

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMAT No.1351 of 2013

Sri Bablu Das Bairagya

Vs

Dibakar Mukherjee & Ors.

**For the Appellant/
Claimant** : Mr. Sattwik Bhattacharya.

**For the Respondent No. 3/
Bajaj Allianz General Insurance Co. Ltd.** : Mr. Rajesh Singh.

**For the Respondent No. 4/
The New India Assurance Company Ltd.** : Mrs. Sucharita Paul.

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 (injured) being aggrieved with the judgment and order dated 15th February, 2012, passed by the learned Judge, M.A.C. Tribunal, Durgapur, in M.A.C. Case No. 146 of 2008, **under Section 163A of the Motor Vehicles Act, 1988.**

2. **Facts :-**

“The case of the petitioner in short is that he was the driver of bus bearing no. WB-53-5502 and the said bus was proceeding from Bolpur to Bankura and when the said bus reached at Four Mile on Moregram Panagarh Road one truck bearing no. WB-23B-0478 which was coming from the opposite direction in a very high speed and negligent manner dashed the bus which was being driven by the claimant. As a result of such collision the claimant was seriously injured and his right leg sustained fracture injury and during treatment his right leg was amputated. Further case of the claimant is that due to such amputation he sustained permanent disability and lost his service as driver. Further case of the claimant is that at the time of accident he was aged about 41 years and used to earn salary amounting to Rs.3300/- per month and at the relevant point of time the bus was covered by the Insurance Policy of New India Assurance Co. Ltd. and the truck was covered by the insurance policy of Bajaj Allianz General Insurance Co. Ltd.”

3. Both the insurance companies contested the case by filing written objection denying the material contention of the claim petition.
4. The claimant was examined as P.W. 1. Relevant documents were proved and marked as **Exhibits 1 to 7.**
5. **On completion of hearing, the learned Tribunal held as follows :**

“M.A.C. Case No. 146 of 2008
Dated: 15th February, 2012

Exhibit 8 is the voter identity card of the claimant Bablu Das Bairagya from which it appears that his year of birth is 1965 and the accident took place on 19.08.2008 and as such on the date of accident the age of claimant was about 43 years. As per second schedule of the M.V. Act thus multiplier 15 is applicable. P.W.-1 stated that he used to earn salary amounting to Rs.3300/- per month but failed to file a document in support thereof. No employer was examined on the side of the claimant to establish that the claimant used to get salary from that employer to the tune of Rs.3300/- per month. Though the claimant failed to produce any document in support of his claim but it is equally true that now a day even an unskilled labour also earns Rs.3000/- per month and having regard thereto it can safely be said that the claimant who used to work as a driver used to earn Rs.3000/- per month.

Broadly speaking while fixing an amount of compensation payable to an injured of an accident the damages have to be assessed separately as pecuniary damages and non pecuniary damages. Pecuniary damages includes (i) expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure (ii) loss of earnings which injured would have made had he not injured comprising (a) loss of earnings during the period of treatment, (b) loss of future earnings on account of permanent disability. (iii) Future medical expenses. Non pecuniary damages includes (i) damages for pain sufferings (ii) loss of amenities and (iii) loss of expectation of life. In the instant case in hand the claimant used to earn as a driver and due to amputation of his right leg below the knee he became incapacitated to work as a driver. Though in the Disability Certificate percentage of disablement was shown as 60% due to amputation but as the claimant was a driver the actual loss of earning capacity may virtually be 100% if he is neither able to drive. But still the claimant is able to change his avocation of life as save the deformity in his right leg his other organs are normal. He still is capable to earn though with difficulty. In such circumstances, the permanent physical and functional disablement of claimant Bablu Das Bairagya is assessed around 80%. The loss of future income of claimant Bablu Das Bairagya thus

will be (Rs.3000/-X12X15X80/100)=Rs. 4,32,500. Though claimant deposed that he incurred expenses amounting to Rs.30,000/- for his medical treatment but failed to produce any scrap of document in support thereof and as such the claimant is not entitled to get any reimbursement of the medical expenses incurred by him. Towards non pecuniary damages as and by way of pains and sufferings and loss of amenities the claimant is entitled to a further sum of Rs.17,500/-. The claimant as such is entitled to get a total compensation amounting to Rs.4,50,000/-. From the evidence it appears that the accident took place in the use of vehicles bearing no. WB-53-5502 and WB-23B-0478 and as such both the insurance companies namely New India Assurance Co. Ltd. and Bajaj Allianz General Insurance Co. Ltd. shall share the liability of making payment of the compensation in equal proportion.

