
(2009) 04 GUJ CK 0020
In the Gujarat High Court
Case No : First Appeal No. 1702 of 2006

United India Insurance Co Ltd.

APPELLANT

Vs

Fatmaben Jamalbhai

RESPONDENT

Date of Decision : 16-04-2009

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110AA, 110C(2A), 110F

Motor Vehicles Act, 1988 — Section 149, 167

Workmens Compensation Act, 1923 — Section 14, 19, 19(2), 2, 3

Citation : (2009) 2 GLR 1450

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Hina Desai, No. 1, for the Appellant; None for Defendant No. 1, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Ms. Hina Desai for appellant-Insurance Company.

2. This appeal is filed by Insurance Company u/s 30 of Workmen Compensation Act challenging judgment and order passed by W.C. Commissioner, Bhavnagar in W.C. (Fatal) Case No. 10 of 1999 Exh. 20 dated 11th February, 2005 wherein W.C. Commissioner has partly allowed W. C. (Fatal) Application and directed opponents Nos. 1 and 2 that they should jointly and severally deposit an amount of compensation of Rs. 75,940-00 within 30 days from the date of receipt of said judgment for making payment thereof to dependents of deceased. No order as to costs was passed by W. C. Commissioner. Commissioner has also not granted any amount of penalty as well as interest on the amount of compensation considering the fact that after death of deceased in accident on 11-3-1996, Claim Petition No. 315 of 1996 was filed initially by claimants and after passing of judgment therein on 17-12-1998, claimants filed application for compensation under the W.C. Act, and therefore, they are not becoming entitled for interest

and penalty on the amount of compensation.

3. This matter was heard by this Court on 6th April, 2009. After hearing learned Advocate Ms. Hina Desai for appellant, in presence of learned Advocate Ms. Hina Desai, oral dictation in this matter was given by this Court. Subsequently, copy of award passed by M.A.C.T. Bhavnagar in M.A.C.P. No. 315 of 1996 decided on 17-12-1998 has been placed before this Court by appellant and same has been considered by this Court and it is found that therein, Claims Tribunal has awarded Rs. 99,600-00 with 15% interest in favour of claimants, therefore, matter would require re-hearing. Dictation given by this Court in this matter earlier on 6-4-2009 was not yet signed by this Court and it had remained only dictation without transcription and after considering award passed by Claims Tribunal Bhavnagar, therefore, matter was kept for further hearing on 13-4-2009. On 13-4-2009, after hearing learned Advocate Ms. Hina Desai for appellant, following order was passed by this Court:

1. This matter was heard by this Court on 6th April, 2009. On the basis of submissions made by learned Advocate Ms. Hina Desai, dictation was given. At that time, award passed by Claims Tribunal was not on record but it has been subsequently placed on record therefore, after giving dictation, this Court has considered award passed by Claims Tribunal at Bhavnagar in Claim Petition No. 315 of 1996 which was filed on 30-5-1996 and decided on 17th December, 1998. Heirs and legal representatives of deceased Jamalbhai Nanjibhai then filed this Claim Petition against truck driver, truck owner and Insurance Company of truck New India Assurance Co. Ltd., Bhavnagar as well as against employer Ajay Jaswantsinh Raol who was owner of the tempo which was driven by deceased and United India Insurance Co. was Insurance Company of tempo.

2. In initial award passed by Claims Tribunal in Claim Petition No. 315 of 1996, Claims Tribunal partly allowed Claim Petition and directed respondent Nos. 1 and 2 means driver and owner of truck jointly and severally to pay Rs. 99,600-00 from the date of Claim Petition with 15 percent interest. Thereafter, claimant has filed application before the Workmen's Compensation Commissioner being Workman Compensation (Fatal) Case No. 10 of 1999 only against owner of tempo Ajay Jaswantsinh Raol means employer of deceased Jamalbhai and United India Insurance Company i.e. Insurance Company of tempo and in those proceedings, owner of truck, driver of truck and Insurance Company of truck were not joined as parties. In objection was raised by Insurance Company u/s 167 of Motor Vehicles Act on the ground that once Claim Petition is filed means choice has been exercised, then, heirs and legal representatives of deceased Jamalbhai are not having right to file application before Workmen's Compensation Commissioner for claiming compensation under the W.C. Act. Preliminary objection raised by Insurance Company vide Exh. 12 was decided by Workmen's Compensation Commissioner and Commissioner came to the conclusion that if the applicants have filed application as per provisions of M.V. Act for getting more compensation, and therein, compensation has been

determined on the ground of negligence of deceased, then, in such peculiar circumstances, there is no bar against registering claim for further compensation under the W.C. Act, 1923 because as per Section 167 of M.V. Act, there is bar for claiming compensation from both forums but there is no bar as regards highest amount of compensation amongst two forums. On that basis, W.C. Commissioner held that claimants are entitled for total compensation of Rs. 1,75,540-00 and then deducted amount of Rs. 99,600-00 received by claimants as per judgment in M.A.C.P. No. 315 of 1996 and held that claimants are entitled to claim and receive remaining amount of Rs. 75,940-00 from opponents i.e. Owner Ajaysinh Jasvantsinh Raol and Insurance Company United India Insurance Company means present appellant.

3. It is required to be noted that accident took place on 11th March, 1996 when certain passengers were travelling in D.C.M. Toyoto vehicle bearing No. GJ-4-T-5862 driven by deceased Jamalbhai who died in accident. Claimants in M.A.C.P. No. 315 of 1996 are heirs of deceased Jamalbhai who was driving D.C.M. Toyota at the time of accident. When said D.C.M. Toyoto reached near Vartej village, at that time, one truck was going ahead of said tempo. Driver of truck applied brake in his vehicle all of sudden, therefore, driver of tempo i.e. deceased Jamalbhai cannot continue control over his tempo, and therefore, tempo had dashed on the rear side of truck wherein claimants in M.A.C.P. No. 151 to 154 of 1996 received serious injuries whereas tempo driver Jamalbhai had received serious injuries and died on the spot.

