Sr.No.103 IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO No. 3878 of 2015(O&M)
Date of decision:13.12.2017

TATA AIG General Insurance Company Ltd.
.....Appellant

versus

Ram Avtar and others
.....Respondents

Coram: **Hon'ble Mr. Justice Rajbir Sehrawat**

Present: Mr. Rajesh K.Sharma, Advocate
for the appellant.

Mr. Tanmoy Gupta, Advocate
for respondent No. 1.

Mr. Surinder Dagar, Advocate
for respondents No. 2 and 3.

Rajbir Sehrawat, J.(Oral)

This is the appeal filed by the Insurance Company of the offending vehicle challenging the Award passed by the Motor Accidents Claims Tribunal, Gurgaon on the ground of maintainability of the claim petition and qua the quantum of compensation, as increased on account of future prospects.

The brief facts of this case are that the claim petition was filed by the father of Devender Kumar who lost his life in the motor vehicle accident. In the claim petition it was claimed that on 17.04.2013 at about 10:30 pm Devender Kumar; along with Suresh Kumar and Raj Kumar were going to their homes after their duties in their company Sunbeam Auto Ltd., 38/6 km Stone, Delhi-Jaipur, Highway No. 8, Nursingpur, District Gurgaon. When they reached little ahead of Hero Honda chowk, near Nitin Vihar, Transport Nagar, Gurgaon then a Truck bearing Registration No.

HR-55M-4737 came from behind, being driven by respondent No.1 (in the claim petition) at a high speed and in rash and negligent manner and on the service road. This truck hit Devender Kumar and Raj Kumar from behind. The driver of the truck stopped his truck after hitting them. Suresh Kumar and Devender Kumar sustained head injuries. Large crowd gathered there and the injured were shifted to hospital in a private vehicle. Thereafter, the driver of the offending Truck ran away from the spot. However, Devender Kumar succumbed to the injuries suffered in the accident. Hence the claim petition was filed.

It was claimed in the petition that the deceased was about 24 years of age and was having good health. It was further claimed that the petitioner had no source of income to maintain himself and the deceased was the only son of the petitioner. It was claimed that the deceased was earning Rs. 10,000/- per month. Hence a compensation to the tune of Rs. 20 lakh was prayed for.

On receipt of the notice, respondents No. 1 and 2 appeared and filed written statement. The pleadings of the claim petition were denied. However, it was submitted that the offending vehicle was insured with respondent No. 3 in the claim petition and that the driver was having a valid driving license. Therefore, it was claimed that in any case, it would be respondent No. 3, the Insurance Company of the offending vehicle who has to pay the compensation.

Respondent No.3, Insurance Company filed written statement taking routine preliminary objections. On merit, it was claimed that the driver of the offending vehicle was not having valid and effective driving license at the time of accident. Respondent No. 3 further denied its liability

to pay compensation. It was claimed that the claimants had cooked up a false story just to extract money from respondent No. 3, the Insurance Company.

Parties led their evidence.

The Salary certificate and muster roll of the deceased were proved on record. Beside this the eye witness was examined by the claimant. Driving license of respondent No. 1, Insurance Policy alongwith the Registration Certificate of the offending vehicle were also placed on record.

On the other hand, respondents did not lead any oral evidence. The driver and owner placed on record the driving license of the driver, the national permit of the offending vehicle, insurance policy of the vehicle and the fitness certificate of the vehicle. In addition to this; the respondent insurance company also submitted information received from Employees State Insurance Corporation (for short, 'ESI Corporation') showing that some payment have been made by the ESI Corporation to the claimant.

After hearing learned counsel for the parties, the Tribunal accepted the claim petition. Resultantly, an amount of Rs. 9,53,950/- along with interest was awarded to the claimant. The Insurance Company of the offending vehicle was held to be liable to make payment.

While arriving at the above said figure of compensation, the Tribunal held that as per the salary certificate of the deceased he had drawn a salary of Rs. 9,587/- and after some deductions his net payable salary was Rs. 8,858/- per month for the month of March, 2013. However, the Tribunal held that the deductions made from salary are not liable to be deducted for the assessment of the income for the purpose of compensation.

