

GAHC040001162023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : MACApp./1/2023

Shri Rakhe Tallar

S/o Lt. Rakhe Teri

Village- Bomte

P.O.- Boasimla, Kamle District,

Arunachal Pradesh.

...Appellant

-VERSUS-

1. Shri Hemanta Kumar Das (Truck Owner),

S/o Narendra Nath Das,

Resident of Hengrabari Mouza, Beltola,

Ward No.33, House No.-36,

P.O.-Dispur, Guwahati,

District Kamrup, Assam.

2. Md. Inush Ali (Driver of Truck),

S/o L.P. Ali

Resident of Lilabari Balijan, Kakoi,

Rajgarh, P.O.-Lilabari,
District Lakhimpur, Assam.

3. Bajaj Alianz General Insurance

Co. Ltd, represented by General Manager,
2nd Floor, Sreeji Towers,
Near Ganeshguri Flyover,
Guwahati, Kamrup District, Assam.

....RESPONDENTS

Advocates for the Appellant : Mr. S. Koyang, Adv.

Advocates for the respondents : Mr. M. Boje, Adv. R-3

**BEFORE
HONBLE MRS. JUSTICE MITALI THAKURIA**

Date of hearing : 26.07.2023
Date of Judgment & Order : 11.08.2023

JUDGMENT & ORDER (CAV)

Heard Mr. S. Koyang, learned counsel for the appellant. Also heard Mr. M. Boje, learned counsel representing the respondent No.3.

2. This is an application filed under Section 173 of the Motor Vehicle Act, 1988 by challenging legality and validity of the Award dated 21.11.2022, passed

by the Court of learned Member Motor Accident Claim Tribunal (in short "MACT"), Lower Subansiri District, Ziro, whereby, the claim application of the appellant has been arbitrarily dismissed.

3. The brief facts leading to the filing of the present application is that;

3.1. On 12.07.2009, a Truck bearing a registration No.AS-01AC-4082 belonging to one Mr. Hemanta Kumar Das/respondent No.1 driven by Md. Inush Ali/respondent No.2 loaded with some electric poles was going towards Raga. The present appellant's elder brother, Lt. Rakhe Kanio boarded in the Truck at Yatap village and was seating in the cabin, while, going down the slope of the road near Repari village, the truck ran up the wall of the hill of the road on right hand side and fell down on the left side of the road causing injury to the deceased, who died on the way to the District Hospital, Ziro. Thereafter, the FIR was lodged on 12.07.2009 in the Police Station, Ziro against the driver of the Truck, which was registered as Ziro P.S. Case No. 58/2009, registered under Section 279/304(A) of IPC. Accordingly, the Police has investigated the case and submitted its final report before the learned Trial Court. And, as per the said report, the cause of accident was due to tyre burst, however, it was due to brake fail as per evidence given by the CW-2 and CW-3.

3.2. The vehicle was duly insured under Bajaj Allianz General Insurance Company Ltd., Vide Insurance Policy No.OG-10-9995-1803-00018051, which was valid from 02.06.2009 to 01.06.2010 mid night, thus, at the time of the accident the insurance policy was valid. Thereafter, the appellant filed the claim

petition against the respondents before the Court of learned MACT, Lower Subansiri District, Ziro, claiming the compensation to the tune of Rs.6,82,000/- (Rupees Six lakhs Eighty-two thousand) only for death of Lt. Rakhe Kanio. Later, the claim amount was modified for Rs.40,65,000/-(Rupees Forty lakhs sixty-five thousand) only, which was based on the decision rendered by the Hon'ble Apex Court in the case of ***National Insurance Company LTD. Vs. Praynay Sethi and others, reported in 2017 (16) SCC 680***. After the death of the claimant/Lt. Rakhe Teri, on 25.06.2020 his son Shri Rakhe Tallar/present appellant, substituted his father as a claimant.

