

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble **Justice Prasenjit Biswas**

FMA 1057 of 2016

Madhab Ghosh

-Versus-

National Insurance Co. Ltd. & Anr.

For the Appellant : **Mr. Uday Sankar Chottopadhyay,
Ms. Trisha Rakshit,
Ms. Rajashree Tah,
Ms. Aishwarya Datta.**

For the Respondent No. 1 : **Mr. Deb Narayan Ray.**

Hearing Concluded on : **06.12.2024**

Delivered On : **17.03.2025**

Prasenjit Biswas, J:-

1. This appeal is directed against the judgment and award dated 30th January, 2015 passed by the learned Judge, Motor Accident Claims Tribunal, 5th Court, Burdwan in M.A.C. Case No. 15 of 2013.

2. By passing the impugned judgment and award the learned Tribunal awarded Rs. 30,200/- along with simple interest @ 7% per annum from the date of filing of the case till the date of his realization in full in favour of the petitioner/appellant from the respondent/Insurance Company. Being aggrieved and dissatisfied with the said impugned judgment and award the present appeal is preferred at the behest of the appellant/claimant.

3. The incident took place on 26.04.2012 at about 1:40 pm while the victim was returning his home along with his friend Laltu Sen by riding a motor cycle being no. WB-42J/5092 and at that time they were dashed by the offending vehicle (mini truck) being no. WB-41B/8019 which was coming from Arambagh side at a very high speed and in rash and negligent manner. In that accident the victim sustained bleeding injuries on his person and he was immediately taken to Burdwan Hospital. As his condition was deteriorating, thus victim was referred to SSKM Hospital, Kolkata. The victim was treated in the said hospital till 01.05.2012. It is said that due to reason of such injuries sustained by the victim he became crippled and lost his earning capacity and as such the wife of the victim filed application before the Tribunal for getting compensation of Rs. 5,00,000/- under Section 166 of the Motor Vehicles Act, 1988.

4. In order to substantiate her case she was examined herself and other three witnesses were examined and produced on her behalf. Documents were marked as exhibits no(s) 1 to 7 respectively on behalf of the appellant/petitioner in that case.

5. Neither any oral nor any documentary evidence was adduced on behalf of the respondent/Insurance Company.

6. The respondent no. 2, owner of the offending vehicle did not choose to contest the claim application and the case was disposed of ex-parte against him. In the present appeal also the owner of the offending vehicle did not venture to appear and contest the present case.

7. Mr. Uday Sankar Chattopadhyay, learned Advocate appearing on behalf of the appellant/petitioner submitted that the impugned judgment passed by the Tribunal is bad, perverse and liable to be set aside. It is said by the learned Advocate that the Tribunal did not at all consider the evidence of PW2 namely Mukta Roy who happens to be the witness to the incident. It is further said by the learned Advocate that police submitted charge sheet against the driver of the mini truck bearing no. WB-41B/8019 wherein the victim Madhab Ghosh was also cited as a charge sheeted witness but due to his mental disorder after happening of the accident he could not be able to depose before the learned Tribunal. As per submission of the learned Advocate that due to the injuries sustained by the victim he became the patient of schizophrenia and the disability certificate would also prove/show the mental condition of the victim. It is said that the victim was a supplier of Gas Cylinders and used to earn Rs. 4,500/- per month and at the time of the accident he was aged about 38 years.

8. Learned Advocate for the appellant further assailed that the certificate issued by the Government of West Bengal, Office of the Principal, Medical College and

Hospital reveals that permanent disability of the injured Madhab Ghosh is 80% and having regard to the nature of the injury the appellant's permanent disability ought to be treated as 100% functional disablement. It is further said that the learned Tribunal held that the drivers of the both the vehicles had contribution to the occurrence of the accident and as such the drivers of both the vehicles were responsible for the same. At this juncture he referred a decision of the Hon'ble Apex Court rendered in case of **Khenyei Vs. New India Assurance Co. Ltd.**¹ It is said that in the said report, the Hon'ble Apex Court held that when other joint tortfeasor has not been impleaded then apportionment of composite negligence cannot be made in his absence and then it would be open to the impleaded joint tortfeasors after making payment of compensation, may sue the other tortfeasors and to recover from him the contribution to the extent of his negligence. So, it is said by the learned Advocate that in view of the dictum of the said report by the Hon'ble Apex Court the appellant/petitioner can implead one of the joint tortfeasors and there is nothing wrong in non impleadment of the other joint tortfeasor.

