MACApp. 50/2010
BEFORE
HON'BLE MR JUSTICE S. TALAPATRA
JUDGMENT & ORDER

This is an appeal by the New India Assurance Company Ltd. against the judgment and award dated 19.04.2008 passed by the Motor Accident Claims Tribunal, North Lakhimpur in MAC Case No.44 of 2006.

2. The findings as returned by the Tribunal as regards the accident that occurred on 12.09.1995 when the husband of the respondent No.1 namely, Basir Riaz @ Riaz Ahmed was driving the vehicle bearing registration No.AMD-4481 (Maruti Van) from North Lakhimpur to Tezpur and dashed against a stationary Mini Bus bearing registration No.AS-07-1847 at Jarabari, for failure of brakes, injuries on his parson including fracture of the right leg, right wrist joint and grievous injuries on head, face and eyes and the insurance coverage by the appellant are not in dispute.

3. Mr. R. Goswami, leaned counsel appearing for the appellant referring to the Written Statement as filed by the appellant in the Tribunal submitted that at the very outset the appellant had pleaded that:

> the accident took place due to the negligence of the injured himself who drove his Maruti Van Reg. No.AMD-4481 with very rashly and negligently and dashed against the stationary vehicle from the back side. In this connection a Criminal Case was registered. Therefore, the insured as well as insurer are not liable to pay any compensation to the claimant.

He further submitted that from the written argument that has been filed in the Tribunal, it would be apparent that the appellant has also seriously contested the claim that the injured suffered total blindness of both the eyes from the said accident. In addition thereto, the appellant raised a question relating to the non-joinder of the necessary parties such as the owner of the stationary vehicle. It is evident from the para-5 of the written argument that the appellant contended in the Tribunal as under:

> 5. The accident took place due to negligence of both the vehicle as such the compensation that may be awarded by your Honour may kindly be apportioned in the ratio 50:50.

4. Mr. R. Goswami, learned counsel appearing for the appellant to buttress his contention, relied on a decision of the apex Court in Tamilnadu State Transport Corporation v. Natarajan & Others as reported in (2003) 6 SCC 137 where it has been held as under:

> 9. From the facts of the case and nature of the claim stated above, we find absolutely no justification in law for the Division Bench of the Madras High Court in its impugned order imposing liability to the extent of 50% on the appellant Corporation. The Division Bench of the High Court completely overlooked that the claimant himself was the driver of the corporation bus and was found negligent to the extent of 50% for causing accident. In view of the above finding of contributory negligence on the part of the claimant as driver of the corporation bus, the Corporation as an employer cannot be held to be vicariously liable for the negligence of the claimant himself. The claim petition did not make the Corporation a party to the claim obviously because the claimant exercised option of approaching the Claims Tribunal under the Motor Vehicles Act against the owner and insurer of the private bus. He did not file any claim under the Workmen's Compensation Act against the employer. Since the Corporation was not at fault and the accident was caused because of the contributory negligence of the drivers of both the buses, the Corporation could not be held liable under the provisions of the Motor Vehicles Act. It was not a claim based on no fault liability . It was a claim petition filed by the claimant against the owner and insurer of the private bus. The claimant is also represented before us and on his behalf it is stated that he has been given compassionate appointment on suitable alternative; job and he never desired to obtain any other compensation from his employer. The Division Bench of the High Court therefore committed a serious error in apportion

ing and fastening 50% liability of compensation on the appellant Corporation. Th is part of the award therefore deserves to be set aside. The liability of the re spondent Insurance Company as insurer of the private bus is found to be only to the extent of 50% of the total compensation determined. The total compensation d etermined is Rs.2,09,800 (Rupees two lakhs nine thousand and eight hundred) only . Fifty per cent liability of the insurer of the private bus would therefore be Rs.1,04,900 (Rupees one lakh four thousand and nine hundred) only. On the afores aid amount, the claimant would be entitled to an interest rate at 9% per annum f rom the date of filing the claim petition as awarded.

Mr. R. Goswami, learned Counsel further referred a decision of the apex Court in T.O Antony v. Karvarnan & Others as reported in (2008) 3 SCC 748 where the Supr eme Court held as under:

6. Composite negligence refers to the negligence on the part of two or more p ersons. Where a person is injured as a result of negligence on the part of two o r more wrongdoers, it is said that the person was injured on account of the comp osite negligence of those wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injured for payment of the entire damages and the in jured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrongd oer separately, nor is it necessary for the court to determine the extent of lia bility of each wrongdoer separately. On the other hand where a person suffers in jury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence on the part of th e injured which contributed to the accident is referred to as his contributory n egligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stand reduced in proportion to his contributory negligence.

