Gopi Ram vs Bhimsen & Ors on 3 August, 2009

Author: Vineet Kothari

Bench: Vineet Kothari

SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER APPEALS . :JUDGMENT DT

1/46

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR.

1. S.B. CIVIL MISC. APPEAL NO.891/2008

The New India Assurance Co. Ltd.

Versus

Smt. Bidami and ors.

2. S.B. Civil Misc. Appeal No.30/2006

Smt. Bidami Devi and ors.

Versus

Bhimsen and ors.

3. S.B. Civil Misc. Appeal No.29/2006

Gopi Ram

versus

Bhim Sen and ors.

PRESENT

HON'BLE Dr.JUSTICE VINEET KOTHARI

Mr.D.S. Nimla, for the appellant- Insurance company
Mr.Anil Bhandari, }
Mr.B.L. Tiwari } for the respondents-claimants.

Mr.Sanjeev Johari } for the owner and driver

DATE OF JUDGMENT : 3rd August, 2009.

REPORTABLE

JUDGMENT

SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

1. This appeal has been filed by the appellant - Insurance Company under Section 30 of the Workmen Compensation Act, 1923 aggrieved by the award of the Workmen Compensation Commissioner, Jodhpur dtd.31.3.2008 in claim Case No.11/2006.

2. The brief facts giving rise to this appeal are that the husband of the respondent No.1 Smt. Badami, namely, Pappu Ram while driving Truck No. RJ-19/1G-3189 coming from Mumbai to Jodhpur in the night between 29.7.2003 and 30.7.2003, collided with Trailer No. HR-55-0707 and in the said accident Pappu Ram lost his life. The wife of the said deceased Pappu Ram, namely, Smt. Bidami Bai and his children Mamta, Rekha and Munna initially filed claim case No.103/2005 on 16.5.2005 before the Motor Accident Claims Tribunal, Jodhpur and the said claim was awarded on 30.11.2005 and a sum of Rs.4,60,333/- was paid to the claimants for the said death, in January, 2006. Thereafter somewhere in June, 2006, it appears that the same claimants filed present claim before the Workmen Compensation Commissioner against the employer and owner of the Truck being driven on the date of accident by Pappu Ram, namely, Truck No.RJ19/1G-3189 impleading the owner Sh. Gopi Ram as SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 employer - respondent and the appellant New India Assurance Company as respondent. In MACT Case No.103/2005, these claimants had impleaded tortfeasor, namely owner Bhim sen, driver and insurer, the same Insurance Company, namely, the New India Assurance Company Limited of other offending vehicle, namely Trailer No. HR55-0707, in which they were awarded a compensation of Rs.4,61,333/-.

3. The Workmen Compensation Commissioner decided the claim No.11/2006 and awarded a sum of Rs.3,46,368/- and interest on the said compensation of Rs.1,93,866/- by the impugned award dtd.31.3.2008. The Workmen Compensation Commissioner in the award dtd.31.3.2008 noticed that there was delay in filing the claim petition of about 3 years, since the accident took place ion 29.7.2003 and the claim petition was filed in June, 2006, however the said delay deserves to be condoned as the employer respondent No.1 Gopi Ram had assured the claimant that let first MACT claim be decided and thereafter the claim under the Workmen Compensation Act as may be decided by the competent authority would be paid by him. The Workmen Compensation Commissioner also held that plea of limitation would not come in the way of the claimants and the claim should be

decided on merits. The Workmen Compensation Commissioner also relying upon the decision of Gujarat High Court in the case of Nasim Banu V/s Ramji Bhai Bachchu Bhai Ahi SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 reported in MACD 2006 (1) Gujarat 108 held that notwithstanding the award of the claim under the provisions of Motor Vehicles Act against the tortfeasor, the claim against the employer under the Workmen Compensation Act, 1923 could be awarded in favour of the claimants. Being aggrieved by the said award, the Insurance Company has preferred this appeal before this Court.

4. Mr. D.S. Nimla, learned counsel appearing for the Insurance Company submitted that in view of bar under Section 167 of the Motor Vehicles Act, 1988 and also Section 3(5) of the Workmen Compensation Act, the claimants - legal representatives of deceased Pappu could not claim double benefit under both the enactments and therefore, the subsequent claim under the Workmen Compensation Act, 1923 was liable to be rejected and the appellant - insurance company cannot be made to pay said compensation. He also urged that claim itself was time barred having been filed after a delay of 3 years and also there was contributory negligence on the part of the driver Pappu Ram himself and thus, the claim under the MACT case having already been paid by the same insurance company, the award under the Workmen Compensation Act, 1923 deserves to be set aside. He relied upon the several decisions of the Hon'ble Supreme Court and various other High Courts and reference to which would be made hereinafter.

SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

5. On the other hand, Mr. Anil Bhandari, Sunil Bhandari, the learned counsels appearing on behalf of the claimants vehemently submitted that doctrine of election provided for in Section 167 of the Motor Vehicles Act, 1988 does not apply where the claimants have right to proceed against the employer under the Workmen Compensation Act and against the tortfeasor; a different person under the provisions of Motor Vehicles Act. They submitted that bar is only against availing two remedies against the same employer under both the enactments, namely, Workmen Compensation Act, 1923 and Motor Vehicles Act, 1988. They also urged that the claim filed before the Workmen Compensation Commissioner was not delayed and the delay, if any, has already been condoned by the Workmen Compensation Commissioner and also there was no contributory negligence on the part of the said deceased Pappu Ram and obviously since the respondent parties in both the claim petitions were different, even though the Insurance Company was common, the Insurance Company cannot be absolved from its liability to pay compensation under two separate insurance contracts, one as insurer of the tortfeasor for vehicle No. HR-55-0707 and other as insurer of Truck No. RJ-19 1G-3189 as employer covering risk of the Workman under the Workmen Compensation Act. He also drew the attention of the Court towards proviso to Section 147 of the Motor Vehicles Act in which liability arising under the provisions of Workmen Compensation Act, 1923 in respect of death or bodily SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 injury to such employee engaged in driving of the vehicle could be covered under the insurance policy. Mr. Anil Bhandari also relied upon the several decisions of the Supreme Court and other High Courts including this

Court, reference to which is being made hereinafter.

SPECTRUM OF CASE LAWS

6. Let this Court deal with case laws cited at the bar on both sides in reverse order date wise, namely, the latest cases being discussed first.

CASE LAWS RELIED UPON BY THE INSURANCE COMPANY

I) Bhakra Beas Management Board V/s Kanta Aggarwal

and ors. reported in 2008 ACJ 2372 decided on 7.7.2008

7. While dealing with the case of compensation under the provisions of Motor Vehicles Act, the Hon'ble Apex Court found that the widow of the deceased had been provided compassionate appointment by the same employer who was drawing almost same salary as the deceased was and in order to arrive at just and fair SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 compensation, the Hon'ble Apex Court reduced the amount of compensation arrived at by the MACT and upheld by the High Court of Rs.8,48,106/- to Rs.5,00,000/- in full and final settlement of claim. While discussing the principles relating to assessment of damages under the Fatal Accident Act, the Court observed that any benefit accruing to the dependents by reason of the relevant death must be taken into account and under those Acts the balance of loss and gain to a dependant by the death must be ascertained. Relying upon the earlier decision of the Supreme Court in the case of Gobald Motor Services Ltd. V/s R.M.K. Veluswami reported in 1958-65 ACJ 179 (SC) and Davies V/s Power Duffryn Associated Collieries Ltd. reported in (1942) AC 601 in para 7 of the judgment and judgment of the Supreme Court in the case of Helen C. Rebello V/s Maharashtra State Road Transport Corporation reported in 1999 ACJ 10 (SC) in para 9 of the judgment, the Hon'ble Apex Court held as under:

> "7. In United India Insurance Co. Ltd. V/s Patricia Jean Mahajan, 2002 ACJ 1441 (SC), it was inter alia, observed as follows:
>
> "(21) Mr. Soli J. Sorabjee submitted that while assessing the amount of compensation, the benefits which have accrued to the claimants by reason of death must also be taken into account. A SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 kind of balancing of losses and the gains or benefit by reason of death would be necessary. In support of the above contention, he has referred to the decision in Gobald Motor Services Ltd. v. R.M.K. Veluswami, 1958-65 ACJ 179 (SC). It is a decision by a three-Judges Bench of this Court and at

page 184, the observations made by the House of Lords in Davies v. Powell Duffryn Associated Collieries Ltd., (1942) AC 601, has been quoted which reads as follows:

"The general rule which has already prevailed in regard to the assessment of damages under the Fatal Accidents Acts is well settled, namely, that any benefit accruing to a dependant by reason of the relevant death must be taken into account. Under those Acts the balance of loss and gain to a dependant by the death must be ascertained, the position of each dependant being considered separatdely."

9. In Helen C. Rebello v Maharashtra State Road Trans. Corpn. 1999 ACJ 10 (SC), it was held as follows:

SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 "(34) 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 on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the 'pecuniary advantage' which from whatever source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do.

Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this Act has to be deciphered, correlating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of pecuniary loss to the claimant by accident injury or death and not other forms of death. If there is natural death or death by suicide, serious illness, including even death by accident, through train, air flight not involving a motor vehicle, would not be covered under the Motor Vehicles Act. Thus, the SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 application of the general principle under the common law of loss and gain for the computation of compensation under this Act must correlate to this type of injury or death, viz. Accidental. If the words 'pecuniary advantage' from whatever source are to be interpreted to mean any form of death under this Act, it would dilute all possible benefits conferred on the claimant and would be contrary to to the spirit of the law. If the 'pecuniary advantage' resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets movable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased, etc. This would obliterate both, all the possible conferment of economic security to the claimant by the deceased and the intentions of the legislature. By such an interpretation, the tortfeasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meagre liability. In our considered opinion, the general principle of loss and gain takes colour of this statute viz. The gain has to be interpreted which is as a result of the accidental death and the loss on

account of the accidental death. Thus, SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 under the present Act, whatever pecuniary advantage is received by the claimant, from whatever source, would only mean which comes to the claimant on account of the accidental death and not other form of death. The constitution of Motor Accidents Claims Tribunal itself under Section 110 is, as the section states:

> "... for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to ..."

