

03.01.2024
SL No.21
Court No. 551
Ali

**IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction**

**F.M.A. 218 of 2021
IA No.: CAN/1/2017 (Old No.:CAN/10791/2017)**

**Jhuma Gorai & Ors.
Versus**

Bajaj Allianz General Insurance Co. Ltd. & Anr.

Mr. Krishanu Banik,
Mr. Tathagata Banik

...for the appellants-claimants.

Mr. Rajesh Singh

...for the respondent No.1-Insurance Co.

The instant appeal has been preferred against the Judgment and Award dated 17th day of December, 2016 passed by the learned Judge, Motor Accident Claims Tribunal, Alipore, 24-Parganas (South), in MAC Case no. 44 of 2015.

The brief facts of the case is that the present appellants being the claimants have preferred an application under Section 166 of the M.V. Act before the learned tribunal for getting compensation on the ground that their predecessor was died in a road traffic accident due to rash and negligent driving of the driver of the offending vehicle duly insured under the policy of the Insurance Company.

The claim case was contested by the insurance company by filing written statement.

After hearing the parties and after receiving the evidences, the learned tribunal has dismissed the claim case only on the ground that the offending vehicle was not involved in the alleged accident.

Being aggrieved by and dissatisfied with the said judgment and award the present appeal has been preferred.

The learned advocate for the appellants submits that the claim application was filed stating the number of the offending vehicle to be WB-19-6182. The PW-1 i.e. the wife of the deceased deposed and stating the number of the offending vehicle to be WB-19-6182. The PW-2 is the eye witness who also stated the same number of the offending vehicle. A police case was initiated on the basis of the accident being Alipore, P.S. Case No.125 dated 23.02.2009 under Section 279/304A IPC. The I.O. has appeared at the instance of the insurance company before the learned tribunal as OPW-1 and produced the entire CD. He further argued that the learned tribunal has misguided himself in passing the impugned judgment though there is a specific evidence of the police in the charge-sheet that initially the FIR was made on the basis of an offending vehicle bearing No. WBS 3013 but at the time of investigation the number of the offending vehicle reveals to be WB-19-6182. The learned tribunal has committed error in passing the impugned judgment by holding the fact that the instant vehicle bearing No. WB-19-6182 was not involved in the alleged accident.

In support of his contention he cited several decisions 1st **The New India Assurance Co. Ltd. Vs.**

Mita Samanta & Ors. On the principle that the Hon'ble Division Bench of this Court has held that the Insurance Company while contesting the claim case after filing an application under Section 170 of the M.V. Act, it is the liability of the Insurance Company to summon the owner of the offending vehicle to disprove the allegation of the claimants if such allegation was not disproved, the claim cannot be denied.

He cited a decision of Hon'ble Supreme Court passed in **Mohar Sai & Anr Vs. Gayatri Devi & Ors.** is set out below:-

“6. The foremost contention in this appeal is that the High Court having concluded that appellant No.2 was not driving the motorcycle at the relevant time and applying the exposition in the case of A. Sridhar Vs. United India Insurance Company Limited and Anr., 1 the claimants at (2011) 14 SCC 719 best would be entitled to compensation on ‘no fault liability principle’ under Section 140 of the Act, for it was a case of compensation on ‘no fault liability principle’ under Section 140 of the Act, for it was a case of accident not because of fault of owner of the vehicle or because of the fault of any other vehicle. It is urged that no liability can be fastened on the appellants for the negligence of the deceased, much less on the pillion riders. It is also urged that the appellants come from a very

humble background and that the appellants come from a very humble background and are engaged in ordinary agricultural labour work. They will not be in a position to pay any compensation amount, if awarded. It is also contended that there was no relationship of master and servant, principal/employer and employee between the deceased and the appellants which alone could have been the basis for awarding compensation, much less fasten liability on the appellants to pay such amount on the principle of vicarious liability. It is submitted by the appellants that the High Court's decision of fastening the liability on the appellants of Rs. 3,86,500/-, with interest at the rate of 7.5% per annum, deserves to be set aside and the appellants ought to be absolved from any liability. Alternatively, it is submitted that the compensation amount be determined under Section 140 of the Act and not under Section 166 of the Act".

He also cited decision of Hon'ble Division Bench of this Court passed in **National Insurance Company Limited-Versus- Shila Debi and Others** wherein the entire police paper and investigation of the police and the version of eye witness and PW-1 is appears to be contrast to the evidence of medical paper recorded at the time of admission of the deceased/injured at the relevant hospital. The

Division Bench is of view that the contradictions are not major so that contradiction cannot hold liable that the claim case is suspicious.