3.3. The respondent No.3, the Bajaj Allianz General Insurance Co., Ltd. filed written statements but the respondent Nos. 1 and 2 have not filed the same. The appellant's side adduced 4 witnesses during the course of proceedings of the case and the respondent No.3 had adduced 1 witness. The Truck owner and Driver of the offending vehicle i.e. the respondent Nos. 1 and 2 has not contested the case. After conclusion of the evidence the Court of learned MACT, Lower Subansiri District, Ziro, heard the arguments advanced by both the parties and dismissed the petition considering it to be devoid of merit.

4. Being highly aggrieved and dissatisfied with the impugned award dated 21.11.2022, passed by the Court of learned MACT, Lower Subansiri District, Ziro, the appellant preferred this instant appeal on the following grounds: -

4.1. The learned MACT, Lower Subansiri District, Ziro, has committed serious error in law as well as in facts while passing the impugned award dated

21.11.2022, which has resulted into failure of justice and also suffered from manifest illegality, thus, it is liable to be set aside and quashed.

4.2. The learned Trial Court failed to appreciate the factual aspects of the case and passed the impugned award in a most casual manner without proper adjudication of the materials on records for which the award dated 21.11.2022 is not at all maintainable. The said Court also failed to appreciate that the respondents were liable to pay compensations for the death of Lt. Rakhe Kanio, who died on 12.07.2009 due to vehicular accident at Repari village.

4.3. The learned MACT, Lower Subansiri District, Ziro erroneously held that the driver, vehicle owner and Bajaj Allianz General Insurance Company Ltd. are not liable to pay compensation in case of gratuitous passengers relying on judgments of the Hon'ble Supreme Court of India in ***New India Assurance Co. Ltd. Vs. Satpal Singh, reported in 2000 ACJ; AIR 2000 SC 233, New India Assurance Co. Ltd. Vs. Asha Rani (2003) 2 SCC 223, Oriental Insurance Co. Ltd. Vs. Devireddy Konda Reddy (2003) 2 SCC 339 and United Assurance Co. Ltd, Shimla Vs. Tilak Singh and Ors. 2006 (4) SCC 404.***

4.4. The learned MACT, Lower Subansiri District, Ziro failed to appreciate that in the case of gratuitous passenger, the Bajaj Allianz General Insurance Company Ltd. is liable to pay compensation to the claimant for the death of Lt. Rakhe Kanio, although it can be recovered from the vehicle owner and driver under doctrine of "Pay and recover" in view of judgment of the Hon'ble

Supreme court of India rendered in ***Anu Bhanvara and Others vs. IFFCO Tokia General Insurance company Ltd. and others reported in 2020 (20) SCC 632***. As such the impugned award dated 21.11.2022 is liable to be set aside and quashed.

4.5. As per the statements of the CW-2 and CW-3, the accident occurred due to brake fail, however, as per Police report, the cause of accident was due to tyre burst. It shows that the vehicle owner and the driver had neglected to maintain the vehicle in good condition which resulted to vehicular accident by causing death of the deceased. Therefore, the owner of the vehicle is liable to pay compensation to the claimant. Since the offending vehicle was dully insured to Bajaj Allianz General Insurance Co. Ltd, the Insurance Company is liable to pay compensation to the claimant under doctrine of "pay and recover" although it can be recovered from the offending vehicle owner.

5. In view of above stated grounds, Mr. S. Koyang, learned counsel for the appellant has submitted that the deceased/Lt. Rakhe Kanio died on 12.07.2009 at Repari village and accordingly, a claim petition was filed claiming the compensation for his death, which was dismissed by the Court of learned MACT, without considering the facts of the case, and hence, prays for setting aside and quashing of the impugned award dated 21.11.2022.

6. He also submitted that the learned MACT, has held that the cause of accident was due to tyre burst and arbitrarily neglected the evidences of CW-1 and CW-2, who have stated that the cause of accident was due to brake fail.

The said Court also erroneously held that, Truck driver was not found negligent in his driving. In fact, the driver drove the offending vehicle rash and negligently and he could not prevent the accident.

