

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Ajay Kumar Gupta

FMA 899 of 2013

With

IA No. CAN 2 of 2017 (Old No. CAN 9404 of 2017)

The Oriental Insurance Co. Ltd

Versus

Tanushree Ghosh and Anr.

With

COT 22 of 2021

With

CAN 3 of 2023

Tanushree Ghosh

Versus

The Oriental Insurance Co. Ltd. and Anr.

For the Appellant in FMA 899/2013

And for the Respondent No.1 in

COT 22/2021

: Mr. Sanjoy Paul, Adv.

Ms Jaita Ghosh, Adv.

For the Appellant in COT 22/2021

And for the Respondent No.1

in FMA 899/2013

: Mr. Krishanu Banik, Adv.

Mr. Tathagata Banik, Adv.

Heard on

: 18.12.2023

Judgment on

: 19.02.2024

Ajay Kumar Gupta, J:

In Re: CAN 3 of 2023

1. Learned advocate appearing on behalf of the appellant in COT No. 22 of 2021 moved an application for condonation of delay in preferring cross-objection. He referred paragraph Nos. 3 and 4 of the said application to show sufficient causes including lockdown due to Covid 19 pandemic prevented in filing the appeal within the prescribed period of limitation under Section 173 of the Motor Vehicles Act, 1988. He further submitted that there were no intentional laches or negligence on the part of the appellant rather it would have delayed due to sufficient

reasons and unavoidable circumstances, which prevented the respondent to file the instant cross appeal/ objection within the period of limitation. He prayed for condonation of delay.

2. On the other hand, Ld. Advocate appearing on behalf of the Insurance Company/appellant in FMA No. 899 of 2013 opposed the prayer for condonation of delay.

3. Heard and on perusal of the application, it appears that the appellant could not file the instant cross objection within the period of limitation as provided in the said Act and the cause shown in the application is justified, sufficient and satisfactory as such accepted. Furthermore, the Motor Vehicles Act, 1988 is a beneficial piece of legislation. So, the Court can take lenient view in case of delay. Delay is hereby condoned.

4. Accordingly, **CAN 3 of 2023** is, thus, disposed of.

FMA No. 899 of 2013

5. Appellant/Insurance Company has filed this instant appeal being FMA No. 899 of 2013 feeling aggrieved by and dissatisfied with a judgment and award dated 22nd day of May, 2012 passed by the Learned Judge, 6th Motor Accident Claims Tribunal, Midnapore in Motor Accident Claim Case No. 49 of 2010 whereby the learned Tribunal allowed the claim application on contest against the O.P. No. 2/Insurance Company and ex parte against the rest. The claimant being wife of the injured is entitled to get the award of compensation amounting to Rs. 5,00,000/- (Rupees five lakhs only). The O.P. No. 2/Insurance Company was directed to pay the compensation to the claimant vide an Account payee cheque in the name of the claimant along with 8% interest per annum from the date of filing of this case, failing which the award shall carry further 8% interest per annum up to its actual realisation in an application filed under Section 166 of the Motor

Vehicles Act, 1988 on account of injuries sustained by the victim due to motor traffic accident.

6. At the same time, the respondent/claimant filed memorandum of cross appeal/objection being COT 22 of 2021 being aggrieved by and dissatisfied with the Judgment and Award dated 22nd day of May, 2012 passed by the Learned Judge, 6th Court of Motor Accident Claims Tribunal, Medinipur in MAC Case No. 49 of 2010 on several grounds as under:

I. For that the Learned Tribunal Judge ought to have assessed 100% permanent disability instead of 90% since the victim suffered 100% earning capacity, while passing the compensation as such the aforesaid impugned award is bad in law and the same is liable to be enhanced and modified.

II. For that the Learned Tribunal Judge ought to have granted the compensation towards the heads of loss of future prospects while passing the impugned judgment and award as such the impugned award is bad in law and the same is liable to be enhanced and modified.

III. For that the Learned Tribunal Judge ought to have granted the adequate compensation on the heads of medical expenses, future medical expenses and non-pecuniary damages while passing the impugned judgment and award as such the impugned award is bad in law and the same is liable to be modified.

IV. For that the Learned Tribunal Judge ought to have assessed the actual income of Rs. 10,000/= instead of Rs. 3,000/= of the injured as he was a businessman by his profession having income of Rs. 10,000/- per month prior to the accident as such the impugned award is bad in law and the same is liable to be enhanced and modified.