It was further held that there is no other evidence from the respondents side for disputing the income of the deceased. Hence keeping in view the facts and circumstances the income of the deceased was assessed by the Tribunal to be Rs. 9000/- per month. Further the Tribunal held the claimant entitled to benefit of future prospects to the extent of 50% of the income of the deceased. Still further keeping in view the age of the deceased the Tribunal held that the applicable multiplier in the case would be 18. Tribunal further held that since the deceased was a bachelor and the claimant is father of the deceased, therefore, 50% of the income of the deceased is liable to be deducted towards his personal expenses. The claimant was held entitled to a sum of Rs. 25,000/- toward funeral expenses as well.

Further the respondent Insurance Company/appellant herein raised an objection that the petition before Motor Accident Claims Tribunal was barred by Section 53 of the Employees' State Insurance Act, 1948(for short, 'the ESI Act') because the claimant has taken some benefits from the ESI Corporation as well. For this purpose, the Insurance Company had relied upon some information obtained by it from the ESI Corporation authorities regarding some payment having been made to the claimant on account of death of his son Devender Kumar. Dealing with this proposition the Tribunal held that although the claim petition itself would not be barred however, the benefits received by the claimant under the provisions of ESI Act are liable to be deducted. Accordingly the Tribunal made the deductions to the extent of benefits obtained from ESI Corporation.

Resultantly, although the income of the deceased was assessed to be Rs. 9,000/- per month. Adding 50% increase on account of future prospects, the income of the deceased was calculated by the Tribunal to Rs.

9000 + 4500(9000 x 50/100) = Rs. 13,500/- per month. From this amount 50% was deducted by the Tribunal on account of personal expenses. Therefore, the income of the deceased was reduced to Rs.6,750/-. Out of this, the Tribunal also deducted an amount of Rs. 2,403/- which was being paid by ESI Corporation to the claimant as periodical payment. Hence after making all additions and deductions the Tribunal had taken the income of the deceased to Rs. 4,347/-. Applying the Multiplier of 18, as stated above, the loss of dependency of the claimant was calculated to be Rs. 9,38,952/- (4347 x 12 x 18).

So far as the funeral expenses are concerned, although the Tribunal held the claimant to be entitled to an amount of Rs. 25,000/- on account of funeral expenses, however, the Tribunal deducted Rs. 10,000/- from this benefit on the ground that Rs. 10,000/- were paid by the ESI authorities on account of funeral expenses on the last rites of the deceased. Accordingly, only an amount of Rs. 15,000/- was held to be payable to the claimant.

Accordingly, a total amount of Rs. 9,53,952/- which was rounded off to Rs. 9,53,950/- was held payable to the claimant.

Aggrieved against this Award of the Motor Accidents Claim Tribunal, the Insurance Company has filed the present appeal. However, no appeal has been filed by the claimant for enhancement of the amount.

While arguing the case learned counsel for the appellant has submitted that the appellant is aggrieved against the award on two grounds, namely, that the claim petition itself was not maintainable before the Motor Accidents Claims Tribunal being barred by Section 53 of the ESI Act and therefore, no compensation could have been awarded by the Tribunal in this

case. Secondly, that even if the claim petition was maintainable; the future prospects could not have been granted to the claimant at the rate of 50% of the assessed income in view of the fact that in the recent judgment of the Hon'ble Supreme Court in case of ***National Insurance Company vs. Pranay Sethi 2017 ACJ 2700*** has held that the benefit of future prospects in case of a self-employed person upto 50 years would be 40% and not at the rate of 50%. To support his first contention, the learned counsel for the appellant has relied upon the judgment of the Hon'ble Supreme Court rendered in ***2009(13) SCC 36***1 titled as ***National Insurance Co. Ltd. vs. Hamida Khatoon and others.*** For the same proposition learned counsel has also relied upon another judgment of this Court rendered in ***2011(4) PLR 603*** titled as ***United India Insurance Company Ltd. vs. Som Wati and others*** in which the above said judgment of the Hon'b le Supreme Court in Hamida Khatoon's case(supra) was followed.