7. He further submitted that, it is not require to prove the act of rash and negligent driving of the driver for claiming compensation in the case of death and injury due to motor vehicle accident in view of various judgments of the Hon'ble Supremment Court of India and High Courts. Therefore, the claimant is entitled for payment of compensation for the death of Lt. Rakhe Kanio/deceased.

8. In support of his submission, he relies on the decision rendered by the Hon'ble Apex Court in the case of ***Kaushnuma Begum (Smt) & Others vs. New India Assurance Co. LTD. & Others, reported in 2001 (2) SCC 9***, wherein, he stressed mainly in paragraph-12 of the said judgment, which read as under;

Para-12, Even if there is no negligence on the part of the driver or owner of the motor vehicle, but accident happens while the vehicle was in use, should not the owner be made liable for damages to the person who suffered on account of such accident? This question depends upon how far the Rule in Rylands vs. Fletcher (supra) can apply in motor accident cases. The said Rule is summarised by Blackburn, J, thus:

"The true rule of law is that the person who, for his own purposes, brings on his land, and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by

showing that the escape was owing to the plaintiffs default, or, perhaps, that the escape was the consequence of vis major, or the act of God; but, as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

9. It is an admitted fact that the deceased was a gratuitous passenger and accident occurred due to use of the vehicle. Thus, the owner and driver of the said vehicle is liable to pay compensation under the "Doctrine of Pay and Recover", which is applicable for gratuitous passenger even in case of a goods vehicle. The insurance company is liable for the payment of compensation to the claimant and is at liberty to recover the compensation from the owner and driver of the offending vehicle. However, the learned MACT, without considering the provisions of law had dismissed the claimant's petition only with an observation that the deceased being the gratuitous passenger was not entitled for any compensation and had violated the policy conditions and as such the Insurance Company was not liable to pay compensation for gratuitous passengers of goods vehicle under Section 147 (1)(b)(I), 1988 Act.

10. The learned counsel for the appellant also relies on the decision passed by the Hon'ble Apex Court in the case of **Anu Bhanvara and others vs. IFFCO Tokio General Insurance Com. LTD. & Others reported in 2020 (20) SCC 632**, wherein, in paragraphs 9, 11 & 12 of the said judgment, it has been held that even in a case of gratuitous passengers, the Insurance Company is liable to pay the compensation under the "Doctrine of Pay and Recover". Paragraphs 9, 11 & 12 are read as under: -

"9. The next question is as to which of the respondents, that is the owner and

driver, or the insurer of the vehicle, would be liable for payment of such compensation. As regard the liability for payment of compensation, it has been contended by the learned counsel for the appellants that since the vehicle was admittedly insured with the respondent no.1 insurance company, the principle of pay and recover would be invoked even in case of a gratuitous passenger in a goods vehicle. The insurance company should thus be made liable for the payment of compensation to the appellants and in turn they would have the right to realise/recover the same from the owner and driver of the vehicle. In support of his submission, learned counsel for the appellants has relied on the following decisions of this Court, namely, [Manuara Khatoon v. Rajesh Kumar Singh](#) (2017) 4 SCC 796, [Puttappa v. Rama Naik \(Civil Appeal No.4397 of 2016, disposed of on 2 nd April, 2018\)](#); [Manager, National Insurance Co. Ltd. v. Saju P. Paul](#) (2013) 2 SCC 41; [New India Assurance Co. Ltd. v. Vimal Devi](#) (Civil Appeal Nos.15781579 of 2004, disposed of on 5th October, 2010); [National Insurance Co. Ltd. v. Challs Upendra Rao](#) (2004) 8 SCC 517; [New India Assurance Co. Ltd. v. C. M. Jaya](#) (2002) 2 SCC 278; [Amrit Lal Sood v. Kaushalya Devi Thapar](#) (1998) 3 SCC 744.

