

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR**

CMAM No. 106/2017

Reserved On: 12th of December, 2024
Pronounced On: 21st of December, 2024.

National Insurance Company Ltd.,
Divisional Office, Srinagar
Through its Sr. Divisional Manager,
Ravi Kant Goel.

... Appellant(s)

Through: -
Mr N. A. Dendru, Advocate.

V/s

1. Khalida Begum W/O Bashir Ahmed Malik

2. Princy Jan; 3. Tehseena Jan; and 4. Shaheena Jan
Daughters of Bashir Ahmed Malik

5. Muneeb Bashir
Son of Bashir Ahmed Malik

2 to 5 minors-through their mother Khalida Begum
Residents of Mandugam, District Shopian.

6. Muhammad Sheikh S/O Khair Sheikh
R/O Menipora, Vehil, Shopian

7. Nissar Ahmed Malik S/O Abdul Khaliq
R/O Kulgam

... Respondent(s)

Through: -
Ms Mahjabeen Bhat, Advocate vice
Mr Mohammad Ayoub Bhat, Advocate for R-1 to 5; and
None for R-6 & 7.

CORAM:

HON'BLE MR JUSTICE M. A. CHOWDHARY, JUDGE

(JUDGMENT)

01. The Appellant-National Insurance Company Limited, through the medium of the instant appeal filed under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act of 1988'), has

challenged the Award dated 20th of July, 2017 passed by the Motor Accident Claims Tribunal, Pulwama in Claim Petition No. 37/2006 titled **‘Mst. Khalida Begum & Ors. v. National Insurance Company & Ors.’**, whereby an amount of Rs. 17,00,000/-, minus the interim relief along with pendentelite and future simple interest @ 6 percent per annum from the date of institution of the Claim Petition till final realization of the awarded amount, was granted to the Claimants/ Respondent Nos. 1 to 5 herein.

02. The facts leading to the filing of the present appeal, as emerge from the perusal of the file on hand, are that one Bashir Ahmad Malik, husband of Claimant/ Respondent No.1 herein and father of Claimant/ Respondent Nos. 2 to 5 herein, approached the Tribunal with a Claim Petition by stating therein that he, on 2nd of December, 2004, was travelling in the vehicle bearing registration No. JK-13-1745 driven by its driver, Nissar Ahmad Malik/ Respondent No.3 herein, rashly and negligently and that, on reaching Chankya Dhar Road Udhampur, Jammu, the driver lost control of the vehicle, as a result whereof, the vehicle skidded off the road, thereby inflicting multiple injuries upon the spinal cord and lower limbs of Bashir Ahmad Malik; that he was shifted to District Hospital Udhampur for the treatment of said injuries, wherefrom he was referred to Government Medical College, Jammu and, then, to Amritsar where he was hospitalized in a private hospital for treatment.

03. It was further stated in the Claim Petition that the said Bashir Ahmad Malik had remained admitted in Hospital for a pretty long time and had, at that point of time, annexed all the medical record/ prescriptions of different Hospitals with the Claim Petition, accordingly; that he had been rendered totally disabled and was having 75% disability, requiring him to take the services of a Helper; that the injured was a case of traumatic compression fracture with paraplegia having 75% disability; that pursuant to notice having been issued by the Tribunal, the Respondent Nos. 1 and 2 appeared and filed their Objections to the Claim Petition, while as, the Respondent No.3-Driver of the offending vehicle did not file any Objections and was, accordingly, proceeded *ex-parte*.; that during the

pendency of the Claim Petition, the original Claimant-Bashir Ahmad Malik succumbed to his injuries on 9th of March, 2012 after a prolonged illness, when the Claim Petition was at the stage of recording of evidence, whereafter the legal heirs of the deceased/ Respondent Nos. 1 to 5 herein moved a motion before the Tribunal for contesting the Claim Petition, which was allowed by the Tribunal vide Order dated 3rd of May, 2012 and the legal heirs were brought on record as the Claimants in the Claim Petition; and that, thereafter, an amended Claim Petition came to be filed by the Claimants on 19th of June, 2014; that a case, in this behalf, was registered in Police Station, Udhampur under FIR No. 357 of 2004 for the offences punishable under Sections 279 and 337 of the Ranbir Penal Code (RPC) against the Respondent No.3 herein viz. the Driver of the offending vehicle.