(35) Thus, it would not include that which claimant receives on account of other forms of death, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no correlation to the accidental death for which compensation is computed. Any amount received or receivable not only on account of the accidental death but that would have come to the claimant even otherwise could not be construed to be the 'pecuniary advantage', liable for deduction. However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incidence may be an SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 amount liable for deduction. However, our legislature has taken note of such contingency, through the proviso of Section 95. Under it, the liability of the insurer is excluded in respect of injury or death, arising out of and in the course of employment of an employee.

(36) This is based on the principle that the claimant for the happening of the same incidence may not gain twice from two sources. Thus, it is excluded either through the wisdom of the legislature or through the principle of loss and gain through deduction not to give gain to the claimant twice arising from the same transaction, viz. Same accident. It is significant to record here in both the sources viz. either under the Motor Vehicles Act or from the employer, the compensation receivable by the claimant is either statutory or through the security of the employer securing for his employee but in both cases, he receives the amount without his contribution. How thus an amount earned out of one's labour or contribution towards one's wealth, savings, etc. either for himself or for his family, which such person knows under the law, has to go to his heirs after his death either by succession or under a will could be said to be the 'pecuniary gain' only on account of one's accidental death. This of course, SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 is a pecuniary gain but how this is equitable or could be balanced out of the amount to be received as compensation under the Motor Vehicles Act. There is no correlation between the two amounts. Not even remotely. How can an amount of loss and gain of one contract could be made applicable to the loss and gain of another contract. Similarly, how an amount receivable under a statute has any correlation with an amount earned by an individual. Principle of loss and gain has to be on the same plane within the same sphere, of course, subject to the contract to the contrary or, any provision of law."

8. The judgment in the case of Helen C. Rebello V/s Maharashtra State Road Transport Corporation decided by the Apex Court arose in the circumstances of question raised before the Court as to

whether the compensation received from the Life Insurance Corporation on the death of the insured arising out of accident could be deducted/set off against the claim awarded under the provisions of Motor Vehicles Act. The Hon'ble Apex Court answered the question in negative and held that the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the Life Insurance Policy is contractual. The relevant portion has already been SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 quoted above and the conclusion drawn by the Apex Court in para 37 of the judgment is reproduced hereunder for ready reference:

> "37. Broadly we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while th amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz. Accident which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No correlation between the two. Similarly, life insurance policy amount is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which insured contributes in the form of premium. It is receivable even by the insured, if he lives till maturity after paying all the premiums, in the case of death insurer indemnifies to pay the sum to the heirs, SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death, but otherwise on insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as 'pecuniary advantage' liable for deduction. When we seek the principle of loss and gain, it has to be on similar and same plane having nexus inter se between them and not to which, there is no semblance of any correlation. The insured (deceased) contributes his own money for which he receives the amount has no correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any

> contribution. As we have said the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

ii) National Insurance Co. Ltd. V/s Mastan and anr. - 2006 ACJ 528.

9. The question being decided in the said case was as to whether the insurer while defending the action initiated under the Workmen Compensation Act is precluded from raising any defence as envisaged under Sub-Section (2) of Section 149 of the Motor Vehicles Act, 1988. The Apex Court observed in para 22 and 23 about Section 167 and 168 of the Act and doctrine of election in the following manner:

> "22. Section 167 of the 1988 Act statutorily provides for an option to the claimant stating that where the death of or bodily injury to any person gives rise to a claim for compensation under the 1988 Act as also the 1923 Act, 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 SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 both. Section 167 contains a non obstante clause providing for such an option notwithstanding anything contained in the 1923 Act.
>
> 23. The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he other would have had. The doctrine of election postulates that when two remedies are available for the same relief, the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case."

10. In the case of A. Trehan V/s M/s Associated Electrical Agencies reported in 1996 Supreme Court on Accident Claims 813, the Hon'ble Supreme Court held that bar under Section 53 of the Employees State Insurance Act, 1948 takes away the right of the workman who is insured person and an employee under the ESI Act to claim compensation under the Workman's Compensation Act, 1923.

11. In the case of Pawan Kumar V/s Commissioner, Workmen's Compensation reported in 1997 ACJ 397, the learned Single Judge of Punjab and Haryana High Court held that in view of Section 167 of SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 the Motor Vehicles Act, the claimant - workman had option of forum and where the claimants filed the claim petition before the Commissioner under the Workmen Compensation Act and they also filed claim petition before the Motor Accident Claims Tribunal under the Motor Vehicles Act, 1993, the Court held that under both the Acts, the claimant could not claim benefit.

12. Similarly, Gauhati High Court in the case of Abul Khayer V/s Union of India reported in 2008 (4) TAC 981 (Gau.) held that claimants have no right to approach both the forums prescribed under MACT Act as well as Workmen Compensation Act and he can opt for forum and such option must be a conscious option and choice of the claimant must be out of free will and should be made before adjudication of his claim.

13. The Gujarat High Court in the case of Gujarat State Road Transport Corporation V/s Hathibhai Senghabhai Ruppura reported in 2003 ACJ 1759 also allowed set off of claim under Section 163A of the Motor Vehicles Act against the compensation awarded under the provisions of Workmen Compensation Act. CASE LAWS RELIED UPON BY THE CLAIMANTS SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

14. In the case of Superintendent of Post Offices, Rajkot V/s Pratap Ghelabhai Maru reported in 1987 ACJ 764, the Division Bench of Gujarat High Court while dealing with the claim of compensation by the driver of Auto-rickshaw who suffered injuries in an accident with another vehicle, a van coming from other side was seized of the question as to whether the claimant who had received the compensation under the Workmen Compensation Act for said injuries can maintain the claim for compensation from the driver/owner of the van under the Motor Vehicles Act, held in positive and discussing Section 110 AA of the Old Motor Vehicles Act, 1939, which is para materia with Section 167 of the new Motor Vehicles Act, 1988 has held in para 3 as under:

> "3.....It is true that under Section 110-AA 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 SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 the appellant under the Workmen's Compensation Act. Therefore, there is no question of making any choice urged on behalf of the appellants..."