7. The facts giving rise to file this instant appeal and cross appeal/objection are as under:

On 25.11.2008 at about 4 PM, when the husband of the claimant was going towards Sonakoniya, at that time the offending truck bearing No. AP-5V/4399, which was going towards Orissa from Belda Side in a high speed and in rash and negligent manner, dashed the husband of the claimant from behind. By such accident, he suffered head injury along with multiple injuries all over his bodies. Thereafter, the injured was admitted to Jaleswar Hospital and thereafter transferred to Kalinga Hospital, Bhubaneswar for his better treatment. The treatment of the injured was held at Kalinga Hospital wherein he was admitted from 25.11.2008 to 12.03.2009. It is the contention of the claimant that the accident occurred due to sole rash and negligent driving of the driver of the offending vehicle and the injured became completely paralysed. Due to such pathetic accident, the victim and

his wife suffered extreme financial loss, pain and agony etc. She prayed for compensation on behalf of the victim to the tune of Rs.5,00,000/=.

The Oriental Insurance Company Limited contested the case by filing written statement as well as additional written Statement contending inter alia that the fact, nature, manner, time and place of accident, as stated by the claimant, is not at all true. Actually, the offending vehicle was not involved in the said accident as such claimant is not entitled to get compensation as prayed for from the appellant/insurance company. However, the Learned Tribunal after considering the case of the parties, finally allowed compensation as aforesaid in favour of claimant. Under Such circumstances, both appeal and Cross objection are taken up for the purpose of proper disposal.

8. Learned advocate appearing on behalf of the appellant/Insurance Company in FMA 899 of 2013

submitted that the respondent/claimant has filed the claim case under Section 166 of the Motor Vehicles Act on account of injuries suffered by Gopal Ghosh, husband of the respondent/claimant, Tanushree Ghosh though the entire case is based on false representation. No alleged offending vehicle being Registration No. AP 5V-4399 (Truck) was involved in the alleged accident. Actually, victim fell down from his own motorcycle owing to sudden puncture of front wheel's tyre and this fact has been disclosed by the two witnesses i.e. Subal Sengupta, the Private Investigator of the insurance company and another Sri Niranjan Bhatta, an employee of Kalinga Hospital, Bhubaneswar examined as OPW No.1 and 2 respectively. Both witnesses were examined on the instance of Insurance Company. The investigation report marked as Ext. A and the documents filed by the employee of the Kalinga Hospital are marked as B and C respectively. The Bed Head Ticket of the injured, Gopal Ghosh, shows he was admitted in Kalinga Hospital on 25.11.2008, the entire history of the accident has been

mentioned in medical document of Kalinga Hospital. Wherein, it is specifically mentioned that while injured person moving in motorcycle, front wheel's tyre had been punctured and he fell down on road NH 60 in village Sonakoniya, Dantan PS at about 4 pm and sustained injuries. Accordingly, the entire case made out by the claimant is a concocted and fabricated.

9. It is further submitted that the offending vehicle has been subsequently planted in the instant case in collusion with the police personnel, Driver and owner of the offending vehicle though offending vehicle was not at all involved in alleged accident occurred on 25.11.2008. In spite of such fact, the learned Tribunal has pleased to ignored and wrongly held that the insurance company did not take a plea regarding non-involvement of the accident in the pleadings i.e. in written statement and Court further held that the evidence led by the claimant cannot be interfered, when there is no pleading and not consistent with the

pleading and finally discarded the contention of the insurance company that the offending vehicle was not involved in the said accident. Actually, the Learned Tribunal overlooked the additional Written Statement filed by the insurance company before the Learned Tribunal wherein the insurance company has taken plea and raised such plea that the vehicle was not involved in the said alleged accident. The observation made by the Learned Tribunal that the offending vehicle was involved in the accident and the accident took place due to rash and negligent driving of the driver of the offending vehicle is totally based on surmises and conjectures.

10. It is further submitted that it is a clear case that no vehicle was involved in the said accident and as such claimant is not entitled to get compensation from the appellant/insurance company. To corroborate the contention of the insurance company, two witnesses i.e. OPWs 1 and 2 have been examined and also produced

documents to satisfy the Learned Tribunal that the offending vehicle was actually not involved in the said accident. Out of two witnesses brought from the side of the insurance company particularly OPW 2, the employee of the Kalinga Hospital is an independent witness and furthermore, the Bed Head Ticket reflects the actual incident occurred on 25.11.2008 while injured person moving in motorcycle, front wheel's tyre had been punctured and he fell down on road NH 60 in village Sonakoniya, Dantan PS at about 4 pm and sustained injuries. Apart from the aforesaid fact, an FIR was lodged on 3rd December, 2008 after 8 days of the accident after planting the offending vehicle with collusion and in connivance with the claimant, police, driver and owner of the offending vehicle as such Judgment and Award passed by the learned Tribunal is bad in law and liable to be set aside.

