THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 02-08-2013

CORAM

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

MAC App. No.01 of 2013

The Branch Manager,
National Insurance Company Limited,
Opposite Tourism Department,
31-A National Highway,
P.O. & P.S. Gangtok,
East Sikkim.

... **Appellant**

Versus

1. Master Suraj Subba,
S/o Late Birkha Bahadur Subba,
R/o Tambutaar,
Saramsa,
P.O. & P.S. Ranipool,
East Sikkim
Represented by
Shri Suk Dhoj Subba,
S/o Late Izam Subba,
R/o Karthok,
P.O. & P.S. Pakyong,
East Sikkim.

... **Respondent/Claimant**

2. Smt. Suk Rani Subba,
W/o Late Birkha Bahadur Subba,
R/o Tambutaar,
Saramsa,
P.O. & P.S. Ranipool,
East Sikkim
(owner of vehicle SK-02/9434)

... **Respondent/Owner**

For Appellant : Mr. Thupden G. Bhutia, Advocate.

For Respondent No.1 : Mr. N. Rai, Senior Advocate with Mr. K. B. Chettri, Mr. Jeewan Kharka and Mr. Sushant Subba, Advocates.

For Respondents No.2 : Mr. S. P. Bhutia, Advocate.

J U D G M E N T (ORAL)

Wangdi, J.

This Appeal arises out of the impugned judgment of the Learned Member, Motor Accident Claims Tribunal, East and North Sikkim at Gangtok dated 28-09-2012 in M.A.C.T. Case No.21 of 2010, by which in a Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (in short the "Act"), death compensation amounting to Rs.38,44,780/- was awarded in favour of the Respondents with interest calculated @ 10% on the said amount from the date of the filing of the Claim Petition, i.e., 18-08-2010.

2. The brief facts of the case leading to the filing of the Claim is that the father of the Respondent No.1, the Claimant in the original Claim Petition, who was employed as a Range Officer, NTFP/SMPB Division, Forests, Environment and Wildlife Management Department,

Government of Sikkim, died in a motor vehicle accident on 07-07-2010 involving a Maruti Car bearing No.SK-02/9434 owned by the Respondent No.2, the mother of the Claimant-Respondent No.1 and the wife of the deceased.

3. In the original Petition, the Respondent No.2, the mother, was impleaded as Opposite Party No.1 and the Appellant-Insurance Company as Opposite Party No.2. The Claim Petition was resisted by the Appellant primarily on the ground that the deceased being the husband of the Respondent No.2, the owner of the accident vehicle, did not fall within the meaning of "third party" as contemplated under Section 165 of the Act and, therefore, was not covered under the Insurance Policy. Further, the Claimant-Respondent No.1 as the son of the Respondent No.2, the owner of the vehicle, would be a deemed insured and thus a "second party" to the Insurance Policy. As such, the Tribunal lacked the necessary jurisdiction to entertain the Claim made by such a party.

4. The Learned Claims Tribunal upon consideration of the pleadings, the evidence and the records and also the law obtaining in such cases rejected the contentions raised on behalf of the Appellant and passed an award of

Rs.38,44,780.00 in favour of the Claimant-Respondent No.1 by the impugned judgment.

5. In the Appeal, the Appellant-Insurance Company apart from raising the very same objections as grounds of Appeal against the impugned judgment, has taken an additional ground that the Claim having been switched from one under Section 163A to Section 166 of the Act, it was mandatory on the part of the Claimant to have proved negligence that resulted in the accident in which the deceased died.

These facts are sufficient to dispose of the Appeal. It is, however, relevant to note that the present Appeal is the second round of litigation between the parties before this Court involving the very same accident.

6. In the first round, the Appeal filed by the Respondent No.1 against rejection of his Claim Petition by the Learned Claims Tribunal had been disposed of by this Court's Order dated 26-04-2012 by which the case was remanded back with a direction to consider the case *de novo* in view of an application for amendment of the original Claim Petition preferred by the Appellant and also because of this Court having found the report of the Motor

Vehicle Inspector, a vital document that would have a direct bearing on the outcome of the Claim Petition filed with the memo of Appeal, was not before the Learned Claims Tribunal when the impugned judgment was passed. The Learned Claims Tribunal by the impugned judgment, having concluded the proceedings on the Claim Petition *de novo* in compliance to the aforesaid Order of this Court, the present Appeal has now come up for consideration by this Court.