04. The Tribunal, on the basis of the pleadings of the parties, initially, had framed the following issues:

- i. Whether the Petitioner was travelling in the offending vehicle on 02-12-2004 being driven by the respondent No.3 rashly and negligently which met with an accident at Chankiya Chowk Dhar Road Udhampur causing thereby injuries to the petitioner? (OPP);
- ii. If issue No.1 is proved in affirmative, whether the Petitioner is entitled to compensation, if yes, to what extent and from whom? (OPP); and
- iii. Relief?

05. During the process of recording of evidence and having regard to the fact that the original Claimant had succumbed to his injuries on 9th of March, 2012 and his legal heirs were brought on record on 3rd of May, 2012, whereafter, they filed amended Claim Petition on 19th of June, 2016, the Tribunal, vide Order dated 9th of October, 2014, appears to have framed the following additional issues:

- i. Whether the injured, namely Bashir Ahmad Malik, was incapacitated as a result of the vehicular accident on 2nd of December, 2004 at Chankiya Dhar Road, Udhampur, Jammu

and as a result of the injuries ultimately died on 9th of March, 2012? (OPP); and

- ii. Whether the applications/ petitioners are entitled to compensation for death of Bashir Ahmad Malik as his legal heirs/ dependents? OPP.

06. After conclusion of the proceedings and hearing the contesting parties, the learned Tribunal, in terms of the impugned Award dated 20th of July, 2017, allowed the Claim Petition, thereby holding the Claimants/ Respondent Nos.1 to 5 herein entitled to compensation to the tune of Rs. 17,00,000/-, minus the interim relief along with *pendentelite* and future simple interest @ 6 % per annum from the date of institution of the Claim Petition till final realization of the awarded amount. The Tribunal, however, directed the Respondent-Insurer/ Appellant Insurance Company herein to make payment of the awarded amount within a period of 30 days from the date of Award through the Tribunal.

07. The impugned Award has been assailed by the Appellant-Insurance Company before this Court through the medium of the appeal on hand, on various grounds, including that the deceased was travelling by the offending Insured vehicle gratuitously, as such, the Claimants, though entitled to receive compensation, but the Insurer is not liable to indemnify the Insured of his liability.

08. The Appellant-Insurance Company, as Respondent-Insured before the Tribunal, had in its Written Statement asserted that the deceased was travelling in the insured vehicle as a passenger and, as such, the Company is not liable to pay any compensation to the owner of the vehicle on that count. Since, the Insurance Company had raised the plea of gratuitous passenger in their Objections, as such, the following additional issue was framed in the Claim Petition:

“Whether the deceased Bashir Ahmad Malik was travelling in the offending vehicle as a gratuitous passenger and, as such, the Insurance Company is not liable to pay any compensation to the owner of the crime vehicle?”.

The onus to prove this issue had been placed on the Insurance Company. After raising this issue, the Insurance Company, however, had not taken any pains in order to prove the said plea, as has been recorded by the Tribunal in the impugned Award, as such, it was unable to hold and decide that the deceased was travelling in the crime vehicle as a gratuitous passenger, as the witnesses produced and examined by the Insurance Company also had not made any whisper with regard to the said plea and also that there was nothing on record which would lead the Tribunal to the conclusion that the deceased was a gratuitous passenger, hence, in absence of any evidence, the said additional issue was decided against the Insurance Company and in favour of the Claimants.

09. Learned Counsel appearing for the Appellant-Insurance Company submitted that the Tribunal has erroneously recorded finding on the aforesaid additional issue, without referring to the evidence led by the Insurance Company, as the Company had examined as many as two witnesses, namely, RW-Gulzar Ahmad Wani and RW-Mohd. Nayeem Khan, both of them, based on the investigation report, had stated that the deceased was travelling by the offending vehicle gratuitously. He has also drawn the attention of this Court towards the statement of the deceased recorded in support of his Petition which he had filed claiming to have been a passenger in the offending vehicle at the time of its accident, before his death.