5. A sequel to that Mr. R. Goswami, learned counsel appearing for t he appellant, relied further on a decision in Ningamma & Anr. Vs. United India I nsurance Company Ltd. as reported in AIR 2009 SC 3056 where the apex Court held as under:

24. There are indeed cases like New India Assurance Company Limited v. Sadan and Mukhi and Ors. AIR 2009 SC 1788, wherein it has been held that the son of th e owner was driving the vehicle, who died in the accident, was not regarded as t hird party. In the said case the court held that neither Section 163A nor Sectio n 166 would be applicable.

25. Undoubtedly, Section 166 of the MVA deals with Just Compensation and e ven if in the pleadings no specific claim was made under Section 166 of the MVA, in our considered opinion a party should not be deprived from getting Just Com pensation in case the claimant is able to make out a case under any provision o f law. Needless to say, the MVA is beneficial and welfare legislation. In fact, the court is duty bound and entitled to award Just Compensation irrespective o f the fact whether any plea in that behalf was raised by the claimant or not. Ho wever, whether or not the claimants would be governed with the terms and conditi ons of the insurance policy and whether or not the provisions of Section 147 of the MVA would be applicable in the present case and also whether or not there wa s rash and negligent driving on the part of the deceased, are essentially a matt er of fact which was required to be considered and answered at least by the High Court.

6. Mr. R. Goswami, learned counsel appearing for the appellant ther eafter relied on a decision of this Court in National Insurance Company Ltd. vs. Kanika Choudhury & Ors. as reported in 2006 (2) GLT 261 where this Court held a s under:

10. In the case on hand, the deceased cannot be said to be a third party, as he himself was driving the vehicle without licence. But admittedly, he was the

employee under the owner of the vehicle and it has came into evidence from the m
outh of an independent witness that he was driving the vehicle under the directi
on of the owner. This being the position, the owner of the vehicle, the third re
spondent herein, cannot avoid the responsibility of paying compensation for the
death of its employee under the Motor Vehicles Act or under the Workmen's Compen
sation Act, law is also settled that the claimants may chose the forum for estab
lishing their claim.

11. In view of the above factual and legal position, the amount of compensat
ion awarded by the learned Tribunal is to be paid by the owner of the vehicle, t
he third respondent herein and in no way the liability can be fixed on the insur
er, the appellant herein. But, taking the queue on the decision in United India
Insurance Company Ltd. (supra) that the insurer should pay the amount of compens
ation to the claimants and later realize the same from the owner, this court fin
ds it appropriate to give a direction on the similar line.

7. While refuting the submissions of Mr. Goswami, learned counsel f
or the appellant, Mr. R.P. Sharma, learned senior Counsel appearing for the clai
mant respondent assisted by Mr. S.M.T Chistie, learned counsel submitted that fr
om the evidence, it would transpire that for failure of the brake the accident t
ook place. As such, there had been no negligence on the part of the driver but t
he said accident occurred from use of the motor vehicle as provided in Section 1
65 of the M.V. Act, 1988. Mr. Sharma, learned senior Counsel seriously questione
d, on taking a recourse to the Order XLI Rule 22 of the C.P.C., and submitted th
at the finding of the Tribunal as regards negligence against the injured whom th
e respondent No.1 represent, is absolutely unsustainable in law and as consequen
ce thereof the observation that 'so from his evidence, it is not transpired that
the brake of the Maruti Van failed for which the accident occurred, rather it t
ranspired that the other vehicle bearing registration No.AMD-4481 was stopped ab
ruptly without giving any signal for which the accident occurred, which has also
attributed some negligence on the part of the driver of the offending 407 Bus v
ehicle bearing registration No. AS-7-1847 but the Insurance Company (if any, of
the mini bus) were not impleaded as OPs in the case. For not impleading them, th
e case will fall if it is established otherwise' was made.

8. Mr. R.P. Sharma, learned senior counsel appearing for respondent
referred to the deposition of the PW.1, who was admittedly not the eye witness
of the accident. From her deposition, it appears that while at the direction of
the owner of the vehicle, the offending vehicle was returning from Itanagar, the
said accident had occurred. There has been no elaboration regarding how the acc
ident occurred. However, from the deposition of Basir Riaz @ Riaz Ahmed, the inj
ured (PW-2), it appears that at the direction of the owner of the vehicle the ve
hicle was returning from Itanagar and it fell in the accident. It appears furthe
r that the vehicle was a passenger vehicle carrying passengers. He stated that t
he vehicle (407 mini bus) bearing registration No.AS-01-1848 was in front of him
. When the said bus vehicle abruptly came to halt for alighting the persons trav
elling by it, the PW-2 applied the brakes but could not control the vehicle and
it dashed against the said vehicle. The vehicle was damaged seriously. He also s
tated that he suffered injuries on his leg and other parts including his eyes. I
n the cross-examination he stated that he has become completely blind from the i
njuries, he received on the eyes. The Tribunal has recorded the conduct of the w
itness(injured), who entered into the witness box with the help of his wife as h
e appeared to be totally blind.

