

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE BIVAS PATTANAYAK

**FMA 1195 of 2019
CAN 1 of 2019 (Old No. CAN 10573 of 2019)
Sri Ganesh Paul
versus
The Oriental Insurance Company Ltd. & Anr.**

For the Appellant-Claimant	: Mr. Krishanu Banik, Advocate
For the Respondent No.1- Insurance Company	: Mr. Sanjay Paul, Advocate
Heard on	: 14.12.2022, 09.01.2022, 24.01.2023, 25.01.2023
Judgment on	: 26.09.2023

Bivas Pattanayak, J. :-

1. This appeal is preferred against the judgment and award dated 31st May, 2019 passed by learned Additional District Judge Judge-cum-Judge, Motor Accident Claims Tribunal, Fast Track Court, Balurghat, Dakshin Dinajpur in M.A.C. Case No. 88 of 2015 dismissing the claim application of the claimant filed under Section 166 read with Section 167 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 14th January, 2015 the claimant-victim boarded the vehicle bearing registration no. WB-61/1848 (bus), as conductor of the said bus in course of his employment, which was proceeding towards Siliguri and when the said vehicle reached at Baroduyari on NH-34, the driver of the said vehicle lost control over the vehicle and dashed a stationary truck which was standing on the other

side of the road. Due to the said accident, the victim and other passengers of the bus got severe multiple injuries on their persons and one of the passengers died on the spot. Immediately after the accident, the victim was shifted to Raiganj District Hospital but considering his serious condition and the injuries sustained, he was referred to any Medical College and Hospital. However, the victim was admitted to Popular Nursing Home at Patna where his both legs were amputated. For the reasons of injuries and amputation due to the said accident, the victim became permanently disabled. On account of the injuries sustained in the accident and subsequent disablement, the injured-victim filed application for compensation of Rs. 25,00,000/- under Section 166 read with Section 167 of the Motor Vehicles Act, 1988.

3. The claimant-injured, in order to establish his case, examined seven witnesses and produced documents which have been marked as **Exhibits-1 to 28** respectively.

4. The respondent no.1-insurance company did not adduce any evidence. However, during cross-examination of P.W.6, the photocopy of discharge certificate dated 16th March, 2015 issued by Dr. Ashok Kumar Sinha has been marked as **Exhibit-A** on behalf of insurance company.

5. Since the respondent no.2-owner of the offending vehicle did not contest the claim application in spite of receipt of summons, hence service of notice of appeal upon the said respondent stands dispensed with.

6. Upon considering the materials on record and the evidence adduced on behalf of the claimant-injured, learned Tribunal dismissed the claim

application of the claimant-injured filed under Section 166 read with Section 167 of the Motor Vehicles Act, 1988.

7. Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal, the claimant has preferred the present appeal.

8. Mr. Krishanu Banik, learned advocate for the appellant-claimant submitted that the learned Tribunal has erred in holding that the claim application of the claimant is not maintainable in its present form and law on the ground that the owner of the truck, which was dashed by the offending bus and its insurer were not made party to the claim application and thereby erroneously holding that the claim application is defective for non-joinder of the necessary parties. He further submitted that the law in this regard is no more *res integra* inasmuch as it is the option of the claimant to claim against sole tortfeasor or against joint tortfeasors. Therefore, non-impleading the insured and the insurer of the said truck does not and cannot make the claim application defective for want of necessary parties and thereby make the application altogether not maintainable. In support of his contention, he relied on the decision of the Hon'ble Supreme Court passed in ***Khenyei versus New India Assurance Co. Ltd. & Ors.*** reported in **2015 (9) SCC 273**.

He further submitted that the learned Tribunal erroneously doubted the fact that the claimant sustained injuries in the accident and disbelieved the evidence of the eyewitness P.W.4 as well as the evidence of the claimant who was the injured himself without any reasonable basis and cogent grounds. Moreover he submitted that in claim cases while

examining the evidence the Court is not to find fault with non-examination of some “best” eyewitness but to analyse the evidence already on record to ascertain whether that is sufficient to answer the matter in issue on the touchstone of preponderance of probability. To buttress his contention, he relied on the decision of the Hon’ble Supreme Court passed in ***Sunita & Ors. versus Rajasthan State Road Transport Corporation & Anr.*** reported in ***AIR 2019 SC 994***. The FIR and the chargesheet clearly manifest that on the relevant date of accident, the victim sustained injury which has not been taken account of by the learned Tribunal. There is no denial to the evidence of the eyewitness P.W.4 in this regard which leads to necessary implication of admission of the facts stated by the witness. In support of his contention, he relied on the decision of this Court passed in ***A.E.G. Carapiet versus A.Y. Derderian*** reported in ***AIR 1961 Cal 359***. Thus, the learned Tribunal erred in negating the occurrence and did not take into account the positive evidence of the claimant-injured, eyewitness and other corroborative evidence.