9. Reliance was also placed upon the decision of the Hon'ble Supreme Court in case of **Kajal vs. Jagdish Chand and Others**² and it is submitted that 'just compensation' should be awarded in favour of the claimant as the principles with regard to determination of just compensation contemplated under the Act are well settled.

10. Reliance was further placed upon the decision of the Hon'ble Apex Court in case of **Master Ayush vs. The Branch Manager, Reliance General Insurance Co.**

¹ (2015) 9 Supreme Court Cases 273

² (2020) 4 Supreme Court Cases 413

Ltd. & Anr.³ wherein Hon'ble Apex Court held that the determination of damages in personal injury cases in relation to motor accident compensation claims is not easy and the mental and physical loss cannot be computed in terms of money but there is no other way to compensate the victim except by payment of just compensation. The attention of the Court is drawn to the paragraph 2 and paragraph 6 of the said report by the learned Advocate for the appellant which are reproducing herein below-

"2. The grievance is with respect to the inadequate amount of compensation on account of the injuries suffered by the appellant. The appellant is a paraplegic patient. The appellant has examined Dr. Amithish Narayana as PW-2 and Dr. S. Adanthya as PW-3. Dr. Adanthya is a medical specialist from National Institute of Mental Health & Neurosciences, Bangalore. The discharge summary issued by the hospital is Exh. P/10. As per the discharge certificate, the appellant is not able to move both his legs and had complete sensory loss in the legs, urinary incontinence, bowel constipation and bed sore. The appellant was aged about 5 years as on the date of the accident, hence has lost his childhood and is dependent on others for his routine work. PW-2 Dr. Amithish Narayana has issued disability certificate Exh.P/12. He is the Head of the Department at the Kasturba Medical College Hospital, Mangalore. The said certificate reads as thus:

3. This is to certify that Master Ayush V/8yrs S/o Vedava (Resident of BC Road) is a known case of Traumatic Paraplegia

³ **2022 Live Law (SC) 330**

following T 10-11 spinal cord lesion due to RTA. He is not able to walk due to poor motor and sensory recovery in LL muscles. He shows significant sinking astasia attitude and collapses on standing. As per the Disability certificate, he has 100% permanent physical impairment and will not be able to walk. Since following therapy, partial recovery has taken place in both motor and sensory aspects up to pelvic girdle level. Further recovery is impossible. Therefore he is been advised to use Advanced Reciprocating Gait Orthosis (ARGO) with bilateral elbow crutches. After the use of Advanced Reciprocating Gait Orthosis (ARGO) with bilateral elbow crutches he can perform independent ambulation. This is a great achievement for his future life as this device gives him controlled mobility capacity. With best wishes and blessings for his good progress.

Sd/- Dr. Amitesh Narayan

*Professor & HOD Department of Physiotherapy K.M.C. Hospital
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amitesh.mpth@yahoo.com Mob: 9448039380”*

11. It is further argued by the learned Advocate for the appellant that PW 2 who happens to be the eye witness to the accident supported the case of the claimant and his evidence cannot be discarded in such a way as the learned Tribunal held in its impugned judgment. It is said that PW 3 who happens to be a Clinical Psychologist of Burdwan Medical College and Hospital and one of the signatories of the Disability Certificate issued in favour of the victim deposed in the case. In the said certificate the disability of the victim was assessed to the extent of 80% with observation that

such disability is not curable but controllable in future. The ticket and treatment sheet in respect of the victim was marked as exhibit 7 by PW 4 which supports the case of the appellant/claimant. As per submission of the learned Advocate for the appellant that the Tribunal at the time of granting compensation for personal injury no compensation was awarded under the head for 'pain and sufferings', for 'loss of amenities', 'loss of earnings' and 'medical treatment' and other 'special damages'. So, the judgment and award passed by the learned Tribunal as impugned in this appeal is ex-facie bad and perverse and cannot be sustained in the eye of law in view of the aforesaid submission.

