Mondal Cal Case of non-involvement- evidence of non-involvement not given held- that vehicle was involved

g. Soma Ghosh- Cal- Victim fell down from running bus - Bus held responsible

h. Sohna Singh –Cal- both vehicles running deceased while going in his car, dashed by a truck-Truck held responsible

i. Mohini Mohanrao Salunke- Bom- Tempo standing in the middle of road without parking light - deceased motorcyclist hit the tempo- Tempo held liable

j. Nita Narendra Nadgouda- Bom- Follows 'Mohini Mohanrao Salunke' (supra) - deceased motorcyclist hit the stationary Truck - Truck held liable

K. Laxmi Devi-se- Truck parked in the middle of road (Raj Rani not considered)

11. Heard the Learned Advocate.

12. Perused the materials on paper book also perused the observation of Learned Tribunal. The fact of the case shows that the track was statutory and was placed at the left portion of the road in the high way without any parking light or signal. At the time the driver of the Maruti Car dashed at the backside of the statutory reasoned the deaths of the deceased who was seated beside the driver. The impugned judgment does not disclose regarding the plea of contributory negligent raised by the Insurance Company in the written statement.

13. It is the case of the Insurance Company that the driver of the car was driving in a high speed for that reason driver could not locate the standing stationary vehicle parked beside the road and dashed the backside of the truck. It is the argument of the Insurance Company that the driver of the Maruti car was also

negligent for the said accident. On the other hand it is the case of the claimant that the stationary track has violated the statutory provisions and parked track without any parking light or signal over the high way. The dangerous and negligent act on behalf of the driver of the track caused accident.

14. Let me consider the observation of Hon'ble Apex Court similar facts situation. In **Rajrani (supra)** a track was parked in the middle of the road without any parking light, at the time of another car which was driven by the deceased at a normal speed of 40 k.m per hour could not locate the parked truck due to the search light from the other side and dashed at the back of the track. In deciding the said case the Hon'ble Apex Court has observed that the deceased was responsible for the contributory negligence to the ratio of 50:50.

15. In **Anjana Bein Hasmukh Chandra** a tanker was parked on the middle of the road without any light or signal, at the time deceased driving another car could not locate the tanker due to heavy light from the vehicles of reverse side, dashed the tanker. In this case the Hon'ble Supreme Court also assessed the contributory negligence to the extent of 50% on behalf of the victim. In **Shail Sribastava (Supra)** the Hon'ble Supreme Court in same fact situation as also decided that both the drivers of both the vehicles are equally responsible for the accident.

16. In **Reshmi Chabra** a track was parked in the middle of the road without any parking light or indicator of any short precaution at the time the car driven by the deceased dashed at the backside of the said parking track and died on spot. In that case the Hon'ble

Supreme Court has apportioned the liability to the ratio of 75% and 25% between parked truck and victim.

17. In considering the principle of contributory negligent and guidelines of proving the said fact before the Learned Tribunal, the observation of Hon'ble Supreme Court is required to be set out. In **Jiju Kurubilla** the Hon'ble Apex Court has held that

20.5. The mere position of the vehicles after accident, as shown in a scene mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction, etc. depends on a number of factors like the speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident was caused, but in the absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual.

18. In **Pramod Kr. Rashikbhai Javeri (Supra)** The Hon'ble Apex Court held that

8. We do not think that these two reasons given by the High Court fully justify the accepted principles of contributory negligence. The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence". Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong".

9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of the defendant's negligence is decided. The standard of a reasonable man is as relevant in the case of a plaintiff's contributory negligence as in the case of a

defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in *Astley v. Austrust Ltd.* is worthy of quoting:

"A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted himself that it failed to take reasonable care for the safety of its person or property."

10. It has been accepted as a valid principle by various judicial authorities that where, by his negligence, if one party places another in a situation of danger, which compels that other to act quickly in order to extricate himself, it does not amount to contributory negligence if that other acts in a way, which, with the benefit of hindsight, is shown not to have been the best way out of the difficulty. In *Swadling v. Cooper* AC at p. 9 Lord Hailsham said: (All ER p. 260 D-E)

"Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence. The plaintiff has no right to complain if in the agony of the collision the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances."

19. In **Soma Ghosh (supra)** This court has observed that when there is no direct evidence or negligence on the part of the deceased, the plea of negligence cannot be proved.

20. Let me consider the fact position of this case as to whether the negligence as pleaded by the Insurance Company on behalf of the driver of the Maruity Car is justified.

21. In this case the FIR was lodged stating that the stationary tracks was responsible for the accident. The Police case which was started on the basis of the accident ended in charge sheet; the final report of the police u/s 173 Cr.P.C. disclosed that the driver of the stationary truck is responsible for the accident and the driver of the truck was charge sheeted. The allegation against the driver of the Maruti car was not prima facie proved thus no charge has been framed against the driver of the Maruti Car. During the course of investigation police has examined several witnesses and recorded their statement u/s 161 Cr.P.C. and on the basis of the statement of the witnesses the charge sheet has been submitted against the driver of the truck.