The case of the claimant was also disbelieved by the learned Tribunal on the ground of delay of two months, observing that the FIR has been lodged on 21st March, 2015 at about 12:05 hours. The learned Tribunal failed to make proper scrutiny of the date noted by the receiving officer. Though the endorsement of the receiving officer on the written complaint shows receipt on 21st March, 2015, yet the receiving officer has put date 21st January, 2015 below his signature which clearly manifest that the written complaint was lodged on 21st January, 2015 and not on 21st March, 2015. Thus, there is delay of only seven days. There is no extraneous fact raising doubt

in the contentions made in the FIR. Delay in lodging FIR *per se* does not make the claim of the claimant doubtful unless there is evidence of concoction or fabrication in FIR. To buttress his contention, he relied on the decision of the Hon'ble Supreme Court passed in ***Ravi versus Badrinarayan and Others*** reported in **2011 ACJ 911**.

He further submitted that the findings recorded by the learned Tribunal is perverse, since the findings arrived at has been made ignoring/excluding relevant material facts adduced on behalf of the claimant-injured. He relied on the decision of the Hon'ble Supreme Court passed in ***Damodar Lal versus Sohan Devi and Others*** reported in **AIR 2016 SC 262**.

In the aforesaid backdrop, Mr. Banik, learned advocate for the appellant-claimant submitted that there are evidence galore in support of the claimant having sustained injury in the said accident and there is no iota to disbelieve the claim of the claimant. Accordingly, the claimant is entitled to receive compensation.

With regard to the quantum of compensation, he submitted that the claimant at the time of accident was a bus conductor which is supported by the evidence of P.W.2, owner of the offending vehicle. P.W.2 has categorically stated that at the time of accident, he used to pay salary to the victim at Rs. 6,172/- along with Rs. 100/- per day towards fooding and thus, the total income of the victim was Rs. 9,172/-. He also submitted that the rate of income stated by P.W.2 is also commensurate with the minimum wages scheduled under the Minimum Wages Act.

He also submitted that the claimant-injured due to the accident sustained amputation on his both legs and though the disability certificate (**Exhibit-**

15) shows permanent physical disablement of 80%, but the functional disablement of the victim should be considered at 100%.

He also submitted that the claimant-injured has proved medical expenses which should be allowed in his favour.

So far as non-pecuniary damages are concerned, he leaves the matter to the discretion of the Court.

Mr. Banik, learned advocate for the appellant-claimant submitted that the claimant has filed an application under Order XLI Rule 27 of the Civil Procedure Code and supplementary affidavit for adducing additional evidence in respect of (i) Referral Card issued by Medical Officer, Raiganj District Hospital, Raiganj, Uttar Dinajpur, (ii) Discharge Summary & Certificate of North Bengal Neuro Centre Pvt. Ltd., (iii) Admission Certificate, (iv) Electro Cardio Gram (ECG) report, (v) Application for obtaining information under Section 6(I) of Right to Information Act, 2005 dated 22.10.2019, (vi) Reply of RTI regarding queries on the admission and the referral details in respect of Sri Ganesh Pal, son of Sitaram Paul issued by the Deputy Superintendent, Raiganj Government Medical College and Hospital, Raiganj Uttar Dinajpur communicated to the applicant by Memo no. RGMCH/3019 dated 11.11.2019, (vii) the photocopy of the online admission details and (viii) GDE copy lodged for the missing documents, since those documents could not be produced before the learned Tribunal in spite of due diligence and he prayed for allowing such prayer of the appellant-claimant for producing additional evidence.

In light of his aforesaid submissions, he prayed for setting aside the impugned judgment of dismissal of the learned Tribunal and allowing compensation in favour of the claimant-injured.

9. In reply to the contentions raised on behalf of the appellant-claimant, Mr. Sanjay Paul, learned advocate for the respondent no.1-insurance company submitted that the fact of the accident is doubtful from the aspect that the accused driver, as per the materials on record, has been arrested prior to the lodgment of the FIR. He indicates that the FIR has been lodged on 21st January, 2015 at about 12:05 hours, however, the chargesheet shows date and time of arrest of the driver to be 21st January, 2015 at about 9:25 hours. The question as to how the driver is arrested prior to the lodging of the FIR has not been clarified by the claimant during the entire proceedings which clearly leads to suspicion so far as the criminal proceedings initiated in respect of the alleged accident is concerned.

He further submitted that the chargesheet though mentions that the claimant was injured in the said accident, but the same is not a conclusive proof of the fact and is at best a corroborative one. In order to ascertain acceptability of the claimant's case, other evidence is also to be looked into. To buttress his contention, he relied on the decision of the Hon'ble Supreme Court passed in ***Kamlesh and Others versus Attar Singh and Others*** reported in **2015 (4) T.A.C. 611 (S.C.)**.