7(i). Mr. Thupden G. Bhutia, Learned Counsel, appearing on behalf of the Appellant, submits that in view of the decision of the Hon'ble Supreme Court in ***New India Assurance Company Limited*** vs. ***Sadanand Mukhi and Others*** : ***(2009) 2 SCC 417*** and ***Ningamma and Another*** vs. ***United India Insurance Company Limited : (2009) 13 SCC 710***, the deceased did not fall within the meaning of third party and, therefore, the finding on this by the Learned Claims Tribunal was grossly erroneous and the compensation awarded in consideration of that was unsustainable. It is stated that the deceased was neither a passenger in the ill-fated vehicle nor was he a pedestrian on the road but was rather driving the vehicle

at the time of the accident. It was then contended that it was impermissible for the Claimant-Respondent No.1 to have switched his Claim from one under Section 163A to Section 166 of the Act. The Claim under Section 163A in any case was not maintainable as the income of the deceased at the time of his death was revealed as being more than Rs.40,000/- annually. That the Learned Claims Tribunal erred in applying Second Schedule to the Act for calculating the death compensation for a Claim switched to Section 166 when the said Schedule applies only to a Claim under Section 163A.

(ii). It was then submitted that the principle adopted in arriving at a "just" compensation by the Learned Claims Tribunal was grossly erroneous and impermissible under the law. As per him the finding was *per incuriam* the ratio laid down in the cases cited by him. It was then submitted that the Claimant-Respondent No.1 being the legal heir of the 'insured', who is the Respondent No.2 in the Appeal, is to be deemed a "second party" to the Insurance Policy and as such, the Learned Claims Tribunal committed a grave error by awarding compensation in his favour.

8(i). Mr. N. Rai, Learned Senior Counsel, appearing on behalf of the Respondents, on the other hand, would submit that the Learned Claims Tribunal had committed no error and that the ground set out for assailing the impugned judgment cannot be sustained in view of the well-settled principles of law and the various decisions on the question of both this Court and the Apex Court.

(ii). On the first contention, it is the submission of Mr. Rai that in ***The Branch Manager, New India Assurance Company Ltd., Gangtok*** vs. ***Smt. Jasu Subba and Others*** : ***AIR 2011 Sikkim 37*** the very question has been considered in depth by this Court and has arrived at a finding that the driver means any person including the 'insured' would be covered in the kind of Insurance Policy as the one in the present case. That the Insurance Policy involved in the case at hand, as per the Learned Counsel, is a 'Package Policy' and not an 'Act Policy'. Reference in this regard was also made to ***Senior Branch Manager, National Insurance Co. Ltd., Gangtok*** vs. ***Smt. Namita Dixit and Others*** : ***AIR 2010 Sikkim 50***. It is then submitted that by virtue of the law laid down in the case of ***Amrit Lal Sood and Another*** vs. ***Kaushalya Devi***

Thapar and Others : ***(1998) 3 SCC 744***, the expression "any person" appearing in the policy would include an occupant of a Car who is gratuitously travelling.

(iii). On the scope of an 'Act Policy', 'Comprehensive Policy' or 'Package Policy', Mr. Rai drew the attention of this Court to ***National Insurance Company Limited*** vs. ***Balakrishnan and Another*** : ***(2013) 1 SCC 731***. He went on to submit that in view of the change in law resulting from the introduction of the new Section 147 in the Act the objection raised on behalf of the Appellant as regards the meaning of "third party" would pale into insignificance.