On the other hand, learned counsel for the respondent has submitted that the compensation has been inadequately awarded. It is further submitted by him that although the claimant has not filed the appeal for enhancement, however, it is clear that the deductions made by the Tribunal on account of benefits granted by the ESI Corporation are wrongly made. His submission is that the claim petition under Motor Vehicles Act, 1988 is maintainable. Section 53 of the ESI Act does not exclude the petition under Motor Vehicles Act, 1988. Hence prayer for dismissal of the appeal is made.

Having heard learned counsel for the parties, this Court is of the considered opinion that the argument of learned counsel for the appellant that the claim petition is not maintainable in view of Section 53 of

the ESI Act is liable to the rejected. First of all, Section 53 of the ESI Act is part of the ESI Act. Therefore, it shall apply only to the persons or entities regarding whom this Act has been extended or made applicable by the application Section and Definition Section of this Act. The Section I of this Act prescribes that it shall apply to factories. Still further Proviso to Section 1 clarifies that this Act shall not apply to any other factory or establishment whose employees are otherwise in receipt of similar or superior benefits as compared to this Act. Still further Section 2A of this Act prescribes that factories to which this Act applies shall be compulsorily registered under this Act. Still further Section 2 of this Act defines the employee and employer qua which this Act applies. Hence a bare perusal of these provisions shows that the application of this Act, including Section 53 of this Act, is circumscribed by so many conditions. So this Act, including its Section 53 does not have any application where the recipient of benefits is not covered by definition of employee, the person liable to make the payment is not covered by definition of employer and the factory as given by this Act and the benefit is claimed and is required to be paid to him as an employee under this Act. Not only this, the Act itself declares that this Act shall not be applicable even to the employees if the employee is entitled to some better benefits under some other Act and the factory is the government factory or a government controlled factory. Hence the essential feature for application of this Act, including its Section 53, is that on the one side it should be an employee as defined under this Act and on the other side, it should be the employer or the factory as defined under this Act, and further the benefit claimed must be in the capacity of the person as employee under this Act. If either the capacity of the person raising a claim is outside the

scope of the applicability of this Act or the person liable to make the payment is outside the scope of the applicability of this Act, then this Act, including Section 53 of this Act, has no application at all. Such a claim shall be totally outside the scope of applicability of this Act, including Section 53 of it. Hence the claim petition filed by a person under Section 166 of the Motor Vehicles Act shall be barred by Section 53 of this Act only if the person raising a claim is himself an employee of the Insurance Company liable to satisfy the Award of the Motor Vehicles Act. If the relation between the claimant and the Insurance Company is of a stranger then the claim petition by such a person against such a Insurance Company shall not be barred by Section 53 of ESI Act. The word "*Any Person"* in Section 53 has to be read as a person/entity to whom this Act applies. Giving any other interpretation would mean giving this Act an over-riding effect over all the other Act. However, notably this Section does start with any 'Non-obstante' clause nor does this Act has any other Section giving over-riding effect to the Act over and above other Acts. Section 61 of this Act also bars only 'similar benefits' admissible to an employee under some other Act if such employee is entitled to such benefits under this Act. Hence this Section also prohibits only receiving twice the 'similar benefits' by an employee with respect to his employment injuries, nothing beyond that. So merely because the injured or the dependents of the deceased are getting some benefits under ESI Act is no ground to deny him/them any other benefit available to him/them under any other enactment if the benefits available to him/them under such other enactment are not similar to the one available under ESI Act. Giving any other interpretation to Section 53 of this Act would render Section 61 of this Act as nugatory. This

position would be better explained by the following paragraphs.

Still further, to properly appreciate the point raised by learned counsel for the appellant, it would be apposite to reproduce Section 53 of the ESI Act herein below:

> ***"Section 53: Bar against receiving or recovery of compensation of 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 of from any other person, any compensation or damages under the Workmen's Compensation Act, 923(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."*

A bare perusal of Section 53 of the ESI Act shows that this Section is only a prohibitory section and not a section relating to entitlement to any benefits. Therefore, this Section has to be interpreted with reference to the scope and context of the ESI Act. If read as a stand alone Section then this Section shall deny to an employee or his dependents any compensation of any kind from anywhere. This would be a thoroughly absurd result. So the spread of the prohibition created by this Section has to be determined by giving the restrictive interpretation with reference to the limiting words used in this Section as well as with reference to other provisions of this Act like definition clauses and Section 61 of this Act. Hence what is prohibited under this section is the entitlement of the injured or his dependents to receive any compensation or damages under