11. We have heard learned counsel for the parties and perused the record as well as the various decisions cited by learned counsel for the parties. The insurance of the vehicle, though as a goods vehicle, is not disputed by the parties. The claimants in the present case are young children who have suffered permanent disability on account of the injuries sustained in the accident. Thus, keeping in view the peculiar facts and circumstances of this case, we are of the considered view that the principle of “pay and recover” should be directed to be invoked in the present case.

12. Accordingly, these appeals are disposed of with the direction that the respondent no.1 – insurance company shall be liable to pay the awarded compensation to the claimants in both the appeals. However, respondent no.1 – insurance company shall have the right to realize the said amount of compensation from the respondents no. 2 and 3 (driver and owner of the vehicle) in accordance with law.”

11. Further, the learned counsel for the appellant relies on two other decisions passed by the Hon'ble High Court, Himachal Pradesh, Shimla in the case of ***Sharma Legal Officer & Authorized Signatory vs. Nirmala Devi and others reported in 2022 SCC online HP 2261*** and ***Hon'ble High Court of Mumbai in the case of Oriental Insurance Company LTD. Vs. Poonam and others reported in 2023 SCC online Bom 616***, respectively. In the aforementioned judgments it has been held that the Insurance Company is liable to pay compensation on the basis of principle of "Pay and Recover" even for a gratuitous passenger.

12. In this regard, Mr. M. Boje, learned counsel for the respondent No.3 has submitted that after the amendment of the Motor Vehicle Act, the liability of the Insurance Company to pay compensation under Section 147 does not extend to the cases of death of, or bodily injury to the owner or goods or his authorised representative carried in a goods vehicle. He also submitted that the Insurance Company is not at all liable to pay compensation to gratuitous passengers even under the "Principal of Pay and Recover", and thus, the learned MACT had rightly dismissed the claimant petition of the present appellant with an observation that the Truck driver was not found negligent in his driving and the gratuitous passengers is not entitled for compensation, therefore, the Insurance Company is not at all liable to pay compensation even under the "Doctrine of Pay and Recover".

13. In support of his argument, he relies on the decision rendered by the ***Hon'ble Supreme Court in the case of New India Assurance Co. LTD.***

Vs. Asha Rani and others reported in 2003 (2) SCC 223, wherein, the paragraphs-25, 26 and 27 read as under:-

"25. Section 147 of 1988 Act, inter alia, prescribes compulsory coverage against the death of or bodily injury to any passenger of "public service vehicle". Proviso appended thereto categorically states that compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in a goods vehicle would be limited to the liability under the Workmen's [Compensation Act](#). It does not speak of any passenger in a 'goods carriage'.

26. In view of the changes in the relevant provisions in 1988 Act vis--vis 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. 'a third party'. Keeping in view the provisions of 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

27. Furthermore, sub-clauses (i) of clause (b) of sub-section (1) of [Section 147](#) speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (ii) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place."

14. After hearing the submission made by the learned Advocates of both sides, and perusing the judgment passed by the learned MACT as well as the documents annexed along with the present appeal, it is seen that the death of the deceased occurred due to travelling in goods carrier vehicle as a gratuitous passenger. Further, it is also seen from the judgment and order passed by the learned MACT, as well as from the evidence that the accident does not occur due to rash and negligence driving but, it was due to mechanical defect or due to tyre burst, the driver lost its control over the steering system and as a result

of which the accident occurred, whereby, the deceased sustained grievous injury. So, it is to be seen that as to whether gratuitous passenger is also entitled for the compensation, and in the same time it is also be decided as to whether the Insurance Company is liable to pay compensation under the "Doctrine of Pay and Recover". The aforementioned issues were discussed by the learned MACT, while passing the judgment and order.

