

---

**(2021) 11 OHC CK 0163**

**Orissa High Court**

**Case No:** MACA No.945 Of 2009

Kumari Jani And Others

APPELLANT

Vs

Bulu Senapati And Another

RESPONDENT

---

**Date of Decision:** Nov. 25, 2021

**Hon'ble Judges:** B.P. Routray, J

**Bench:** Single Bench

**Advocate:** P.C. Pattnaik, P.K. Mishra, P.K. Mishra, P.C. Pattnaik

**Final Decision:** Disposed Of

---

### **Judgement**

B. P. Routray, J

1. Heard Mr. P.C. Pattnaik, learned counsel for the claimants, Mr. P.K. Mishra, learned counsel for the owner and Mr. G.P. Dutta, learned counsel

for the insurer.

2. Both the appeals being arise out of the same judgment, have been heard together and disposed of by this common order.

3. The case of the claimants is that the deceased when going on the left side of the road on 9th April, 2006 met with the accident as the offending

vehicle bearing registration No.OR 07 M 4116 all of sudden came in the reverse gear causing death of the deceased. P.W.1, the wife of the deceased

examined herself as the eye witness of the occurrence, but the learned Tribunal disbelieving their case and basing on the police report held that the

deceased was a gratuitous passenger in the offending vehicle at the time of accident and died due to capsizing of the vehicle. Learned Tribunal granted

compensation of Rs.1,94,300/- to the claimants along with 6% interest and directed the owner to pay the same. The learned Tribunal did not fix any

liability on the insurer.

4. This is questioned by the claimants and owner before this Court in the present appeals. It is submitted on behalf of the appellants that when P.W.1,

the wife of the deceased has stated in her oral evidence that she along with deceased were walking on the left side of the road and the offending

vehicle dashed the deceased coming in a reverse gear, the reliance on the police report by the Tribunal is erroneous.

5. Examining the contention of the Appellants it reveals from the impugned judgment and the copy of LCR that Ext.1 (copy of the F.I.R.), Ext.2 (copy

of the charge-sheet) and all other documents were produced and relied on by the claimants to mark as Ext.1 to Ext.7 on their behalf. It is seen from

the contents of the F.I.R. that the informant has seen the accident and in the charge-sheet present P.W.1 has not been cited as a witness to the

occurrence. So from the own documents filed by the claimants, it is proved that this P.W.1 was not an eye witness to the occurrence and tried to

develop her case subsequently. Thus, no fault is seen in the finding of the learned Tribunal to disbelieve the evidence of P.W.1 as an eye witness.

Accordingly the finding of the learned Tribunal that the deceased was a gratuitous passenger traveling in the offending vehicle at the time of accident

is confirmed.

6. At this stage it is further submitted on behalf of claimants " Appellants that the poor claimants are the wife and children of the deceased who

was a labourer. It is also submitted that under the principle of pay and recover, the insurer may be directed to pay the compensation amount and

proceed for recovery of the same from the owner keeping in view the poor condition of the claimants.

7. In the case of Anu Bhanvara Etc. v. IFFCO Tokio General Insurance Company Limited and other, sAIR 2019 SC 3934, the appellants-

claimants were admittedly gratuitous passengers travelling in a goods vehicle and the Supreme Court by referring to catena of decisions from both

sides directed the insurer to pay the compensation amount with right to realize the amount from the owner. The relevant observations of the Supreme

Court are as follows:

9. The next question is as to which of the respondents, that is the owner and driver, or the insurer of the vehicle, would be liable for payment of such compensation. As regards the liability for payment of compensation, it has been contended by the learned counsel for the appellants that since the vehicle was admittedly insured with the respondent No.1-insurance company, the principle of pay and recover would be invoked even in case of a gratuitous passenger in a goods vehicle. xx .. .. xx .. .. xx.

10. Per contra, learned counsel for the respondent-insurance company has contended that since the claimants were gratuitous passengers in a goods vehicle, in which case the liability for payment of compensation for death or body injury to the passengers of such goods vehicle would not be cover, hence the principle of pay and recover would not apply. xx .. .. xx .. .. xx.

11. We have heard learned counsel for the parties and perused the record as well as the various decisions cited by learned counsel for the parties. The insurance of the vehicle, though as a goods vehicle, is not disputed by the parties. The claimants in the present case are young children who have suffered permanent disability on account of the injuries sustained in the accident. Thus, keeping in view the peculiar facts and circumstances of this case, we are of the considered view that the principle of "pay and recover" should be directed to be invoked in the present case.

12. Accordingly, these appeals are disposed of with the direction that the respondent No.1-insurance company shall be liable to pay the awarded compensation to the claimants in both the appeals. However, respondent No.1-insurance company shall have the right to realize the said amount of compensation from the respondents No.2 and 3 (driver and owner of the vehicle) in accordance with law.

8. Keeping in view the facts of the present case, the insurer " Respondent No.2 is directed to pay the compensation amount as granted by the learned Tribunal in the impugned judgment dated 4th July, 2009 within a period of eight weeks from today and proceed on the principles of "pay and recover" to realize the amount from the owner.

9. The owner " Appellant in MACA No.751 of 2009 is permitted to take refund of the statutory deposit made before this court along with accrued

interest thereof.

10. With the above observations the appeals are disposed of.

11. An urgent certified copy of this order be issued as per rules.

â€|â€|â€|â€|â€|â€|â€|â€|â€|â€|â€|â€|â€|..