**Sd/-
Judge,
MAC Tribunal
Durgapur”**

- 6. Being aggrieved with the said order, the claimant/appellant has preferred this appeal on the following ground:-**

“The actual pecuniary loss, including future earnings and other benefits under the law to which the claimant was entitled was not granted by the learned Tribunal.”

- 7. Learned counsel for the claimant/petitioner has relied upon the following judgments :-**

1. Raj Kumar vs. Ajay Kumar & Anr., Civil Appeal no. 8981 of 2010, AIR ONLINE 2010 SC 125.

2. Jagdish vs. Mohan & Ors., Civil Appeal No. 2217 of 2018, AIR 2018 SC 1347.

Both these judgments are in respect of a claim under **Section 166 of the M.V. Act**. The present case is under Section 163A of the M.V. Act.

8. The accident in the present case occurred in the year 2008. The injury suffered by the victim in this case as per disability certificate proved **(Exhibit 7)** that the victim's **right leg has been amputated and he sustained 60% permanent disability**.
9. The victim was aged **43 years** at the time of accident and his income has been taken as **Rs.3300/- per month** as no documents were produced in support of his income. But it appears that at the time of accident **he was the driver of bus No. WB-53-5502** and thus a **skilled labourer**. Due to his disability, the victim would now not be in a position to carry on the profession of a driver as **his right leg has been amputated**.
10. In **Deepal Girishbhai Soni & Ors. Vs. United India Insurance Co. Ltd., Baroda, SLP (c) NO. 708 of 2003, 2004 (5) SCC 385, on 18.03.2004**, the Supreme Court held as follows :-

*“....So far as Civil Appeal Nos. 3126/2002 and 3127/2002 are concerned, we in exercise of our jurisdiction under Article 142 of the Constitution direct that the claim applications of the appellants under Section 163-A of the Act be treated to be applications under Section 140 thereof. The amount invested by the Tribunal may be allowed to be withdrawn by the respondent - Insurance Company. The appellants shall refund the excess amount withdrawn by them after adjusting the amount payable in terms of Section 140 of the Act and the interest which would have accrued thereon shall be adjusted towards the compensation received by the claimant within four weeks from the date of communication of this order whereafter, the Motor Vehicles Accident Claims **Tribunal shall***

proceed to determine their claim petitions filed under Section 166 of the Act in accordance with law. This order shall not be treated as a precedent....”

11. **Though prima facie from the evidence on record, it appears that there is sufficient materials to show that the offending vehicle was being driven in a rash and negligent manner, as to why, was the claim application filed under Section 163A of M.V. Act is not clear to this Court.**
12. An application under Section 166 of M.V. Act along with an application under Section 163A of M.V. Act is maintainable but on the guidelines/directions in ***Deepal Girishbhai Soni & Ors. Vs. United India Insurance Co. Ltd., Baroda, (Supra).*** Here in this case no such application under Section 166 of M.V. Act has been filed.
13. The Gujarat High Court in ***Pushpalattaben Navinchanda vs. Gujarat State Road Transport, Special Civil Application No.3313 of 2016, decided on 24th September, 2018,*** held as follows :-

“1. Heard learned advocate Ms. Amrita Ajmera for the petitioners and learned advocate Ms. Sejal K. Mandaviya for respondent No. 1 Respondent Nos. 2 and 3 were decalred from the cause title considering that issue raised in the matter is purely on law point, when claim petition under Section 166 of the Motor Vehicle Act by the petitioner has been dismissed by the Tribunal under Motor Vehicles Act, 1956 (for short the ‘Act’), only on the ground that compensation under Section 163A is already awarded to them”.