22. There are two relevant witnesses in this case. PW 3 is eye witness of the accident and PW 4 is the driver of the Maruti Car. During cross-examination of PW 3 he stated that after hearing the noise of accident he saw the accident. PW 4 (Driver of the Maruit Car) deposed before the Learned Tribunal as follows

3. That the Truck no. WB 65B/1998 was stationary on the pucca road facing towards Malda side without any parking light or indicator and it was a dark night and there was no street light at the place of accident and road was not visible from distance and at last moment when I saw the Truck no. WB 65B/1998 I tried my best to swerved the Maruti car on my right hand side of the road and lastly the left hand side of the car struck against the back right hand side of the truck.

4. That due to this impact the left front side of the Maruti car damaged badly and the owner of the car Susanta mallik who was sitting on left front side of the car received severe injustice on his person and he succumbed to his injuries on the spot and I also received injury over the accident.

23. During the cross-examination PW 4 set out as follows

I was driving Maruti Swift Desire Car and my said Driving License is deposited in Ld. Court. I can produce the same if required by obtaining certified copy from said court. I had no Letter of Authority. Accident took place at around 9 p.m behind a stationary truck. My car was having head light. Since it was bit foggy and even my Upper light of the head light was on as there was darkness and the truck was standing in a dark place I saw the truck at the last moment. I was admitted to Hospital for two days and related documents are at my home and I have not brought the same as I was not asked to bring the same. Usually up to 200 meters can be seen when the Upper light of the head light is on.

Not a fact more than 1/2 k.m can be seen with the aid of upper light of head light of truck.

Incident took place in the month of October '07,2010.

Not a fact that evening of October does not remain foggy. I know if road is seen with difficulties then driving is to be done at controlled speed.

24. From the above evidences it appears to me the rash and negligent driving on behalf of the driver of the Maruti car was not at all proved. In the entire facts it appears that the driver of the truck was made responsible for the accident. It is true that the driver of the Maruti Car was driving the vehicle with upper light on. This is the positive/argument of the Insurance Company that when Maruti Car is running its upper light on, it must have located the stationary truck but due to excessive speed it could not control and dashed at the back side of the truck. To substantiate this argument the Insurance Company must have to prove: **firstly**, the driver of the

Maruti was running in a high speed; **secondly**, the driver of the Maruit car due to his own negligence could not locate the stationary truck. In this case there is no evidence to prove the fact that the driver of the Maruti Car was running in a high speed further more it is also not proved in this case that the driver of the Maruit car due to his own fault contributed the accident; rather facts suggested, fateful night foggy and there are no street light at the place of occurrence. It can be revealed from experience that fog made the upper light of a car difficult to see at night. Moreover the upper light of his case in a foggy night make the visibility more poor due to pollution nowadays.

25. The argument on behalf of the Insurance Company is not supported by any direct evidence moreover, evidence of PW 4 in examination-in- chief was not shaken during his cross-examination the evidentiary value of PW 3 and PW 4 proved that the driver of the maruti car was not driving the vehicle in excessive speed. Parking truck over the high way without indicator or signals is an act of negligence and violation Motor Vehicles Rules enumerates under Rule 105 and 109 of the Central Motor Vehicles Rule 89. The rule is set out as follows:

[109. Parking light:

[[Every construction equipment vehicle, combine harvester and motor vehicle] and every motor vehicle other than motor cycles and three wheeled invalid carriages shall be provided with one white or amber parking light on each side in the front. In addition to the front lights, two red parking lights one on each side in the rear shall be

provided. The front and rear parking lights shall remain lit even when the vehicle is kept stationary on the road:

Provided that these rear lamps can be the same as the rear lamps referred to in rule 105 sub-rule (2):

[Provided also that construction equipment vehicles [and combined harvesters), which are installed with flood light lamps or sport lights at the front, rear or side of the vehicle for their off-highway or construction operations, shall have separate control for such lamps or lights and these shall be permanently switched off when the vehicle is travelling on the road.]

26. In considering the observation of Hon'ble Apex Court in the similar facts situation in the case of **Reshmi Chabra (supra) Md. Mamtaz, Anjana Bein, Hasmukh Chand, Rajrani, Sahil Sribastava(supra)**

In all the cases the rush and negligent driving of the running car was sufficiently proved; thus the Hon'ble Apex Court has assessed the contributory negligence on each case. In this present case the facts are particularly different, there is no evidence regarding rash and negligent driving on part of the driver of the maruti car. Moreover, the principles of contributory negligence by virtue of decision of Hon'ble Apex Court in **Pramod Rashikbhai Javeri** and **Jiju Kurubilla** has not been properly followed by the Insurance Company by adducing any corroborative or direct evidence; thus after considering the entire facts and circumstances of this case. I am of a view that the grounds of appeal as raised by the Insurance Company regarding contributory negligence on the part of the driver of the maruti car cannot entertained at this stage.

27. The instant appeal is hereby dismissed as devoid of merit.

28. The award passed by the Learned Tribunal is hereby affirmed. It appears that the Insurance Company has deposited the entire awarded sum together with interest to the office of the Ld.Registrar General, High Court, Calcutta which must have accrued some of interest. The office of the Learned Registrar General, High Court, Calcutta is directed to disburse the amount in the name of the claimants along with the accrued interest according to the direction of the Learned Tribunal within 04 weeks from the date of passing of this order.

29. The payment of compensation is subject to ascertainment of payment of deficit court fee, if any.

30. The Learned Tribunal shall act upon the certified copy of this order to receive the deficit court fee, if any.

31. According to the above observation the instant FMA is disposed of. Connected CAN applications if pending are also disposed of.

LCR be sent down at once.

32. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.

(Subhendu Samanta, J.)