11. Per contra, learned counsel appearing on behalf of the Respondent No. 1 /claimant, Tanushree Ghosh vehemently opposed the prayer of the appellant no. 1/Insurance Company and further vociferously argued that the facts of accident as alleged by the claimant has been proved in positive by eye witness, P.W. 2 and further documents like FIR, Charge Sheet, Medical Document, Disablement Certificate are the vital documents which corroborated the manner of accident as claimed by the claimant and involvement of the offending vehicle. So, evidences, both oral and documentary fully established and proved the involvement of the offending vehicle as well as sole rash and negligent driving of the driver of the offending vehicle. Consequently, there is no question of dismissal of the claim application or setting aside of the judgment and award dated 22nd day of May, 2012 passed by the Learned Tribunal.

12. It is further submitted neither driver nor owner has been produced from the side of insurance company to discard the contention of the claimant. Accordingly, presumption can be drawn that the offending vehicle was involved in the said accident. He also referred a judgment reported in ***The New India Assurance Co. Ltd. Vs. Mita Samanta and Ors.***¹

13. Finally, the learned counsel submitted that the learned Tribunal has assessed the compensation without addition of future prospect, actual medical expenses, non-pecuniary damages and future medical expenses. The Learned Tribunal could have awarded more compensation in an application filed under Section 166 of the Motor Vehicles Act, 1988 considering actual income of victim @ Rs. 10,000/- per month from the business of paddy, bricks and sand but the learned Tribunal has erred in assessing his income as Rs. 3,000/- per month and assessed 90%

¹ **2010 ACJ 2212; 2010 (1) TAC 343**

disablement on the basis of certificate issued by the Medical Board in favour of the injured though it ought to have considered 100% because victim suffered paralysis due to injuries suffered in the Motor Traffic Accident and finally loss his 100% permanent earning capacity. The amount of compensation would have been more than the awarded compensation as such claimant filed COT 22 of 2021 seeking enhancement of compensation after modifying the Judgment and Award under challenge.

14. Heard the rival submissions of parties and on perusal of the materials available in the record including the judgment passed by the learned Tribunal, this Court finds the learned Tribunal has assessed a total sum of Rs. 5 lakhs in favour of the claimant after observing that the offending vehicle bearing No. AP-5V/4399 was involved in the said accident and terrific accident took place due to high speed and negligent driving by the driver of the offending vehicle endangering human life and safety dashed

the victim from behind as a result victim sustained severe injuries on his person. He was immediately shifted to Jaleswar for primary treatment and thereafter he was shifted to renowned Kalinga Hospital, Bhubaneswar, Orissa for better treatment. The said accident occurred on 25.11.2008 while the husband of the respondent/claimant Tanushree Ghosh was going to Sonakoniya following left side of the Highway and when a truck bearing no. AP-5V/4399 was going towards Orissa from Belda side dashed the victim from behind as a result accident occurred. He was admitted since 25.11.2008 to 12.03.2009. Despite of the prolonged treatment, he was totally paralysed and he could not speak, walk and recognize and his brain, hands and legs have been permanently disabled and he became completely disabled due to such accident.

15. Before going into the merits of the cross-objection filed by the claimant for enhancement of compensation, the

questions raised by the appellant/insurance company are relevant to be decided first as follows:

1) Whether the offending vehicle no. AP-5V/4399 was involved in the said accident on 25.11.2008 as alleged by the claimant?

2) Whether the accident occurred due to rash and negligent driving of the Driver of the offending vehicle no. AP-5V/4399 as a result victim sustained severe injuries on his head, hands and legs and finally became paralysed due to such injuries?

3) Whether claimant is entitled to get compensation on behalf of the injured, Gopal Ghosh from the appellant/insurance company herein?