He also cited a decision of Hon'ble Supreme Court passed in **Smt. Laxmi-Versus-Karnataka State Road Transport Corporation, Bangalore** wherein the Hon'ble Supreme Court has held that in absence of filing time charts/long charts and control charts of the offending vehicle by the Insurance Company before the tribunal, the entire case of the petitioner cannot be disbelieved.

On that score, he submits that the learned tribunal has committed error for dismissing the entire claim case without following final report of the police as well as the evidences of PW-1 and PW-2.

Mr. Singh appearing on behalf of the Insurance Company strongly supports the impugned judgment. He cited the relevant paragraph of the written statement filed by the Insurance Company before the learned tribunal wherein the Insurance Company has specifically challenged the involvement of the vehicle bearing No. WB-19-6182 in the alleged accident. He argued specifically that the entire case record would go to show that the vehicle involved in the accident was WBS-3013. He cited the FIR wherein it has been noted that the deceased was dashed by the private bus bearing No. WBS-3013. The alleged accident happened in the

broad daylight at 7.00 A.M. Wherein there was a police booth. The FIR was lodged by the police personnel. Moreover, when the injured was brought by a police constable to the Calcutta Medical Research Institute, the number of the offending vehicle was mentioned to be WBS-3013. Surprisingly, at the time of filing charge-sheet the number of offending vehicle bearing No. WB-19-6182 was incorporated with a ground that during the course of investigation, the number of the real offending private bus was unearthed by the investigating agency.

Mr. Singh argued that there are several instances wherein the number of vehicle was falsely implicated in a case of accident. This Court has observed in several occasions that such conduct has been done several times. He also cited the decision of Hon'ble Supreme Court in **Sk. Safiq Ahmad Vs. ICICI Lombard General Insurance Co. Ltd. & Ors** as well as **Anil and Ors. Vs. New India Assurance Co. Ltd. and Ors.** wherein the Hon'ble Supreme Court has observed that several vehicles were running in the state without any insurance coverage, but when an accident happened there was a tendency of the police authority as well as the claimants to falsely implicate a vehicle having valid insurance policy. He specifically argued that the police authority at the time of filing of FIR as well as

at the time of admission of the injured has mentioned the correct number of the vehicle but when it appears that the offending vehicle bearing No. WBS-3013 had no valid insurance coverage, has falsely implicated the instant vehicle in the alleged accident bearing No. WB-19-6182. Mr. Singh relied upon the observation of the learned tribunal and submits that the learned tribunal has meticulously perused the entire papers and the doubt which raised at the mind of the learned tribunal was not properly cleared so learned tribunal had no opportunity to allow the claim application. He submits that the instant appeal has got no merit and liable to be dismissed.

Heard the learned advocates perused the materials on record also perused the entire papers. LCR has received. To verify the observation of the learned tribunal, I think it necessary to find out the entire merits of this case. It is true that at the time of filing FIR the number of the offending bus was stated to be WBS-3013. The FIR maker is Gopal Ch. Dey Modak one of the SI of Police F.S.T.P. Lalbazar. FIR contains that the offending vehicle bearing No. WBS-3013 while running from north to south direction in a rash and negligent manner dashed the victim Ekbalpur, Diamond Harbour Road Crossing, by such the victim fell down and sustained severe bodily injuries. The victim was removed to the

nearest CMRI Hospital wherein he was declared as brought dead.

The same FIR maker, namely, Gopal Ch. Dey Modak appears before the learned tribunal as DW-1. He deposed that he investigated the case and submitted a charge-sheet. As per direction of this Court, he produces the entire photo copy of CD which was filed before the learned CJM, Alipore.

It appears that the learned tribunal at the time of passing the impugned award has not gone through the entire CD. He is of the opinion that prima-facie the accident was caused by the bus bearing No. WBS-3013 but afterwards the bus bearing No. WB-19-6182 was incorporated in the charge-sheet. However, the learned tribunal has placed the burden upon the claimants that they could not prove the discrepancy appearing in the FIR as well as the charge-sheet and he is also of the view that PW-2 i.e. the alleged eye witness is a cousin brother of the deceased so he is interested witness and his evidence cannot be believed. Learned tribunal has also perused the paper of Calcutta Medical Research Institute wherein the offending bus No. was written as WBS-3013.

It appears that the learned tribunal has not gone through any portion of the CD considering the same the duty cast upon this Court to peruse the CD at length.