He also pressed into service that, as per the discharge certificate of Popular Nursing Home at Patna, the victim was operated on 11th January, 2015 and such date was corrected subsequently by the Hospital Authorities

which is evident from the deposition of the P.W.6, Basant Kumar, Manager of Popular Nursing Home at Patna. Therefore, the accident having taken place on 14th January, 2015 and the operation of the victim has been held on 11th January, 2015 clearly indicates that the victim did not sustain injuries in the said accident. The aforesaid aspect of discrepancy in the dates of operation has been noted and dealt with by the learned Tribunal correctly. He further submitted that P.W.2, who claimed to be the owner of the offending vehicle, stated that at first the victim after the accident was treated at Siliguri Hospital whereas the victim himself has stated that he was at first taken to Raiganj District Hospital. Thus, the evidence of P.W.2 becomes doubtful and is unreliable. So far as the evidence of P.W.4, who claimed himself to be an eyewitness to the occurrence, is concerned, he submitted that the witness stated that the amputation of both the legs of the victim was done at Raiganj District Hospital whereas the documents produced on behalf of the victim shows that the amputation has been done at Popular Nursing Home, Patna which creates a doubt in the evidence of P.W.4 as well. All the aforesaid aspect has been taken into account by the learned Tribunal and thus the decision of the learned Tribunal cannot be said to be perverse since the same has been arrived at on the basis of evidence on record and hence proposition in *Damodar Lal (supra)* is not applicable to the facts and circumstances of this case. Further, the proposition in *A.E.G. Carapiet (supra)* that where the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be proved disputed at all, does not apply to the

evidence of P.W.2 and P.W.4 since their evidence is contradictory to the facts itself. Thus, the claimant-injured failed to establish that he sustained injuries in the said accident. After considering the entire evidence, the learned Tribunal discounted the same and came to a definite findings that no such accident took place on the relevant date as claimed which led to dismissal of the claim and it does not call for interference. Moreover, there is delay in lodging of the FIR which makes the claim case doubtful.

He further submitted that the claimant-injured has failed to establish his income and profession. P.W.2, employer of the victim, in his cross-examination has admitted that he does not maintain any salary register of the employees and he also did not issue any cash memo in the name of the employee Ganesh Chandra Paul (victim) and, therefore, the evidence of P.W.2 also cannot come in the aid of the victim so far as his avocation and monthly income is concerned.

With regard to the prayer of the appellant-claimant for adducing additional evidence, he submitted that the documents were within the knowledge of the claimant and, therefore, he cannot be allowed to fill up lacunae in his case in the garb of producing additional evidence, hence the prayer should be dismissed in *limini*.

In light of his aforesaid submissions, he prayed that the impugned judgment and award of dismissal passed by the learned Tribunal should be affirmed in the interest of justice.

10. Before delving into the merits of the appeal, it would be apposite to deal with the application of the claimant-injured for adducing additional

evidence under Order XLI Rule 27 of the Civil Procedure Code being **CAN 1 of 2019 (Old No. CAN 10573 of 2019)**.

10.1. Mr. Banik, learned advocate for the appellant-claimant while pressing such application for additional evidence for producing (i) Referral Card issued by Medical Officer, Raiganj District Hospital, Raiganj, Uttar Dinajpur, (ii) Discharge Summary & Certificate of North Bengal Neuro Centre Pvt. Ltd., (iii) Admission Certificate, (iv) Electro Cardio Gram (ECG) report, (v) Application for obtaining information under Section 6(I) of Right to Information Act, 2005 dated 22.10.2019, (vi) Reply of RTI regarding queries on the admission and the referral details in respect of Sri Ganesh Pal, son of Sitaram Paul issued by the Deputy Superintendent, Raiganj Government Medical College and Hospital, Raiganj Uttar Dinajpur communicated to the applicant by Memo no. RGMCH/3019 dated 11.11.2019, (vii) the photocopy of the online admission details and (viii) GDE copy lodged for the missing documents, submitted that the aforesaid documents were handed over to the learned conducting advocate before the learned Tribunal but the same could not be produced in spite of due diligence. Since the documents were misplaced, application under the Right to Information Act was filed and missing diary was lodged. Hence those relevant facts needs to be brought by way of producing additional evidence for substantial justice. *Per contra*, Mr. Paul, learned advocate for the respondent no.1-insurance company submitted that the documents namely referral card and discharge summary of North Bengal Neuro Centre Pvt. Ltd. was well within the knowledge of the victim but the same was not produced for the reasons better known to him. The additional

evidence may be received by the Appellate Court if the appellant satisfies the Court that after exercise of due diligence such evidence was not within his knowledge or could not be produced when the case was taken up for hearing. No case is made out that in spite of due diligence, the document could not be produced or was not within the knowledge. Thus, the application for additional evidence filed by the claimant-injured is liable to be dismissed in *limini*.