16. Upon perusal of the FIR, seizure list and Charge sheet, it appears the FIR was lodged on 03.12.2008 at 16.15 hrs. On the basis of the said complaint, a case was

registered as Dantan P.S. FIR No. 123/08 dated 03.12.2008 under Sections 279/338 of the IPC and the vehicle was seized on 03.12.2008 at 19.15 hrs. from the place Sonakoniya by NH 60 road at PS Dantan and the documents of the vehicle like RC book, Insurance Certificate, Permit, Tax Token, Pollution Certificate, Driving Licence in the name of Narashim Rao K, son of Laxmi Narayan were seized on 08.12.2008 at 08.15 hrs though the accident occurred on 25.11.2008. According to the claimant and eye witness, the accident took place on 25.11.2008 at about 4 PM while the husband of the claimant was going Sonakoniya at that time offending vehicle no. AP-5V/4399 came in a high speed and rash and negligent manner and danger in human life and safety and dashed the husband of the claimant from behind as such he suffered injuries. Question arises why FIR was lodged after 8 days. The reason has been explained by the claimant that the family members were busy in his treatment as the victim sustained severe injuries in his

person and he was admitted in hospital as such explanation of delay put in an FIR is genuine and justified.

17. P.W. 2 eye witness narrated in his evidence during cross examination that the vehicle was apprehended on the self-same date of accident at commercial check post. After such apprehension, the matter was informed to the local P.S. Police came and stopped the vehicle on the self-same date of accident but no explanation brought on record why vehicle was seized on 03.12.2008 at 19.15 hrs. from the place Sonakoniya by NH 60 road at PS Dantan and the documents of the vehicle like RC book, Insurance Certificate, Permit, Tax Token, Pollution Certificate, Driving Licence in the name of Narashim Rao K, son of Laxmi Narayan were seized on 08.12.2008 though the accident occurred on 25.11.2008. The whole episode creates a doubt about the involvement of the vehicle. The claimant has examined herself as P.W. 1, wife of the injured person, P.W. 2 as eye witness, P.W. 3 one of the doctors of the medical

board, who issued the disablement certificate in favour of the injured person. Whereas the insurance company, on the other hand, led two witnesses i.e. Sri Subal Sengupta, investigator of the insurance company as OPW 1 and another witness i.e. Niranjana Bhatta as OPW 2 who was an employee of the Kalinga Hospital, Bhubaneswar, Orissa. From the evidence of P.W. 2, it reveals he is the eye witness. He deposed in his evidence that on 25.11.2008 at 4 PM when the injured Gopal Ghosh was going towards Sonakoniya village following left side of NH 60 road at that time the vehicle bearing no. AP-5V/4399 was proceeding towards Orissa from Belda Side with rash and negligent manner and dashed behind the injured person, causing severe injuries on his head, legs and other parts of the body. He further stated that he saw the accident which took place in his presence. During cross-examination, he narrated after the accident he brought the injured to the hospital accompanied by others. The injured was proceeding by foot at the time of accident and the offending

vehicle came and dashed the victim from behind. Thereafter, the offending vehicle fled away. He further deposed that injured was initially removed to Jaleswar hospital and, thereafter, he was referred to Kalinga Hospital, Bhubaneswar and he accompanied him. But he cannot say who has stated regarding the cause of accident before the doctor of Kalinga Hospital. He further denied that he had stated about the accident before the doctor that due to puncture of front wheel's tyre of motorcycle the victim sustained injuries. He further narrated that he did not go to police station either for lodging complaint or for interrogation.

18. Learned advocate appearing on behalf of the insurance company rightly pointed out that during cross-examination, the PW 2 stated that the offending vehicle was apprehended on the self-same date of accident at commercial check post. After such apprehension, the matter was informed to local Police Station. Police came

and stopped the vehicle on the self-same date of accident. But no such reference or seizure or lodging any FIR found from the record on the date of accident to support his contention though he is the eye witness. At the same time, OPW 1 Subal Sengupta stated in his evidence that he was an investigator of the insurance company and he investigated the case as private investigator of the insurance company. During investigation, he collected injury report of injured Gopal Ghosh from Kalinga Hospital, wherefrom it appears Gopal Ghosh was injured after falling from motor cycle while he was moving in a motorcycle and suddenly front wheel's tyre was punctured, he fell down on the road NH 60 near village Sonakoniya under Dantan PS and suffered injuries. Accordingly, he submitted a report of his investigation marked as Exhibit A and his signature on the said report marked as Exhibit A/1. His report was only on the basis of medical document of the Kalinga Hospital. The OPW 2, the medical record Officer of Kalinga Hospital, Bhubaneswar came and

deposed in his evidence that injured Gopal Ghosh was admitted in Kalinga Hospital on 25.11.2008. He was admitted to the hospital with a history of road traffic accident in NH 60 near village Sonakoniya. He was admitted as casualty for his treatment. He has stated before the Doctor that while moving in a motorcycle the front tyre was punctured and he fell down on the road NH 60 near village Sonakoniya under Dantan PS at 4 PM. He also produced the original casualty card containing the note of doctor of the aforesaid facts marked as Exhibit C. During cross-examination, he unable to say the name who has stated the fact of accident to the doctor. The discharge summary was marked as Exhibit 7. Treatment sheets and the CT scan conducted by the doctor marked as Exhibit 8 series.

