



Dil Kumari Subba and Others vs. The Branch Manager, National Insurance Co. Ltd.

## THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

Dated : 13.08.2015

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**S.B. : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE**  
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### MAC App No.10 of 2015

- Appellants** : 1. Smt. Dil Kumari Subba,  
W/o Late. Tarang Subba @ Tara  
Hang Subba,  
Aged about: 39 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.
2. Ms. Sun Maya Subba,  
D/o Late. Tarang Subba @ Tara  
Hang Subba,  
Aged about: 23 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.
3. Ms. Budha Rani Subba,  
D/o Late. Tarang Subba @ Tara  
Hang Subba,  
Aged about: 17 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.
4. Ms. Gita Subba,  
D/o Late. Tarang Subba @ Tara  
Hang Subba,  
Aged about: 15 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.



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5. Ms. Bishnu Maya Subba,  
D/o Late. Tarang Subba @ Tara  
Hang Subba,  
Aged about: 14 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.
6. Master Anil Subba,  
S/o Late. Tarang Subba @ Tara Hang  
Subba,  
Aged about: 11 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.
7. Master Damber Bahadur Subba,  
S/o Late. Tarang Subba @ Tara Hang  
Subba,  
Aged about: 10 years,  
R/o Ralap P.W. Singbel G.P.U.,  
Dungdung, Khamdong,  
P.O & P.S. Singtam,  
East Sikkim.

**versus**

**Respondent** : The Branch Manager,  
National Insurance Company Ltd.,  
Having its Office at: -  
31-A, National Highway, Opposite  
Tourism Department, Government  
of Sikkim,  
P.O. & P.S. Gangtok,  
East Sikkim.

**Appeal under Section 173 of the Motor  
Vehicles Act, 1988**

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### **Appearance**

Mr. Ajay Rathi, Advocate with Ms. Pema Wangmu Bhutia, Advocate for the Appellants.

Mr. Thupden G. Bhutia, Advocate for the Respondent-Insurance Company.

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## **J U D G M E N T (ORAL)**

(13<sup>th</sup> August, 2015)

### **Wangdi, J.**

1. This Appeal is directed against the impugned judgment of the Motor Accident Claims Tribunal, East Sikkim at Gangtok (for short the "Claims Tribunal"), dated 26.03.2015 in MACT Case No.18 of 2014. The Appellants who are the Claimants before the Claims Tribunal are aggrieved by the principles adopted by the Claims Tribunal in arriving at the quantum of compensation awarded to them in the impugned judgment.

2. The principal grounds questioning the soundness of the impugned judgment are that - (i) the Claims Tribunal erred in converting the claim under Section 166 of the Motor Vehicles Act, 1988 (for short the "Act"), to one under Section 163A of the Act arbitrarily and, (ii) fixing the monthly income of the deceased @



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Rs.3000/- was on an erroneous application of the principle laid down in *State of Haryana and Others vs. Jasbir Kaur and others: (2003) 7 SCC 484*.

3. At the time of hearing Mr. Thupden G. Bhutia, Learned Counsel for the Respondent-Insurance Company, in his usual fairness, conceded to the first contention that the conversion of the claim under Section 166 of the Act to one under Section 163A of the Act was erroneous being unwarranted in the facts and circumstances of the case. We may, therefore, not delay ourselves on this and proceed to consider the next contention.

4. Mr. Ajay Rathi, Learned Counsel for the Appellant, contended that reduction of the income of the deceased from Rs.6,000/- as reasonably claimed by the Appellants, to Rs.3,000/- per month was based on a principle which was inapplicable in the facts and circumstances of this case and in total disregard to the criteria adopted in earlier decisions of this Court on similar facts. It was urged that reliance placed by the Claims Tribunal upon *Jasbir Kaur (supra)* was misplaced *inasmuch* as in that case the deceased was a farmer whose income was not unascertainable as would appear from paragraph 8 of the judgment. This, as per him, is



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quite distinct from the facts of the present case where the deceased was a labourer, a fact which could not be displaced during the Trial. The evidence of P.W.1 who is the Claimant No.2 in the Claim Petition and the Appellant No.2 in the present Appeal, clearly reveals that her deceased father was a casual labour by profession earning monthly income of not less than Rs.6,000/- per month. This witness is found to have remained firm on this and could neither be contradicted nor demolished in her cross-examination. The Learned Counsel would refer to a decision of this Court in ***Smt Urbashi Rai and Others Vs. Branch Manager, National Insurance Company: 2014 (1) T.A.C. 114 (Sikkim)*** where in the facts and circumstances that are *pari materia*, the Court accepted the contention of the Claimant that the rates prescribed by the State Government under the Minimum Wages Act vide Notification No.16/DL dated 06-04-2013 published in the Gazette Notification dated 15-04-2013 should be taken as a guiding principle for fixing monthly income of the deceased.