9. I have considered the rival contentions of the Learned Counsels and upon consideration of the pleadings and the records available, I am inclined to agree with the submissions made by Mr. Rai. The decision in ***Smt. Jasu Subba (supra)*** is comprehensive and has dealt with in great detail the first question raised on behalf of the Appellant. In that judgment rendered by this very Court (Wangdi, J.), upon consideration of the nature of the Insurance Policy which was identical to the one under consideration in the present Appeal, the provisions of India

Motor Tariff and cognate Rules, it was concluded as under:-

> **"9.** On a perusal of the India Motor Tariff (IMT) prescribed by the Tariff Advisory Committee in exercise of its powers u/S. 64UC of the Insurance Act, 1938, it is found that Section 4 thereof provides for regulation for Tariff for Commercial Vehicles. Regulation 12B falling thereunder provides for "Guide to Completion of Policy Schedules and Certificate of Insurance". Under the head "Certificate of Insurance and Policy Schedule Wording Regarding "Limitations As to Use: for Use in Package Policy And Liability Only Policy Forms", we find Clause D inserted provides for "Vehicles for Hire" which contains several paragraphs from amongst which we are concerned only with paragraph (vii) providing for "Certificate of Insurance and Policy Schedule Wording Regarding "Driver" for use in Package Policy and Liability only Policy Forms. "Driver" has been defined in the table provided thereunder which reads as follows :-
>
> "Driver : Persons or classes of persons entitled to drive:
>
> | | |
> |---|---|
> | Stage Carriage/Contract Carriage/Private Service Vehicle | Any person including insured :

(underlining supplied)

Provided that a person driving holds an effective driving license at the time of the accident and is not disqualified from holding or obtaining such a license. Provided also that the person holding an effective Learner's License may also drive the vehicle when not used for the transport of passengers at the time of accident and that such a person satisfies the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989. |
>
> **10.** It becomes quite clear from the above entry that in respect of stage carriage/contract carriage/ private service vehicle, "driver" means any person including "insured" with the only condition being that such person should hold to effective driving license at the time of the accident and is not disqualified from holding or obtaining such a license. This, therefore, is consistent with the case of the respondents/claimants that the driver owner is fully covered. Any other view would be inconsistent with the object of the Motor Vehicles Act, 1988 and, therefore, unacceptable. It is also not the case of the appellant that the insured who was the owner driver, did not hold a valid driving license at the time of the accident. It is well settled that law does not restrict or prohibit the insured and the insurer from entering into a special contract, providing larger coverage of risk on payment of special or higher premium. We may usefully refer to the case of National Insurance Assurance Company Ltd. v. C. M.

> Jaya and others decided by a Constitution Bench of the Apex Court, reported in 2002 (2) SCC 278 (AIR 2002 SC 651) in this regard.**"**

10(i). In the present case, the deceased although was the husband of the insured having a valid driving license and who was not a party to the agreement of Insurance, would undoubtedly fall within the meaning of "third party" as has been held by the Learned Claims Tribunal. We may refer to paragraph 32 of the impugned judgment:-

> **"**32. In this regard one may go through the Provisions of Section 146 of the M.V.Act which speaks of necessity for insurance against third party risk. The object of this provision is to enable a thirty party to claim and recover damages from the Insurance company without recourse to the financial capacity of the driver or owner of the vehicle. The policy of insurance is thus a result of a contract between the insurer and the insured under which the insurer agrees to indemnify the insurer against the liability incurred by him. Hence other then the contracting party to the Insurance policy the expression " the third party" should include everyone else. It may be worthwhile to refer to the following decision with regard to the said issue.**"**

(ii). Apart from the above, we may also consider this in the light of the statutory provisions contained in Section 147 of the Act. For better appreciation, relevant Clause of Sub-Section (1) of Section 147 is reproduced as under:-

> **"147. Requirements of policies and limits of liability.**—(1) ……..
>
> (a) ……
>
> (b) ……

> (i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, including owner of the goods or his authorised representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
>
> ……."
>
> **[underlining mine]**

(iii) The portion under Sub-Clause (i) of Clause (b) of Sub-Section (1) of Section 147 reproduced above commencing with the words "injury to any person" ending with the words "carried in the vehicle", was introduced by Act 54 of 1994 with effect from 14-11-1994 signifying the intention of the Legislature to add substance to Chapter XI of the Act as a piece of benevolent legislation. The term "injury to any person" is wide enough to bring within its ambit the deceased who was not a party to the Insurance Policy and, therefore, not the 'insured'. This aspect of the matter has been analysed in detail by this Court in ***Smt. Namita Dixit (supra)*** relying upon a catena of decisions rendered by the Apex Court. In ***New India Assurance Co. Ltd. vs. C. M. Jaya and Others : (2002) 2 SCC 278***, a Constitution Bench of the Hon'ble Supreme Court, in a reference made to it for settling an apparent conflict in two-Judge Bench decisions in ***Amrit Lal Sood (supra)*** and

