

**(2012) 05 CAL CK 0063****Calcutta High Court****Case No:** P.M.A. No. 411 of 2005

Smt. Aloka Mondal and Others

APPELLANT

Vs

The United India Insurance  
Company Ltd. and Another

RESPONDENT

**Date of Decision:** May 2, 2012**Acts Referred:**

- Motor Vehicles Act, 1988 - Section 163A, 166, 171

**Citation:** (2013) 1 ACC 466 : (2013) ACJ 551 : (2012) 3 CALLT 736**Hon'ble Judges:** Shukla Kabir (Sinha), J; Ashim Kumar Banerjee, J**Bench:** Division Bench**Advocate:** Krishanu Banik, for the Appellant; Rajesh Singh for the Insurance Company, for the Respondent

### **Judgement**

Ashim Kumar Banerjee, J.

The victim Rabindra Nath Mondal was forty years old. He was working in the office of the Superintendent, Government Railway Police earning Rs. 7720/- per month. He met with an accident on November 5, 2002 when he received multiple injuries and succumbed to death on the spot. As per the complaint motor vehicle WP-03-7740 caused the accident. The vehicle was insured with the United India Insurance Company Limited. The policy was valid at the time of accident. The widow, two sons and the aged mother applied for compensation for rupees ten lacs along with interest in terms of section 171 of the Motor Vehicles Act. 1988. It was contended that the subject motor vehicle had been proceeding from Baruipur towards Sonarpur in a rash and negligent manner. The vehicle hit a motor cycle being driven by the deceased. Victim sustained multiple injuries and succumbed to the injury on the spot. The widow deposed as P.W.1. Her evidence was corroborated by P.W. 2 who proved the income of the deceased. According to P.W.3, an ocular witness, he was going to her sister's place when he saw the vehicle hitting the motorbike causing death to the victim. On the strength of the above evidence the learned

Tribunal considered the issue and allowed the claim application. The learned Judge awarded Rs. 3,77,450/- in addition to interim compensation of Rs. 50,000/- that the claimants had received. The learned Judge however observed that the Insurance Company would be obliged to pay compensation at the rate of fifty per cent. The learned Judge relied on a judgment of our Court in the case of Smt. Mita Gupta & Ors. v. Oriental Insurance Company Ltd. & Ors. reported in (2001) 1 CLJ 123. According to the learned Judge, since there was some manner of doubt as to how the accident had occurred the Insurance Company should not be foisted with liability beyond fifty per cent. Mr. Krishanu Banik, learned counsel appearing for the appellant contended that in an accident occurred on the main thorough fare it would be too difficult for the claimants particularly in death case to prove the rash and negligent driving of the vehicle responsible for the same. In this regard he relied on the Apex Court decision in the case of Usha Rajkhowar & Ors. v. Paramount Industries & Ors. reported in (2002) 2 SCC 9 T&A

2. Mr. Banik also relied upon the following decisions :-

- (i) Hasan Murtza Vs. State of Haryana,
- (ii) (2002) 2 (Raj.) 239 T&A (U.I. Comp. Ltd. v. Babul Saini & Anr.)
- (iii) (2004) 3 A&C 273 (M.N. Rajan & Ors. v. Konali Khalid Haji & Anr.)
- (iv) (2005) 3 A&C 483 (Bombay High Court) (N.I. Assu. Comp. Ltd. v. D.G. Y & Ors.)
- (v) Sudhir Kumar Rana Vs. Surinder Singh and Others,

3. Opposing the appeal Mr. Rajesh Singh learned counsel appearing for the Insurance Company submitted that the P.W.3 the so-called ocular witness was not reliable. He referred to his deposition where the witness could not specify the house number of his sister which he had been visiting. He prayed for dismissal of the appeal.

4. We have perused the judgment and order of the Tribunal. The Tribunal considered the last pay drawn at Rs. 7720/-, however at the time of calculation the Tribunal considered the income at Rs. 7045/- and after deduction of 1/3rd and applying multiplier of fifteen, ultimately came to conclusion that the compensation would be Rs. 8,45,400/- in addition to Rs. 9500 as statutory payment u/s 163A aggregating to Rs. 8,54,900/- and then asked the Insurance Company to pay fifty per cent of the same deducting Rs. 50000/- already paid on account of "no fault liability". The Tribunal however overlooked the aspect of future prospect. Significant to note, the victim died at the age of forty years. Hence, the bereaved family was entitled to additional thirty per cent in view of the decision in the case of Smt. Sarala Verma & Ors. v. Delhi Transport Corporation & Anr., reported in (2009) 2 T.A.C. 677 (SC). Even if we discard Mr. Banik's contention on the issue of limiting of liability of the Insurance Company to the extent of fifty per cent the award should be modified by enhancing the amount to the extent of thirty per cent making it Rs. 5,55,685/-.

5. In the case of Mita Gupta & Ors. (supra), the Division Bench held, since the Tribunal disbelieved the sole eye witness the learned Tribunal ought to have, at least, come to a finding regarding contributory negligence on the part of the driver of the truck whose evidence was withheld by the respondent. The Division Bench modified the award by dividing the compensation by fixing the responsibility in equal share.

6. In the case of Usha Rajkhowar & Ors. (supra), the Tribunal did not come to a finding on contributory negligence, however, restricted the amount of compensation to 50 per cent. The Apex Court, considering the facts and circumstances involved therein, set aside the judgment and order impugned to the extent where the claim was restricted to fifty per cent. In the case before us, the facts would depict, there was head on collision of the motorbike and the truck. The sole ocular witness deposed that it was the fault on the part of the truck. Such evidence did not find any corroboration. It was the duty of the claimant to prove the negligence of the truck particularly when they filed the claim petition u/s 166 of the said Act of 1988. In absence of appropriate evidence, the Tribunal followed the Division Bench decision in the case of Smt. Mita Gupta & Ors. (supra) that would not deserve any interference at our end on that score.

7. The decision in the case of Sudhir Kumar Rana (supra), would not apply as the Insurance Company who insured the scooter could not be held responsible as the minor driving the same did not have any licence at all. The Apex Court considered the evidence and came to conclusion that truck was responsible for the accident.

8. The rest three decisions were cited by Mr. Banik for the proposition, contributory negligence was not pleaded in the pleadings, hence, such plea could not be taken subsequently. In the case before us, the evidence so discussed above, would deserve application of the ratio decided in the case of Smt. Mita Gupta (supra). The Tribunal did it rightly and no interference is called for.

9. The appeal thus succeeds in part and is allowed. The award is modified to the extent that the Insurance Company would be obliged to make payment of Rs. 5,55,685/- less Rs. 50000/-, thus making it a sum of Rs. 5,05,685/-.

10. The appellant would also be entitled to interest @7% per annum on the awarded sum.

11. The Insurance Company is directed to make payment of the differential sum after taking credit of the sums already paid, along with interest at the rate of seven per cent on and from the date of making of the application till the date of payment. The Insurance company would also be obliged to make payment of interest at the same rate on the sum already paid to the appellants on and from the date of the making of the application until it was actually deposited and/or paid.

12. The Insurance Company is directed to pay the said sum as well as the interest in the same proportion fixed by the Tribunal to the respective claimants through account payee cheques to be sent at their recorded address by registered post with acknowledgement due. Such payment must reach the claimants within four weeks from the date of communication of this order.

13. The appeal is disposed of accordingly without any order as to costs.

14. The Registry is directed to send down the records at once, if received by this time.

15. Urgent xerox certified copy of this order, if applied for, be given to the parties, on priority basis.

Shukla Kabir (Sinha), J.

I agree.