

**(2009) 12 CAL CK 0041**

**Calcutta High Court**

**Case No:** F.M.A.T. No. 1664 of 2008

New India Assurance Co. Ltd.

APPELLANT

Vs

Balai Majhi and Another

RESPONDENT

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**Date of Decision:** Dec. 15, 2009

**Citation:** (2011) ACJ 31 : (2011) 1 TAC 984

**Hon'ble Judges:** Subhro Kamal Mukherjee, J; Abdul Ghani, J

**Bench:** Division Bench

**Advocate:** Soumendra Nath Ganguly and Kinkar Pandit, for the Appellant; Amit Ranjan Roy, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Subhro Kamal Mukherjee and Abdul Ghani, JJ.

When this application for stay came up for hearing, Mr. Amit Ranjan Roy, learned advocate appearing for the claimants-Respondents, submits that the appeal itself is not maintainable inasmuch as it has been clearly recorded in the impugned award that the insurance company did not repudiate the contention of the claimant.

2. Mr. Roy in his turn relies upon a decision in the case of [Bank of Bihar Ltd. Vs. Mahabir Lal and Others](#),

3. Supreme Court of India in [Bank of Bihar Ltd. Vs. Mahabir Lal and Others](#), , held that where a statement appearing in the judgment of a court that a particular thing happened or did not happen before it, it ought not ordinarily be permitted to be challenged by a party unless both the parties to the litigation agree that the statement is wrong, or the court itself admits that the statement is erroneous. The remedy of a party aggrieved is by way of review.

4. Mr. Soumendra Nath Ganguly, learned advocate appearing for the Appellant, however, strenuously argues that [Bank of Bihar Ltd. Vs. Mahabir Lal and Others](#), , is distinguishable. He submits that there are sufficient materials to show that the insurance company strongly contested the claim of the claimant before the Motor

Accidents Claims Tribunal.

5. Mr. Ganguly, however, relies upon a decision of the Apex Court of India in the case of [Jagdish Singh Vs. Madhuri Devi](#),

6. The Apex Court of India in [Jagdish Singh Vs. Madhuri Devi](#), held that it is no doubt true that the High Court was exercising power as the first appellate court and hence it was open to the court to enter into not only questions of law, but questions of fact as well. It is settled law that an appeal is a continuation of suit. An appeal, thus, is a rehearing of the main matter and the appellate court can reappraise, reappraise and review the entire evidence, oral as well as documentary, and can come to its own conclusion.

7. We fail to understand how [Jagdish Singh Vs. Madhuri Devi](#), is applicable in the case in hand. The power of the first appeal court is well-known, but in this case the question is whether the appeal itself is maintainable. In other words, whether order was passed on concession.

8. In the judgment the learned Member of the Motor Accidents Claims Tribunal categorically recorded that the insurance company did not repudiate the contention of the claimant. On the basis of such concession the award has been passed.

9. It was for the insurance company to approach the Tribunal drawing attention that such contention was never made and it was wrongly recorded in the judgment, but it is not open to the insurance company to agitate in the appellate court that there was no concession in the Tribunal below.

10. We are of the considered opinion that as the award was passed recording that the insurance company did not repudiate the contentions of the claimant before the Motor Accidents Claims Tribunal, the appeal is not maintainable.

11. We are informed that already the entire awarded sum has been deposited with the learned Registrar General. The learned Registrar General is directed to release the payment in favor of claimants if an application is made for such payment, as expeditiously as possible.

12. On the prayer of Mr. Ganguly, the learned advocate appearing for the Appellant we make it clear that the insurance company will be entitled to take steps in accordance with law.

13. The application for stay stands rejected.

14. We also dismiss the appeal as not maintainable.

15. We, however, direct the parties to bear their respective costs in this appeal.

16. Urgent xerox certified copy of the order, if applied for, same be supplied to the parties expeditiously.