New India Assurance Co. Ltd. vs. ***Shanti Bai (Smt.) and Others*** : ***(1995) 2 SCC 539*** respectively, was pleased to hold as under:-

> **"10.** On a careful reading and analysis of the decision in *Amrit Lal Sood* [(1998) 3 SCC 744] it is clear that the view taken by the Court is no different. In this decision also, the case of Jugal Kishore [(1998) 1 SCC 626] is referred to. It is held:
>
> (*i*) that the liability of the insurer depends on the terms of the contract between the insured and the insurer contained in the policy;
>
> (*ii*) there is no prohibition for an insured from entering into a contract of insurance covering a risk wider than the minimum requirement of the statute whereby risk to the gratuitous passenger could also be covered; and
>
> (*iii*) in such cases where the policy is not merely statutory policy, the terms of the policy have to be considered to determine the liability of the insurer.
>
> Hence, the Court after noticing the relevant clauses in the policy, on facts found that under Section II(1)(*a*) of the policy, the insurer has agreed to indemnify the insured against all sums which the insured shall become legally liable to pay in respect of death of or bodily injury to "any person". The expression "any person" would undoubtedly include an occupant of the car who is gratuitously traveling in it. ……..**"**

(iv) The Insurance Policy in question in the case before us is a 'Package Policy' and not an 'Act Policy' in which the 'insured' is, Suk Rani Subba, Limboo, the Respondent No.2, the wife of the deceased. The clauses in the Policy relevant for determination of the matter in *lis* read as follows:-

> **"**Driver's Clause:Any person including the Insured: Provided that a person driving holds an effective driving license at the time of the accident and is not disqualified from holding or obtaining such a license. Provided also that the person holding an effective learner's license may also drive the vehicle & that such a person satisfies the requirements of Rule 3 of the Central Motor Vehicles Rules, 1989.
>
> Limits of Liability Clause : Under section II-1 (I) of the policy-Death of or bodily injury. Such amount as is necessary to meet there requirements of the motor vehicle act 1988. ……."
>
> **[underlining mine]**

(v) It is quite apparent from a bare reading of the "Driver's Clause" that a driver of a insured vehicle would include any person including the insured, the only condition being that such person should hold an effective driving license at the time of the accident; that he is not disqualified from holding or obtaining such license; etc.

(vi) From an analysis of Section 147(1)(b)(ii) of the Act, the decision in ***C. M. Jaya (supra)*** and the Insurance Policy, the irresistible conclusion that one arrives at is that the term "any person" will bring within its sweep the deceased who was driving the accident vehicle under a valid license to drive, free of the disabilities set out in the Insurance Policy reproduced above.

11(i). The decisions cited by Mr. Thupden G. Bhutia, Learned Counsel for the Appellant, are clearly

distinguishable from the facts and circumstances of the present case in as much as those were rendered on cases involving 'Act Policy' whereas the one before us is one pertaining to a 'Package Policy' or a 'Comprehensive Policy' that call for different considerations altogether. For the reasons stated, the first contention raised on behalf of the Appellant stands rejected.

(ii). As regards the impermissibility of switching Claims under Section 163A to Section 166 of the Act urged by Mr. Thupden G. Bhutia, Learned Counsel for the Appellant, the contention on the face of it does appears to bear some substance. But on a deeper consideration in the light of the object of the Act and various decisions, more particularly, ***Guruanna Vadi and Another*** vs. ***The General Manager, Karnataka State Road Transport Corporation and Another*** : ***AIR 2001 Karnataka 275***, a Full Bench decision of the Karnataka High Court, I am persuaded to hold otherwise.