Workmen's Compensation Act or any other law in respect of ***employment injury*** sustained by the injured/deceased person and in his capacity **as an employee under this Act.** Hence it is clear that the bar created by Section 53 would be applicable only in case injuries sustained by of injured/deceased is an employment injury and the same is sustained by injured/deceased in his capacity as employee and only if he is claiming subsequent compensation in his capacity as an employee under this Act.

The employment injury has been defined by Section 2(8) of the ESI Act which is reproduced hereinbelow:-

> *""employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India."*

A bare perusal of the definition of the '***employment injury'*** as defined in the Act shows that the injury sustained by the injured/deceased employee would be an employment injury only if the same is caused by an accident or an occupational disease **arising out of** and **in course of employment** of the insured, if he is in an insurable employment. Still further it is clear that injury would be employment injury only if such injury is sustained by the person as an employee under this Act. If the injury sustained by the injured or the death of the injured occurs outside the scope of the employment the same can not be considered to be an employment injury. Hence the claim based upon such an injury shall not be an

impediment under the Act in the way of the insured or the dependents of the insured to get the compensation as per their entitlement under any other Act or any other law. Any other interpretation would reduce the words.

The term '***employment injury'*** has been considered in the judgment of the Hon'ble Supreme Court reported in ***1996(6) SCC 1*** titled as ***Regional Director, E.S.I Corporation vs. Francis De Costa.*** While clarifying the definition the Hon'ble Supreme Court has held that an injury shall be treated as employment injury only if the same is caused by an accident which had its origin in the employment. The mere road accident can not be said to have its origin in the employment. Hence, such an injury can not be treated as an injury arising '***out of employment'*** as required under the ESI Act. Still further the Hon'ble Supreme Court also further explained the meaning of the '***employment injury***' and held that the term '***in course of employment***' would mean only an injury suffered during the period of employment, namely, during office hours. Still further the Hon'ble Supreme Court explained that even if some accident happens not within the duty hours, then the injury would be considered to be an injury suffered in the course of employment only if the same is sustained by the injured or the deceased in an accident which has reasonable and incidental connection to his employment. The relevant paragraph of the judgment of the Hon'ble Supreme Court are reproduced hereinbelow:-

> "6. In our judgment, by using the words "arising out of....his employment ", the legislature gave a restrictive meaning to "employment injury ". the injury must be of such an extent as can be attributed to an accident or an occupational disease arising out

of his employment. "Out of" in this context, must mean caused by employment., Of course, the phrase "out of" has an exclusive meaning also. If a man is described to be out of his employment, it means he is without a job. The other meaning of the phrase "out of" is "influenced, inspired, or caused by: out of pity; out of respect for him". (Webster Comprehensive Dictionary- lnternational Edition-1984). In the context of Section 2(8), the words "out of" indicate that the injury must be caused by an accident which had its origin in the employment. A mere road accident, while an employee is on his way to his place of employment cannot be said to have its origin in his employment in the factory. The phrase "out of-the employment" was construed in the case of ***South Maitland Railways Pty. Ltd. v. James, 67 C.L.R 496***, where construing the phrase "out or the employment", Starke, J,, held "the words 'out of' require that the injury had its origin in the employment".

7. Unless an employee can establish that the injury was caused or had its origin in the employment, he cannot succeed in a claim based on Section 2(8) of the Act. The words "accident . . . arising out of . . . his employment" indicate that any accident which occurred while going to the place of

employment or for the purpose of employment, cannot be said to have arisen out of his employment. There is no causal connection between the accident and the employment.

8. The other words of limitation in sub-section(8) of Section 2 is "in the course of his employment". The dictionary meaning of "in the course of" is "during (in the course of time, as time goes by), while doing (The Concise Oxford Dictionary, New Seventh Edition). The dictionary meaning indicates that the accident must take place within or during the period or employment. If the employee's work shift begins at 4.30 P.M., any accident before that time will not be "in the course of his employment". The journey to the factory may have been undertaken for working at the factory at 4.30 P.M. But this journey was certainly not in course of employment. If employment begins from the moment the employee sets from his house for the factory, then even if the employee stumbles and falls down at the door-step of his house, the accident will have to be treated as to have taken place in the course of his employment. This interpretation leads to absurdity and has to be avoided.