“31. Reference of following judgments is also relevant (1) Reliance General Insurance Co. Ltd. vs. Shashi Sharma & Ors. reported in 2016 (9) SCC 627 (2) Oriental Insurance Company Ltd. vs. Chintharbhai Sibabhai reported in 2004 (3) GLR 2018 (3) National Insurance Company Ltd. vs. S.L. Sharma & Ors.

reported in 2009 (1) ACC 282 (4) Narsiji Nagaji Majirana vs. Manilal Amturam Bishnoi reported in 2004 (1) FLR 875 31.1 wherein different Courts have held that order under Section 163A is practically awarding interim amount of compensation and that in fact there were two options open to the claimants under the act i.e. (i) under Section 166 and (ii) under Section 14 or under Section 163A of the Act. Thereby claimant can file appropriate application under Section 166 for full compensation which can be awarded based upon the evidence adduced before the tribunal as well as either under Section 140 or under Section 166 of the Act, wherein the tribunal can award interim amount of compensation either as a fix amount of Rs.50,000/- or based upon the structural formula as per second schedule of the Act, even without recording evidence. Such position is required because for the victims whose income is fixed as salaried person but whose yearly income is less than Rs.40,000/- and thereby their families certainly in need of compensation, at the earliest, tribunal can award compensation under structural formula without waiting for evidence to be recorded, more particularly when prima facie evidence regarding age and income is possible for some of the victims when they are salaried and having specific evidence regarding their age and income.

31.2. The reference of full bench judgment in case of Reliance General Insurance Co. Ltd. vs. Shashi Sharma & Ors. reported in 2016 (9) SCC 627 is material, wherein the Honourable Apex Court has held that benefit received under any other statute or rules cannot be excluded while awarding compensation under Section 166 of the Act.”

14. In Govindbhai Chhaganbhai Bhil (Rana) vs. Dilawarkhan

Sahebkhani Baloch, First Appeal No. 845 of 2023, dated 29th

August, 2023, the Gujarat High Court held as follows :-

“5.2 In case of Divisional Manager, United India Insurance Co. Ltd. v. Sunita and Others, 2019 ACJ 109, it is held by the NEUTRAL CITATION C/FA/845/2023 ORDER DATED: 29/08/2023 undefined Karnataka High Court **that there is no prohibition under Motor Vehicles Act for**

conversion of a claim application from one under Section 163A to Section 166. The claimants during pendency of appeal filed an application under Order 6 Rule 17 of CPC seeking permission to convert their claim filed under Section 163A to Section 166. It was noted that the Tribunal and High Court have discretionary power to allow conversion of the claim application taking into consideration the facts of the case and conduct of the claimants. In *Sunita and Others* (supra), in Paragraphs 8 and 12, the scope of Sections 163A and 166 of the MV Act has been explained, which read as under:-

"8. A reading of section 163-A along with Second Schedule also makes it very clear that it is only in those cases where the income of the injured/victim would be up to Rs.40,000 per annum can a claim petition be maintained under Section 163-A of the MV Act. This makes it very clear that a claim petition under Section 163-A of the MV Act is not maintainable where the income of the injured/victim is/was more than Rs.40,000 per annum. However, to overcome this, the claimants, who are respondents, read with section 151 of Civil Procedure Code seeking permission to amend the provision of the claim petition from section 163-A of the MV Act to section NEUTRAL CITATION C/FA/845/2023 ORDER DATED: 29/08/2023 undefined 166 of the same Act. In the affidavit accompanying the application, the applicants - claimants have stated that they have claimed yearly income of the deceased at more than Rs.40,000. Though the provision of law mentioned in the claim petition was under Section 163-A of the MV Act, but they conducted the case as if they have filed petition under Section 166 of the MV Act. The Tribunal also appreciated the materials and evidence in this regard.

12. Regarding the scope of section 163-A and section 166 of the MV Act, as already observed above, it is only in those categories of cases where the income of the injured-claimant/victim is not more than Rs.40,000 per annum can a claim petition be filed under Section 163-A of the MV Act, if they so feel like. There is no bar for them to file the petition under Section 166 of the MV Act instead of section 163-A of the same Act. However, if the claim petition

is filed under Section 163-A of the MV Act, the claimants need not take the risk of proving the alleged negligence on the part of the rider/driver of the alleged offending vehicle which has caused the accident, whereas section 166 of the MV Act requires the claimants to prove such negligence on the part of the rider/driver of the alleged offending vehicle."