(iii) Undeniably the Act, in particular Chapter XI thereof was introduced as a benevolent piece of legislation for amelioration of the helpless conditions faced by the victims of motor vehicle accidents. While granting reliefs

under the Act, Courts are not to be bound by mere technicalities but would adopt a liberal approach by giving the law a wider construction and meaning that would favour the victims. The decision in ***Guruanna Vadi (supra)*** was rendered in a case where an application under Section 166 was switched to Section 163A making it permissible to notionally scale down the income to Rs.40,000/- to bring the Claim under Section 163A. While dealing with this aspect a Full Bench of the Karnataka High Court in a reference held as under:-

> **"33.** Question No. 4 : The Legislature intended to extend the benefit of this provision to a chosen class of persons. The intention to limit it to a certain class is exemplified in the schedule appended to the statute. The schedule forms part of the statute and it often gives the details and forms for working out the policy underlying the statute. The division of a statute into section and Schedules is a mere matter of convenience and the Schedule, therefore, has to be treated as a substantive enactment which, sometimes, may even go beyond the scope of a section to which the schedule is appended. The Second Schedule limits the operation of the section to a limited class of persons whose income is Rs. 40,000/- or less per annum. The prescription of the outer limit of Rs. 40,000/- under the Schedule does not take away the right of the person to claim compensation under any other provision of the Act. The Legislature in its wisdom has thought it fit to provide the luxury of choice to persons whose income does not exceed Rs. 40,000/- in order to obviate the need for such persons to involve themselves in a long drawn litigation, the cost and consequences of which may work to their disadvantage and ultimate failure of justice. Such a beneficial provision which is more in the nature of advancement of social justice, keeping in view a select class of citizens, cannot be construed by

> Courts as applicable to all class of citizens. But, in case the person with the higher income nationally brings down his income to Rs. 40,000/- in order to present his claim under Sec. 163-A the same can be permitted.**"**

(iv) I am of the considered view that there can be no reason as to why the very same principle enunciated above cannot be applied also in a case where an application under Section 163A is switched to one under Section 166 as in the present case. The contention placed on behalf of the Appellant on this, therefore, holds no water and stands accordingly rejected.

(v). The next contention as regards the Respondent No.1 not having discharged the onus of proving negligence, an aspect which, as per Mr. Bhutia, the Learned Claims Tribunal had failed to consider, does not appear to be sound as we find that the Learned Claims Tribunal has given specific findings on this question in paragraphs 39, 40 and 41 of the impugned judgment which we may reproduce below:-

> **"**39. The question of rashness and negligence is a matter to be drawn from the circumstances leading to the accident, the manner in which the accident occurred and other relevant facts. Recourse can also be taken to the principle of *res ipsa loquitor* as in the present case.

40. What constitutes negligence has also been analysed in Halsbury's Law of England as follows:

> *"Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all. Where there is no duty to exercise care , negligence in the popular sense has no legal consequence; where there is a duty to exercise care, reasonable care must be taken to avoid acts or omissions which can be reasonable foreseen to be likely to cause physical injury to persons or property. The degree of care required in the particular case depends on the surrounding circumstances, and may vary according to the amount of the risk to be encountered and to the magnitude of the prospective injury. The duty of care is owned only to those persons who are in the area of foreseeable danger; the fact that the act of the defendant violated his duty of care to a third party does not enable the plaintiff who is also injured by the same act to claim unless he is also within the area of foreseeable danger."*

(See An Exhaustive Commentary on Motor Vehicles Act, 1988 by Justice Rajesh Tandon, New Edition reprint 2012 page 1.646.)

The counsel for O.P.No.2 in his averment has admitted that the accident took place due to the negligence .

Thus from the evidence on record in the instant case and in view of the principles laid down in the rulings above it is clear that the victim had acted negligently inasmuch as he had failed to check the brakes of the vehicle before taking it out and proceeding to travel in it.

41. In addition the cross-examination of the attorney of claimant by the O.P.no.2 may also be taken into consideration. While being cross-examined by ld. counsel for the O.P.no.2 the attorney for the claimant has stated; " *It is true that in Para 9 of my evidence on affidavit it is clearly mentioned that he said accident occurred due to the failure in the brake system as*

> *reported in the inspection report of the Motor Vehicle in reference to vehicle in accident bearing No.SK-02/9434."* The O.P.no.1 under cross-examination by the O.P.no.2 has stated *" It is true that the report of the Inspection of the Motor Vehicle clearly states that the accident occurred due to brake failure."* The evidence establishes that the accident occurred due to the negligence.**"**

I find no reason to differ with the above views and accordingly uphold the same as valid.