4. Issue No. 1 in respect of negligence has been decided by Claims Tribunal. Claims Tribunal came to the conclusion on the issue of negligence and came to the conclusion that the driver Jamalbhai of D.C.M. Toyota is negligent to the extent of 60 percent and driver of truck is negligent to the extent of 40 percent and total amount of compensation was Rs. 2,49,000-00 was awarded and after deducting 60 percent from the aforesaid amount, Claims Tribunal directed respondent Nos. 1 and 2 to pay Rs. 99,600-00. It is made clear that the Claims Tribunal has not properly applied number of respondents because respondent No. 1 is driver and respondent No. 2 is owner of truck and respondent No. 3 is Insurance Company. Said amount of Rs. 99,600-00 has been received by claimants from said respondents against whom aforesaid directions have been given by Claims Tribunal in M.A.C.P. No. 315 of 1996 filed by heirs of deceased Jamalbhai.

5. Therefore, now, in claim application filed before the Workmen's Compensation Commissioner has directed present appellant to pay Rs. 75,940-00 to claimants after deducting amount of Rs. 99,600-00. Facts of this case are squarely covered by decision of this Court reported in Nasimbanu Vs. Ramjibhai Bachubhai Ahir, in case of Nasimbanu. Said decision was pointed out to learned Advocate Ms. Hina Desai for appellant. Now, she requests for some time and considering her request, matter is now adjourned to 16th April, 2009. Registry of this Court is directed to notify this matter in 1st Board on 16th April, 2009.

4. Thus, considering award passed by M.A.C.T. in M.A.C.P. No. 315 of 1996 and also considering decision of Division Bench of this Court reported in Nasimbanu Vs. Ramjibhai Bachubhai Ahir, in case of Nasimbanu, matter was requiring further hearing, and therefore, it was ordered to be notified in 1st Board on 16th April, 2009. Therefore, today, matter has been notified and has been accordingly heard by this Court.

5. Learned Advocate Ms. Hina Desai for appellant Insurance Company has made her submissions before this Court only on the ground that before Claims Tribunal, present appellant was joined as party, and therefore, claimants are not entitled to file case for compensation before W. C. Commissioner against present appellant, and therefore, bar u/s 167 of M.V. Act would come against claimants because option was already exercised by claimants by preferring to file Claim Petition before Claims Tribunal.

6. I have considered submissions made by learned Advocate Ms. Hina Desai for appellant. I have also perused judgment and order passed by W.C. Commissioner as well as award made by M.A.C.T. Bhavnagar in M.A.C.P. No. 315 of 1996. Question is that deceased was working under employer Ajaysinh Jayvantsinh Raol and present appellant United India Insurance Co. Ltd. is the Insurance Company of D.C.M. Toyota bearing No. GJ-4T-5862. Accident occurred on 11th March, 1996. Deceased Jamalbhai was driver of said D.C.M. Toyota No. GJ-4T-5862 which was owned by said opponent No. 1 and insured with present appellant Insurance Company. Claim Petition No. 315 of 1996 was filed by heirs and legal representatives of deceased Jamalbhai. On the date of accident, one Bharatbhai Bhaya was cleaner on said D.C.M. Toyota. While aforesaid D.C.M. Toyota was passing from near to village Vartej, at that time, one truck was passing ahead the said tempo. Truck driver applied brake all of a sudden, therefore driver of tempo i.e. deceased Jamalbhai could not maintain control over his tempo and dashed on rear side of the truck going ahead and that resulted into an accident. In said accident, claimants in M.A.C.P. Nos. 151 to 154 of 1996 had received serious injuries whereas driver of tempo Jamalbhai died on the spot because of serious injuries. Before Claims Tribunal, question of negligence was examined by Claims Tribunal while examining other Claim Petitions filed by persons, those who were travelling in the said tempo as owner of the goods. Based upon aforesaid facts, Claim Petition No. 315 of 1996 was filed by heirs of deceased Jamalbhai, driver of tempo was filed claiming compensation of Rs. 6,00,000-00 against owner of D.C.M. Toyota Ajaysinh Jayvantsinh Raol, Insurance Company of said D.C.M. Toyota as well as owner and Insurance Company of offending truck.

7. On the basis of pleadings of the parties, Claims Tribunal framed issues wherein issue No. 1 was relating to negligence, whether claimants prove that the drivers of vehicles No. RJ-14G-4425 and GJ-4T-5862 involved in this accident were rash and negligent in driving their Motor Vehicles? While answering said issue No. 1 relating to negligence, it was held by Claims Tribunal that the negligence on the

part of driver of truck No. RJ-14-4425 was to the extent of 40% whereas driver of D.C.M. Toyota No. GJ-4T-5862 was negligent in driving to the extent of 60%. Based upon aforesaid finding on the issue of negligence and after considering other aspects, Claims Tribunal made award of Rs. 99,600-00 in M.A.C.P. No. 315 of 1996 only against truck driver and Insurance Company namely opponent Nos. 1 and 2 in M.A.C.P. No. 315 1996, and thus it is clear that no award was passed against employer of deceased Jamalbhai whose tempo was being driven by deceased Jamalbhai at the time of accident.