15. Similarly, the learned Single judge of Bombay High Court in the case of Sherad Ganpat Deshmukh V/s Kunda Ashok Polade reported in 2003-IV- LLJ (Supp.) - NOC -480 held as under:

> "The questions that arose for consideration before the High Court were whether receiving the compensation under the Workmen's Compensation Act was a bar to the respondent's filing a claim petition under the M.V. Act, and the question of computing the compensation. It was well known, the High Court observed that the adjudication of a claim under the M.V. Act takes several years whereas under the W.C. Act, the compensation is required to be deposited soon after the death of the deceased. The compensation under the Workmen's Compensation Act was a statutory

> payment without demand and the receiving of said compensation by the respondents was not a bar to their filing a claim petition under the M.V. Act. As for computing the compensation amount Section 110-B of the M.V. Act, SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 empowered the Tribunal to determine the compensation " which appears to be just". Both the M.V. Act of 1939 and 1988 contain similar provisions relating to compensation, which are beneficial provisions and the legislative intent is to confer wide discretion on the Tribunal in awarding monetary compensation. The Tribunal had already deducted 50% from the total amount awarded as there was a finding of contributory negligence. The High Court was not inclined to interfere in the just discretion exercised by the Tribunal."

16. Again the Division Bench of the Gujarat High Court in a later decision in the case of Nasimnbanu V/s Ramjibhai Bachubhai Ahir reported in MACD 2006(1) (Guj.) 108 which has been referred and relied upon by the Workman Compensation Commissioner in the impugned order in the present case also, the Gujarat High Court held that where the claimant can avail one remedy against the employer under the Workmen Compensation Act, 1923, he is not debarred from receiving/claiming compensation under the Motor Vehicles Act against the tortfeasor. The Division Bench held that Section 3(5) of the Workmen Compensation Act could not take into account the provisions of later to be enacted Act, namely Motor Vehicles Act, 1939 and therefore, could not bar such proceedings under the Motor Vehicles Act, 1939. It would be appropriate to reproduce relevant part SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 of para 5 of the said judgment in including the quotation of Himachal Pradesh High Court in the case of Smt. Gayatri Devi V/s Tani Ram reported in AIR 1976 HP 75 as under:

> "5……. Section 110-A of Motor Vehicles Act, 1939 is applicable to a person who has two remedies against the joint tort-feasor (s) while object of Sec. 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, 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 Vehciles Act, 1930. In the claim petition before the Claims Tribunal, employer and insurer of tanker are not party, therefore, no claim has been raised against SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 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."

".....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 Sec. 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 Hans Raj Gupta V/s Dehra Dun Mussorie Electric Tramway Co. Ltd. , AIR 1933 PC

63. A proceeding for compensation under the Motor Vehicles Act cannot be confused with a suit. That ingredient of Sec. 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 Bhikaji (supra) spoke of a duplication of proceedings, it was apparently not pointed out to the SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 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..."

17. Dealing with bar under Section 53 of the ESI Act, 1948 vis-a- vis claim under the provisions of MV Act, there are two decisions of coordinate benches of this Court as well. In the case of Tribhuwan Singh V/s Ramesh Chandra and ors. reported in 1998 ACJ 579, the learned Single has held that Section 53 of the ESI Act does not debar the workman to claim compensation against tortfeasor under the provisions of Motor Vehicles Act. In the case of Tribhuwan Singh (supra), this Court held as under :

"11. Apart from this, Section 75 of the E.S.I. Act envisages the matters which can be decided by the E.S.I. Court. Clause (e) is the only relevant clause for our purpose. Under this clause, if an employee has a right to have benefit as to the amount and duration thereof, he can approach the E.S.I. Court. The benefits have bene categorised in Chapter V of the Act. Section 46(1)(c) provides that insured is entitled to the periodical payment when suffers from disablement as a result of SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 employment injury. In my opinion, section 46 does not envisage remedy where an employee suffers from tortious act. It has been held by Madhya Pradesh High Court in the case of Madhya Pradesh State Road Transport Corpn. V/s Praveen Kumar Bhatnagar 19945 ACJ 579 (MP), that the E.S.I. Court does not deal with a tortfeasor's liability and does not award against him damages/compensation according to the uncodified law of Torts for such of his act of omission or commission as is regarded as a wrong liable to be redressed under the English common law. It has further been held in this case that Section 53 of the E.S.I. Act cannot kill the indefeasible right of obtaining compensation/damages under Motor Vehicles Act. The learned Judge has

> interpreted section 53 of the E.S.I. Act and has held that the term 'any other law' which follows immediately the clause "under the Workmen's Compensation Act or" must reasonably mean a law of the same genre as of the named Act, and that section 110-A of the Motor Vehicles Act (166 of the new Act) is not covered by Section 53. I fully agree with the view taken by the learned Judge in that case. The right to sue arising from the substantial law, namely, law of Torts cannot be destroyed by the procedural provision of section 61 of SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 the E.S.I. Act or section 53 of the Act."

