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**(2001) 03 GUJ CK 0017**  
**In the Gujarat High Court**  
**Case No : First Appeal No. 1357 of 1986**

New India Assurance Co. Ltd

APPELLANT

Vs

Mahebubانبibi

RESPONDENT

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**Date of Decision :** 08-03-2001

**Acts Referred:**

**Citation :** (2001) 2 ACC 85 : (2002) ACJ 1017 : (2003) 23 GLH 483 : (2001) 4 GLR 2950

**Hon'ble Judges :** R.K. Abichandani, J;A.M. Kapadia, J

**Bench :** Division Bench

**Advocate :** S.B. Parikh, for the Appellant; Archana K. Singh, for the Respondent

**Final Decision :** Dismissed

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## Judgement

R.K. Abichandani, J.—The appellant challenges the judgement and award dated 26th December 1985 of the Motor Accident Claims Tribunal, Kheda, at Nadiad in M.A.C. Petition No. 175 of 1983, by which the respondents - claimants were awarded an amount of Rs.1,04,000=00 with interest at the rate of 6% per annum from the date of application till realisation and proportionate costs.

2. The accident took place on 6th October 1982 on Nadiad - Petlad road in the outskirts of village Rangaipura. At that time, the deceased alongwith others had gone to village Ravipura at the place of the respondent No.6 by his tractor and trailer. After replacing the transformer, the damaged transformer was kept in the trailer. The deceased Mahemudbeg also sat in that trailer and they all were returning from village Ravipura. The tractor was at that time being driven by the respondent No.5. According to the claimants, it was driven at an excessive speed and in a rash and negligent manner. When the tractor was passing from near the outskirts of village Rangaipura, at about 3.00 p.m., the driver lost his control, as a result of which the tractor climbed down the eastern edge of the road and fell in a ditch turning turtle. The deceased got pressed under the damaged transformer and sustained injuries. He was carried to the hospital at Petlad, and thereafter to Baroda, where he died on 8-10-1992 at noon. The deceased was

about 28 years of age when he died. He was a permanent employee working as a Helper in the Gujarat Electricity Board with a salary of Rs.300=00 per month. On holidays, he used to do repairing jobs and earn Rs.125=00 per month. The claimants therefore prayed for an award of Rs.1,50,000=00 by way of compensation.

3. The claim was contested by the owner, driver as well as the insurance company. The owner and driver have not challenged the award and therefore, we do not set out their defence taken up before the Tribunal, which is narrated in the judgement. The insurance company i.e. appellant in its written statement exh. 23, inter alia, contended that the driver did not have a valid license and that though vehicle was meant for use of agricultural purposes and the permit was only to that effect, it was used for carrying passengers free of charge and thereby, there was breach of the terms of the policy absolving the insurance company from any liability. The insurance company in its written statement had denied the existence of the policy itself on the ground that it was unable to trace it out, but latter on, the policy came to be produced on the record at exh. 46.

4. The Tribunal, on the basis of the material on record, came to a finding that it was proved that Mahemudbeg had died due to the rash and negligent driving of the tractor - trailer in question. While examining the aspect of negligence, the Tribunal rightly discarded the defence of inevitable accident put up by the owner and its driver. The Tribunal took note of the fact that there was no mention in the panchnama of any damage caused to the diaphragm. The Tribunal came to a finding that the applicants had succeeded in proving that the deceased sustained vital injuries which resulted in his death, on account of rash and negligent act of driving of the tractor. This finding which has been given for valid and cogent reasons is not questioned before us.

5. The learned counsel appearing for the appellant raised two contentions before us. He argued that the amount of Rs.30,000=00 which was received by way of compensation by the claimants from the employer - Gujarat Electricity Board as per the deposition of Ghanshyambhai who was the employee of the Gujarat Electricity Board, should have been deducted by the Tribunal u/s 110AA of the Motor Vehicles Act, 1939 from the amount of compensation which was awarded.

5.1 In support of this contention, he drew our attention to the decision of the Supreme Court in Mrs. Helen C. Rebello and Others Vs. Maharashtra State Road Transport Corpn. and Another, . The Supreme Court considering as to whether the life insurance money of the deceased was to be deducted from the claimant's compensation receivable under the Motor Vehicles Act, 1939, came to a finding that the life insurance amount received by the claimants was not deductible from the amount of compensation which the tribunal would award u/s 110B of the Act. The learned counsel however placed reliance on the observations made in paragraph 33 of the judgement, in which it has been held that so far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by

balancing the loss to the claimant of the future pecuniary benefits that would have occurred to him but for the death, with the "pecuniary advantage" which from whatever source comes to him by reason of the death. It was further observed that the application of general principle under the common law of loss and gain for the computation of compensation under this Act must co-relate to accidental death covered under the Motor Vehicles Act, 1939. It was submitted that the amount of compensation of Rs.30,000=00 which was received by the claimants was in respect of the accidental death and therefore, such pecuniary advantage was liable to be deducted.