Mr. R.P. Sharma, learned senior counsel having regard to that pa
rt submitted that the accident occurred for failure of the brakes despite his se
rious attempts. However, the Tribunal without any reason disbelieved the said pi
ece of evidence. To advance his contention further Mr. R.P. Sharma, learned seni
or counsel referred a decision in National Insurance Company Ltd. v. Prembai Pat
el & Others as reported in (2005) 6 SCC 172 where it has been held that:

6. A person, who has sustained injury or where death has resulted from an a
ccident all or any of the legal representatives of the deceased can claim compen
sation by moving an application under Section 166 of the Act by filing a claim p

etition before the Motor Accidents Claims Tribunal. Section 3 of the Workmen's Compensation Act lays down that if personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter II of the said Act. Section 167 of the Motor Vehicles Act, 1988 lays down that notwithstanding anything contained in the Workmen's Compensation Act, 1923 where the death of, or bodily injury to, any person gives rise to a claim for compensation under the Act and also under the Workmen's Act, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both. The claim petition had been filed by Respondents 3 to 6 claiming compensation for the death of Sunder Singh, who was an employee of Respondent 2, in an accident arising out of and in the course of his employment. Therefore, they could claim compensation under either of the Acts. But they chose the forum provided under the Motor Vehicles Act. In a petition under the Workmen's Act the injured or the legal heirs of the deceased workmen have not to establish negligence as a pre-condition for award of compensation. But the claim petition before the Motor Accidents Claims Tribunal is an action in tort and the injured or the legal representatives of the deceased have to establish by preponderance of evidence that there was no negligence on the part of the injured or deceased and they were not responsible for the accident. The exception to this general rule is given in Section 140 of the Act where the legislature has specifically made provisions for payment of compensation on the principle of no-fault liability.

7. The High Court, after a careful analysis of the evidence on record, has held that the deceased Sunder Singh was not responsible for the accident. The accident occurred on account of breaking of the arm bolt of the truck and the owner of the vehicle had not taken adequate care in maintaining the vehicle and in keeping the same in roadworthy condition. This finding has not been assailed before us, nor is there any reason to take a contrary view.

In Prembai Patel(supra) it has been further held that:

12. The heading of Chapter XI of the Act is Insurance of Motor Vehicles Against Third Party Risks and it contains Sections 145 to 164. Section 146(1) of the Act provides that no person shall use, except as a passenger, or cause or allow any other person to use, a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter XI. Clause (b) of sub-section (1) of Section147 provides that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub-section (2) against any liability which may be incurred by him in respect of death of or bodily injury to any person or passenger or damage to any property of a third party caused by or arising out of the use of the vehicle in public place. Sub-clauses (i) and (ii) of clause (b) are comprehensive in the sense that they cover both any person or passenger . An employee of owner of the vehicle like a driver or a conductor may also come within the purview of the words any person occurring in sub-clause (i). However, the proviso (i) to clause (b) of sub-section (1) of Section 147 says that a policy shall not be required to cover liability in respect of death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of an in the course of his employment other than a liability arising under the Workmen's Act if the employee is such as described in sub-clauses (a) or (b) or (c). The effect of this proviso is that if an insurance policy covers the liability under the Workmen's Act in respect of death of or bodily injury to any such employee as is described in sub-clauses (a) or (b) or (c) of proviso (i) to Section 147(1)(b), it will be a valid policy and would comply with the requirements of Chapter XI of the Act. Section 149 of the Act imposes a duty upon the insurer (insurance company) to satisfy judgments and awards against persons insured in respect of third-party risks. The expression such liability as is requi

red to be covered by a policy under clause (b) of sub-section (1) of Section147 being a liability covered by the terms of the policy - occurring in sub-section (1) of Section 149 is important. It clearly shows that any such liability, which is mandatorily required to be covered by a policy under clause (b) of Section 147(1), has to be satisfied by the insurance company. The effect of this provision is that an insurance policy, which covers only the liability arising under the Workmen's Act in respect of death of or bodily injury to any such employee as described in sub-clauses (a) or (b) or (c) to proviso (i) to Section 147(1)(b) of the Act is perfectly valid and permissible under the Act. Therefore, where any such policy has been taken by the owner of the vehicle, the liability of the insurance company will be confined to that arising under the Workmen's Act.