(vi) However, while holding so, the impact that would have on the compensation to be awarded owing to the established contributory negligence on the part of the deceased by application of the principle of *res ipsa loquitur* requires consideration. The Learned Claims Tribunal appears to have overlooked the decision of ***Raj Rani and Others*** vs. ***Oriental Insurance Company Limited and Another*** : ***(2009) 13 SCC 654*** which as dealt with the very situation faced by us as would be apparent from the following:-

> **"17.** So for as the issue of "contributory negligence" is concerned, we may notice that the Tribunal has deducted 1/3rd from the total compensation on the ground that deceased had contributed to the accident. The same, we find, has been upheld by the High Court. This Court in *Usha Rajkhowa* v. *Paramount Industries* [(2009) 14 SCC 71] discussed the issue of contributory negligence noticing, inter alia, earlier decisions on the same topic. It was held that (SCC p.75, para 20):

> "*20.* The question of contributory negligence on the part of the driver in case of collision was considered by this Court in *Pramodkumar Rasikbhai Jhaveri* v. *Karmasey Kunvargi Tak* [(2002) 6 SCC 455]. That was also a case of collision between a car and a truck. It was observed in SCC p.458, para 8:
>
> > '8. … 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".'
>
> **18.** The principle of 50:50 in cases of contributory negligence has been discussed and applied in many cases before this Court. In *Krishna Vishweshwar Hede* v. *Karnataka SRTC* [(2008) 15 SCC 771], this Court upheld the judgment of the Tribunal assessing the ratio of liability at 50:50 in view of the fact that there was contributory negligence on the part of the appellant and fixed the responsibility for the accident in the ratio of 50:50 on the driver of the bus and the appellant.**"**

(vii) In the present case, contributory negligence on the part of the deceased husband of the Respondent No.2 is quite apparent considering the report of the Motor Vehicle Inspector which mentions that "leakage of brake fluid was observed at the spot due to which the ill-fated car loss (sic) its braking efficiency, and Veer (sic) off NH-31A at Namli Bhir, and fell

about 300 ft (approx.) down the road into the Khola below". It is an accepted practice in the normal course of human conduct that a driver of a vehicle would subject it to a proper inspection every morning, particularly before embarking upon a long journey which the deceased apparently had failed to do. Had he done so, leakage of the brake fluid would have been detected. Apart from this aspect, application of the principle of *res ipsa loquitur* ought to have led the Learned Claims Tribunal to apply the principle laid down in ***Raj Rani (supra)*** in reducing the quantum of compensation. In these circumstances, it is left for this Court to do so. Thus applying the principle contained in paragraph 18 above, the extent of contributory negligence is fixed at the ratio of 50:50 against the deceased who was himself the driver of the ill-fated vehicle.

(viii) A Tribunal while awarding compensation is guided by the provisions of Section 168 of the Act which stipulates that the compensation to be determined should be such as would be "just and reasonable". However, in ***State of Haryana and Another vs. Jasbir Kaur and Others : (2003) 7 SCC 484*** a word of caution has been sounded in

observing that "but at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit; but the same should not be a pittance." It has been further held that –

> **"7.** ……. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just" a wide discretion is vested on the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression "just" denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so it cannot be just. (See *Helen C. Rebello* v. *Maharashtra SRTC*) [(1999) 1 SCC 90]."

(ix) As held in paragraph 31 of ***Reshma Kumari and Others*** vs. ***Madan Mohan and Another*** : ***(2009) 13 SCC 422*** multiplier specified in the Second Schedule to the Act has to be taken as a guiding factor for calculation of the amount of compensation even in a case under Section 166 of the Act. We may also refer to ***New India Assurance***

Co. Ltd., Kolkata vs. ***Nakul Gurung & Others*** : ***AIR 2010 Sikkim 13*** rendered by this Court. Under such circumstances, I find no infirmity in the Tribunal applying that Schedule in calculating the compensation arrived at by it. This is, of course, subject to the consequence on finding of contributory negligence on the part of the deceased in causing the accident on the anvil of the principle adopted in ***Raj Rani (supra)*** alluded to earlier.