5.2 The learned counsel for the appellant further contended that the deceased was travelling as a passenger in the trailer. Admittedly, he was an employee of the Gujarat Electricity board and not an employee of the owner of the tractor. His risk was therefore not covered under the policy, and therefore, the Tribunal has committed an error in making an award against the appellant - insurance company. In support of this contention, he relied upon the following decisions :-

[a] The decision in Smt. Mallawwa Etc. Vs. The Oriental Insurance Co. Ltd. and Others, was cited for the proposition that persons travelling in goods vehicles, whether owners of the goods or passengers on payment of fare or gratuitous passengers, who died in accident met with by such goods vehicle, were not covered by said proviso (ii) to section 95(1)(b) of the Act, and therefore, insurer of the goods vehicle was not liable to pay compensation for their death. The decision in Mallawa's case (supra) was applied by this Court in National Insurance Co. v. Vijayagauri Kalidas, reported in 1999 (2) GLR 1047, which was also cited by the learned counsel.

[b] The decision in United India Insurance Co. Ltd. v. Manjulaben Purshottamdas Patel, reported in 35(1) GLR 269 was cited for the proposition that the tractor or trailer is a goods vehicle and no passenger for hire or reward could be carried in the same. It was held that the trailer being a goods vehicle, insurance company was not liable to pay compensation. The Court held that the vehicle involved in that case was a public carrier and it could not have carried passengers for hire or reward, and that a gratuitous passenger who travelled in the vehicle could not have claimed any compensation from the insurance company and since no distinction could be made between the tractor and trailer, he could not be treated as third party. It was held that since the tractor and trailer were registered as public carrier, no passengers could have been carried in the said vehicles when in the permit itself it was specifically mentioned that it was subject to the provisions of the Act and the Rules.

[c] The decision in Bhoi Vanaji Dhulaji v. Patel Shivabhai Kashibhai, reported in 20(2) GLR 342 was cited to point out that when there was a special condition embodied in the policy, which stated that it did not cover the use for carriage for passengers for hire or reward, the insurance company will not be liable for the award which may be passed in favour of the claimants and against the driver if the vehicle is used or driven otherwise than in accordance with the schedule. In

that case, the vehicle was used for carriage of a marriage party.

6. In context of the arguments which have been made before us, the following statutory provisions will be relevant :-

[1] Motor Vehicles Act, 1939 :

Section 2(22) : "private carrier" means an owner of a transport vehicle other than a public carrier who uses that vehicle solely for the carriage of goods which are his property or the carriage of which is necessary for the purposes of his business, not being a business of providing transport, or who uses the vehicle for any of the purposes specified in sub-section (2) of section 42.

Section 2(30) : "tractor" means a motor vehicle which is not itself constructed to carry any load (other than equipment used for the purpose of propulsion) but excludes a road-roller.

Section 2(32) : "trailer" means any vehicle, other than a side-car, drawn or intended to be drawn by a motor vehicle.

Section 110-AA : Option regarding claims for compensation in certain cases -

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 this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may claim such compensation under either of those Acts but not under both.

Section 110-B : Award of the Claims Tribunal -

On receipt of an application for compensation made u/s 110-A, the Claims Tribunal shall, after giving the parties an opportunity of being heard, hold an inquiry into the claim and may make an award determining the amount of compensation, which appears to it to be just, and specifying the person or persons to whom compensation shall be paid; and in making the award, the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be.

[2] Workmen's Compensation Act, 1923 :

Section 3 : Employer's liability for compensation.

(1) 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 this Chapter.

(2) xxxxxx

(3) xxxxxx

(4) xxxxxx

(5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any court of law in respect of any injury -

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this act.

#### Section 8 : Distribution of Compensation :-

(1) No payment of compensation in respect of workman whose injury has resulted in death, and no payment of a lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation.

(2) xxxxx

(3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him.

#### Section 13 : Remedies of employer against stranger -

Where a workman has recovered compensation in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid to pay damages in respect thereof, the person by whom the compensation was paid and any person who has been called on to pay an indemnity u/s 12 shall be entitled to be indemnified by the person so liable to pay damages as aforesaid.