8. In M.A.C.P. No. 315 of 1996, widow of deceased Jamalbhai namely Fatmaben has given deposition at Exh. 30 wherein it was deposed by her that her husband was working as driver on the tempo owned by Ajaysinh Jasvantsinh Raol and he was receiving salary of Rs. 4,000-00 to Rs. 5,000-00. However, for want of any documentary evidence to show that the deceased was receiving salary of Rs. 4,000-00 to Rs. 5,000-00 p.m., and also considering year of accident 1996, Claims Tribunal held that it could be believed that maximum salary of Rs. 2,000-00 p.m. could be considered and deducting Rs. 500-00 towards personal expenses of deceased Jamalbhai, it could be considered that deceased was contributing Rs. 1,500-00 to the family every month, and therefore, annual dependency could be assessed at Rs. 18,000-00 and considering age of deceased Jamalbhai as per p.m. report, Claims Tribunal applied multiplier of 13 and held that the claimants are entitled for dependency benefit of Rs. 2,34,000-00 plus Rs. 15,000-00 towards conventional and thus Rs. 2,49,000-00 in all and then deducted 60% therefrom on the basis of finding on issue No. 1 and awarded Rs. 99,600-00 only against owner-cum-driver and Insurance Company of offending truck. Said award was made by Claims Tribunal on 17-12-1998 wherein no award is made against employer and Insurance Company of the Tempo driven by Jamalbhai, and therefore, claimants thereafter filed claim application before W. C. Commissioner on 13-1-1999. It is necessary to note that Claims Tribunal in its award passed in Claim Petition No. 315 of 1996 has directed to opponents No. 1 therein to pay amount of compensation to claimants in M.A.C.P. No. 315 of 1996 and there was no direction issued by Claims Tribunal against employer Ajaysinh J. Raol and opponent No. 5-United India Insurance Co. Ltd. So, merely because employer Ajaysinh J. Raol and Insurance Company of tempo owned by Ajaysinh Raol were joined as a party, it cannot be said that such mere joining of them would create bar against claimants for claiming compensation against employer and its Insurance Company under the W.C. Act, 1923 as per Section 167 of M.V. Act, 1988 because there was no any direction given by Claims Tribunal to pay amount of compensation then it become formal party remained without liability though one is employer of deceased and another is Insurance Company of tempo owned by employer. Therefore, based upon the aforesaid facts, claim application was filed by heirs of deceased Jamalbhai before W. C. Commissioner claiming compensation under the W.C. Act, 1923 only against employer Ajaysinh J. Raol and Insurance Company of tempo owned by employer Ajaysinh J. Raol. W. C. Commissioner has not discussed facts of accident, how accident has occurred. No

doubt, award passed by M.A.C.T., Bhavnagar in M.A.C.P. No. 315 of 1996 was produced by claimants as Exh. 13/10 before W. C. Commissioner and same was taken into consideration by W. C. Commissioner while passing judgment and order in claim application.

9. Before W. C. Commissioner, opponent No. 1 employer filed reply Exh. 16 and denied averments made by claimants and also raised contention that once claimants have opted for forum of Claims Tribunal under the M.V. Act, then, application for compensation under the W.C. Act, 1923 is not maintainable. Said contention was also taken by Insurance Company without filing reply but by filing application for preliminary objection Exh. 12 while reserving its right to file reply if required. According to appellant, once claimants have opted to file Claim Petition, then, there is bar of Section 167 of M.V. Act, 1988, and therefore, W.C. Commissioner ought not to have entertained Claim Application filed by present respondents claimants. Said preliminary objection was considered by W. C. Commissioner and W. C. Commissioner has come to conclusion that there is no bar to receive claim or compensation when in M.A.C.P., amount has been decided on the basis of negligence of deceased. It was observed by W.C. Commissioner that if the application was filed by claimants under the M.V. Act with an object of getting more compensation and if the amount of compensation has been decided therein on the basis of negligence of the deceased, then, in such peculiar circumstances, there is no bar in raising claim for further legitimately available compensation under W.C. Act, 1923, and therefore, bar u/s 167 of M.V. Act would not operate against claimants. Thereafter, W.C. Commissioner has considered that under W.C. Act, 1923, responsibility of the employer has been decided to pay amount of compensation. As per Section 3, if the workman has received injuries in an accident during the course of employment, then, employer is becoming liable to pay compensation. Section 4 is providing for payment of the amount of compensation. As per Section 4A, employer is liable to pay compensation as soon as it is becoming payable and if it is not paid within 30 days, then, there are provisions for interest and penalty. Accordingly, considering the provisions of Section 4, income Rs. 2,000-00 and age 43 years, W. C. Commissioner held that the claimants are entitled for compensation of Rs. 1,75,540-00 and then deducted the amount of Rs. 99,600-00 received by them as per award in M.A.C.P. No. 315 of 1996 and held that the claimants are entitled to receive remaining amount of Rs. 75,940-00 from opponents in Claim Application and considering fact that the claimants have received compensation in M.A.C.P. No. 315 of 1996, not imposed any penalty and interest on the amount of compensation. Said amount was deposited by appellant Insurance Company before W. C. Commissioner on 5th September, 2005, and subsequently, it was brought to the notice of this Court that the said amount has been withdrawn by claimants, means, it has been disbursed by W. C. Commissioner Bhavnagar to claimants.

10. In light of this background, question arising for consideration of this Court is whether the proceedings filed by claimants before Claims Tribunal under M.V. Act

as well as before W. C. Commissioner under the W.C. Act, 1923 are maintainable or not and whether bar would operate against claimants u/s 167 of M.V. Act for claiming compensation under the W.C. Act, 1923 or not. For considering this question, Section 167 of M.V. Act, 1988 is required to be considered. Same is, therefore, reproduced as under:

167. Option regarding claims for compensation in certain cases: Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (VIII of 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 without prejudice to the provisions of Chapter X claim such compensation under either of those Acts, but not under both.