12. For the reasons stated above, the compensation on the loss of earning calculated at Rs.37,70,280/- (Rupees thirty seven lakhs seventy thousand two hundred and eighty) by the Learned Claims Tribunal is modified at Rs.18,85,140/- (Rupees eighteen lakhs eighty five thousand one hundred and forty) adding thereto the general damages against funeral expenses, loss of estate, loss of love and affection, future prospects and pain and suffering calculated at Rs.74,500/- (Rupees seventy four thousand and five hundred) by the Learned Claims Tribunal thereby making Rs.19,59,640/- (Rupees nineteen lakhs fifty nine thousand six hundred and forty) as the total amount of compensation payable to the Claimant-Respondent No.1.

13. So far as the component of interest is concerned it shall remain as directed by the Learned Claims Tribunal, i.e., 10% per annum on the awarded amount from the date of filing of the Claims Petition, i.e., 18-08-2010 until the date of its final payment.

14. There is an aspect of the matter that calls for rectification. By Order dated 27-06-2013 this Court had directed as follows:-

> "……..
>
> Having regard to the fact that the accident dates back to 07.07.2010 and that the impugned judgment was passed on 28.09.2012 and also considering the grounds raised in the Appeal, it would be in fairness and also in the interest of justice if an order for making interim payment to the minor claimant is passed. The Appellant Insurance Company is, therefore, directed to pay a sum of Rs.5,00,000.00 (Rupees five lakhs) as interim payment out of which Rs.3,00,000.00 (Rupees three lakhs) shall be deposited in a Nationalised Bank in the name of the minor claimant, leaving Rs.2,00,000.00 (Rupees two lakhs) in the hands of the guardian to meet the requirements of the minor's family. This direction shall be complied within a period of two weeks from hence and not later than that.
>
> A report shall be filed by the Appellant Insurance Company as soon as the aforesaid direction is complied with.
>
> List on 02.08.2013."

This Order was passed under an erroneous assumption that the Respondent No.2, the mother, was

also one of the Claimants when it was only the minor son who had preferred the Claim.

15. In view of this, since the Claimant-Respondent No.1 is a minor, it will be in the interest of justice to direct that out of the modified amount of compensation of Rs.19,59,640/- (Rupees nineteen lakhs fifty nine thousand six hundred and forty), 60%, i.e., Rs.11,75,784/- (Rupees eleven lakhs seventy five thousand seven hundred and eighty four), rounded off as Rs.12,00,000/- (Rupees twelve lakhs) only, which shall be inclusive of Rs.3,00,000/- (Rupees three lakhs) released vide Order dated 27-06-2013, shall be kept in a Fixed Deposit in a Nationalised Bank in the name of the Claimant-Respondent No.1, the minor son, for a period not less than three years leaving the balance amount of Rs.7,59,640/- (Rupees seven lakhs fifty nine thousand six hundred and forty) inclusive of Rs.2,00,000/- (Rupees two lakhs) released vide Order dated 27-06-2013, to be operated in a Savings Bank Account in a Nationalised Bank by the guardian/representative of the Claimant-Respondent No.1, Shri Suk Dhoj Subba, until the Claimant-Respondent No.1 attains the age of majority, in meeting the minor's

expenditure towards his livelihood and education. The aforesaid amount shall be in addition to the simple interest @ 10% calculated thereon as directed earlier. For the sake of clarity, the mode of deposits and payment is set out below:-

Sl. No.	**Total amount of Compensation**	**Amount to be deposited in Fixed Deposit A/c**	**Amount to be deposited in Savings Bank A/c**
1.	Rs.19,59,640.00	Rs.12,00,000.00 (inclusive of Rs.3,00,000/- released vide Order dated 27-06-2013) + 10% interest per paragraph 13.	Rs.7,59,640.00 (inclusive of Rs.2,00,000/- released vide Order dated 27-06-2013) + 10% interest per paragraph 13.

16. In the result, the MAC App. is allowed in part.

17. No order as to costs.

18. The Appellant-Company is directed to satisfy the award as modified within a period of six weeks from hence. While making such payment, the amount disbursed thus far shall naturally be deducted.

19. A compliance report to this effect shall be filed by the Appellant-Company on the expiration of six weeks as stipulated by this Court.

20. Let a copy of this judgment and the Original records be transmitted to the Learned Claims Tribunal forthwith for compliance.

(S. P. Wangdi)
Judge
02-08-2013

Approved for reporting : Yes/~~No~~
Internet : Yes/~~No~~

at/ds