7. The question of right to claim compensation both under the Motor Vehicles Act and the Workmen's Compensation Act can arise only when the workman is injured or dead by an accident arising out of and in the course of his employment. The employer's liability to pay compensation arises u/s 3 of the Workmen's Compensation Act. The expression "arising out of employment" is not confined to mere nature of the employment, but also applies to the conditions, obligations and incidence of such employment. Thus, here the claimants who are the heirs and legal representatives of the deceased who was in the employment of the Gujarat Electricity Board as a helper when the accident occurred during the course of his employment with the Gujarat Electricity Board, could have made a claim u/s 3 of the Workmen's Compensation Act against the Gujarat Electricity Board. However, since the accident was caused by use of a motor vehicle belonging to a different person i.e. owner of the tractor - trailer due to the negligence of its driver, these claimants also had a right to claim

compensation, for the liability arising out of negligence of the driver in using the motor vehicle, u/s 110A of the Motor Vehicles Act, 1939. This liability contemplated by the said provision arises under the law of negligence and under the principles of vicarious liability. The Workmen's Compensation Act introduced the concept of liability without fault and the provisions of cash benefits as of right. The liability contemplated by the Workmen's Compensation Act for paying compensation to a workman who has died or received injuries during the course of his employment is a statutory liability of an absolute nature, while the liability to pay compensation under the Motor Vehicles Act is based on tort.

7.1 An employer is under a duty to take reasonable care so that the employee is not subjected to unnecessary risk. But the Workmen's Compensation Act provides for compensation for a workman injured in the course of his employment though no negligence on the part of his employer could be shown. The basis of workman's claim is not negligence or fault, but accident. The death of the workman in the present case gave rise to a claim u/s 3 of the Workmen's Compensation Act for compensation since he died by accident arising out of and in the course of his employment. Sub-section (5) of section 3 of that Act debars a workman from claiming compensation under that Act if he has already instituted a suit in a Civil Court for damages in respect of the personal injury. Similarly, a suit for damages cannot be filed in respect of an injury in a Court of law if a claim for compensation has been instituted before the Commissioner under the Workmen's Compensation Act or if an agreement has been reached for payment of compensation under that Act. This is intended to protect the employer from double proceedings and the workman has to select his remedy when the injury is caused by an accident arising from and during the course of his employment.

7.2 Thus, where death or bodily injury to a workman arises out of the use of a motor vehicle and during the course of employment, it gives rise to a claim for compensation under the Motor Vehicles Act, and also under the Workmen's Compensation Act, in which event the person entitled to compensation cannot claim it under both the Acts and has to apply for his claim either under the Motor Vehicles Act or under the Workmen's Compensation Act. If the wrongdoer and the employer in whose employment the accident has occurred are the same person or where the employer is vicariously liable for such tortious act, then claim would lie against the employer either under the Motor Vehicles Act or under the Workmen's Compensation Act by virtue of section 110AA of the Motor Vehicles Act and this position is complimentary to the position envisaged in section 3(5) of the Workmen's Compensation Act. Where however a wrongdoer or his insurer have become liable under the Motor Vehicles Act for the accident causing death or injury of a workman and such accident arises out of and during the course of employment of a person other than the wrongdoer, the question arises whether the tort-feasor gets absolved from being proceeded against for enforcing his liability if the workman has proceeded against his employer for a statutory claim with which the tort-feasor was not concerned, because, his

liability is based on tort and is different in nature from employer's statutory liability to compensate for the personal injury to his workman caused during the course of employment. It is by virtue of wider meaning given to the expression "accident arising out of and in the course of his employment" in section 3 of the Workmen's Compensation Act that even an employee who is sent on an errand away from any physical supervision and control falls within that expression. The idea behind enacting section 3(5) of the Workmen's Compensation Act and section 110AA of the Motor Vehicles Act is mainly to protect the employer from being simultaneously exposed to two different forums by his workman for a claim for personal injury caused due to an accident during the course of employment. These provisions cannot be attributed a meaning that the tort-feasor's liability to pay compensation is reduced in any manner where a claim is made against the tort-feasor under the Motor Vehicles Act and a separate claim is made against the employer, who is a person different from the tort-feasor, under the Workmen's Compensation Act. The parameters for assessing the liability of a tort-feasor and the nature of such liability are entirely different from the liability of an employer statutorily fixed under the Workmen's Compensation Act, which springs out of the relationship of master and servant and is independent of any negligent or wrongful act of the master. The extent of liability of any stranger to such relationship cannot be decided under the Workmen's Compensation Act and falls to be determined under the provisions of the Motor Vehicles Act. The option u/s 110AA is not either to proceed against the tort-feasor or the employer where they are different; but it is either to proceed under the Motor Vehicles Act or under the Workmen's Compensation Act where the claim lies under both against the employer. Excepting cases where the employer is also a wrongdoer or is vicariously liable for the wrongdoer, there can arise no question of exercising an option by the claimant to proceed either under the Motor Vehicles Act or under the Workmen's Compensation Act for his claim against the person liable for the claim. A workman can in a case where the employer and wrongdoer are different proceed against them for their respective liability which are of distinct nature under both the Acts.