11. Considering provisions of Section 167, it is very much clear that in case if any accident has occurred where a person has died or received injury and he files application before W. C. Commissioner, then, such claimant is thereafter not entitled to file Claim Petition before Claims Tribunal under provisions of M.V. Act. Claimant has to select either to file proceedings under W.C. Act or under M.V. Act. This Section suggests that for one accident, claimant is not entitled to have double compensation different forum from same party. Meaning thereby, that in one case before W.C. Commissioner, employer is a party and in Claim Petition under M.V. Act, owner of vehicle is party. So, if the driver while driving vehicle under the control of employer met with an accident, and if he has died, then, heirs and legal representatives of such driver can file claim application under the provisions of W.C. Act, but cannot file Claim Petition in respect of the same accident under the M.V. Act, 1988 but in accident, if two vehicles are involved, then, claimant can file Claim Petition against offending vehicle and also file claim application under the W.C. Act against employer because in both the cases, claimant is having different status for claiming compensation and having two separate independent right in his favour entitling him to file two separate independent proceedings but in case wherein only one vehicle is involved in accident and there is no other vehicle involved in accident and accident occurred only because of rash and negligent driving of driver wherein vehicle has either been turned turtle or dashed with any tree or wall or electric pole resulting into injuries and/or death of occupants therein, in such case alone, provisions of Section 167 of M.V. Act are applicable, otherwise, provisions of Section 167 of M.V. Act, 1988, bar would not apply. In this case, two vehicles are involved. One is the tempo owned by employer Ajaysinh J. Raol insured with present appellant and the another is the truck bearing No. RJ-14G-4425 wherein driver of tempo died on the spot because of injuries received by him in an accident while in service under the employer Ajaysinh J. Raol, therefore, his heirs who were otherwise entitled to claim compensation from owner, driver and Insurance Company of the offending truck filed Claim Petition wherein owner and Insurance Company was joined as party for avoiding plea of non-joinder of party and that would, according to my opinion, not create any bar against claimants for

preferring claim application against employer means owner of tempo and Insurance Company of tempo. In said Claim Petition No. 315 of 1996 also, Claims Tribunal has, considering issue of negligence, not awarded any amount of compensation against employer of deceased and Insurance Company of tempo which was being driven by deceased at the time of accident. So, in said Claim Petition, they remained only as a formal party because 60 percent amount of compensation has been deducted considering negligence to the extent of 60 percent on the part of driver of tempo. Therefore, according to my opinion, mere joining of owner and Insurance Company as a party to the proceedings of M.A.C.P. No. 315 of 1996 under the M.V. Act, 1988 cannot create any bar against the claimants for preferring Claim Application against the employer and Insurance Company of the tempo driven by deceased at the time of accident in the capacity of an employee of owner of tempo and in such situation, claimants can file claim application against employer and Insurance Company of tempo under the W.C. Act, 1923. Section 3(5) read with Section 19(2) of W.C. Act, 1923 would also not come in the way of claimants for filing of claim application before W. C. Commissioner because it is not against the same party, meaning thereby, two separate proceedings for claiming compensation for one accident cannot be initiated against same party but if the parties are different in both the proceedings, then, such Claim Petition is maintainable though arising from one accident but involving two vehicles and in such case, proceedings under both Acts are maintainable. In proceedings under W.C. Act, 1923 before W. C. Commissioner, driver and owner as well as Insurance Company of truck No. RJ-14G-4425 were not joined as party by claimants, meaning thereby, it was separate independent right of claimants to claim compensation against employer of deceased Jamalbhai, so, both the proceedings are independent, distinct and there is no bar of Section 167 of M.V. Act, 1988 as contended by learned Advocate Ms. Hina Desai for appellant before this Court. Relevant Section 3(5) and Section 19(2) of W.C. Act, 1923 are quoted as under:

3(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 inquiry in accordance with the provisions of this Act.

19. Reference to Commissioners.- (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or

extent of disablement), the question shall, in default of agreement, be settled by a Commissioner.

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act.

12. In *Nasimbanu Vs. Ramjibhai Bachubhai Ahir*, Division Bench of this Court has held that the liability of employer under W.C. Act is separate from liability of tort-feasor under M.V. Act. Therefore, matter is squarely covered by said judgment of Division Bench of this Court. Issue was examined by Division Bench of this Court on the basis of facts which are almost similar to the facts of present case. As per facts of case before Division Bench of this Court, Sirajuddin Amruddin Kazi (deceased) was driver of Tanker bearing Registration No. GTB-6374 of Kavina Transport Company owned by Ramjibhai Hirabhai Ahir (respondent-2 in F.A. 407 of 1998) and insured with the New India Assurance Company Limited. Accident took place on 23-12-1987 at Boriyavi village when deceased was going from Ahmedabad to Vadodara and the offending vehicle Truck bearing Registration No. GQY-4478, driven by Ramjibhai Bachubhai Ahir (respondent-1 in F.A. 407 of 1998) dashed against the tanker driven by Sirajuddin Amruddin Kazi. As a result of this accident, deceased (33) died leaving behind the claimants Nasimbanu (widow) and two minor children Sadiq Sirajuddin Kazi and Shabana Sirajuddin Kazi. Claim for compensation of Rs. 3,50,000/- with interest is made. Allegation is that the offending vehicle was driven rashly and negligently, otherwise, accident could not have taken place. Deceased was the sole bread-winner for the family and after his death, family is facing starvation. Claims Tribunal awarded Rs. 2,12,000-00 with 12 percent interest with effect from 7-2-1997 which was challenged by both parties before this Court. Claim application was filed by claimants before W. C. Commissioner under the W.C. Act, 1923 claiming compensation for death of deceased wherein objection was raised by Insurance Company before Commissioner that such application is not maintainable before Commissioner. Division Bench of this Court considered relevant provisions of Sections 3(5) and 19(2) of W.C. Act and also considered provisions of old M.V. Act, 1939 namely Sections 110A, 110AA, 110C(2A) and Section 149 of M.V. Act, 1988, and thereafter, Division Bench of this Court considered whether claimant is entitled to file Claim Petition and claim application before both authorities under the Act or not. After considering various provisions and decisions, Division Bench of this Court came to conclusion in Para 15 that the claimants' right to raise claim under two statutes is already answered by Division Bench of this Court. Relevant discussion made by Division Bench of this Court after considering various provisions in Paras 5, 6 and 7 are reproduced as under:

Giving considerations to these submissions, we find that contention of the Insurance Company is that amount of Rs. 80,000/- paid to the claimants under the Workmen's Compensation Act, 1923, be deducted from the compensation paid under the Motor Vehicles Act, 1939. This is challenge to quantum of

compensation, therefore, contention raised by appellant is not sustainable. In this case, the appellant Insurance Company has not obtained permission to contest the claim u/s 110C(2A) of the M.V. Act, 1939. In case permission is not sought for contesting the claim u/s 110C(2A) of the Motor Vehicles Act, 1939, defences available to the Insurance Company are limited u/s 149, Motor Vehicles Act, 1988. Since challenge is to quantum, which is not available defence under this provision, it cannot be raised by the appellant. For these reasons, appeal by Insurance Company is not maintainable. See : National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, wherein the Apex Court has overruled the decision in United India Insurance Co. Ltd. Vs. Bhushan Sachdeva and Others, referred to by Mr. Parikh. See : New India Assurance Co. Ltd. Vs. Tara Sundari Phauzdar, and National Insurance Co. Ltd. Vs. Challa Bharathamma and Others, Chinnama George and Others Vs. N.K. Raju and Another,

Even otherwise, there is no force in the submissions raised by the learned Counsel for the appellant-Insurance Company. Section 110A of Motor Vehicles Act, 1939 is applicable to a person who has two remedies against the joint tort-feaser(s) while object of Section 3(5) of the Workmen's Compensation Act, 1923, is to save the employer from double jeopardy, meaning thereby, from multiplicity of litigation, one under the Workmen's Compensation Act, 1923, and other under the Motor Vehicles Act, 1939. Where a claimant can avail one remedy against the employer under the Workmen's Compensation Act, 1923, he is not debarred from raising/claiming compensation under the Motor Vehicles Act, 1939, against the tort-feaser. Present is a case where claimants are receiving compensation from the employer who is statutorily bound to pay the same on the death of deceased being his Master. This is separate relationship and liability and has nothing to do with the liability of a tort-feasor under the Motor Vehicles Act, 1939. In the Claim Petition before the Claims Tribunal, employer and insurer of Tanker are not, party therefore, no claim has been raised against them. Submission raised by the appellant, if accepted, would mean that claimants should feel satisfied with whatever is paid to them under the Workmen's Compensation Act, 1923, by the employer, and thereby, tort-feaser escaping liability under the Motor Vehicles Act, 1939, which remedy is independently available to the claimants as third party qua the offending vehicle.

Chief Justice Shri R. S. Pathak (as His Lordship then was) speaking for the Division Bench of High Court of Smt. Gayatri Devi Vs. Tani Ram and Others, said in Paragraphs 13, 14, and 15 that:

13. In Radhabai Bhikaji v. Baluram Daluram 1970 ACJ 403 (MP) the Madhya Pradesh High Court held that duplication of proceedings occasioned by a claim instituted under the Workmen's Compensation Act and a claim filed under the Motor Vehicles Act was intended to be avoided, and therefore, Section 3(5) of the Workmen's Compensation Act was enacted. With great respect, it seems difficult to accept the reasons which have found favour with that Court. When Section 3(5) of the Workmen's Compensation Act was enacted, the Legislature could not

have had in mind the Motor Vehicles Act, which was enacted in 1939. Indeed, in 1923, there was not statute which provided for any other Tribunal for entertaining claims in respect of such injuries or death. None has been pointed out to us. It seems that when Section 3(5) of the Workmen's Compensation Act was enacted, the Legislature could have had in mind the ordinary Courts only as an alternative forum for entertaining a claim for damages. It will be noted in particular that Section 3(5) speaks of a "suit" and as has been well settled a suit is "a civil proceeding instituted by the presentation of a plaint". That was laid down by the Privy Council in *Abdullah Ashgar Ali v. Ganesh Das*, AIR (20) 1933 PC 63 A proceeding for compensation made under the Workmen's Compensation Act or under the Motor Vehicles Act cannot be confused with a suit. That ingredient of Section 3(5) has apparently not been noticed by the learned Judges in the cases cited before us. Moreover, when the Madhya Pradesh High Court in *Radhabai Bhikhaji* (supra) spoke of a duplication of proceedings it was apparently not pointed out to the learned Judges that there is no duplication in the true sense, and that the claim under the Workmen's Compensation Act is based on a statutory liability while that under the Motor Vehicles Act rests on liability in tort. In *Shardaben v. M.I. Pandya* 1971 ACJ 222 : AIR 1971 Guj. 51 the Gujarat High Court identified Claims Tribunal as a Court, and that is also the view which appears to have been taken by the Madhya Pradesh High Court in *Krishan Gopal Devi Prasad and Others Vs. Dattatraya Madho Lad*, and again in *Mangilal Ganpat Vs. The Union of India (UOI)*, . Reliance has been placed by the respondents on *Jaswant Rai v. National Transport & General Co. Ltd.* 1972 ACJ 21 (Punj.), but in that case it was not specifically considered that a claim could not lie directly under the Workmen's Compensation Act if a claim had already been made under the Motor Vehicles Act. If the decision in that case can be construed as the respondents would have it, I regret I am unable to agree with the law laid down by it. Following the view taken by the Madhya Pradesh High Court in *Radhabai Bhikaji* (supra), the Mysore High Court held in *Yellubai Torappa Kadam v. Mujawar & Co.* 1973 ACJ 242 (Mys.) that a Claims Tribunal under the M.V. Act could be described as a "Court of law" in the sense used in Section 3(5) of the Workmen's Compensation Act, and therefore, a claimant could file a claim either under the Workmen's Compensation act or under the Motor Vehicles Act, but not under both. The view proceeds on the assumption that because Section 110F excludes a Civil Court from adjudicating on claims falling within the jurisdiction of the Claims Tribunals, it is intended that Claims Tribunals could substitute for Civil Courts and can therefore be regarded as "Courts of law". With respect, the assumption is not justified. The purpose of Section 110F of the Motor Vehicles Act has already been discussed above, and in my opinion, the exclusion of the Civil Court does not make a Claims Tribunal a Court of law, notwithstanding that the Claims Tribunal exercises some of the powers of a Civil Court under the Code of Civil Procedure. I may also add that, as was observed by the Madhya Pradesh High Court in *Radhabhai Bhikaji* (supra), there is no material distinction relevant to the point before us between the expression "Civil Court" and the expression "Court of law" used in Section 3(5) of the Workmen's Compensation Act.