10.2. The power to allow additional evidence at the appeal stage under Order XLI Rule 27 of the Civil Procedure Code is a discretionary power. The general rule is that no evidence shall be produced during the pendency of the appeal but the Court has been given the discretionary power that under some specified circumstances, the Court may allow the additional evidence. The Rule refers to cases where the Appellate Court itself requires certain evidence to be adduced in order to enable to do justice between the parties. The Rule is not intended to give a party a second opportunity of proving his case but to cure a defect in the existing evidence on record. The parties to an appeal shall not be entitled to produce additional evidence, oral or documentary, before the Appellate Court except on the grounds enumerated in Clause (a), (aa) and (b) of Order XLI Rule 27 of the Civil Procedure Code. The Court may permit the additional evidence to be produced only upon satisfaction of the three grounds namely (i) if the Court from whose decree appeal is preferred has refused to admit evidence which ought to have been admitted, (ii) a party seeking to produce additional evidence to establish that notwithstanding the exercise of due diligence such evidence was not within his knowledge

or could not, after due diligence, be produced by him at the time when the decree appealed against was passed and (iii) when the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment or for any other substantial cause.

10.3. There is no case of the appellant-claimant that the learned Tribunal refused to admit evidence which ought to have been admitted by him.

10.4. Bearing in mind the aforesaid proposition of law, let me revert back to the contention made in the application for admitting additional evidence on record. From the contention in the application, it is manifest that the documents under sl. no. (i) to (iv) for which prayer for additional evidence has been sought for were handed over to the learned conducting advocate before the learned Tribunal. Although it is stated in the application that the documents though within his knowledge but after exercising due diligence could not be produced at the time of trial, yet excepting such solitary statement, no circumstances has been enumerated as to how the documents which were within the knowledge of the claimant could not be produced before the learned Tribunal. Accordingly, it is found that the claimant-injured though having knowledge of the documents which precisely was in his possession failed to produce it before the Court. The documents under sl. no. (v) to (viii) relates to subsequent happenings for procuring the relevant documents namely referral card and others. The Rule makes it very clear that it cannot be intended to give a party a second opportunity to prove his case. Thus, the application for seeking additional evidence falls short of merit. Accordingly, **CAN 1 of 2019 (Old No. CAN 10573 of 2019)** stands dismissed.

11. Having heard learned advocates for the respective parties, the following issues have fallen for consideration:

Firstly, whether the claim application is maintainable in its present form and law.

Secondly, whether the accident took place on the relevant date causing injuries to the claimant-injured.

And *thirdly*, whether the accident took place due to rash and negligent act of the driver of the offending vehicle.

12. With regard to the first issue relating to maintainability of the claim application, it is found that the learned Tribunal held that since as per the claim application one truck was also involved in the alleged accident, the insured and the insurer of the said truck was necessary parties and as those have not been impleaded as a party, the application is not maintainable in its present form and law. In order to appreciate the aforesaid issue, it would be profitable to refer to the observation of the Hon'ble Supreme Court in *Khenyei (supra)* as follows:

“When injury is caused as a result of negligence of two joint tort-feasors, claimant is not required to lay his finger on the exact person regarding his proportion of liability. In the absence of any evidence enabling the Court to distinguish the act of each joint tort-feasor, liability can be fastened on both the tort-feasors jointly and in case only one of the joint tort-feasors is impleaded as party, then entire liability can be fastened upon one of the joint tort-feasors. If both the joint tort-feasors are before the Court and there is sufficient evidence regarding the act of each tort-feasors and it is possible for the Court to apportion the claim considering the exact nature of negligence by both the joint tort-

feasors, it may apportion the claim. However, it is not necessary to apportion the claim when it is not possible to determine the ratio of negligence of joint tort-feasors. In such cases, joint tort-feasors will be jointly and severally liable to pay the compensation.”

12.1. Thus, the law is no more *res integra*. Bearing in mind the aforesaid proposition of law laid down by the Hon’ble Supreme Court, it is now open to the claimant to seek compensation either from one tort feisor or from both the tort feisors. Therefore, even if the insurer and the insured of the truck which on the relevant date of accident was standing on the road and was dashed by the offending vehicle, is not made a party that *per se* would not make the application of the claimant for compensation not maintainable in the eye of law. I find substance in the argument of Mr. Banik, learned advocate for appellant-claimant in this regard. Accordingly, the claim application of the claimant-injured is maintainable in the present form and law.

