

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA No. 1207 of 2021

(FMAT 1149 of 2014)

Sri Krishna Mohan Ghosh

Vs

The New India Assurance Co. Ltd. & Anr.

**For the Appellant/
Claimant**

: Mr. Saidur Rahaman,
Mr. Niranjan Maity.

**For the Respondent No.1/
Insurance Company**

: Ms. Gopa Das Mukherjee.

**For the Respondent No. 2/
Owner**

: None.

Hearing concluded on

: 06.08.2024

Judgment on

: 13.08.2024

Shampa Dutt (Paul), J.:

1. The appeal has been preferred by the claimant against the judgment and award dated 30.06.2014 passed by Judge, Motor Accident Claims Tribunal, 3rd Court, Alipore, District South 24 Parganas in MAC Case No. 17 of 2013, **under Section 166 of the Motor Vehicles Act, 1988.**

2. FACTS :-

“On 02.12.2002 while the victim Krishna Mohan Ghosh along with Ashoka Ghosh, Bhim Ghosh and Biswajit was returning after attending a marriage ceremony (Bhowbhat) on foot following the extreme western side non-metal led portion of the Diamond Harbour Jagannathpore Road near Jagannathpore more, the driver of the offending vehicle bearing registration number WB-19A/5739 was proceeding with his vehicle in a rash and negligent manner and thereby dashed against the pedestains namely Krishna Mohan Ghosh, Ashoka Ghosh, Bhim & Biswajit Ghosh and they sustained severe injuries on their person causing permanent disablement. Rash, reckless and negligent driving of the driver of the offending vehicle (Tata 407) was the sole and direct cause for this pathetic accident which could have been easily avoided had the driver been not reckless, rash and negligent and did not fail to take reasonable care and attending while driving the said vehicle at the material time. The injured Krishna Mohan Ghosh had an active life till the date of accident but after the accident and owing to sustaining permanent disablement he has lost his active life and is unable to lead a normal life. He has become completely dependent on the assistance and help of others and has sustained immense pecuniary loss besides suffering from perpetual pain, shock and mental agony.”

3. O.P. no. 1, the owner of the offending vehicle did not appear to contest the case. However, the O.P. no.2/The New India Assurance Co. Ltd. appeared and filed Written Statement to contest the case. In the Written

Statement, the O.P. 2 disputed the statements of the claimant and further stated that the claimant himself was **travelling in a goods vehicles** in violation of the terms and conditions of the Insurance policy and therefore he could not take the advantage of any wrong committed by him and consequently the O.P. no.2 was not liable for any compensation towards the injuries sustained by the claimant, if any and therefore, a prayer was made for dismissal of the case. On its application filed u/s 170 of the M.V. Act, 1988 the O.P. no.2 was also permitted by order dated 20.03.10 to contest the case on all the grounds that are available to the insured.

4. The claimants **examined 10 (Ten) witnesses** and proved relevant documents, which were marked **Exhibit 1 to 33**.
5. The Insurance Company/O.P. examined one witness on their behalf and proved documents marked **Exhibit A to C**.
6. **The tribunal finally held as follows :-**

“MAC Case No. 17 of 2013

Dated: 30.06.2014

*Therefore it is clear that the claimant and others were in the offending vehicle **as gratuitous passengers** of a Goods vehicle and they met with an accident which caused them injuries and accordingly in view of the judgment of the Hon'ble Supreme Court of India as relied upon by the Ld. Counsel for the O.P.no.2 **they are not entitled for compensation** from the Insurance Co. (O.P. no. 2) as they willingly, knowingly and willfully had travelled in the goods vehicle and clearly in order to gain some compensation had filed the present case by concealing the truth and the real facts.*

Accordingly, in the light of the discussions as made above the claimant is not found entitled to any compensation.

All the issues are disposed of accordingly.

As a result, the case fails.

Hence it is accordingly,

Ordered

*that the instant **case is dismissed** on contest against the O.P. no.2 and ex-parte against the O.P. no.1 but without costs.*

The claimant is not found entitled to get any compensation.

Sd/-

Judge,

M.A.C Tribuna, 3rd Court Alipore”

7. Being aggrieved the present appeal has been preferred on the following ground :-

That the judgment under appeal is not in accordance with law as the victims were hit by the offending vehicle and that they were not gratuitous passenger in a goods vehicle, as held by the tribunal.