14. Having regard to the manner in which the law has developed, to which reference has already been made, I find myself unable to accept the proposition that a claimant, to whom Section 110AA of the Motor Vehicles Act does not apply, cannot claim compensation both under the Workmen's Compensation Act and the Motor Vehicles Act.

15. I am of the opinion that neither Section 3(5) nor Section 19 of the Workmen's Compensation Act operates as a bar to the consideration of the claim made by the appellants under the Motor Vehicles Act. That claim was maintainable before the Claims Tribunal, and therefore, the present appeal is maintainable. The institution of a claim under the Workmen's Compensation act does not bar the present appeal.

Similar view has been taken by the Division Bench of this Court (Coram : R.C. Mankad & S.A. Shah, JJ.) in Superintendent of Post Offices, Rajkot and Ors. v. Pratap Ghelabhai Maru and Ors. 1987 ACJ 674. Relevant Paragraph 3 of the said judgment is reproduced as under:

3. Second ground which is urged on behalf of the appellant is that since the claimant has received compensation under the Workmen's Compensation Act, it is not open to him to claim compensation or damages from the appellants. We do not find any substance in this argument also. It is true that u/s 110AA of the Motor Vehicles Act, the claimant could not have claimed compensation under the Workmen's Compensation Act and also damages from the owner and insurer of auto-rickshaw. So far as the owner of auto-rickshaw was concerned, the claimant had to make a choice either to claim compensation under the Workmen's Compensation Act or to claim damages under the general law. However, the question of making such election does not arise so far as third party is concerned. Claimant could not have claimed any compensation from the appellant under the Workmen's Compensation Act. Therefore, there is no question of making any choice as urged on behalf of the appellant. Reliance was sought to be placed on a decision of this Court in Premier Insurance Co. v. Gambhirsing AIR 1975 Guj. 133, in support of the argument that claimant is not entitled to claim damages he having obtained compensation under the Workmen's Compensation Act. This decision on which reliance is placed has no application to the facts of this case. That was a case in which two vehicles were not involved in the accident. The claimants in rash and negligent driving of motor vehicles driven by the driver employed by the owner who had engaged them as labourers. It was in the background of the facts which obtained in that case, that the Court held that the claimants had to choose between two remedies available to them - one under the Workmen's Compensation Act and other under the general law. Therefore, the mere fact that the claimant has obtained compensation under the Workmen's Compensation Act does not disentitle him from claiming compensation or damage from the appellants. Therefore, the second ground urged on behalf of the appellants also fails.

In National Insurance Company Ltd., Palai Vs. Philomina Mathew and Others, Full

Bench of the Kerala High Court has held that if a claim for compensation arises under both the Acts, there is no doubt that the liability of the insurer is wider and not restricted to cases of insolvency, etc., mentioned in Section 14 of the W.C. Act, 1923. See also in case of Sharad Ganpat Deshmukh and Ors. v. Kunda Ashok Polade and Ors. reported in 2003 (IV) LLJ 480, Bombay High Court.

This apart, contention as regards Section 3(5) of the Workmen's Compensation Act, 1923, has neither been raised either in the Written Statement nor in the Memorandum of Appeal before this Court by the Insurance Company. As such, the opponents-claimants have no opportunity to meet the same. Consequently, it cannot be allowed to be raised at this stage. Even otherwise, if barred, it is recourse to Civil Courts *stricto sensu* and not the Tribunals which came into existence in 1939 while the Workmen's Compensation Act in 1923.

In *Smt. Gayatri Devi v. Tani Ram and Ors.* AIR 1976 HP 78, it has been observed as under:

11. Reliance was placed by the respondents on Section 19 of the Workmen's Compensation Act in support of the proposition that if an application for compensation is made u/s 3 of the Workmen's Compensation Act, it is the Commissioner under that Act who alone has jurisdiction to decide the question and that the Civil Court is barred from dealing with it. Section 19 provides:

19. Reference to Commissioners :- (1) If any question arises in any proceedings under this Act as to the liability of any person to pay compensation (including any question as to whether a person injured is or is not a workman) or as to the amount or duration of compensation (including any question as to the nature or extent of disablement), the question shall, in default of agreement, be settled by a Commissioner.

(2) No Civil Court shall have jurisdiction to settle, decide or deal with any question which is by or under this Act required to be settled, decided or dealt with by a Commissioner or to enforce any liability incurred under this Act.