8. The question will therefore arise as to whether a person claiming compensation for injury to a workman or his death from the employer under the Workmen's Compensation Act and from the owner and driver of the vehicle and their insurer under the Motor Vehicles Act, is entitled to get compensation under both the Acts, one from the tort-feasor and other from the employer where they are different persons. There is no rationale for absolving the tort-feasor from the claim being put up against him just because the employer is liable under the social security legislation. In fact, if a person has recovered compensation under the Workmen's Compensation Act in respect of any injury caused under circumstances creating a legal liability of some person other than the person by whom the compensation was paid, to pay damages in respect thereof, the employer who has paid the compensation becomes entitled to be indemnified by the person so liable to pay the damages for the tort committed by him or for

which he is vicariously liable. Such a claim of the employer to be indemnified for the compensation paid under the Workmen's Compensation Act from the tort-feasor who was liable to pay damages in respect of the same injury is recognised by section 13 of the Workmen's Compensation Act. This goes to show that there is no statutory scheme of reducing the liability of the tort-feasor arising under the Motor Vehicles Act even when compensation is paid by the employer under the Workmen's Compensation Act. The employer who has paid compensation under the Workmen's Compensation Act, will step into the shoes of the claimant and be entitled to recover that much amount from the tort-feasor. This in no way entitles the tort-feasor to defend the claim under the Motor Vehicles Act and his liability for the tortious act is required to be determined thereunder. The expenditure incurred for payments under the Workmen's Compensation Act will ordinarily be included by the industry in the cost of production and would thus enter into charges for services and prices of goods produced, to bring about in the end, the burden which will fall upon the consumers. Thus, if the tort-feasor who is not the employer is made to benefit by paying less to the extent of compensation already paid by the employer to the claimant ultimately the society will be bearing the burden of his wrongdoing. To avoid this and to keep the tort-feasor liable for the tort, the employer would be subrogated u/s 13 of the Workmen's Compensation Act, to the extent to which he has paid the employee for the personal injury caused by such a stranger. At best, he can plead that the amount paid by the employer under the Workmen's Compensation Act be reimbursed to the employer or seek a direction as to satisfy his liability u/s 13 of the Workmen's Compensation Act for the amount paid by the employer for which the tort-feasor is primarily liable.

9. The Tribunal makes an award u/s 110B of the Motor Vehicles Act determining the amount of compensation which appears to be just to it after holding an inquiry into the claim. It also specifies "person or persons to whom compensation shall be paid". Thus, the Tribunal will specify the claimants who shall be paid the compensation. If the claimants are already paid any compensation under the Workmen's Compensation Act in respect of which the employer has a remedy against the person who is under a legal liability to pay damages in respect of any injury caused to such person u/s 13 of the Workmen's Compensation Act, the Tribunal is empowered to direct such portion of the compensation as is already recovered from the employer to be paid to the employer while specifying the persons to whom compensation shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them as the case may be. This would prevent the claimants from recovering any part of compensation twice and will also not result in unintended benefit to the tort-feasor of retaining the portion of compensation which was paid by the employer.

10. The question whether the amount of compensation was paid under the Workmen's Compensation Act can never arise before the Motor Accident Claims Tribunal unless a claim is already instituted for recovery of compensation under the Act against the employer or an agreement as envisaged u/s 3(5)(b) of the



Workmen's Compensation Act between the workman and his employer for paying compensation under the Act has been reached.