13. With regard to the second issue as to whether the accident took place on the relevant date causing injuries to the claimant-injured, it is found that the claimant-injured (P.W.1) in his claim application as well as in his evidence has stated that on 14th January, 2015, he boarded the offending vehicle bearing registration no. WB-61/1848 as a bus conductor for going to Siliguri in course of his employment and when the vehicle reached near Baroduyari at NH-34, the driver of the said vehicle lost control over the vehicle and dashed a stationary truck which was standing on the other side of the road. Due to the said accident, he sustained injuries along with other persons and one person died on the spot. Upon going through the

cross-examination of P.W.1, it is found that his evidence that on the date of accident, he was travelling in the bus which met with an accident and the injuries sustained has remained unchallenged. P.W.4, Sudip Acharjee deposed that he is an eyewitness to the occurrence. He also stated in his evidence-in-chief that on 14th January, 2015 the offending vehicle met with an accident in which the victim and other passengers were injured. The learned Tribunal has discounted the evidence of P.W.4 on the ground that he failed to bring on record any proof that he actually boarded the bus on the relevant date and further there is no evidence that he sustained any injuries and lastly he was not named as a witness in the chargesheet. It is relevant to note that the evidence of this witness that he was travelling by the offending vehicle on the relevant date of accident is further established in cross-examination where he stated that on 14th January, 2015 he was going to Siliguri by the Bus. It is of general prudence that no person travelling on a bus keeps the bus ticket and the same is either thrown away or destroyed unless those are required for any future purpose. It is probable that after the accident the ticket might have been lost. Non-production of any proof of boarding the bus does not *ipso facto* leads to the fact that he was not travelling in the bus on the relevant date when his presence in the bus is admitted in cross-examination. It is true that P.W.4 did not state of sustaining any injury. In an accident, there might be occasion that some persons may sustain injuries and the others might not. For not stating of the impact of the accident on the witness cannot make his evidence doubtful which is otherwise reliable. It is true that P.W.4 has not been listed as a witness in the chargesheet. There is no hard and fast

rule that in claim case only the witness listed in the chargesheet is to be examined. Therefore, even if the witness is not a chargesheeted witness for such reasons his evidence cannot be ignored. There are no contrary evidence either in the cross-examination or by adducing any independent evidence to challenge the evidence of eyewitness P.W.4 regarding the injuries sustained by the victim while travelling in the offending vehicle on the relevant date. The evidence of claimant-injured and the eyewitness P.W.4 that the injured sustained injuries in the said accident is corroborated by the FIR and the chargesheet which clearly indicates that in the accident the victim sustained injuries.

13.1. Challenge has also been thrown to the evidence of P.W.4 on the ground that he stated that the amputation of both the legs of the victim was done at Raiganj Hospital which is at variance to the evidence of injured (P.W.1) who deposed that the amputation was done at Popular Nursing Home, Patna. P.W.4 though stated of amputation but did not state of the hospital where the amputation was done. It is relevant to note that this witness has also not accompanied the injured to the hospital. Hence it was never possible for him to state correctly of the treatment. Be that it may, such aspect does not make his otherwise reliable evidence of the occurrence and injury sustained by the victim doubtful.

13.2. Although P.W.2, Dipankar Roy deposed in his evidence-in-chief that the victim sustained injuries in the said accident on 14th January, 2015, yet his evidence in this regard is inconsequential since he is not an eyewitness to the occurrence. Mr. Paul, learned advocate for respondent no.1-insurance company has raised doubts in the evidence of P.W.2 on the

ground of his discrepancy in stating that the victim was at first treated at Siliguri Hospital whereas, as per the victim, he was taken to Raiganj District Hospital and thus such statement is contrary to the deposition of the injured (P.W.1) that he was taken at first to Raiganj District Hospital. The materials on record does not show that the witness ever accompanied the victim to the hospital. Hence such discrepancy does not effect the core case of the claimant.

13.3. Relying on *A.E.G. Carapiet (supra)* Mr. Banik, learned for appellant-claimant submitted that evidence of P.W.4, eyewitness to the occurrence, stood admitted inasmuch as the same has not been denied in cross-examination. However, on going through the cross-examination of this witness, it is found that suggestion has been given to the witness denying that the victim sustained injury in the said accident. Thus, the facts of the cited decision is distinguishable from case at hand.

13.4. It is trite law that the claimants are merely to establish their case on the touchstone of preponderance of probability and the standard of proof beyond reasonable doubt cannot be applied by the learned Tribunal while dealing with the motor accident cases. Mr. Banik, learned advocate for the claimant-injured has rightly argued in this regard relying on *Sunita (supra)*. Mr. Paul, learned advocate for the respondent no.1-insurance company relying *Kamlesh (supra)* has submitted that chargesheet cannot be a conclusive proof. I concede to the proposition as laid down by the Hon'ble Supreme Court as above. However, in the case at hand, apart from chargesheet, there are oral evidence of the claimant-injured as well as of

the eyewitness and thus the case of the claimant-injured is not based only on the chargesheet.