8. From the materials and evidence on record, it appears that :-

- i) The accident by the offending vehicle (**Charge Sheet Exbt.-31**) was caused by hitting a stationary lorry by driving in a rash and negligent manner.
- ii) **From the Charge Sheet** it also appears that **41 persons** were injured in the accident and they were all travelling in the offending vehicle which was a goods vehicle, thus it is proved that the victim was also a **gratuitous passenger** in the offending vehicle.

The tribunal has rejected the claim on the said ground. The offending vehicle has a valid Insurance (**Exhibit – 2**). **Carrying passengers in a goods vehicle is a violation of the insurance policy conditions.**

- iii) **Exhibit 3** - Madhyamik Certificate of the claimant/injured shows that he was aged **36 years** at the time of accident (Date of Birth:- 01.02.1966) so **multiplier 15** will be applicable. (*Sarla Verma (Smt) & Ors. Vs. Delhi Transport Corporation and Anr., (2009) 6 SCC 121*)
- iv) Accident happened in the year 2002, the victim/injured having a grocery business, his income is taken as **Rs. 3000/- per month.**
- v) The total amount of medical bills (**Exbt.- 16, 17 Series, 24, 25, 26, 27, 28 & 33**) is **Rs. 1,45,206.95/-.**
- vi) **Exhibit 8** Disability Certificate, though not proved by a witness, shows **40% disability.** The reason for not believing this certificate by the tribunal is not sound and thus cannot be accepted by this Court. Disability is ascertained and decided after a person has recovered from his injuries and his treatment is primarily completed.
- vii) **Exhibit 11** another Disability Certificate proved by P.W. 2 (Doctor) shows **50% disability.**

On perusal of **Exhibit 11**, it appears that the said Certificate though proved by P.W. 2 **is not as per rules and as such cannot be considered.**

viii) On the other hand **Exhibit 8** has been issued as per rules by the medical board of Sub-Divisional Hospital, Diamond Harbour and **can thus be relied upon.**

ix) The Supreme Court in ***Bajaj Allianz General Insurance Company Pvt. Ltd. Vs Union of India and ors., 2021 (4) T.A.C. 676 (S.C.)***, held:-

*“(iv) As far as the aspect of the issuance of certificate on disability of victims is concerned, it is reiterated that the guidelines laid down by this Court in Raj Kumar v. Ajay Kumar and Anr., (2011) 1 SCC 343 mandatorily must be followed by the MACTs, in respect of loss of income due to injury/disablement. **The District Medical Board is also directed to follow the guidelines issued** by the Ministry of Social Justice and Empowerment, Government of India vide Gazette Notification S. No. 61, dated 05.01.2018, **for issuance of disability Certificate** in order to bring Pan India uniformity. **The consequence is that the MACT would ascertain that permanent disability certificate issued by the District Medical Board or body authorized by it is in accordance with the Gazette Notification alone.** Once the certificate is issued in this manner, the same can be marked for purposes of being taken into consideration as evidence **without the necessity of summoning the concerned witness to give formal proof of the documents unless there is some reason for suspicion on the document;**”*

- x) Admittedly the claimant/injured suffered severe grievous injuries being **fracture injuries on right leg, fracture of backbone, fracture bone of face, fracture of nose, blindness of right eye, fracture chest, coronial nerve paralysis right side and disfiguration of face causing permanent disablement and as a result he cannot walk properly cannot sit and stand properly and cannot see in the right eye properly to chew hard food stuff, breathing problem and cannot lead normal and pleasurable life.**

He has been under actual treatment for about **7(seven) months** and conservative treatment till the year 2009.