10.1 In the present case, there is absolutely no evidence on record to show whether the claimants had applied to the Commissioner for compensation under the Workmen's Compensation Act, or whether the compensation payable under that Act was paid under such proceedings or by any agreement as contemplated u/s 3(5) of the Act. Much reliance was placed on behalf of the appellant on the deposition exh. 48 of Ghanshyambhai, an Assistant of the Gujarat Electricity Board, who in his cross examination said that Rs.30,000=00 were paid as compensation to the deceased by his office. No further details were elicited from him, nor any suggestion made to him that compensation of Rs.30,000=00 was paid for the personal injuries to the workman. The word `compensation' by itself would not necessarily mean compensatory damages for personal injury, because, compensation in common parlance would mean something given or received as payment or reparation, as for goods, services or loss. As per Black's Law Dictionary (Fifth Edition), one of the meaning of the word `compensation' is "remuneration for services rendered whether in salary, fees or commissions." Thus, if the employer has paid the amount due by way of remuneration or provident fund, gratuity or any other dues payable under the service conditions or even ex-gratia, they would not be compensation paid under the provisions of the Workmen's Compensation Act for personal injury. In any event, as held by a Division Bench of this Court in Harivadan Maneklal Mody v. Chandrasinh Chhatrasinh Parmar, reported in 28(2) GLR 1274, merely because the claimant received compensation deposited by the employer suo motu to discharge his obligation under the Statute, it cannot be said that the claimants had exhausted their option to claim compensation under the Statute and were, therefore, debarred from claiming compensation under the Motor Vehicles Act. In the present case, there is absolutely nothing on record to enable us to attribute the word `compensation' the meaning that it was a compensation given in respect of the injury caused to the workman during the course of his employment. There is therefore no valid reason to reduce the amount of Rs.30,000=00 from the claim awarded to the respondents by the Tribunal.

10.2 Even if the amount of Rs.30,000=00 were directly paid as compensation in respect the personal injury that resulted in death of the workman, no payment of a lumpsum as compensation to a workman or a person under a legal disability e.g. a minor shall be made otherwise than by depositing with the Commissioner and no such payment made directly by an employer shall be deemed to be a payment of compensation, as laid down in section 8 of the Workmen's Compensation Act which provides for distribution of compensation. The receipt of the Commissioner shall be sufficient discharge in respect of any compensation deposited with him, as provided by section 8(3) of the Act. No such deposit or payment of compensation is proved in the present case, and therefore also, no question arises of adjusting Rs.30,000=00 towards the amount awarded by the Tribunal, which has rightly negated such contention of the appellant.

11. The contention that the risk of the deceased was not covered because he was travelling in the tractor trailer which was a goods vehicle not as an employee of the owner of the tractor and had only accompanied the transformer, is misconceived. In fact, though the insurance company first denied having insured the vehicle, the policy exh. 46 which was subsequently produced on record, showed that both the tractor and the trailer were insured by the company. The policy shows that the limitation to use was that the vehicle should be used only under a private carrier permit within the meaning of Motor Vehicles Act, 1939, and that the policy did not cover use for (a) hire or reward, and (b) organised racing or speed testing. The trailer risk was also covered by paying extra premium as per the endorsement attached to the policy exh. 46. The expression 'private carrier' as defined in section 2(22) means an owner of a transport vehicle other than a public carrier who uses the vehicle solely for the carriage of goods which are his property of carriage of which was necessary for the purpose of his business not being a business for providing transport. Trailer is defined in section 2(32) to mean any vehicle, other than a side-car, drawn or intended to be drawn by a motor vehicle. It has clearly come in evidence that nothing was charged by way of hire or reward in carrying the deceased or the transformer in the tractor - trailer. Since the damaged transformer was to be replaced to operate the electric motor installed in the well of the owner of the vehicle for irrigating the crops in his agricultural field, the tractor - trailer was being used for the purpose of the business of the owner. Such a use was clearly covered under the policy exh. 46 and there is no basis for the appellant to contend that the tractor trailer was used for hire or reward or for transporting any gratuitous passenger. The process of carriage of transformer for replacement involved accompanying of adequate manpower for effecting such carriage and replacement, and therefore, taking the helper who was an employee of the Gujarat Electricity Board with the transformer for replacing it amounted to engaging the tractor - trailer in the business or occupation of the owner, which use was squarely covered by the policy exh. 46. We are therefore unable to accept the contention raised on behalf of the appellant that the insurance company was not liable under the policy on the ground that the deceased was a gratuitous passenger travelling in the vehicle at the time of the accident.

12. In the above view of the matter, we find ourselves in complete agreement with the reasoning adopted by the Tribunal and the findings reached by it and dismiss this appeal with no orders as to costs.