13.5. Mr. Paul, learned advocate for the respondent no.1-insurance company tried to impress upon the Court that there are discrepancies in the date of operation and the date of injury noted in the discharge summary issued by Popular Nursing Home, Patna and the same has been corrected subsequently. In the first discharge summary, the date of injury has been noted as 12th January, 2015 and thereafter the same has been corrected. Subsequent thereto, the date of operation in OT Note, which was firstly noted as 11th January, 2015, has been corrected and noted as 19th January, 2015 in duplicate discharge summary. Thus, the discrepancy in the date of injury and the date of operation clearly shows that the facts alleged by the claimants is false and fabricated. It is a fact that in the discharge summary of Popular Nursing Home, Patna dated 16th March, 2015 (**Exhibit-18**), the date of injury has been noted as 12th January, 2015. This clearly appears to be a wrong recording since all other documents namely the FIR and chargesheet manifest the accident to have taken place on 14th January, 2015 and the discharge summary (**Exhibit-18**) shows the date of admission is 16th January, 2015 and the date of operation is 19th January, 2015. It is true that in the OT Note, it is mentioned that amputation of limb was done under S/A on 11th January, 2015. This also clearly appears to be a wrong recording in the discharge summary, in view of the fact that the date of operation has been noted as 19th January, 2015 and as such there cannot be amputation prior to the date of operation on 19th January, 2015. Subsequently in the duplicate

discharge summary (**Exhibit-18a**), the date of injury has been corrected and noted as 14th January, 2015 and in the OT Note the date of amputation on 11th January, 2015 is corrected to 19th January, 2015 which have been duly signed by Dr. Ashok Kumar Sinha, Chief Consultant, Orthopaedics Surgeon, Popular Nursing Home, Patna. P.W.6, Basant Kumar, Manager of Popular Nursing Home, Patna, has stated in his evidence-in-chief that in the discharge certificate, date of OT was mistakenly typed as 11th January, 2015 instead of 19th January, 2015 and the same doctor has subsequently issued duplicate discharge certificate. There is nothing in the cross-examination of this witness that there was intentional incorporation and/or corrections made in the discharge certificate in respect of date of operation in the OT Note or in the date of injury surreptitiously. No evidence has been brought on record by the insurance company in the contrary to establish that the dates in the discharge summary mentioned earlier has been corrected and incorporated with ulterior motive of getting compensation on false basis. Therefore, discrepancy in date of injury and date of operation noted earlier in the discharge summary does not lead to the fact that the victim had amputation prior to the accident and he did not sustained injuries in the said accident.

13.6. Mr. Paul, learned advocate for the respondent no.1-insurance company has raised another issue that the accused was arrested prior to the lodging of the FIR which will be evident comparing the date of receipt of the FIR and the date and time of arrest of the accused mentioned in the chargesheet. It is a fact that, as per the endorsement of the receiving

officer, the FIR was received on 21st January, 2015 at about 12:05 hours. The chargesheet shows date and time of arrest of the accused to be 21st January, 2015 at 9:25 hours, which is prior in time. The Criminal Procedure Code envisages that a police officer can arrest a person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has committed a cognizable offence and the police officer has reason to believe on the basis of such complaint, information or suspicion that such person has committed the said offence. Therefore, until and unless the complaint made or information received, there cannot be effectually an arrest of any person. Thus, the time of arrest of the accused/driver in the chargesheet appears primarily to be a wrong noting. The only person, who could have clarified, was the investigating officer who has not been examined by the insurance company. The aforesaid time of arrest of an accused cannot altogether make the FIR as a whole doubtful. Since such aspect has not been clarified by the insurance company by adducing the evidence of the investigating officer of the case, hence argument in this regard does not hold good.

13.7. Further challenge has been thrown to claim case on the ground of delay in lodging FIR. Although there is delay of seven days in lodging of the FIR, but there are no evidence of any concoction, fabrication or engineering of the FIR. In *Ravi (supra)*, the Hon'ble Supreme Court has observed as follows:

"20. It is well settled that delay in lodging F.I.R. cannot be a ground to doubt the claimant's case. Knowing the Indian conditions as they are, we cannot expect a

common man to first rush to the police station immediately after an accident. Human nature and family responsibilities occupy the mind of kith and kin to such an extent that they give more importance to get the victim treated rather than to rush to the police station. Under such circumstances, they are not expected to act mechanically with promptitude in lodging the F.I.R. with the police. Delay in lodging the F.I.R. thus, cannot be the ground to deny justice to the victim. In cases of delay, the courts are required to examine the evidence with a closer scrutiny and in doing so the contents of the F.I.R. should also be scrutinized more carefully. If court finds that there is no indication of fabrication or it has not been concocted or engineered to implicate innocent persons then, even if there is a delay in lodging the F.I.R., the claim case cannot be dismissed merely on that ground.”