11. Construing the meaning of the phrase "in the course of his employment", it was noted by Lord Denning that the meaning of the phrase had gradually been widened over the last 30 years to include doing

something which was reasonably incidental to the employee's employment. The test of "reasonably incidental" was applied in a large number of English decisions. Buts Lord Denning pointed out that in all those cases the workman was at the premises where he or she worked and was injured while on a visit to the canteen or other place for a break. Lord Denning, however, caution that the words "reasonably incidental" should be read in that context and should be limited to the cases of that kind. Lord Denning observed:-

> *"Take a case where a man is going to or from his place of work on his own bicycle, or in his own car. He might i.e said to be doing something "reasonably incidental"to his employment. But if he has an accident on the way it is well settled that it does not "arise out of and in the course of his employment". Even if his employer provides the transport, so that he is going to work as a passenger in his employer's vehicle (which is surely reasonably incidental" to his employment) nevertheless if he is injured in an accident, it does not arise out of and in the course of his employment. It needed a special "deeming" provision in a statute to make it "deemed" to arise out of and in the course of his employment."*

13. The meaning of the words "in the course of his employment" appearing in Section 3(1) of

Workmen's Compensation Acts 1923. was examined by this Court in the case of ***Saurashtra Salt Manufacturing Co. v, Bai Valu Raja, AIR 1958 SC 881***. There, the appellant, a salt manufacturing company, employed workmen both temporary and permanent. The salt works was situated near a creek opposite to the town of Porbandar. The salt works could be reached by at least two ways from the town, one an over land route nearly 6 to 7 miles long and the other via a creek which had to be crossed by a boat. In the evening of 12.6.1952, a boat carrying some of the workmen capsized due to bad weather and over-loading. As a result of this, some of the workmen were drowned. One of the questions that came up for consideration was whether the accident had taken place in the course of the employment of the workers. S. Jafer Imam, J., speaking for the court, held "As a rule, the employment of a workman does not commence until he has reached the place of employment and does not continue when he has left the place of employment, the journey to and from the place of employment being excluded." After laying down the principle broadly, S. Jafer Imams, J., went or to observe that there might be some reasonable extension in both time and place to this principle. A workman might be regarded as in the course of his employment even though he had not reached or had left his employer's premises in some special cases. The facts and circumstances of each case would have to be examined very carefully in order to determine whether the accident arose out of and in the course of the employment of a workman, keeping in view at all times this theory of

notional extension. But, examining the facts of the case in particular, after noticing the fact that the workman used a boat, which was also used as public ferry for which they had to pay the boatman's dues, S.Jafer Imam, J. observed:-

> "It is well settled that when a workman is on a public road or a public place or on a public transport he is there as any other member of the public and is not there in the course of his employment unless the very nature of his employment makes it necessary for him to be there. A workman is not in the course of his employment from the moment he leaves his home and is on his way to his work. He certainly is in the course of his employment if he reaches the place of work or a point or an area which comes within the theory of notional extension, outside of which the employer is not liable to pay compensation for any accident happening to him. In the present case, even if it be assumed that the theory of notion extension extends upon point D, the theory cannot be extended beyond it. The moment a workman left point B in a boat or left point A but had not yet reached point B, he could not be said to be in the course of his employment and any accident happening to him on the journey between these two points could not be said to

> have arisen out of and in the course of his employment. Both the Commissioner for Workmen's Compensation and the High Court were in error in supposing that the deceased workmen in this case were still in the course of their employment when they were crossing the creek between points A and B. The accident which took place when the boat was almost at point A resulting in the death of so many workmen was unfortunate, but for that accident the appellant cannot be made liable."

Hence from the perusal of the above said judgment of the Hon'ble Supreme Court it is quite clear that the injury in question should have been caused during the performance of the job requirements in the premises of the employment or if the same are caused any where outside the premises of the employment, the same should have been caused in an accident which has a reasonable and incidental connection to the employment, only then; the injury sustained by the injured/deceased could be treated as an *employment injury*.