18. In the recent case of Oriental Insurance Co. Ltd. V/s Mohan Kanwar reported in 2007 ACJ 420, this Court has held as under:

> "If the submissions of learned counsel for the insurer are accepted, the same would lead to the proposition that whenever an employee covered under the E.S.I. Act suffers an employment, even if because of or at the hands of a person absolutely unconnected with such employment or the employer, such a tortfeasor would enjoy immunity from damages because of the victim's employment being covered under the protective umbrella of State insurance. It cannot be gainsaid that 50 per cent of the liability for the accident in the present case has been of the truck driver. There could still be cases involving entire responsibility of third person for bringing about death of or injury to an E.S.I. covered employee. Neither the Motor Vehicles Act nor the E.S.I. Act proceed on any such principle that the tortfeasor who is a third party qua an employee or employer gets benefited or goes scot-free having nothing to answer for his tortious deed. If such liability would be permitted to be avoided with reference to SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 section 53 of the E.S.I. Act the result would be of providing exemption to a tortfeasor to answer for his tortious deed only because a beneficial piece of legislation of E.S.I. Act provide for relief to the victim if there is a causal connection of the injury with him employment. Such interpretation has never been approved by the Hon'ble Supreme Court and, on the contrary, as indicated by the Hon'ble Supreme Court in Western India Plywood Ltd., 1997 ACJ 1281 (SC), the liability of the third party tortfeasor is not taken away by section 53 of the E.S.I. Act. A social security legislation like E.S.I. Act operating in an entirely different area cannot be permitted to be used by a tortfeasor to suggest that it provides him with immunity from his liability.
>
> The bar of section 53 is obviously to protect the employer from being vexed twice for the same cause and this court is clearly of the opinion that the suggestion by the appellant insurer of the offending truck having no co-relation whatsoever with the employer of the deceased, that the bar of section 53 or section 61 of the E.S.I. Act would operate to its benefit also, remains fundamentally baseless. Tribunal has awarded compensation towards 50 per cent liability of SBCMA NO.891/2008- THE

> NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 the truck concerned and in the context of such liability, the E.S.I. Act created no bar. The contentions made on behalf of the insurer deserve to be and are rejected."

19. The Division Bench of The Bombay High Court in the case of Inspector General of Police V/s Sayed Adam reported in 1998 (79) FLD 69 (Bombay), specifically dealt with the question as is involved in the present case held that doctrine of election under Section 167 of the Motor Vehicles Act, 1988 (Section 110-AA of the old Motor Vehicles Act, 1939) would only apply when the workman chose to proceed against his employer only and he could proceed either under the Workmen Compensation Act or the Motor Vehicles Act for the same injury or death as the case may be, but bar did not apply when the same claimants for the same injury or death proceeded against the tortfeasor - a third party and not being his employer. Distinguishing the Division Bench decision of Allahabad High Court in the case of Kalawati V/s Balwant Singh reported in 1986 ACJ 550, the Court proceeded to hold as under:

> "The learned Judges of the Division Bench of the Allahabad High Court in the matter of Kalawati V/s Balwant Singh lays down that by enactment of Section 110-AA, the tortfeasor has been exempted from paying any compensation, once it is found that the claimant has SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 made an application for compensation under the Workmen's Compensation Act and has been awarded compensation. In the very judgment, the learned Judges have made a specific reference to a disturbing aspect of this interpretation. The learned Judges observed that the claim that is made for compensation under the Motor Vehicles Act is based on the law of torts and is claimed against a tortfeasor. The tortfeasor is liable to pay compensation as awarded on the finding that there was a rash and negligent act on the part of the driver of the truck. Once this finding is given, the liability of the driver, the tortfeasor and the liability of the owner vicariously and that the insurer arises. Once there is a finding of rash and negligent act on behalf of the driver the claimant is entitled to compensation under the Motor Vehicles Act. The learned Judges further found that it appears that by enactment of Section 110-AA, the tortfeasor has been exempted from paying compensation once it is found that the claimant has made an application for compensation under the Workmen's Compensation Act and has been awarded compensation. The learned Judges rightly felt that would it not give rise to a situation where the tortfeasor would try to indue the claimant to got to the Commissioner under the SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 Workmen's Compensation Act, if need be by paying the claimant some amount to tide over, in order that the bigger liability to pay compensation be avoided. The poor and helpless claimant, in order to secure some amount quickly, may unknowingly approach the Commissioner under the Workmen's Compensation Act. Similarly a clever employer in order to avoid his liability may induce the claimant to

approach the Tribunal under the Motor Vehicles Act. This may lead to malpractice and manipulation. The learned Judges held that in their opinion, the principle of double jeopardy, as held in some cases, will not be applicable in the present case or such cases. The respondents being different parties and against whom there are different causes of action the principle of double jeopardy will not be attracted. The learned Judges posed the question but then should the tortfeasor avoid his liability and go free, avoiding payment of compensation? They further observed that it is common knowledge that the amount of compensation payable under the Motor Vehicles Act is substantially more than that awarded under the Workmen's Compensation Act. The learned Judges wondered could it be the real intention of the law makers that the tortfeasor should not be made to pay compensation, say SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 in a case where the bread-winner of the family dies in a motor accident leaving his entire family destitute ? However the learned Judges felt that the law needs to be suitably amended so that the tortfeasor does not evade payment of compensation in such a situation. However, the learned Judges felt helpless and held that the law as it stands cannot be stretched to say that in case of two different causes of action and where there are two different respondents, the claimant could claim compensation under both the Acts. According to the learned Judges, the law is clear that under Section 110- AA of the Motor Vehicles Act the claimant is barred from seeking compensation from more than one respondent. The law emphasises that he can claim compensation only under one forum and not both and that the choice is his.