13.8. Bearing in mind the aforesaid proposition in the absence of any concoction, fabrication or engineering of FIR, delay *per se* would not make the claim application of the claimant doubtful. I find substance in the argument of Mr. Banik, learned advocate for the appellant-claimant in this regard relying on *Ravi (supra)*. Accordingly, it is held that on the relevant date the accident took place in which the victim sustained injuries.

14. With regard to the last issue relating to the aspect of rash and negligent driving of the driver of the offending vehicle, it is found that the learned Tribunal has negated such issue against the claimant. P.W.1, claimant-injured, who was travelling by the bus on the relevant date, has deposed that the driver of the offending vehicle has lost control over the offending vehicle and proceeded to wrong side and dashed a stationary truck. He further deposed that in the accident several persons were

injured and one has expired. Such fact is also supported by P.W.4 eyewitness to the occurrence who was also travelling by the same bus on the relevant date of accident. The evidence of P.W.1 and P.W.4 is corroborated by the facts noted in the FIR. Upon completion of investigation, the investigating agency submitted chargesheet against the driver of the offending vehicle under Sections 279/337/338/304(A)/427 of the Indian Penal Code. There are no other contrary evidence that the driver was not guilty of rash and negligent driving. Considering the aforesaid materials on record, it is found that the accident took place due to rash and negligent act of the driver of the offending vehicle. Further keeping in mind the manner of the accident and the fact that several persons were injured and one person died, it can be safely said that on the relevant date of accident, the driver of the offending vehicle was guilty of rash and negligent act.

15. In view of the above discussion, the order of dismissal of the claim application by the learned Tribunal is liable to be set aside. The decision in *Damodar Lal (supra)* is factually different from the case at hand and is not applicable.

16. Now let me consider the aspect of quantification of the compensation amount. In order to quantify the compensation amount, following aspects have to be looked into:

Firstly, multiplier.

Secondly, determination of income.

Thirdly, loss of earnings.

And *lastly*, pecuniary loss and non-pecuniary loss.

17. With regard to the multiplier, it is found that as per the Voter's Identity Card (**Exhibit-8**), the date of birth of the victim is 1st January, 1979, therefore, on the date of accident (14th January, 2015) the victim was aged 36 years. Following the observation of the Hon'ble Supreme Court in **Sarla Verma (Smt) and Others versus Delhi Transport Corporation and Another** reported in **(2009) 6 SCC 121**, the multiplier should be 15.

18. With regard to the income, it is found that the claimant-injured has claimed that he was a bus conductor of the offending vehicle and he produced his license of conductor (**Exhibit-6**). P.W.4 Sudip Acharjee, eyewitness to the occurrence, also deposed that the victim on the relevant date was the bus conductor of the offending vehicle. Be that as it may, in the written complaint, the informant stated that the victim was a passenger in the offending bus which is also noted in the chargesheet. The claimant in order to establish his profession and income examined one Dipankar Roy as P.W.2 who deposed in his evidence-in-chief that he is the owner of the vehicle bearing no. WB-61/1848 (offending vehicle) and the victim Ganesh Chandra Paul was the conductor of the said vehicle on the date of accident. He further deposed that he used to pay Rs. 6,172/- per month and Rs. 100/- per day for fooding to the victim and he proved the income certificate marked as **Exhibit-10** with objection. Although P.W.2 deposed of the aforesaid facts in his evidence-in-chief but it is relevant to note that in cross-examination this witness admitted that he does not maintain any salary register of the employee and thereafter he went to depose that he maintained income and expenditure in daily sheet. During

the proceeding, no income and expenditure was produced before the learned Tribunal. He also admitted in cross-examination that he did not issue any cash memo in the name of Ganesh Chandra Paul. Further no bank statement is available regarding payment of money to the employee. The salary certificate (**Exhibit-10**) thus is not supported by any cogent documentary evidence. In the absence of any document showing payment of salary to the victim by P.W.2, owner of the offending vehicle, it would not be appropriate to consider the salary claimed by the victim at Rs. 6,172/- per month along with Rs. 100/- per day towards fooding by working as a conductor on the basis of evidence of P.W.2. The claimant thus has failed to establish his profession and income. In the case of **Sri Ramachandrappa versus The Manager, Royal Sundaram Alliance Insurance Company Limited** reported in **(2011) 13 SCC 236**, the Hon'ble Supreme Court observed as follows:

“14. . . . We hasten to add that in all cases and in all circumstances, the Tribunal need not accept the claim of the claimant in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to the ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guesswork, which may include the ground realities prevailing at the relevant point of time. . . .”

18.1. Bearing in mind the aforesaid proposition of law and resorting to certain guesswork and also keeping in mind the economic factors and price of essential commodities prevailing in the year 2015, an income of Rs.5,000/- per month would be reasonable and appropriate in the facts

and circumstances of the case. Further since at the time accident the victim was 36 years of age and was presumably self-employed, following the observation of the Hon'ble Supreme Court passed in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in **(2017) 16 SCC 680**, the claimant-injured is entitled to an amount equivalent to 40% of his annual income towards future prospect.