5.5 In Mukeshbhai Bhalchandra Jani (supra), the Division Bench of this Court has held in affirmative observing that it is permissible to exercise the option out of two proceedings under Sections 163-A and 166 of the MV Act to convert the claim petition under any of the section either during pendency of the proceedings before the Tribunal or at an appellate stage. The claimant can move the Court for amendment of his claim petition at any stage of the proceedings and it would be for the concerned Court to pass order on that application in accordance with law on being satisfied about the other conditions such as income factor etc. 5.6 In the instant case, the application, exh. 7 was moved by the claimants for converting the application from no fault liability under Section 163A to the fault liability under Section 166 of the MV Act. It is the Tribunal, which was brought to the notice of the income and NEUTRAL CITATION C/FA/845/2023 ORDER DATED: 29/08/2023 undefined since the claim compensation deposited by the insurance company has not been withdrawn by the applicants, it would be in the wider interest of justice that the prayer to consider the application under Section 166 of the MV Act is allowed."

- 15. In the present case, the petitioner's claim is under Section 163A of M.V. Act. There is no prayer to convert the application under Section 163A of M.V. Act to an application under Section 166 of M.V. Act, even though the learned counsel on behalf of the claimant has prayed for enhanced compensation.**

16. The claimant has already received a sum of Rs.4,50,000/- as compensation under Section 163A of M.V. Act, the highest that now be granted being Rs.5,00,000/-.
17. Thus, considering the judgment ***Pushpalattaben Navinchanda vs. Gujarat State Road Transport, (Supra)*** and ***Govindbhai Chhaganbhai Bhil (Rana) vs. Dilawarkhan Sahebkhani Baloch, (Supra)***, the interest of justice requires that **the claimant be given an opportunity** to convert the claim application under Section 163A of M.V. Act to one under Section 166 of M.V. Act, **even at this stage (appellate).**
18. The claimant has now stated that he **does not** wish to avail of the said opportunity of converting his application under Section 163A of M.V. Act to an application under Section 166 of M.V. Act.
19. In the present case, the learned counsel for the Respondent 3 & 4/Insurance companies has submitted that, as this Court enhanced the compensation in **FMAT 1100/13/FMA 1844/14** relying on the judgment of the Apex Court in ***Janabai WD/O Dinkarrao Ghorpade & Ors. Vs. M/S. I.C.I.C.I. Lambord Insurance Company Ltd., CIVIL APPEAL NO._____ OF 2022 (Arising out of SLP (CIVIL) NO. 21077 of 2019)***, even though there was no cross appeal by the claimant, this Court should also consider reducing compensation in an appeal by the claimant, even if there is no cross appeal by the Insurance Companies.
20. The learned counsel for the Insurance Companies have to keep in mind that, this is a beneficial legislation, though, **in appropriate**

cases their submission to the above extent can always be considered taking into account the facts and circumstances of the case.

21. The present appeal is an appeal from a claim application under Section 163A of M.V. Act and the position of law in such a proceeding is already in place and the same is also applicable to the present case.

22. (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.”*

23. In the present appeal, the claim was decided by the tribunal on 15th February, 2012, thus prior to 22nd May, 2018 and compensation of a sum of Rs. 4,50,000/- was granted in terms of the old schedule.

24. 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 Appellant/Claimant is 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.**

25. Admittedly, the **Appellant/ Claimant** has already received the amount of compensation of **Rs. 4,50,000/-** in terms of order of the Learned Tribunal. Accordingly, the **Appellant/ Claimant** is now entitled to the balance amount of compensation of **Rs. 50,000/-** together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit.

26. Respondent No. 3 & 4/ Insurance Companies, thus are directed to deposit the balance amount and the interest as indicated above in

equal proportion, by way of cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date.

The **Respondent No. 3 & 4/ Insurance Companies**, shall also pay the interest upon the **sum of Rs. 50,000/-** at the rate of 6% till deposit if not already paid, within the period as specified above.

27. Upon deposit of the aforesaid amount and the interest, learned Registrar General, High Court, Calcutta shall release the amount in favour of the **Appellant/Claimant** , upon satisfaction of his identity and payment of *ad-valorem* Court fees, if not already paid.

28. The appeal being FMAT 1351 of 2013 stands disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.

29. No order as to costs.

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

31. Interim order, if any, stands vacated.

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

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

(Shampa Dutt (Paul), J.)