12. In reply to the contentions as raised on behalf of the appellant/claimant, Mr. Deb Narayan Ray, learned Advocate appearing for the respondent no. 1/ Insurance Company said that there is no illegality or material irregularity in the impugned judgment. It is said that under Section 166 of the Motor Vehicles Act it is the duty of the petitioner to prove that the entire accident took place due to rash and negligent act of the vehicle against which the claim has been set out. It is further said that in this case PW 2 who cited as a witness to the incident did not at all say that for whose negligence the said incident took place. It is further said that the Disability Certificate did not reflect about the functional disability of the victim. As per his submission there is no such finding in the Disability Certificate regarding the time from which he was suffering and it did not relate to the accident in which the victim sustained head injuries. So, as per submission of the learned Advocate there is nothing to interfere in the impugned judgement passed by the learned Tribunal and as such the present appeal may be dismissed outright.

13. It is well settled principle of law that claim cases are to be decided on the touchstone of preponderance of probability and the standard of prove beyond

reasonable doubt cannot be applied while dealing with motor accident case. The involvement of the offending vehicle (mini truck) was not doubted by the Tribunal but it is held that the driver of the motor cycle and the offending vehicle both had contribution towards the said accident and as such amount of compensation so assessed is to be deducted on account of some contributory negligence. The negligence of the motor cycle was assessed as 25% and entitlement of the petitioner is held to 75% of the amount assessed. In case of **Khenyei** (supra) the Hon'ble Apex Court observed that apportionment of composite negligence cannot be made in the absence of impleadment of joint tortfeasor and it would be open to the impleaded joint tortfeasor after making payment of compensation to sue the other joint tortfeasor to recover from him the contribution to the extent of his negligence. It is profitable to quote the observation of the Hon'ble Apex Court in the said report at paragraphs 11 and 17 which are as under:

“11. A Full Bench in KSRTC v. Arun @ Aravind (supra) while answering aforesaid questions has observed that it was a case of composite negligence and the liability of tortfeasors was joint and several. Hence, even if there is non-impleadment of one of tortfeasors, the claimant was entitled to full compensation quantified by the Tribunal. The Full Bench referred to the decision of a Division Bench of the Gujarat High Court in Hiraben Bhaga & Ors. v. Gujarat State Road Transport Corporation [1982 ACJ (Supp.) 414 (Guj.)] in which it has been laid down that it is entirely the choice of the claimant whether to implead both the joint tortfeasors or either of them. On failure of the claimant to implead one of the joint tortfeasors, contributory liability cannot be fastened upon the

claimant to the extent of the negligence of non-impleaded joint tortfeasors. It is for the joint tortfeasors made liable to pay compensation to take proceedings to settle the equities as against other joint tortfeasors who had not been impleaded. It is open to the impleaded joint tortfeasor to sue the other wrong doer after the decree or award is given to realize to the extent of others' liability. It has been laid down that the law in Ganesh's case (supra) has been rightly laid down and it is not necessary to implead all joint tortfeasors and due to failure of impleadment of all joint tortfeasors, compensation cannot be reduced to the extent of negligence of non-impleaded tortfeasors. Non-impleadment of one of the joint tortfeasors is not a defence to reduce the compensation payable to the claimant. In our opinion, the law appears to have been correctly stated in KSRTC v. Arun @Aravind (supra).

17. *The question also arises as to the remedies available to one of the joint tortfeasors from whom compensation has been recovered. When the other joint tortfeasor has not been impleaded, obviously question of negligence of non-impleaded driver could not be decided apportionment of composite negligence cannot be made in the absence of impleadment of joint tortfeasor. Thus, it would be open to the impleaded joint tortfeasors after making payment of compensation, so as to sue the other joint tortfeasor and to recover from him the contribution to the extent of his negligence. However, in case when both the tortfeasors are before the court/tribunal, if evidence is sufficient, it may determine the extent of their*

negligence so that one joint tortfeasor can recover the amount so determined from the other joint tortfeasor in the execution proceedings, whereas the claimant has right to recover the compensation from both or any one of them.”

14. With regard to the rash and negligent act of the offending vehicle it is found that PW 2 eye witness to the occurrence has categorically stated that at the time of accident he was on the ‘morum road’ and was on the back side of the offending vehicle and the victim vehicle was in front of the offending vehicle and so it was not possible for him to say for whose negligence the said occurrence took place. So, it can be said that the drivers of both the vehicles had contribution to the occurrence of the said accident and the drivers of both the vehicles were responsible for the same and the finding of the learned Trial Court to that extent is found to be correct.