Although Section 51 E, which has been added w.e.f. 01.06.2000 in the Act, creates the deeming fiction that an accident occurring to an employee while commuting from his residence to the place of employment for duty or from the place of employment to his residence after performing the duty shall be deemed to have arisen '*out of*' and '*in course*' of employment, however, this deeming fiction is also not absolute in its terms. Section itself makes it clear that injury sustained by the employee shall be

deemed to be the '***employment injury'***, when coming to or going from the place of work, only if the employment has a nexus with the circumstances, time and place in which the accident occurred. Hence this again takes the point back to the judgment of the Hon'ble Supreme Court rendered in the ***Regional Director, E.S.I Corporation's case(supra)*** which has laid down that if the injury is sustained by the employee out side the premises and hours of the employment then such injury must have reasonable and incidental connection to the employment as such. Hence mere incorporation of the Section 51 E can not, per se, exclude the claim under the Motor Vehicle Act for an accident which happened during the time when person was, allegedly, going to his home after the duty hours. Ingredients of Section 51 E of the Act has to be pleaded and proved by the Insurance Company to invoke Section 53 of the Act.

In the present case, there is nothing on record, pleaded or proved to show that the injury was caused during the performance of the job requirement of the deceased or the injury was sustained by him in an accident which has reasonable and incidental connection to the employment or that injury sustained by him was having any reasonable and incidental connection to the employment of the deceased or that the benefits received by claimant under ESI Act are similar to the benefits available to them under Motor Vehicles Act. Hence it can not be said that the injury sustained in this case was proved to be an '***employment injury'***. Hence Section 53 of the Act does not come to play in this case.

Otherwise also, the word '***as an employee'*** under this Act; as mentioned in the last line of Section 53 of the Act is also not without any significance. These words would make it clear that the bar against claiming

compensation from anywhere else is contemplated only if the injured/deceased sustained the injuries as an employee under this Act. This would show that the bar created by Section 53 of the Act would be only regarding any other any other subsequent compensation, if claimed, by the injured or the dependents; in the capacity of injured/deceased being an employee under the ESI Act. This would mean that it is not the claim of compensation under Motor Vehicles Act which would be excluded by Section 53 of the Act, rather, it would be any other compensation, if claimed, under any other Act having provisions for similar compensation for the employees as defined under the ESI Act. This means that Section 53 of the Act only bars receipt of compensation from the employer or any other person under any other labour law which might be providing compensations for the employees/workmen. This is also clarified by the provision of Section 61 of the Act; which specifically says that once a person is provided benefit under the ESI Act, he shall not be entitled to receipt any *'similar benefits'* admissible under the provisions of any other enactment. Giving any other unrestricted interpretation to the provisions of Section 53 of the Act would render the Section 61 of the Act as superfluous. And it is well settled that the legislature can not be deemed to have wasted words in any Section of a statute, much less to speak of wasting of a full Section of statute, like Section 61 of the ESI Act. Hence read with Section 61 of the Act, the Section 53 can be interpreted to prohibit only a second claim of similar compensation in his capacity as employee from the employer or from any person required to compensate such an injured person /dependent in his capacity as an employee under the ESI Act. Since there is no commonality between the benefits available under Motor Vehicles Act

and under the provisions of ESI Act, therefor, the provisions of two Acts can not be mixed up to deny compensation to a person under Motor Vehicle Act. In a given case, even the monthly interest earned on the amount awarded under Motor Vehicles Act can be many fold higher than the total amount of benefits available under the provisions of ESI Act. Hence the benefits available under these two enactments are altogether different and separate.