In considering the entire materials, it is true that there are some doubt regarding the initiation of the case and the final report. I have perused the CD which contains several papers. The CD starts with the formal portion of the FIR; the FIR maker Mr. Gopal Chandra Dey Modak initially took up the investigation as per direction of his superior. He started investigation on the basis of the telephonic information received from Section (Z) that at about 7.00 A.M. on 23.02.2009 one Chittaranjan Gorai received injury on his person with the history of RTA and was removed to C.M.R.I. where he was brought dead.

At 8.00 A.M. he reached to the C.M.R.I. Hospital situated at Calcutta-27 and received the death report of the deceased Chittaranjan Gorai vide Memo No. 23334 dated 23.02.2009. Thereafter, he reached the Ekbalpore P.S. at 10.00 A.M. with the extract of G.D. Entry vide G.D. Entry No. 2197 dated 23.02.2009. He was informed in the P.S. that the deceased was dashed by the driver of a private bus bearing No. WBS-3013, while the same was running over Diamond Harbour road in a rash and negligent manner.

At 10.30 A.M. he started a case vide the P.S. Case No 125 dated 23.02.2009 under Section 279/304A IPC against the driver of the private bus No. WBS 3013. At 13 hours on the same day he had

been to the Alipore Morgue for Postmortem examination of the deceased and thereafter the dead body was handed over to the son of the deceased, namely, Debasish Gorai.

At about 3.13 hours to 14.45 hours on the same day, he received information from the Ekbalpore P.S. that the bus bearing No. WBS-3031 and its driver was apprehended and taken custody in the P.S. He reached the PS. and arrested the driver of private bus No. WBS-3013, namely, Md. Zahangir Khan by preparing a arrest memo.

On the same day at about 15.25 hours to 17.30 hours he reached the P.O. and collected the evidence of witness. Their evidence was recorded under Section 161 CrPC. During the course of taking the evidences, it appears to him that the private bus bearing No. WBS-3013 is not the offending bus but the actual offending private bus was bearing No. WB-19-6182 which was left the Ramnagar terminals as 6.00 hours earlier to the bus bearing No. WBS-3013. Both the bus having the same route of route No. 1/1A.

To consider the correctness of the Entry in the diary, I perused the relevant documents. The production list of vehicles being private bus No. WBS-3013 and WB-19-6182 are of the same date i.e. on 23.02.2009. The driver of the private bus bearing No. WB-19-6182 namely, Santanu Roy was

arrested by the Memo of arrest on 23.02.2009 at 18.35 hours and he was produced to the Court on the next day i.e. on 24.02.2009 at 10.30 hours. While the driver of the bus, namely, Md. Zahangir Khan bearing No. WBS 3013 was arrested on 23.02.2009 at 14.45 hours and was produced to the Court on the next day i.e. on 24.2.2009 at 10.30 hours.

In inspection memo of both the drivers was of the same day and the forwarding memo dated 24.02.2009 i.e. the next day of the accident to the Court of the learned CJM, Alipore has disclosed the entire incidents of filing FIR in the name of the vehicle bearing No. WBS-3013 and the production of offending vehicle bearing No. WB-19-6182.

The statement of surgeon, namely, Nazmul Hossain was recorded by the I.O. on 23.2.2009, who stated that while he was on duty on 23.2.2009 from 6.00 A.M. to 2.00 P.M. as a surgeon, received a telephone call from the guard at about 7.02 A.M. that at the Ekbalpore More one RTA happened, by such one home guard was severely injured. The constables who were engaged on duty at the Ekbalpore more, namely, Arun Kumar Gorai and constable Bamacharan Ghosh stated the number of offending vehicle to be WBS-3013. They stated the said private bus has fled away. The surgeon stated he did not see the accident in his own eyes.

Another surgeon, namely, Sanjay Kar also stated the I.O. he received the information that the bus bearing No. WBS-3013 has committed the accident and fled away.

During the course of investigation, the I.O. has also inquired the traffic constable, namely, Arun Kr. Gorai and Bamacharan Ghosh they stated that at the relevant time they were posted at the point of Ekbalpur Road and Diamond Harbour crossing bit No. (18). They were stayed inside the traffic signal booth, the signal was opened. At the time they found there is some hue and cry and some persons were gathered. They rash to the spot and found that one home guard sustained injuries. They heard from the other persons that one bus bearing No. WBS-3013 has committed the accident and fled away.