15. Now the determination of compensation is considered and in dealing with such compensation following aspects are to be taken into account:

1. Multiplier,
2. Income,
3. Loss of earnings,
4. Future prospect,
5. Pecuniary and non-pecuniary damages.

16. So, far as the income of the victim is concerned as per the claim application and the evidence adduced on behalf of the claimant it appears that at the time of accident the victim was a gas cylinder supplier and he used to earn Rs. 150/- per day and the monthly income of the injured was Rs. 4,500/-. Although no document was produced on behalf of the appellant regarding the claim of income of her husband but to refute the claim of the appellant no oral or documentary evidence

was adduced on behalf of the respondent/Insurance Company. Considering the economic factors prevalent at the time of accident in the year 2012, I am of the opinion that the income claimed by the victim is reasonable and should be accepted. The victim is further entitled to an amount equivalent to 40% of his annual income towards future prospect since at the time of accident he was aged about 38 years and was self employed.

17. It is found from the Voters Identity Card that the victim was aged about 21 years on 1st January, 1995. Thus on the date of accident i.e. on 26.04.2012, the victim was aged about 38 years. Following the observations of the Hon'ble Apex Court in **Sarla Verma (Smt) and Others Vs. Delhi Transport Corporation and Another**⁴ the multiplier should be 15.

18. With regard to the loss of earnings it is found that in order to prove the disablement certificate the petitioner has examined Dr. Saptarshi Adhikary, Clinical Psychologist of Burdwan Medical College and Hospital who is one of the signatories of the Disability Certificate. It is deposed by the said witness that the board assessed the disability of the victim to the extent of 80% which in future is not curable but controllable. This witness also stated that the board assessed the disability of the victim and according to Indian Disability Evolution of Assessment Scale in global disability score it came to 15 which indicate that the victim has been suffering from several disabilities due to the accident. The said Disability Certificate was marked as exhibit 4 in the case before the Tribunal. The another witness PW 4 who was a Professor of Surgery in Burdwan Medical College and Hospital deposed that the victim was admitted in Burdwan Hospital with head injury and at the time of

⁴ (2009) 6 SCC 121

admission blood was oozing out from his nose and ear and the patient was in unconscious state and as there is no development of his condition the victim was referred to the Neurology Department of SSKM Hospital. Thereafter, the victim was discharged from the said hospital on 01.05.2012 as it would reveal from the exhibited document. The learned Tribunal held that no surgery was done upon the victim on 26.04.2012 when he was admitted in the hospital and it was written in the final diagnosis as B.S. Temporal and immediate after discharge of the victim from the hospital there was no such complaint of disorganized behavior, running away from the home and as such the claim of the petitioner that the victim was suffering from schizophrenia is not believable at all. It is further held by the Tribunal that as no evidence was led on behalf of the petitioner that the disability as shown in the disability certificate is the proximate cause of such head injury and in the absence of such evidence it cannot be ascertained that the victim became disable due to such accident. Undeniably the accident took place on 26.04.2012 and immediately thereafter he was taken to the hospital for treatment in unconscious state. After giving him primary treatment and since there was no development of his condition he was referred to the Neurology Department of SSKM Hospital where he was treated till 01.05.2012. Thereafter the victim visited the O.P.D. Department on different occasions with the complaint of his disorganize behavior, running away from the homes. Although immediate after his discharge no complaint was there of such disorganize behavior but for that reason it cannot be said that the head injury is not the probable cause of schizophrenia. From the disablement certificate marked as exhibit 4 in the case it would appear that the victim is suffering from disablement to the extent of 80% and in order to prove his disablement two witnesses namely PW 3 and PW 4 were cited on behalf of the petitioner. The one of the signatories (PW3) of

the disablement certificate deposed that the victim sustained 80% disablement and in future it will not be curable but controllable. Now it is to be ascertained whether such physical disablement affected the earnings of the victim. It is said by PW 1, the wife of the victim that her husband was a LPG gas cylinder supplier and due to such injuries he is suffering from schizophrenia which resulted in his unemployment. However, there are no such evidences brought on record to show that due to such injuries whether he is unable to work at all. In his examination PW3 stated that the disablement of the victim would not be curable in future but it would be controllable. Considering the above in my opinion the loss of earnings of the victim should be considered at 30%.