10. Heard learned Counsel for the Appellant-Insurance Company as also the learned Counsel appearing for the Claimants/ Respondent Nos. 1 to 5 herein. The Respondent Nos. 6 and 7, in view of their non-appearance despite deemed service, have been proceeded *ex-parte*.

11. This Court has the advantage of having the record of the Tribunal. Firstly, going to the statement of the deceased as original Claimant, it is revealed that the deceased, Bashir Ahmad Malik, had stated that he had been travelling in the offending vehicle on 2nd of December, 2004 to Srinagar and when the offending vehicle reached at Chankya Dhar Road, Udampur, the same met with an accident due to the rash and

negligent driving of the Respondent-Driver, causing him serious injuries. The deceased had been cross-examined by the learned Counsel for the Appellant-Insurance Company, wherein he stated that he had started the journey in the offending vehicle from Delhi, besides some other persons and that the vehicle was loaded with rice. However, the Insurance Company had not put any specific question to the deceased as to how he was travelling by the offending vehicle, whether as a passenger or as owner of the load of the vehicle. Therefore, it cannot be stated that the deceased had ever admitted to have travelled by the offending vehicle as a passenger gratuitously.

12. The other witnesses examined by the Appellant-Insurance Company before the Tribunal, RWs Gulzar Ahmad Wani and Mohd. Nayeem Khan, had stated that as per the investigation carried out by RW-Mohamad Nayeem Khan, Investigator, the Claimant-Bashir Ahmad Malik had got injured in the accident caused by the offending vehicle on 2nd of December, 2004 and that his Claim Petition was based on facts. The Investigator-Mohd. Nayeem Khan did not say anything with regard to the fact that the deceased was travelling in the offending vehicle gratuitously. RW-Gulzar Ahmad Wani, who is an official as Legal Assistant of the Appellant-Insurance Company, has attempted to say that the Investigator, in his report, had stated that the Claimant-Bashir Ahmad Malik was travelling by the offending vehicle as a passenger and, as such, the Company was not bound to indemnify the compensation to the Claimants. The statement of RW-Gulzar Ahmad Wani to this effect, however, pales into insignificance as the Investigator himself had not stated anything with regard to this fact and the investigation report was neither placed on record nor proved, so as to remotely suggest that the deceased had been travelling in the offending vehicle as on the date of accident as a gratuitous passenger and, as such, in view of the terms and conditions of the policy of insurance, it is the Appellant-Insurance Company which was/ is liable to indemnify the liability of the owner of the vehicle, as Insured, to pay compensation to the Claimants.

13. It appears that the Appellant-Insurance Company, without leading any evidence, with regard to an issue, the onus of which had been placed on it to prove, wishes to assume and expects the Tribunal and even this Court to presume this fact, even against evidence. Once, an issue is framed on the basis of a contention raised by a party and the onus is placed on it to prove the same, that party is supposed to lead conclusive evidence to prove that issue. Since, in the present case, the Appellant-Insurance Company, as Respondent-Insurer before the Tribunal, has failed to lead any evidence on this point that the deceased was travelling by the offending vehicle as a gratuitous passenger, the sole plea urged by the learned Counsel for the Appellant is not tenable and is liable to be rejected outrightly.

14. Viewed thus, the instant appeal is found to be devoid of any merit and substance. The same is, accordingly, **dismissed**, along with the connected CM(s). The impugned Award passed by the Tribunal is, thus, upheld. The amount of compensation, if any, deposited before this Court is ordered to be released in favour of the Claimants in terms of the Award of the Tribunal, of course, on proper identification and after deduction of requisite Court fee. No order as to costs.

15. Record of the Tribunal be sent down, along with a copy of this Judgment.

(M. A. CHOWDHARY)
JUDGE

SRINAGAR

December 21st, 2024

"TAHIR"

i. Whether the Judgment is approved for reporting? No.