15. The learned MACT, held that there was no rash and negligence driving on the part of the driver of the offending vehicle bearing registration No. AS-01-AC-4082, and as per the investigation report the accident had occurred due to sudden tyre burst, as a result of which the vehicle fell down on left side position. However, as per the learned MACT, the incident occurred only due to steering system fail only due to burst of the front right tyre and steering system out of control. Hence, the owner and driver of the vehicle is not liable to pay the compensation as the claimant failed to establish the fact that there was any rash and negligence driving on the part of the driver.

16. And further, in regard to other issues, that whether the deceased being gratuitous passengers the claimant is entitled for the compensation or not?

In this regard the learned MACT relied on the decision of the Hon'ble Supreme Court in the case of ***Asha Rani (supra)***, wherein, it is categorically stated that "*goods carriage*" would mean a motor vehicle constructed or adapted for use "*solely for the carriage of goods*". Carrying of passengers in a "*goods carriage*", thus, is not contemplated under the 1988 Act."

17. The learned MACT also relying on another decision of **Satpal Singh (Supra)**, has held that the word "*injury to any person*" was defined and judicially explained by the Apex Court to mean to any person including the gratuitous passenger of the concerned offending vehicle to fix the liability of the Insurance Company. However, this got a turn in view of the amendment under Section 147(1) clause (b) (i) by substituting the word "*injury to any person*" by the word "*injury to any person including the owner of the goods or his authorized representative carried in the vehicle*" as introduced with effect from 14th November, 1994 in the statute".

18. Thus, with support of above-mentioned judgments the learned MACT has held that the Policy of the Insurance Company does not cover any gratuitous passenger and also held that the accident had not occurred due to any rash and negligence driving, hence, the Insurance Company or any of the opposite parties cannot be held liable to pay compensation amount to the claimant. In addition to, the said Court also extracted the decision passed by the Hon'ble Apex Court in the case of **Tilak Singh (Supra)** wherein, it has been held that as the "*Insurance Policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to gratuitous passenger*".

19. With above observation, it has been held by the learned MACT that the claimant is not entitled for any compensation for the death of the deceased.

20. It is an admitted fact that deceased was a gratuitous passenger, who took lift in the truck, a goods carrier vehicle without even paying any fare. It has

been rightly held by the learned MACT that there is a violation of policy and the Insurance Company does not cover the gratuitous passenger and hence, the same is not liable to pay compensation to the claimant for the death of the deceased being gratuitous passenger. But, in the case of **Anu Bhanvara (supra)** wherein, the Insurance Company was directed to pay the compensation even for gratuitous passenger considering the circumstances of this case under the "Doctrine of Pay and Recover" from the driver and owner of the vehicle.

21. So, considering the view of the Hon'ble Apex Court as well as considering the entire circumstances of this case and death of the deceased, I find that, the deceased being a gratuitous passenger, the insurance company is not liable to pay the compensation, but a direction can be given to the Insurance Company to make payment of compensation under the doctrine of "Pay and Recover" from the owner and driver of the offending vehicle. Coming to the point of rash and negligence driving, it is seen from the evidence and records that the accident does not occur due to rash and negligence driving of the vehicle, but it cannot be denied that the accident had occurred due to use of the motor vehicle. Thus, the compensation cannot outrightly be rejected only with a view that the accident had occurred due to tyre burst or for mechanical defect.

22. In view of the entire discussions made above, I am of the opinion that the claimant is entitled for compensation, for the death of the deceased/Lt. Rakhe Kanio out of motor vehicle accident which took place on 12.07.2009, and accordingly, it is seen that the learned MACT had committed an error while

passing the award by dismissing the claim of the present appellant.

23. Accordingly, the appeal stands allowed and disposed of with a direction to remand back the matter before the Court of learned Member Motor Accident Claim Tribunal, Lower Subansiri District, Ziro and to pass an appropriate order after making proper calculation of the award based on the guidelines provided in 2nd Schedule of the M.V. Act and following the decision passed by the Hon'ble Apex Court in the case of ***Pranay Sethi (Supra)***.

24. The Registry shall return back the records immediately to the learned Trial Court.

JUDGE

Comparing Assistant