With great respect we find ourselves unable to agree with the aforesaid decision rendered by the Division Bench of the Allahabad High Court. In our opinion from the reading of the section, it is clear that it is only in the case where the tortfeasor and the employer happens to be one and the same person that the workman or the claimant would have the choice and it is only in such a situation that the workman or SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 the claimant has to be exercise his option, namely, he can either proceed against his employer before the Accidents Claims Tribunal or he can proceed against the employer under the provisions of the Workmen's Compensation Act. So far as tortfeasor other than the employer is concerned, it is clear that the workman can never proceed against such a tortfeasor under the provisions of the Workmen's Compensation Act. We see absolutely no logic or reason to bar the remedy of the claimant or the workman against his employer or the tortfeasor when in the facts and circumstances of the case he could proceed against the tortfeasor only under the provisions of the Motor Vehicles Act and against the employer only under the provisions of the Workmen's Compensation Act."

20. Karnataka High Court in the case of National Insurance Co. Ltd. V/s Sarojini (since deceased) by L.Rs. and ors. reported in 2000 ACJ 126 held that the additional compensation paid to a passenger

travelling in a private car under a separate clause of Insurance Policy for which separate coverage was given on payment of additional premium was not deductible from the compensation payable as determined by the Tribunal under Section 166 of the Motor Vehicles Act and the Court held that it was not a case of duplication of SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 compensation, but it involves two sets of compensation which are payable virtually under two different heads. The relevant portion of the said judgment reads as under:

> "3.... The principle canvassed by Mr. Mahesh basically prohibits duplication of compensation in respect of the same contract of insurance and there can be no two options about the fact that the principle well founded. The issue in the present case does not involve the question of duplication of compensation but it involves two sets of compensation which are payable virtually under two different heads even if they are under the same policy. The reason why I have referred to the payment of a separate premium and the fact that this is a optional is because in insurance parlance, this would come under the concept of 'additional cover'. The essence of the term additional cover pre-supposes the fact that this would be a cover that one would be entitled to irrespective of what the quantum of the basic cover is and if this is the clear intention of the parties and if this is the clear scheme of the contract then it would be wrong to contend that the payment of the amount o Rs.1,00,000 under the IMT 5 would constitute either a second payment or a duplication of the compensation. To my mind, when the SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 payment of Rs. 1,00,000/- was made under IMT 5, it was treated as a separate issue altogether because there was no question of determination of quantum as the terms specifically provide that it would be straightaway payable on the death occurring and the insurance company honoured this part of the contract. That being so, it would be wrong to contend that it must once again be taken into the head of computation when the Tribunal decided to compute the heads of compenastion. I would go to the extent of holding that since it was under a separate clause and since it was under the head of additional cover, then it was an amount that was payable to the insured or the person claiming as an amount which was required to be added on to whatever other compensation was received. What the Supreme Court was dealing with in the case referred to supra was essentially a situation whereby a court erroneously duplicates the same compensation possibly even under different heads and thereby falls into the error of allowing a claimant to end up with two sets of compensation in respect of one head of loss. I do concede that a death has taken place in this case and it is under the same insurance policy but the law does envisage a situation whereby there could be more than SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 one claim under the same policy, the classic instance being the present one where the additional premium was paid for additional cover."

21. Recently, the Division Bench of Kerala High Court in the case of Kuriakose V/s Santosh Kumar reported in II (2009) ACC 835 similarly held that bar of sec. 53 of E.S.I. Act did not apply to claim under the provisions of Motor Vehicles Act and relying upon the Supreme Court's decision in the case of Regional Director V/s Francis De Costa reported in 1993 Supp. (4) SCC 100, the Court held as under:

> "The Supreme Court in the decision in Regional Director, E.S.I.C. V/s Francis De Costa, 1993 Supp. (4) SCC 100 held :-
>
> "Para 44 : The next contention that the Motor Vehicles Act provides the remedy for damages for an accident resulting in death of an injured person and that, therefore, the remedy under the Act cannot be availed of lacks force or substance. The general law of tort or special law in Motor Vehicles Act or Workmen's Compensation Act may provide a remedy for damages. The coverage of insurance under the Act in an insured SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 employment is in addition to but not in substitution of the above remedies and cannot on that account be denied to the employee. In K. Bharathi Devi V/s G.I.C.I. The contention that the deceased contracted life insurance and due to death in air accident the appellant received compensation and the same would be set off and no doubt advantage of damages under Carriage by Air Act be given was negatived."
>
> "3. We are persuaded to agree that the decision in Regl. Director, E.S.I.C. V/s Francis De Costa (supra), covers the specific issue raised in this case. Claim is raised against a stranger to the contract of employment for compensation on the basis of negligence for causing the accident. The claim is not for compensation for employment injury and in these circumstances, the observations in para 44 of Regl. Director, E.S. I.C. V/s Francis De Cost must be preferred. Following the dictum therein, we accept that a claim for compensation in tort against a strange can co-exist with a claim for benefits under the E.S.I. Act. The use of the words "any person"

in Section 53 of the E.S.I. Act which we extract below cannot take within its sweep the claim in tort against the stranger/tort-feasor under Section 166 of the M.V. Act SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 for compensation for the loss suffered in a motor accident caused by negligence.