During the course of investigation, the I.O. has also inquired the bus syndicated operator of bus route No. 1/1A. He stated the I.O. that the bus No. WB-19-6182 left the bus terminal prior to WBS-3013. Both of the buses are of same bus route i.e. route No. 1/1A. He has received information that the bus No. WB-19-6182 has committed one accident at the Ekbalpur More and after such accident the driver has garaged the bus and informed the fact of accident to him. Thereafter, he received the information that one bus No. WBS-3013 was apprehended. Accordingly, he forwarded the

information to the Ekbalpore P.S. that the bus No. WB-19-6182 was actually involved in the said accident.

During the course of investigation, police has also received one statement of one person, namely, Sukdev Singh who is one of the driver and he saw the accident that the bus No. WB-19-6182 has caused the accident.

During the course of investigation, the I.O. has also received certain other statements of the local person having their shop nearby who stated the number of the offending bus bearing No.-WB-19-6182.

During the course of investigation the driver of the offending bus viz. Santanu Roy also gave statement to the I.O. that accident happened as the victim wanted to board the running bus being No. – WB-19-6182.

Considering the entire police paper, it appears to me that during the course of investigation of the police of the alleged accident, the police initially started the police case by the strength of the FIR by mentioning the number of the offending bus bearing No. WBS-3013. Thereafter, during the course of investigation, while on the same day, the I.O. visited the P.O. has come to know the fact that the bus bearing No. WB-19-6182 was involved in the accident. Moreover, the Secretary of

the syndicate of the bus operator has also deposed that after accident the driver has informed him that the accident was caused. It further appears that after 2.00 hours of the arrest of driver of bus No. WBS-3013, the driver of the bus bearing No. WB-19-6182 was arrested by preparing a proper arrest memo. Both the drivers were forwarded to the Court of the learned CJM, Alipore. On the next day both the drivers were enlarged on bail by the order of the learned CJM. So, considering the entire aspects, it appears to me that the confusion of starting the case i.e. the police case by bus No. WBS-3013 and the charge-sheet contained the offending vehicle bearing No. WB-19-6182 has properly justified.

The learned tribunal has not gone through the entire CD properly. As such, there are some confusion. Initially, the confusion appears to be justified but after perusing the entire CD and after perusing the order of the learned CJM and forwarding memo to the learned CJM, Alipore. It appears to me that that no foul play in incorporating the number of the offending vehicle bearing No. WB-19-6182. Considering the same it appears to me that the observation of the learned tribunal regarding the non-involvement of the vehicle bearing No. WB-19-6182 in the alleged accident is not proper.

In considering the just and proper compensation of this case it appears to me that the claim case was filed stating the deceased to be one of the home guard who used to earn Rs. 4,805/- per month. The home guards are not the permanent employee of the State of West Bengal. They are employed and paid on the basis of "No Work No Pay". The daily earning of the home guard was mentioned in the memo issued by the Deputy Commissioner of Police Home Guard, Kolkata to be Rs. 155 days. The home guards are compulsorily employed in a year only for 11 months. So, considering the yearly income of the deceased, it appears that the daily income of the home guard Rs. 155 is to be multiplied with 355 days (11 months Approx.). Thus, the yearly income comes to Rs. 51,925/-. The deceased was not a permanent job and he died at the age of 44 years. So, the claimants are entitled to get the future prospects which would be added 25% of the establish income of the deceased. Considering the age of the deceased the applicable multiplier is 14.

The just and proper compensation of this case assessed as hereunder:-

Calculation of compensation

1. Monthly income be assessed as.....Rs. 4,805/-
2. Annual income be assessed as 155X335)
.....Rs. 51,925/-
3. Add: 25% future prospect.....Rs. 12,981.25/-

	Rs. 64,906.25/-
4. Less: 1/3 rd deduction	<u>Rs. 21,635/-</u>
	Rs. 43,271/-
5. Multiplier 14	<u>X 14</u>
	Rs 6,05,794/-
6. Add: General Damages.....	<u>Rs. 84,000/-</u>
Total Compensation.....	Rs. 6,89,794/-

After calculation the award comes to Rs. 6,89,794/-. The insurance company is directed to pay the compensation alongwith interest @ 6% per annum from the date of filing of the claim application i.e. from 13.07.2012 within six weeks from the date of passing of this order through the office of the learned Registrar General High Court Calcutta. On such deposit the office of the learned Registrar General High Court Calcutta shall disburse the award in the name of the claimants vides three equal account payee cheques subject to the ascertainment of payment of deficit Court Fees.

The instant FMA 218 of 2021 is disposed of.

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

Interim orders, if any, stand vacated.

Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)