19. It can be safely accepted that the delay may be caused in lodging an FIR due to the involvement of the family member in his treatment. But here the question

raised by the insurance company is vital because the eye witness himself admitted that on the date of accident the vehicle was apprehended by the local people and the fact of the accident was also informed to the police. Police came and stopped the vehicle but no such reference produced from the side of claimant. It creates a serious doubt about the version of the eye witness. P.W. 1, the claimant herself during cross-examination admitted that on the date of accident her husband proceeded to Sonakonia at about 3 P.M. by his own motor cycle. She further admitted front tyre of the motor cycle was punctured. Medical document of Kalinga Hospital indicates the manner of accident as similar to the statement of P.W.1. Whereas fact stated by the eye witness is totally different though he had seen the accident. P.W. 2 stated that accident took place while victim was walking on foot. All these facts are not consistent rather there are vital contradictions and inconsistency. Therefore, this Court does not repose confidence that the offending vehicle bearing no. AP-

5V/4399 was really involved in the said alleged accident. Particularly, eye witness is not reliable. Claimant/Respondent No. 1 fails to prove her case that the offending vehicle bearing no. AP-5V/4399 was involved in the said accident and accident was occurred due to rash and negligent driving of the driver of the offending vehicle and injured Gopal Ghosh suffered injuries on his person due to such alleged accident. No cogent and reliable evidence brought on record to show vehicle was involved. In such facts and circumstances, it can be safely presumed that the offending vehicle was not involved in the said accident.

20. Apart from that, the learned Tribunal has rejected the argument of Insurance Company only on the ground that the insurance company did not take plea of non-involvement of the offending vehicle in the written statement. But from the record, it reveals the insurance company had filed an additional written statement which

was accepted by the learned Tribunal on 6th September, 2011. In the said additional written statement, plea was taken by the insurance company that the offending vehicle was not involved in the said accident. Despite of the said fact, Ld. Tribunal ignored and overlooked the said facts. Judgment referred as aforesaid by the claimant/Respondent No. 1 is not at all applicable as the manner of accident narrated by P.W. 1 and P.W. 2 are not consistent.

21. In the light of above discussion, it is clear that the insurance company has able to prove its case that the offending vehicle bearing no. AP-5V/4399 was not involved in the said alleged accident. Evidence of OPWs 1 and 2 and documents marked as Ext. A, A1, B and C are sufficient to establish and corroborate the case of the appellant/insurance company.

22. As the Claimant/Respondent No. 1 fails to prove with reliable or cogent evidence that the alleged offending AP-5V/4399 was involved in the alleged accident, claimant is not entitling to get any compensation from the appellant/insurance company. Consequently, all issues decided in positive in favour of the appellant/Insurance Company. There is no need to decide other issues raised by the respondent No.1/claimant as issues decided by this Court are sufficient to decide the case in its finality in favour of the appellant/Insurance Company. Hence, judgment and awarded dated 22.05.2012 passed by the Ld. Tribunal Judge needs to be interfered by this Court.

23. In the result, the appeal being **FMA 899 of 2013** is allowed on contest without order as to costs. Consequently, **CAN 2/2017 (Old CAN 9404/2017)** is also, thus, disposed of. At the same time **COT 22 of 2021** is dismissed without order as to costs.

24. The impugned judgment and award of the learned Tribunal dated 22.05.2012 passed in MAC Case No. 49 of 2010 by Ld. Judge, 6th Court, Motor Accident Claims Tribunal, Midnapur is hereby set aside.

25. Insurance Company/Appellant has already deposited Rs. 4,75,000/- vide OD Challan No. 35 dated 02.04.2013 and has also deposited the statutory amount of Rs. 25,000/- vide OD Challan No. 6585 dated 30.11.2012 with the Registry of this Court. Both amounts together with accrued interest shall be returned to the Insurance Company after proper verification and identification.

26. Let a copy of this Judgment along with Lower Court records, if any, be sent back to the learned Tribunal forthwith for information.

27. All parties shall act on a server copy of the judgment and order uploaded from the official website of High Court at Calcutta.

28. Urgent photostat copy of this Judgment and Order be given to the parties upon compliance of all legal formalities.

(Ajay Kumar Gupta, J)