19. It is found from the materials on record that immediately after happening of the incident the victim was admitted in the Burdwan Medical College and Hospital and thereafter he was transferred to SSKM College and Hospital where he was treated till 01.05.2012. Exhibit 4/1 shows that the patient was discharged from the said hospital on the said date but thereafter he was compelled to visit OPD of the hospital on different occasions. Though, no document regarding medical expenses incurred by the victim was proved, but bearing in mind that the victim was hospitalized and was under treatment. I am inclined to allow an amount of Rs. 20,000/- towards medical expenses.

20. As far as non-pecuniary damages is considered under the heads of 'pain and sufferings' bearing in mind the hospitalization I am inclined to allow an amount of Rs. 40,000/-

21. Admittedly the witness to the incident failed to pinpoint for whose negligence the said occurrence took place as he was on the backside of the offending vehicle and the victim's vehicle was in the front of the offending vehicle. So, both the motorcycle

and the offending vehicle had contribution towards the said accident. As such I find nothing irregularity or illegality in the finding of the learned Tribunal in holding and assessing the negligence of the motorcycle and the entitlement of the petitioner to the extent of 75%. It has already held in the forgoing paragraphs that in view of the decision rendered by the Hon'ble Apex Court in case of **Khenyei (supra)** that from whom compensation is to be recovered when there are joint tortfeasors. It has been held by the Apex Court that when the other joint tortfeasors has not been impleaded, apportionment of composite negligence cannot be made in the absence of impleadment of joint tortfeasor and in that event it would be open to the impleaded joint tortfeasors after making payment of compensation sue the other joint tortfeasor and recover from him the contribution to the extent of negligence. Accordingly, in this case payment of compensation should be made by one of the joint tortfeasors i.e. respondent no. 1 National Insurance Company who after making of payment of compensation may sue the other joint tortfeasor for recovery of his contribution to the extent of its negligence.

22. Other factors have not been challenged in the present appeal.

23. In view of the above discussion the calculation of compensation is made hereunder.

24. Calculation of compensation:

Monthly income	4,500/-
Annual income (Rs. 4,500/- X 12)	54,000/-
Add: Future Prospect @ 40% of the annual income	Rs. 21,600/-

	Rs. 75,600/-
Loss of earnings: 30% loss of income	Rs. 22,680/-
Adopting multiplier 15 (Rs. 22,680 X 15)	Rs. 3,40,200/-
Add: Medical expenses incurred	Rs. 20,000/-
Add: Non-pecuniary damages	Rs. 40,000/-
Total compensation	Rs.4,00,200/-

25. Thus, the claimant is entitled to compensation of Rs. 4,00,200/-together with interest @ 6% per annum from the date of filing of the claim application till payment less the amount already received if any, by the appellant/petitioner.

26. Respondent no. 1 insurance company is directed to deposit the awarded compensation less the amount already received by the claimant if any, together with interest as indicated above by way of cheque before the learned Registrar General, High Court, Calcutta within a period of 6 weeks from the date. It would be open to one of the impleaded joint tortfeasors i.e. respondent no. 1 Insurance Company after making payment of compensation as indicated above may sue the other joint tortfeasor to recover from him the contribution to the extent of his negligence as indicated by the learned Tribunal in the impugned judgment.

27. Upon deposit of the aforesaid amount the learned Registrar General, High Court, Calcutta shall release the same in favour of the appellant/claimant on satisfaction of her identity.

- 28.** The appellant/claimant is directed to deposit deficit Court Fees on the compensation amount assessed, if not already paid.
- 29.** With the aforesaid observation the appeal stands allowed and modified to the extent as indicated hereinabove.
- 30.** There will be no order as to costs.
- 31.** All connected applications, if any, stand disposed of.
- 32.** Interim order, if any stands vacated.
- 33.** Let a copy of the judgment be forwarded to the learned Tribunal along with lower Court records for information.
- 34.** Urgent Photostat certified copy of this impugned judgment be given to the parties upon compliance of all legal formalities.

(Prasenjit Biswas, J.)