5. Mr. Thupden G. Bhutia, Learned Advocate, appearing on behalf of the Respondent-Insurance Company, on the other hand, submitted that there was



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no error in the finding of the Claims Tribunal as the Claimants failed to establish their claim that the monthly income of the deceased was Rs.6,000/- per month having failed to produce any evidence in support thereof leaving the Claims Tribunal to search for a guiding principle as a reasonable criteria to work out the monthly income of the deceased. Thus, the principle laid down in *Jasbir Kaur (supra)* was adopted which, as per the Counsel was justified and unassailable.

6. Upon hearing the Learned Counsel for the parties and on perusal of the records and pleadings, I am of the view that the Appeal ought to be allowed for the reasons that shall follow hereafter.

7. The first contention having been conceded fairly, no further discussion is felt necessary except to observe that it is impermissible for a claim under Section 166 of the Act to be converted to one under Section 163A of the Act when it is a settled position of law that it is left to the choice of the Claimant to prefer a claim either under Section 166 of the Act or under 163A of the Act, the only difference being that in a claim under Section 163A there is no onus on the claimant to establish rash and negligence on the part of the driver of the accident



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vehicle but, in a claim under Section 166 of the Act it is mandatory upon them to do so. While award of compensation in a claim under Section 163A is generally circumscribed by the limits prescribed in the Second Schedule to the Motor Vehicles Act, 1988, it is not so in the case of those made under Section 166.

**8.** On this, we may usefully refer to paragraph 13 and sub-paragraphs thereunder in *Reshma Kumari and Others Vs. Madan Mohan and Another: (2013) 9 SCC 65*.

**“13.** The 1988 Act gives a choice to the claimants to seek compensation on structured formula basis as provided in Section 163-A or make an application for compensation arising out of an accident of the nature specified in sub-section (1) of Section 165 under Section 166:

**13.1.** The claimants have to elect one of the two remedies provided in Section 163-A and Section 166. The remedy provided in Section 163-A is not a remedy in addition to the remedy provided in Section 166 but it provides for an alternative course to Section 166.

**13.2.** By incorporating Section 163-A in the 1988 Act, Parliament has provided the remedy for payment of compensation notwithstanding anything contained in the 1988 Act or in any other law for the time being in force or instrument having the force of law, that the owner of a motor vehicle or authorised insurer shall be liable to pay compensation on structured formula basis as indicated in the Second Schedule in the case of death or permanent disablement due to accident arising out of the use of motor vehicle.

**13.3.** The peculiar feature of Section 163-A is that for a claim made thereunder, the claimants are not required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner or owners of the vehicle concerned.



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The scheme of Section 163-A is a departure from the general principle of law of tort that the liability of the owner of the vehicle to compensate the victim or his heirs in a motor accident arises only on the proof of negligence on the part of the driver. Section 163-A has done away with the requirement of the proof of negligence on the part of the driver of the vehicle where the victim of an accident or his dependants elect to apply for compensation under Section 163-A. When an application for compensation is made under Section 163-A the compensation is paid as indicated in the Second Schedule. The Table in the Second Schedule has been found by this Court to be defective to which we shall refer at a little later stage.

**13.4.** On the other hand, by making an application for compensation arising out of an accident under Section 166 it is necessary for a claimant to prove negligence on the part of the driver or owner of the vehicle. The burden is on the claimant to establish the negligence on the part of the driver or owner of the vehicle and on proof thereof, the claimant is entitled to compensation."

**9.** The concession made by the Learned Counsel, therefore, appears to be in consonance with this law and his fairness is well-appreciated.

**10.** On the next contention, however, the objection raised on behalf of the Respondent-Insurance Company does not appear to be convincing. The view of the Claims Tribunal in the impugned judgment, is that the Claimants were unable to establish that the monthly income of the deceased was Rs.6,000/- and, therefore, fixed it Rs.3000/- per month relying upon the principle adopted in *Jasbir Kaur (supra)*.





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**11.** In doing so, the Claims Tribunal appears to have clearly misdirected itself. In the evidence of P.W.1, Ms. Sun Maya Subba, Respondent No. 2, daughter of the deceased, the sole witness on behalf of the Claimants, she has categorically stated that the deceased was a labourer earning monthly income of not less than Rs.6,000/-. This fact could not be successfully contradicted or demolished in her cross-examination except making suggestions to the contrary. Even if the submission of the Learned Counsel is accepted, the Tribunal was not bereft of a guiding principle. When it has been accepted that the deceased was a labourer but, whose income was unascertainable, it was appropriate for the Tribunal to have sought for the rates of daily wages prescribed by the State Labour Department, under the Minimum Wages Act. This was precisely what was done in the case of ***Urbashi Rai (supra)*** and had accordingly granted the then prevailing rate of wage prescribed for unskilled labourers.