9. Mr. R.P. Sharma, learned senior counsel submitted that according to the insurance policy, the liability of the workmen is covered by the said insurance policy and he further submitted that the insurance company has never denied the liability to cover the driver of the said Maruti vehicle.

10. On scrutiny of the records as available including the Written Statement and depositions and on appreciation of the rival contentions as advanced by the counsel for the parties, this Court finds that without impleading the owner and the driver of the vehicle (407 mini bus) and without affording any opportunity to them the liability as saddled to pay 25% of the awarded sum is absolutely unsustainable in law, since it defies the basic principle of justice and accordingly the said direction is interfered with and set aside.

It further evinces from the records that the case of the respondent No. 1 who is appearing for the injured who is now completely blind, is that the bus vehicle was in a stationary condition and for failure of brake the Maruti vehicle dashed at the back side of the said vehicle. However, a little bit of improvement has been sought to be made by the injured at the time of giving deposition before the Tribunal stating that the said bus vehicle abruptly came to halt for alighting the persons who boarded the said vehicle. But that part is hardly believable that when signalled, the vehicle came to sudden halt and it had been dashed by the offending vehicle for the reason that the offending vehicle was supposed to maintain a safe distance for averting such casualties. Now pertinent question that has to be attended by this Court is whether the Tribunal was correct in deciding the claim under Section 166 of the Motor Vehicles Act or not. The choice of the proceeding lies with the persons who are entitled to set the proceeding in. If the workman is entitled to realise the compensation under Section 3 of the Workmen's Compensation Act, 1923 for an accident which arose from the road traffic accident from use of the motor vehicle, he may file the claim under Section 166 of the Motor Vehicles Act but in that case he cannot be a tort feasor.

But the apex court in Prembai Patel(supra) held that the claim under Section 3 of the Workmen's Compensation Act does not require to prove the element of negligence and such claim is determined as if it is a claim under 'no fault' liability, but the said claim should be restricted to the extent of the compensation that a victim can claim under Section 3 of the Workmen's Compensation Act, 1923. In this case, it is found that there is no rebuttal evidence regarding the failure of brake. Maintenance of the vehicle in proper condition is the fundamental duty of the owner and as such if the brakes failed to work at a critical moment and the accident occurred or taken place for negligence in maintaining the vehicle properly, the driver of the vehicle cannot be styled as the tort feaser. Rather it is for the negligence of the owner that surfaces unless rebutted by the owner. In the written statement of the owner, the claim of the driver as regards the failure of the brakes has not been rebutted at all.

In view of the above observations, the compensation has to be redrawn to ascertain the liability under Section 3 of the Workmen's Compensation Act, 1923. Prior to that it is also required to appreciate the challenge as projected in the appeal as regards the blindness of the appellant from the motor accident. The finding of the Tribunal is well reasoned and based on the well-laid evidence in as much as the nature of the impact that was created from the said accident, the injured received serious injuries on his eyes and gradually he had become com

pletely blind. Having situated thus, no interference is required.

11. The findings as returned by the Tribunal that the injured was aged about 32 years at the time of accident and he was earning Rs.4,500/- per month is not under dispute from either of the parties. He has been permanently disabled so far his occupation is concerned. The determination of the compensation has to be made under Section 4(1)(b) of the Workmen's Compensation Act. For purpose of computing the compensation, an amount equal to 60% of the monthly wages of the injured workman has to be multiplied by the relevant factor in terms of his age and for purpose of calculating the wage, Explanation-II provides that the monthly wages exceeding Rs.4,000/- be limited to Rs.4,000/-. For purpose of Clause(a) and Clause(b) of Section 4 of the Workmen's Compensation Act, the monthly wage would therefore be deemed Rs.4,000/- only at the maximum. As such the compensation would be (60% of Rs.4,000/- X 203.85) = Rs.4,89,240/-. The said amount shall carry interest @7.5% per annum from the date of filing the claim till 19.04.2008 when the said impugned judgment and award was passed and thereafter the said amount shall carry interest @12% per annum till payment is made.

12. The appellant shall pay the entire awarded sum within a period of 2(two) months from today in the Tribunal after deducting the sum, if any, that has been paid by now.

13. For the reasons as aforesaid, the appeal stands partially allowed to the extent as indicated above.

14. However, there shall be no order as to costs.

15. The statutory deposit as made by the appellant be returned for purpose of making the final payment in the Tribunal.

Send down the LCRs forthwith.