

## HIGH COURT OF ORISSA: CUTTACK

**MACA NO. 891 OF 2013**

From the judgment dated 31.08.2013 passed by the learned 3<sup>rd</sup> Addl. District Judge-cum-M.A.C.T., Cuttack in MAC Case No. 98 of 2013/913 of 2007.

Charulata Mallik and others ..... Appellants

-Versus-

Prakash Ku. Mohanty &amp; another ..... Respondents

For Appellants : M/s. Pradeep Ku. Mishra,  
P.P. Mishra & N. Parida

For Respondents : M/s. S.S. Rao  
& B.K. Mohanty  
(For R-2)

M/s. K. Gaya, B.B. Swain,  
& S.C. Sahoo  
(For R-1)

Date of Judgment: 23.12.2016

**P R E S E N T:**

**THE HONOURABLE SHRI JUSTICE K.R. MOHAPATRA**

**K.R. Mohapatra, J.** The claimants in MAC Case No. 98 of 2013/913 of 2007 before learned 3<sup>rd</sup> Addl. District Judge-cum-M.A.C.T., Cuttack have filed this appeal assailing the judgment and award dated 31.8.2013 passed therein holding that the claimants-appellants are entitled to compensation of Rs.4,58,056/- together with interest at the rate of

6% per annum from the date of filing of the claim application payable by the owner of the vehicle (respondent no.1) with certain conditions.

2. Facts in brevity relevant for proper adjudication of the appeal are that on 11.7.2007 at about 6.30 P.M., while one Gangadhar Mallik (deceased) was returning to his village along with other associates in a Truck bearing Registration No. OR-09-E-9868 along with their musical instruments, the Truck capsized near village Gopanagar in the district of Jajpur, as a result of which the deceased succumbed to the injuries at the spot. Accordingly, Dharmasala P.S. Case No. 268 of 2007 was registered and on completion of investigation, charge-sheet was submitted against the driver of the offending Truck to face the trial under Sections 279/337/338/304 (A) I.P.C. It was contended in the claim application that the deceased was a Musician by profession and was earning about Rs.4500/- per month from his profession. Accordingly, the claimants, who are legal heirs and dependants of the deceased, claimed compensation of Rs.3,00,000/-. The owner of the vehicle (respondent no. 1) did not contest the case and was set ex parte.

3. The Insurance Company-respondent no.2 filed written statement denying its liability. It was specifically contended in the written statement that the deceased was travelling in the Truck as a gratuitous passenger. The Insurance Company also assailed the income of the deceased and denied other contentions made in the claim petition.

4. Learned Tribunal on analysis of the materials on record came to the conclusion that the deceased was a gratuitous passenger in the offending Truck. Relying upon the case of ***United India Insurance Co. Ltd –v- Tilak Singh and others***, reported in 2006 (2) T.A.C. 312 (S.C.), learned Tribunal held that Insurance policy being statutory in nature does not cover the risk of death or bodily injury of a gratuitous passenger. Accordingly, learned Tribunal held that the insurer was not liable to indemnify the owner of the the offending vehicle and saddled the liability on the owner-respondent no.1 to pay compensation.

5. Mr. Mishra, learned counsel for the petitioner contended that the deceased was travelling in the offending Truck with musical instruments as the owner of the goods. Hence, the insurer should be held liable to pay compensation to the claimants as per provisions under Section 147(1) of the Motor Vehicles Act, 1988 (for sort ‘the Act’). In the alternative, if it is held that the deceased was a gratuitous passenger, then also the Insurance Company is liable to pay compensation with a right of recovery from the owner as it would amount to breach of policy conditions by the owner. Relying upon the cases of ***National Insurance Company Ltd. –v- Baljit Kaur and others***, reported in 2004 (I) TAC (SC) 366 and ***Manguli Juanga and others –v- Dinabandhu Sahoo and another***, reported in 2016 (II) OLR 448 as well as unreported decision of this Court in M.A.C.A. No. 485 of 2011 disposed of on 03.05.2013 (***Bajaj Allianz General***

**Insurance Company Ltd. -vrs- Sadhabi Dharei and others**), he submitted that the Insurance Company should be held liable to pay the compensation. He also prayed for enhancement of the compensation as well as rate of interest as awarded by learned Tribunal.

6. Mr. K. Gaya, learned counsel for the owner-respondent no.1 supported the case of the claimants-appellants. Mr. S.S. Rao, learned counsel for the Insurance Company-respondent no.2, on the other hand, relying upon the case of **National Insurance Co. Ltd. -v- Kaushalya Devi and others**, reported in AIR 2008 SC 2252, contended that insurer is not liable to pay compensation as the deceased was travelling in the Truck as a gratuitous passenger and not as an owner of the goods. Thus, supporting the findings arrived at by learned Tribunal, Mr. Rao submitted that the appeal is liable to be dismissed.