**12.** The Claimants have made a Claim of Rs.200/- per day which is less than the daily wage prescribed for unskilled labourer as per the last Notification issued for the purpose by the State Government. This is not



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disputed. Placing reliance upon *Jasbir Kaur (supra)* on this was clearly fallacious as it was a case of a deceased farmer whose income was firstly, unascertainable and secondly, no prescribed rates existed for farmers under any Government Notification.

**13.** In my view, it will be fair and reasonable if the Notification of the State Government prescribing the minimum wages is adopted as a reasonable criteria for arriving at the monthly income of the deceased. Since the claim made by the Claimant was Rs.200/- per day as the income of the deceased which is less than Rs.220/- prescribed for unskilled labour, there should be no difficulty in accepting this as a fair claim. Consequently, the monthly income of the deceased is calculated and fixed at Rs.6,000/- .

**14.** There is another aspect pressed on behalf of the Appellants and, that is on the deduction of income towards personal expenses of the deceased to work out the multiplicand. It is urged on behalf of the Appellants that deduction of the one-third of his income by the Claims Tribunal on his personal expenses was in conflict with the formula prescribed in *Sarla Verma (Smt) and Others Vs. Delhi Transport Corporation and Another (2009)*



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**6 SCC 121** as per which the deduction was one-fourth of the income having regard to the number of dependents.

**15.** The Learned Counsel for the Respondent-Insurance Company, preferred not to contest this contention in view of it being a settled principle.

**16.** In *Sarla Verma (supra)*, it has been, *inter alia*, as laid down as follows: -

“30. Though in some cases the deduction to be made towards personal and living expenses is calculated on the basis of units indicated in *Trilok Chandra*, the general practice is to apply standardized deductions. Having considered several subsequent decisions of this Court, we are of the view that where the deceased was married, the deduction towards personal and living expenses of the deceased, should be one-third ( $1/3^{\text{rd}}$ ) where the number of dependent family members is 2 to 3, one-fourth ( $1/4^{\text{th}}$ ) where the number of dependent family members is 4 to 6, and one-fifth ( $1/5^{\text{th}}$ ) where the number of dependent family members exceeds six”.

**17.** As would appear from the above where the number of dependent family members is 4 to 6 (six), the deduction against the personal expenses of the deceased ought to be one-fourth. However, in the present case, the Dependents are as many as 7 (seven) in which case, as per the formula reproduced above, the deduction ought to have been one-fifth the income. The error in making the claim obviously appears to be as a result of an oversight by the Learned Counsel who drafted the



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Claim Petition. In my view, it would be unjust to deprive the Claimants of the benefit for no fault of theirs. Therefore, in the interest of justice the deduction is fixed at one-fifth of the income.

**18.** For the aforesaid reasons, the award stands modified as under: -

<b>A.</b>	Income per month (Rs. 200 x 30 days)	=	Rs. 6,000.00
	Future prospects [30% of Rs.6,000/- i.e., Rs. 1,800/- {Rs.6,000/- (+) 1,800/-}]	=	Rs. 7,800.00
	Personal expenses ( <sup>1</sup> / <sub>5</sub> of Rs.7,800/- deducted as personal expenses, i.e., Rs.7,800.00 (-) Rs. 1560.00	=	Rs. 6,240.00
<b>B.</b>	<b><u>Computation</u></b> after application of multiplier 14 [Rs.6,240 x 14 x 12 months]	=	Rs.10,48,320.00
	Funeral expenses	=	Rs. 25,000.00
	Loss of estate	=	Rs. 2,500.00
	Loss of consortium	=	Rs. 1,00,000.00
	Non-pecuniary damages (as claimed and allowed by the Claims Tribunal)	=	<u>Rs. 50,000.00</u>
	Total	=	Rs.12,25,820.00
	Less : Award paid under Section 140 of Motor Vehicles Act	=	<u>Rs. 50,000.00</u>
	Grand Total	=	<b><u>Rs. 11,75,820.00</u></b>

**19.** The rest of the directions as regards the mode of disbursal of compensation and payment of interest



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stipulated in the impugned judgment shall remain unaltered.

**20.** It would only be fair to direct that the payment shall be made within a period of 6 (six) weeks' and not later than that.

**21.** In the result, the Appeal is allowed.

**22.** No order as to costs.

**23.** Let a copy of this judgment along with the original records of the case be transmitted to the Motor Accident Claims Tribunal, East Sikkim at Gangtok, for information and compliance.

**( S. P. Wangdi )**  
**Judge**  
13-08-2015

Approved for reporting : **Yes**

Internet : **Yes**