Bar against receiving or recovery of compensation or damages under any other law - an insured person or his dependents shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act. The expression "any other person' in Section 53 can take within its sweep only such other person who is sought to be made liable, under or on the basis of the contract of employment, to compensate the

employee for the 'employment injury' suffered by him. If an injury is suffered in a motor accident and such injury is an employment injury also, section 53 does not bar the claim in tort under Section 166 of the Motor Vehicles Act against the stranger tort-feasor. But bars the claim against the employer under any other law. As held by the Supreme Court in Francis De Costa, the insurance SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 coverage under the Act is in addition to an not in substitution of the other remedies against a stranger."

22. Thus, from the legal position emerging out of aforesaid case laws quoted extensively and on a thoughtful consideration, this Court is of the opinion that the claimants having been awarded and received compensation under the provisions of Motor Vehicles Act, 1988 for the death of Pappu Ram in an accident which took place on 29.7.2003, in January, 2006 were not debarred from making claim against the employer Gopi Ram under the provisions of Workmen's Compensation Act, 1923 before the Workmen Compensation Commissioner. Obviously, not only the respondents in two proceedings are different, namely tortfeasor in claim under Section 166 of the Motor Vehicles Act and employer in the proceedings under the Motor Vehicles Act, 1923, but insurance contracts in question are also two different contracts, of course with the same insurance company, New India Assurance Company. In one case, the same insurance company - appellant herein insured the employer against the claim arising under the Workmen's Compensation Act in respect of his employees meeting death or injury during the course of employment and other the owner of the vehicle or tortfeasor insured to pay compensation to third party in case of accident resulting in the death or injury to such third party.

SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

23. The intention of creating bar of estoppel in the form of doctrine of election in sec. 167 of the Motor Vehicles Act, 1988 is also only to save same person viz. the employer where such employer happens to be tortfeasor also, being vexed twice over for the same cause of action. Intention of bar created either under Section 167 of the Motor Vehicles Act, 1988 akin to Section 110-AA of the old Motor Vehicles Act, 1939 or Section 3(5) of the Workmen's Compensation Act, 1923 or Section 53 of the ESI Act, 1948 is the same. Said bar nowhere provides nor it could be possibly intended to provide for any exemption or immunity to other tort-feasor even if he was negligent and liable in tort law to pay damages for causing death or bodily injury to other person or the claimants. Even if the injured or the deceased person as workmen have received compensation under the provisions of Workmen Compensation Act, 1923 or the ESI Act, 1948, there is no question of same cause of compensation i.e. death or injury resulting in double benefit to the claimants if separate compensation under Motor Vehicles Act is also given to such claimants. Such two sets of compensation if provided by two separate legislations against different persons under different contracts of insurance enures to the benefit of the claimants, there is no prohibition in law nor it can be said to be amounting to unjust enrichment or unfair and excessive or double compensation to the claimants. The payment of just and fair compensation under the provisions of Motor Vehicles Act as determined by the Tribunal does SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

not impede, curtail, restrict or prohibit in any manner, the compensation payable to the claimants for the same death or injury under the provisions of Workmen's Compensation Act or the ESI Act. The payment of compensation under the one Act at prior point of time or later depending upon the forum the claimants choose to first approach also does not matter. Since the benefits accruing and flowing from two different enactments flow in two different streams and such claim is made against two different parties; employer in one case and tort-feasor other than employer in another case, one compensation does not militate or offend against other compensation. The claimants also are rightly entitled to both the compensations in such cases and one cannot be set off or deducted from the other.

24. The judgments of Punjab & Haryana High Court and Gauhati High Courts cannot be followed in view of contra views expressed by Bombay High Court and Gujarat High Court and ratio of Supreme court decisions cited supra.

25. Therefore, in the considered opinion of this Court, in the present case, doctrine of election under Section 167 of the Motor Vehicles Act, 1988 did not apply qua the claimants and the claimants Smt. Bidami and ors. though having received compensation for death of Pappu Ram under the provisions of Motor Vehicles Act, could also be awarded and given compensation under the provisions of SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 Workmen's Compensation Act, 1923 against the employer and his insurer and therefore, there is no error in the impugned award of the Workmen's Compensation Commissioner dtd.31.3.2008. The insurer would naturally pay such compensation under separate contract of insurance with the employer Sh. Gopi Lal and cannot claim any deduction or set off of the compensation already paid to the claimants under the award of the Motor Accident Claims Tribunal, which was paid under a separate contract by the tortfeasor. Had the tortfeasor before MACT and Workman Compensation Commissioner been the same person, namely the employer and owner of Truck which Pappuram, deceased was driving, the claimants, legal representatives of Pappuram would have been debarred from claiming compensation again before the Workman Compensation Commissioner against the same tortfeasor employer from whom they had received compensation under the award of Motor Accident Claims Tribunal, but since such compensation was paid by other tortfeasor, the owner of the other vehicle, the Trailer under MACT award, therefore there is no bar in law for the claimants to claim compensation from the ownder employer of the truck in the forum of Workman Compensation Commissioner under the Workman Compensation Act, 1923.