7. In the instance case, it is not disputed that the accident took place on 11.07.2007 and the deceased was travelling in the offending vehicle. Although it was contended by the claimants-appellants that the deceased was the owner of the musical instruments carried in the offending Truck, the appellant-claimant no.1 (P.W.1) in her cross-examination categorically deposed that one Rabindra Mallick was the owner of the Band Party and possessed the musical instruments carried in the offending Truck. P.Ws. 2 and 3, who examined on behalf of the claimants also in their cross-

examination deposed that musical instruments along with equipments belonged to one Rabindra Nath Mallick. Thus, it is apparent that the deceased was not travelling in the offending vehicle as the owner of the goods. Hence, provision of Section 147 (1) of the Act has no application to the case at hand. The only conclusion that can be drawn in this case is that the deceased was travelling in the offending vehicle as a gratuitous passenger. Thus, the only question that remains for consideration in this case is, whether the Insurance Company (respondent no.2) is liable to pay the compensation for the death of a gratuitous passenger (deceased) of the offending vehicle.

8. In the decision in the case of Baljit Kaur (supra), the Hon'ble Supreme Court held as follows.

“21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable (?). We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decisions of this Court in Satpal Singh (supra). The said decision has been overruled only in Asha Rani's (supra). We, therefore, are of the opinion that the interest of justice will be sub-served if the appellant herein is directed to satisfy the awarded amount in favour of the claimant if not already satisfied and recover the same from the owner of the vehicle”.

9. This Court in the case of Manguli Juanga (supra) and in an unreported decision in Sahabi Dhareji (supra), placing reliance on the case of *Manager, National Insurance Co. Ltd. -v- Saju P. Paul*,

reported in (2013) 2 SCC 41 held that in order to ensure prompt payment of compensation to the family members of the deceased, the Insurance Company should be directed to pay compensation amount to the claimants with a right of recovery from the owner of the offending vehicle in due process of law.

There cannot be any quarrel over the ratio decided in *Kaushalya Devi as well as Tilak Singh's case* (supra) so also in the case of ***National Insurance Co. Ltd. -v- Bommithi Subbhayamma and others***, reported in (2005) 12 SCC 243, wherein it has been held that carrying a gratuitous passenger in a goods carriage vehicle is a fundamental breach of condition. Thus, the owner of the vehicle is liable to pay compensation amount as awarded and therefore, the insurer cannot be asked to pay the awarded compensation amount to the claimants and thereafter, the same shall be recovered from the owner of the vehicle. The Hon'ble Apex Court while arriving at this conclusion has also taken into consideration the observation made at para-20 of a larger Bench in *Baljit Kaur's case* (supra), which reads as follows:

“20. It is therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance

was entered into, nor any premium was paid to the extent of the benefit of insurance to such category of people.”

However, the conclusion arrived at para-21 of the said case (quoted above) was neither discussed nor disturbed.

10. It is not only the duty of the Tribunal to see that just and adequate compensation is awarded to the claimants for the loss suffered by the deceased due to the accident, but also to see that there is hassle free payment of compensation with promptitude in order to save the claimants from distress. In that view of the matter, I am persuaded to rely upon the decision of Hon’ble Apex Court in the case of Baljit Kaur (supra) and Saju P. Paul (supra) and followed in the decision reported in 2016 (II) OLR 448 as well as unreported decision in M.A.C.A No. 485 of 2007 (supra).

11. So far as the quantum of compensation is concerned, although it is contended by the claimants that the deceased was earning about Rs.4,500/- per month, there is overwhelming material to come to a conclusion that the deceased was a BPL Card holder. As such, I do not find fault with the Tribunal in assessing the income of the deceased at Rs.4,000/- per month. The other parameters for computation of the compensation also appear to be just and proper. Hence, I feel that learned Tribunal cannot be faulted with the assessment of the income of the deceased at Rs. 4,58,056/-.

12. In that view of the matter, the appeal is allowed in part to the extent stated above and the Insurance Company-respondent no.2

is directed to deposit the compensation awarded along with interest accrued thereon before learned Tribunal within a period of six weeks hence. On such deposit being made, the same shall be disbursed/released in favour of the claimants proportionately in terms of the impugned award on proper identification. The Insurance Company is at liberty to prosecute the owner of the offending vehicle (respondent no.1) to recover the compensation amount taking recourse to law.

13. This Court vide order dated 10.07.2015 passed in Misc. Case No. 1569 of 2013 exempted the claimants from payment of Court fee for the time being. Hence, learned Tribunal is directed to realize a sum of Rs.1,000/- from the claimants at the time of disbursement of the awarded amount towards fee payable on the memorandum of the appeal.

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**K.R. Mohapatra, J.**

*Orissa High Court, Cuttack*  
*Dated the 23<sup>rd</sup> December, 2016/bks*