While considering this aspect, this Court in ***FAO No. 881 of 2013*** titled as ***Paramjit Kaur and others vs. Sanjeev Pathak and others decided on 23.08.2017*** has held that the benefits available to the dependents under ESI Act are limited in their scope, quantum, consistency, persistence and even qua entitlement and availability. Therefore, merely because an employee has been granted benefit under ESI Act would not mean that he can not claim compensation under Motor Vehicles Act. It would be appropriate to reproduce the relevant part of the judgment:-

> *"10. Another reason why two provisions cannot be mixed up to disentitle the claimants to receive the compensation is; the nature of the benefits/compensation paid/permissible under these two provisions. Under the Employees State Insurance Act, the insured or his dependents are entitled only to the compensation or benefits as specified by the provisions of the Act or the rules or the scheme framed thereunder. On the other hand, the claimants under Motor Vehicles Act are entitled to compensation of the total loss actually caused or proved by them to have been caused on account of death of*

the deceased. Hence, the nature and the degree of the benefits under the Employees State Insurance Act and the Motor Vehicles Act are altogether different. There are certain benefits available, by way of judicial interpretations, under the Motor Vehicles Act, which are not even conceived or contemplated by the Employees State Insurance Act. The loss on account of love and affection and compensation on account of loss of consortium are not even contemplated by the Employees State Insurance Act. Still further under the provisions of the Employees State Insurance Act, the benefits given to the dependents do not attained finality and continue to remain subject to review/change under the provisions of Employees State insurance Act. Section 55 (a) of the Act provides for review of benefits to the dependents. As per this Section, the benefits are subject to review as per the satisfaction of the Corporation even, in case of any death or birth or marriage or remarriage or cessation of infirmity or attainment of the age of 18 years by a claimant or anyone of them. Hence, the benefits available under Employees State Insurance Act are in the nature of contingent benefits subject to change at any time by the authorities as per their satisfaction; regarding the fulfillment of certain conditions mentioned in the provisions of the Act. On the other hand, the compensation/benefits available to the

dependents of a deceased who dies in a motor vehicle accident are absolute and one time payment. Any entitlement to absolute and full scale compensation cannot be excluded by grant of any restricted benefits; which are otherwise also subject to change from time to time. Hence, an attempt to mix and mingle the provisions of Employees State Insurance Act and the provisions of the Motor Vehicles Act qua the entitlement of the benefits of the dependent of the deceased; is totally misconceived and is without any legally sustainable basis.

11. *Otherwise also, the Employees State Insurance Act is a social beneficial legislation. Therefore, the provisions of this Act cannot be interpreted in a manner as to restrict the other benefits available to the insured or his dependents on account of injury or death occurring outside employment of the insured. At the best, Section 53 of the Employees State Insurance Act can be interpreted to restrict the other 'statutory compensation' available to the employee in his capacity as an employee or his dependents under any other statutory labour law which, may have some common cover, regarding the injuries sustained by the insured or regarding the entitlement of the dependents on account of death of the insured."*

Still further a perusal of provision contained in Section 167 of the Motor Vehicle Act shows that the legislature never considered the

compensation available under ESI Act to be comparable to or in exclusion of the compensation available under Motor Vehicles Act. This Section has made a compensation available under Workmen's Compensation Act as an alternate to compensation available under Motor Vehicles Act; by prescribing that a person can claim compensation under either of these two Acts and not under both these Acts, of course this alternative is also applicable to a person in his capacity as a workman or an employee under workman's compensation Act and when claiming compensation from his employer. This shows that although the legislature considered the compensation payable under Workmen Compensation Act to be comparable with the compensation available under Motor Vehicle Act, however, the benefits available under the ESI Act have not been raised to the level of alternate compensation by the legislature. Hence any compensation paid under ESI Act would not be an alternative to the compensation payable under Motor Vehicles Act. These would be two different and independent remedies available to a person.

Another aspect which goes against bar of claim petition under Motor Vehicles Act on account of periodic benefit being received by the claimant under ESI Act is that; the periodic payment available to the dependents is only in the nature of family pension. It is available to the dependents of the deceased in their own right under the statute. The Hon'ble Supreme Court in the case reported as ***2007(8) SCC 319*** titled as ***Lal Dei and others vs. Himachal Road Transport*** has categorically held that the family pension being received by the dependents of the deceased is not to be deducted from the Income of the deceased while calculating the loss of dependency. Since even receiving the family pension is no bar for