26. Death or injury is the event, which gives rise to cause of action to the claimants. Since two different forums are provided under two independent legislations and such compensation is claimed from two SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 different persons and insurance companies reimburse such claims under two different insurance contracts, there is no conflict between the two and doctrine of election does not apply in such cases. There is no question of same person being vexed twice over in two different forums nor there is any duplication of compensation nor any question of double benefit or unjust enrichment of the claimants does arise in such cases. It may be because of the same death or injury but as stated above, such death or injury

though embedded in the cause of action in both the forums, compensation from both such forums are not mutually exclusive or in mutual conflict in such cases. Both are not such 'pecuniary advantages' which have to be balanced or set off against each other to determine the just and fair compensation for 'loss or gain to dependants on such death or injury'. This is what the ratio of above referred Supreme Court decisions appears to be. Therefore, this court is of the firm belief that the award of the Workmen Compensation Commissioner in the present case cannot be set aside on the ground that same claimants had received compensation under the award given by MACT against the different tortfeasor.

27. The contention of the learned counsel for the appellant - insurance company regarding claim before the Workmen Compensation Commissioner being delayed or there being any contributory negligence on the part of the driver Pappu Ram - SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 deceased are also not worthy of acceptance. In the facts and circumstances of the case the Workmen Compensation Commissioner has rightly condoned the delay of 3 years in claimants' approaching the Workmen Compensation Commissioner by way of such claim nor there is any finding of contributory negligence by the MACT Tribunal in the proceedings under the Motor Vehicles Act and therefore, these findings of Motor Vehicles Act as well as the Workmen Compensation Commissioner are binding on the insurance company and the same cannot be challenged successfully.

28. Consequently this court finds no force in this appeal of the insurance company and the same is accordingly dismissed. No order as to costs.

29. This appeal has been filed by the claimants Smt. Bidami Devi and ors. for the death of Pappu Ram in the accident taken place on 29.7.2003 deciding claim case No.103/2005 by the Motor Accident Claims Tribunal, Jodhpur on 30.11.2005. The claimants were awarded a sum of Rs.4,60,333/- by the Tribunal and have claimed enhancement of the said compensation in the present appeal. SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

30. The learned counsel for the claimants Mr. Anil Bhandari only pointed out that the Tribunal while taking net annual income of the deceased Pappu Ram at Rs.40,000/- applied multiplier of 18 as per Second Schedule of the Act, but on account of printing mistake in the second Schedule itself, multiplying net income of Rs. 40000/- by 18 compensation would have come to Rs.7,20,000/-, whereas the Tribunal has awarded only Rs.6,80,000/-. He drew attention of the Court towards second schedule to the Act and it appears that in last column of said Schedule and else where also when the compensation in rupees in thousand is computed, computation provided in the said second schedule with income does not tally. Obviously, Rs.40000 x 18 would come to Rs.7,20,000/- and not Rs.6,80,000/- and therefore, this appears to be a calculation error. Consequently to the extent of this, namely, Rs.40,000/-, enhancement deserves to be granted in the present appeal. Since 1/3rd for the personal expenses has already been deducted by the Tribunal, the net enhancement of Rs.40,000/- is awarded in the said compensation which would be payable with same rate of interest as already awarded by the Tribunal, namely, 7.5% per annum to these

claimants.

31. This appeal is accordingly allowed with the said modification in the award of MACT. No order as to costs.

SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009 APPEAL NO.29/2006.

32. This appeal is by the injured Gopiram, the owner of Truck itself, against the award dtd.30.11.2005 arising out of the same accident which took place on 29.7.2003 in which the driver Pappu Ram lost is life and his claim No.103/2005 was also decided by the common order dtd.30.11.2005 and the case of the present appellant Gopi Ram was decided in claim case No.26/2005. The injuries suffered by the appellant Gopi Ram were fracture in his left leg, and injuries on ear, head and right eye and it is stated in the claim that he had to be hospitalized for 10 days and suffered 7% permanent disability. The Tribunal has awarded total compensation of Rs.28,500/- under Section 163A of the Act. The learned counsel Mr. B.L. Tiwari pointed out that expenditure of medicines has wrongly been reduced from Rs.21,655/- to Rs.15,000/- as the second schedule refers to only one time expenditure on the medicine being not more than 15,000/- and not total medical expenditure. In the facts and circumstances of the case, the prayer of the learned counsel for the claimant Gopi Ram appears to be justified and therefore, the compensation is enhanced by a lump sum of Rs.10,000/- which would be payable with interest @7.5% as awarded by the Tribunal. SBCMA NO.891/2008- THE NEW INDIA ASSURANCE CO. LTD. V/S SMT. BIDAMI AND ORS. AND 2 OTHER CONNECT APPEALS . :JUDGMENT DTD.3.8.2009

33. This appeal also is accordingly allowed with the said modification in the award of MACT. No order as to costs.

(Dr.VINEET KOTHARI)J. Item No. Ss/-