19. With regard to loss of earnings, at the outset, it would be apposite to refer to the principles laid down by Hon'ble Supreme Court in decision of ***Raj Kumar versus Ajay Kumar & Anr.*** reported in **(2011) 1 SCC 343** which is reproduced hereunder:

“12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. *Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.*

14. *For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a*

consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation.....”

19.1. Bearing in mind the aforesaid principles laid down by the Hon’ble Supreme Court, let me first decide whether the victim sustained any permanent disability due to the accident and, if so, to what extent. The victim in his claim application at column 11 stated that he sustained fracture and injuries on both legs and due to such injuries subsequently he had to undergo amputation of both the legs below knee. The discharge certificate of Popular Nursing Home at Patna **(Exhibit-18a)** notes as follows:

“Diagnosis:-A case of Poly trauma with Traumatic amputation Rt leg and crush injury left leg, # BBFA Lt side and # 2nd metacarpal Lt side.

OT Note:-19.01.15 Under S/A Amputated limb recovered, Cleaning debridement done and application

of external fixation Left leg. Followed by cleaning debridement of wound left hand.

-22.01.15 Under S/A Cleaning debridement Rt stump and B/K Guillotine amputation left leg done.

-21.01.15 Under R/A ORIF # shaft radius Left side done using LCP (Synthes) and TEN left ulna done, followed by cleaning debridement both stump.

-05.02.15 Under S/A closure of left stump and secondary closure Rt stump.”

The claimant adduced the evidence of the physiotherapist Saswata Kundu as P.W.5 who proved the discharge certificate of the victim marked **Exhibit-15** with objection. He deposed that the medical board found below knee amputation of both the legs and the disablement was assessed at 80%. The disability certificate (**Exhibit-15**) also records below knee amputation of the both legs with 80% disablement which is permanent in nature. The disability certificate though objected to, yet there are no contrary evidence adduced in challenge to the said certificate. Considering the disability certificate and the amputation of both the legs below knee, it is found that the injured sustained disability to the extent of 80% which is permanent nature. Now it is to be ascertained as to the effect of such permanent disablement on the actual earning capacity of the injured-victim. It is true that in the present case at hand the victim claimant has failed to establish his profession. However, the Court cannot be oblivious to the fact that for sustenance the victim in all probability used to do some work. Considering the nature of injuries and the subsequent disablement, I am of the opinion that such disablement would cause loss of earnings of 80%.

20. With regard to regard to pecuniary loss in the form of medical expenses, it is found that the claimant by adducing evidence of P.W.6 has proved medical expenses namely **Exhibits-19 to 27** (excepting **Exhibit-20-series** which is advance payment being part of **Exhibit-19**), considering the same, the total medical expenses comes to Rs.1,85,220/-.

21. So far as non-pecuniary damages are concerned, it is found that the victim due to the said accident has to undergo operative measures for amputation of his both legs. Considering the above, I am inclined to allow an amount of Rs. 1,00,000/- under the head of pain and sufferings.

22. Other factors have not been challenged in the present appeal.

23. In view of the above discussion, the calculation of compensation is made hereunder:

Calculation of Compensation

Monthly income	Rs. 5,000/-
Annual income (Rs. 5,000/- x 12)	Rs. 60,000/-
Add: Future prospect @ 40% of the annual income	Rs. 24,000/-
	Rs. 84,000/-
Loss of earnings: 80% loss of income	Rs. 67,200/-
Adopting multiplier 15 (Rs. 67,200/- x 15)	Rs. 10,08,000/-
Add: Medical expenses incurred	Rs. 1,85,220/-
Add: Non-pecuniary damages	Rs. 1,00,000/-
Total compensation	Rs. 12,93,220/-

24. Thus, the claimant is entitled to compensation of Rs. 12,93,220/- together with interest at the rate of 6% per annum from the date filing of the claim application till payment.

25. Respondent no.1-insurance company is directed to deposit the aforesaid compensation amount together with interest as indicated above

by way of cheque before the learned Registrar General, High Court, Calcutta, within a period of four weeks from date.

26. Upon deposit of the aforesaid amount and the interest indicated, learned Registrar General, High Court, Calcutta shall release the aforesaid amount in favour of the appellant-claimant upon satisfaction of his identity.

27. With the aforesaid observation, the appeal stands allowed. The impugned order of dismissal of the learned Tribunal is hereby set aside. No order as to costs.

28. All connected applications, if any, stand disposed of.

29. Interim order, if any, stands vacated.

30. Let a copy of this judgment be forwarded to the learned Tribunal along with lower court records for information.

31. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)