the dependents of the deceased to claim the compensation under Motor Vehicle Act, therefore, there is no question of any other similar periodic payment being a bar against claim arising out of an accident. Needless to say that in case of ESI Act, whatever the dependents are getting is partly a product of the contribution made by the employee himself during his life time and partly the contribution of employer. Therefore, the employer of the deceased employee may be absolved of any liability of making any payment under any other law relating to the employment injury; qua to the entitlement of the deceased as an employee, however, such periodic payment, which is in the nature of family pension, would not absolve a stranger to the employment from discharging its independent liability created under any other statute. This is also to be kept in mind that the Motor Vehicle Act has been reintroduced in 1988 whereas the ESI Act of the year 1948. Despite that no provision has been made by the legislature in the Motor Vehicle Act to specifically exclude the liability of the insurer of the offending vehicle; in case of motor vehicle accident; if the dependents of the employee are getting compensation or benefits under ESI Act (unlike compensation under Workmen Compensation Act) in the capacity of the deceased being an employee. Neither the Section 166 of the Motor Vehicles Act has created any bar against filing of a claim petition by such a person nor has this been made any defence under Section 149 of the Act for the Insurance Company. This omission of the legislature has to be taken to be intentional because omission to legislate is always deemed to be intentional on the part of the legislature. Therefore, despite the fact that the dependents of the employee may be having some benefits under the ESI Act in the capacity of the deceased being an employee would not debar them

from claiming compensation under the Motor Vehicles Act for the said accident.

The judgment relied upon by learned counsel for the appellant i.e. ***Hamida Khatoon's case(supra)*** does not support the case of the appellant. A bare perusal of the judgment of the Hon'ble Supreme Court in this case shows that this judgment is based upon discussion of the law relating with the Workmen's Compensation Act, 1923. As mentioned above, the compensation available under provisions of Workmen's Compensation Act has expressly been made alternate to the compensation available to the claimants under Motor Vehicles Act. Therefore, this judgment did not hold the claim petition, *per se,* to be not maintainable. Rather the Hon'ble Supreme Court in this case only sent back the matter to the MACT concerned to re-work out the compensation taking note of Section 53 of the Act.

So far as the other point raised by learned counsel for the appellant that the amount of compensation has to be decreased on account of the percentage of future prospects having been reduced by the Hon'ble Supreme Court in the judgment of the ***National Insurance Company (supra)*** is concerned, the same deserves to be accepted. The Motor Accident Claims Tribunal has added the future prospects at the rate of 50%. However, the Hon'ble Supreme Court in the above said case has held that in case of a person upto the age of 50 years future prospects at the rate of 40% would be applicable. Accordingly, it is held that the claimants shall be entitled to the benefit of future prospects to the extent of 40%, instead of 50% as granted by the Tribunal. Accordingly, the compensation awarded to the claimants on account of loss of dependency is required to be reworked

out. Hence, the loss of dependency would be Rs. 9000/- + 3600 (40% of 9000) = Rs. 12,600 - 6300 (50% of 12,600)= Rs. 6300/-. As held above, although the benefit of family pension granted by the ESI authorities to the claimant would not have been liable to be deducted in this case, however, since the claimant has not filed any appeal in the present case, therefore, the findings of the Tribunal qua the deduction of the periodical payment from the income of the deceased stands finalised. Hence out of the Income assessed, Rs. 2403/- for month has to be deducted as was done by the Tribunal. Accordingly monthly loss to the claimant is held as Rs. 3,897/- (6300-2403). This is rounded of to Rs. 3900/- per month.

Resultantly, the claimant is held entitled to a compensation of Rs. 8,57,400/- as per the details given below:-

Sr. No.	***Heads***	***Amount(₹)***
1	**Annual loss of dependency**	**3900 x 12 = 46,800/-**
2	**Multiplier 18**	**46,800 x 18 = 8,42,400/-**
3	**Funeral Expenses**	**15,000/-**
	Total	**8,57,400/-**

No further argument was raised by learned counsel for the parties.

In view of the above, the present appeal is partly accepted. The Award of the Motor Accident Claims Tribunal, Gurgaon is modified to the above extent.

13th December, 2017 **[RAJBIR SEHRAWAT]**
Shivani Kaushik **JUDGE**

Whether speaking/reasoned Yes/No

Whether Reportable Yes/No