- xi) Thus, considering the said materials and evidence on record and the judgment in ***Sidram Vs The Divisional Manager, United India Insurance Co. Ltd. and Anr., Civil Appeal No. 8510 Of 2022***, the **“Just Compensation”** in this case would be as follows:-

<i>Rs.3000 x 12 x 15 x 40%</i>	<i>Rs. 2,16,000/-</i>
<i>Medical expenses (bills)</i>	<i>Rs. 1,45, 207/-</i>
<i>Loss of earning due to hospitalization (3000x7).</i>	<i>Rs. 21,000/-</i>
<i>Non-Pecuniary damages</i>	<i>Rs. 20,000/-</i>
<i>Loss due to disability</i>	<i>Rs. 50,000/-</i>
	<i>Rs.4,52,207/-</i>
<i>Future Prospect 30%</i>	<i>Rs. 1,35,662.1/-</i>
Total amount:-	Rs. 5,87,869.1/-
Total round off amount	Rs. 5,87,869/-

xii) Admittedly, the Claimant has not received any **amount of compensation/interest** by the order of the learned Tribunal, as the claim case was dismissed. Accordingly, the Claimant is now entitled to the **total amount of compensation of Rs. 5,87,869/- together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit.**

xiii) Respondent No. 1/Insurance Company shall deposit the total amount, along with the interest, with the learned Registrar General, High Court, Calcutta, within a period of six weeks, who shall release the amount in favour of the Claimant, upon satisfaction of his identity and payment of *ad-valorem* Court fees, if not already paid.

9. The Hon'ble Supreme Court in ***Balu Krishna Chavan vs. The Reliance General Insurance Company Ltd. & Ors., in SLP (C) No. 33638 of 2017, on 3rd November, 2022***, held as follows **Para 8 to 14:-**

“8. Hence, the only aspect for our consideration herein, is as to whether in the facts and circumstances of the present case, an order to direct the Insurance Company to “pay and recover”, is required to be made. On this aspect, the law is well settled that if the liability of the Insurance Company is decided and they are held not to be liable, ordinarily, there shall be no direction to “pay and recover”. However, in the facts and circumstances arising in each case, appropriate

orders are required to be made by this Court to meet the ends of justice.

9. In the instant case, the appellant has relied on the judgment dated 21.02.2017 passed by this Court in Civil Appeal No.(s). 3047 of 2017 titled as **“Manuara Khatun & Ors. Vs. Rajesh Kr. Singh & Ors.”**. In the said case also, a Bench of this Court, having referred to the earlier decisions in Para-15 and 16 of that Judgment, has concluded that normally, there would be no order to “pay and recover”. However, in the said facts, this Court, to meet the ends of justice, had taken into consideration the fact situation though, the claimant therein, was a ‘gratuitous passenger’ and had kept in view that the benevolent object of the Act and had directed the payment by the Insurance Company and to recover the amount.

10. Therefore, on the legal aspect, it is clear that in all cases such order of “pay and recover” would not arise when the Insurance Company is not liable but would, in the facts and circumstances, be considered by this Court to meet the ends of justice.

11. If this aspect of the matter is kept view, in the instant facts, it is noticed that the appellant, as on the date of the accident, was aged about 19 years and due to the injuries suffered in the accident by him, his left leg was amputated below the knee.

12. Even, if the contention that the appellant was in the vehicle getting trained to be as a cleaner, is not taken into consideration, the fact remains that any other avocation that is to be undertaken by the appellant would involve physical labour which the appellant will not be able to perform and in such circumstance, if the appellant is not able to realize the amount of compensation awarded in his favour at this stage from the owner of the vehicle, the appellant would be prejudiced. However, the Insurance Company, if ordered to pay to the appellant and recover it from the owner of the vehicle, it would not be prejudiced to that extent.

13. Therefore, keeping all aspects in view, and not making this case as a precedent, but, only to serve the ends of justice in the facts of this case, we direct that respondent no. 1 (Insurance Company) to deposit the compensation amount before the MACT within eight weeks from the date of the receipt of a copy of this judgment, whereupon, the MACT shall disburse the amount of compensation to the appellant.

14. The respondent no. 1 (Insurance Company) is reserved the liberty to recover the compensation from the owner of the vehicle.”

- 10.** As it has been proved that the victim was **a gratuitous passenger**, the Insurance Company is granted **leave to recover** the compensation paid from the O.P./Owner by **due process of law**.
- 11. The appeal being FMA 1207 of 2021/FMAT 1149 of 2014 stands allowed. The impugned judgment and award of the learned Tribunal under appeal being not in accordance with law is set aside.**
- 12.** All connected applications, if any, stand disposed of.
- 13.** There will be no order as to costs.
- 14.** Interim order, if any, stands vacated.
- 15.** Copy of this Judgment be sent to the Learned Tribunal, along with the trial court records, if received.
- 16.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)