To my mind, Section 19 refers to a liability arising by virtue of the Workmen's Compensation Act. Sub-section (1) speaks of a proceeding under the Act. Such a proceeding relates to the statutory liability created under that Act. And Sub-Section (2) specifically mentions "any liability incurred under this Act". The liability adjudicated upon by Claims Tribunals under the Motor Vehicles Act is a liability founded in tort and falls outside the scope of Section 19 of the Workmen's Compensation Act."

[Also See *Krishi Utpadan Mandi Samiti v. Arvind Chaubey*, (2002) 9 SCC 549

Further, the question for determination is whether the amount of Rs. 80,000/- awarded under the Workmen's Compensation Act, 1923, is liable to be deducted from the compensation paid under the Motor Vehicles Act, 1939? This question shall be considered when the question of enhancement of compensation is considered.

Further, it is found that Claim Petition was filed on 6-4-1988 and Written Statement has been filed on 22-8-1988. Thereafter, matter remained pending before the Tribunal till 1996. Issues were framed on 29-6-1996, deposition of claimants recorded on 7-2-1997, and second witness of claimants examined on 8-8-1997. The Insurance Company did not examine any witness in its defence. Award was pronounced on 30-8-1997. With this background, we find that delay is from 22-8-1988 to 29-6-1996. It is not because of claimants. Rather, they represented to this Court on administrative side seeking direction to the Claims Tribunal to dispose of the matter at an early date. Consequently, claimants cannot be held responsible, for delay therefore, they are entitled to interest from 6-4-1988 at the rate allowed by the Claims Tribunal.

#. Now considering First Appeal No. 407 of 1998 filed by claimants for enhancement, the deceased was driver of oil-tanker. He was earning Rs. 1,000/- per month salary and Rs. 30/- per day daily allowance as per the statement of widow apart from Rs. 900/- for S. S. Carriers (partnership firm). There is no rebuttal to this claim. However, the Claims Tribunal accepts the salary of Rs. 1,000/- but reduces the income from daily allowance to Rs. 500/- per month on the ground that he may not be on outstation duty for all the thirty days and there being no satisfactory evidence of income from partnership firm. At the time of accident, deceased was 33 year old. He leaves behind widow and two minors. Salary of driver during 1987 could not be Rs. 1,000/-. Family could not survive on this amount. May be, the widow meant to say that she was receiving this amount from the husband. However, we take that he was receiving Rs. 1,000/- per month by way of salary. However, deduction of daily allowance is not justified since drivers, particularly of tankers/trucks remain out day and night. Therefore, daily allowance being claimed should be allowed but not the income from partnership firm. This way, monthly income of deceased is taken Rs. 1,900/- per month.

Considered on the principles laid down by the Apex Court in Smt. Smt. Sarla Dixit and another Vs. Balwant Yadav and others, and Division Bench decision of this Court in Ritaben alias Vanitaben and Anr. v. Ahmedabad Municipal Transport Service and Anr. 2000 ACJ 153, amount of compensation payable to the claimants, is computed thus : $1900 \times 2 = 3800$ (double of monthly salary); $3800 + 1900 = 5700$ (add one month's salary); $5700/2 = 2850$ (half of the above); deducting 1/3rd from 2850 comes to 1900; $1900 \times 12 = 22,800$ (yearly income); $22,800 \times 17 = 3,87,600$ (multiplier as per schedule); $3,87,600 + 20,000 = 4,07,600$ (add Rs. 2,000/- under heads of pain, shock etc.)

Therefore, the total compensation comes to Rs. 4,07,600/-. It is submitted that claimants have claimed Rs. 3,50,000/-, therefore, they are not entitled to more amount. We do not agree with this submission, particularly when it has been decided in catena of decisions by Apex Court that claimants are entitled to just compensation against the tort-feasors, and it is the duty of the Court to assess the same. [See Nagappa Vs. Gurudayal Singh and Others, Questions falling for

examination in the present case have not been examined in Mrs. Helen C. Rebello and Others Vs. Maharashtra State Road Transport Corpn. and Another, therefore, this decision is not applicable to the facts of this case.

Looking to all the facts and circumstances of the case, more so, the fact that deceased was a young man with good prospects for improvement in salary, left behind young widow and minor children with nothing to depend upon, compensation worked out be paid to them.

#. Examining the matter, it seems, amount has not been correctly worked out under the Workmen's Compensation Act, 1923, and paid to the claimants. Section 4(1)(a) is reproduced:

4. Amount of compensation :- (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:

(a) Where death results from the injury

an amount equal to fifty percent of the monthly wages of the deceased workman multiplied by the relevant factor; or

an amount of eighty thousand rupees, whichever is more....

Explanation I :- For the purposes of Clause (a) and Clause (b) "relevant factor" in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

Explanation II :- Where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purposes of Clause (a) and Clause (b) shall be deemed to be four thousand only

(c) Where permanent partial disablement resulted from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury; and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

Looking to the definition of "wages" u/s 2(m) of the W.C. Act, 1923, wages includes any privilege or benefit which is capable of being estimated in terms of money, means all allowances including daily allowance. Taking the income at Rs. 1,900/- per month, compensation can be Rs. 1,91,577/-.

Monthly wages : Rs. 1,900/-

Fifty percent thereof : Rs. 950/-

Considering the age (33), relevant factor as mentioned in Schedule V of 201.66 would be applicable.

Therefore, $950 \times 201.66 = \text{Rs. } 1,91,577/-$

The Workmen's Compensation Commissioner seems to have granted less compensation u/s 4 of the Workmen's Compensation Act, 1923, since the claimants are entitled to the amount whichever is more envisaged in Section 4(1) (a) of the said Act. That apart, Commissioner has not taken into consideration the default made by the employer in depositing the amount within one month from the date it fell due so imposing penalty and interest for late deposit u/s 4A of the Workmen's Compensation Act. Relevant Section 4A is as under:

4-A. Compensation to be paid when due and penalty for default:

(1) Compensation u/s 4 shall be paid as soon as it falls due.

(2) In cases where the employer does not accept the liability for compensation to the extent claimed, he shall be bound to make provisional payment based on the extent of liability which he accepts, and such payment shall be deposited with the Commissioner or made to the workman, as the case may be, without prejudice to the right of the workman to make any further claim.

[(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall:

(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at the rate of twelve percent, per annum or at such higher rate not exceeding the maximum of the lending rates of any Scheduled Bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due; and

(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears, and interest thereon pay a further sum not exceeding fifty percent of such amount by way of penalty:

Provided that an order for the payment of penalty shall not be passed under Clause (b) without giving as reasonable opportunity to the employer to show cause why it should not be passed.

Explanation :- For the purposes of this sub-section, "Scheduled Bank", means a Bank for the time-being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

[(3A) The interest and the penalty payable under Sub-section (3) shall be paid to the workman or his dependent, as the case may be.]]

It is also contended that claimants offered undertaking before the Commissioner for Workmen's Compensation vide Application No. 149 of 1988 confining the claim to Rs. 80,664/-. Therefore, no further compensation is payable to the claimants. It is found that claim under Motor Vehicles Act, 1939, is prior in point of time, filed on 6-4-1988. It was pending. Learned Counsel for the claimants submits that the Workmen's Compensation Commissioner was approached on 20-7-1988 for payment of compensation under the Act. Therefore, a contract, which is unconscionable, defeats the provisions of law is neither enforceable nor creates bar against statute and statutory right. Claimants right to raise the claim under the two statutes has already been answered. Further, there is no substance in this contention also as the right of claimant cannot be set at naught by unconscionable bargain; undertaking is not against the offending owner of vehicle and its Insurance Company nor it could be entertained by the Commissioner. Therefore, deduction is not permissible. In these circumstances, it is open for the claimants to approach the Commissioner for more compensation as per Section 4(1)(a) read with Section 4A of the Workmen's Compensation Act, 1923, in the light of observations made in the preceding part of the judgment or take such other legal steps which may be available to them, and Court/Tribunal, Commissioner shall consider the matter and decide in accordance with law.

13. In view of the decision of Division Bench of this Court as referred to above, law is very much clear on the subject that the claimants are entitled to file independent proceedings against respondent if two vehicles are involved in accident and claimants are entitled to file Claim Petition before Claims Tribunal against offending vehicle being third party under the M.V. Act and simultaneously claimant is also entitled to file claim application before W.C. Commissioner against his employer and Insurance Company of the vehicle of employer. Employer is statutorily bound to pay compensation in case of death of its employee because of the relationship of employer and employee and claimant is also filing Claim Petition against tort-feasor who is liable to pay compensation under the M.V. Act, 1988. Particular observations made by Division Bench of this Court are reproduced as under:

Even otherwise, there is no force in the submissions raised by the learned Counsel for the appellant-Insurance Company. Section 110A of Motor Vehicles Act, 1939 is applicable to a person who has two remedies against the joint tort-feasor(s) while object of Section 3(5) of the Workmen's Compensation Act, 1923, is to save the employer from double jeopardy, meaning thereby, from multiplicity of litigation, one under the Workmen's Compensation Act, 1923, and other under the Motor Vehicles Act, 1939. Where a claimant can avail one remedy against the employer under the Workmen's Compensation Act, 1923, he is not debarred from raising/claiming compensation under the Motor Vehicles Act, 1939, against the tort-feasor. Present is a case where claimants are receiving compensation from the employer who is statutorily bound to pay the same on the death of deceased being his Master. This is separate relationship and liability

and has nothing to do with the liability of a tort-feasor under the Motor Vehicles Act, 1939. In the Claim Petition before the Claims Tribunal, employer and insurer of Tanker are not party, therefore, no claim has been raised against them. Submission raised by the appellant, if accepted, would mean that claimants should feel satisfied with whatever is paid to them under the Workmen's Compensation Act, 1923, by the employer, and thereby, tort-feasor escaping liability under the Motor Vehicles Act, 1939, which remedy is independently available to the claimants as third party qua the offending vehicle.

14. Entire issue is becoming clear in view of observations made by Division Bench of this Court as referred to above and looking to facts of this case, respondents claimants are entitled to claim compensation from tort-feasor namely driver owner and Insurance Company of offending truck and they are also entitled to claim and receive compensation from employer of deceased and Insurance Company of tempo owned by employer, and are therefore, entitled to file two separate proceedings claiming compensation against tort-feasor means third party driver and driver-cum-owner of truck and Insurance Company of truck and in view of that, contentions raised by learned Advocate Ms. Hina Desai that there is bar of Section 167 of M.V. Act cannot be accepted because in said Claim Petition, owner Ajaysinh J. Raol and Insurance Company were formal party and matter was decided by Claims Tribunal only on the basis of negligence of driver of tempo means deceased who was driving vehicle, and therefore, nothing was awarded to claimants from employer and Insurance Company of tempo driven by deceased, and therefore, that can be considered to be formal party since no effective orders were passed against employer and Insurance Company of vehicle, and therefore, all such contentions raised by learned Advocate Ms. Hina Desai are rejected.

15. Therefore, according to my opinion, W.C. Commissioner has rightly decided matter and in doing so, no error has been committed by W.C. Commissioner, and therefore, no interference of this Court is required in this appeal, and therefore, this appeal is dismissed.