16.9.2022
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Ct No. 654
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F.M.A. 1640 of 2019

IA No: CAN/1/2019 (Old No. : CAN/8603/2019)
With
COT 112 of 2019

The National Insurance Company Limited.

versus

Samiresh Bhaduri & Another.

Mr. Sanjay Paul
...for the appellant.
Mr. Ashique Mondal
...for the respondent no.1-claimant.

This appeal is directed against the judgment and award dated 21st June, 2019 passed by the learned Judge, Motor Accident Claims Tribunal, 2nd Court, Hooghly in M.A.C. Case No. 82 of 2012 granting compensation in favour of the respondent-claimant to the tune of Rs. 11,01,007/- alongwith interest @ 8% per annum from the date of filing of claim application till final realization under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 10.5.2020 in the midnight at 12-00 hours the victim along with other occupants was returning from Howrah Station towards Chinsurah on a Tata Indica Car bearing No. WB-74K/7737 and when they reached near Maheshpur under Polba P.S., the driver stopped the car and both the occupants came out from the said car for urinating. One occupant after relieving himself boarded the said car and driver immediately started the car with a high speed. The injured-victim tried to stop the car but the driver without stopping the vehicle in a rash and negligent manner dashed the injured-victim, as a result of which he sustained grievous injuries all over the body including head and was shifted to the hospital. The other occupant as well as the driver of the offending vehicle died in the said accident. The claimant herein being the injured-vicitm filed claim application under Section 166 of the Motor Vehicles Act, 1988 praying for compensation.

Upon considering the materials on record and oral documentary evidence adduced by the parties, the learned tribunal allowed the application of the claimant granting compensation to the tune of Rs. 11,01,007/- together with interest @ 8% per annum from the date of filing of claim application till final realization.

Mr. Sanjay Paul, learned advocate appearing for the appellant-insurance company at the very outset submits that the insurance company cannot be made liable to compensate the claimant as policy of the vehicle did not cover the same. He further submits that the policy of the vehicle was not a *"Package policy"* to cover each and every liability rather it is an statutory *"Act policy"* which covers liability of only a third party. As on the date of incident the claimant was travelling in the offending vehicle as a gratuitous passenger and was not a third party, as such the policy of the vehicle which is an *"Act policy"* does not make the insurance company liable to compensate. Furthermore, he draws the attention of the court that specific pleadings has been made by the insurance company that it was not liable to make payment as the policy covers only third party and the claimant not being a third party, the insurance company cannot be called upon to compensate. He further submits that in order to establish such fact the insurance company has examined the Assistant Manager of National Insurance Company Limited, as Dw1, who has in clear terms deposed that the policy was a one liability only insurance policy and as such it is a third party policy. He further indicates from the insurance policy **(Exhibit A)** that the policy holder has deposited a sum of money towards third party basic and the column under own damage has not been covered which clearly also goes to show that the policy was an *"Act policy"* covering only third party. Save and except the version of the claimant (Pw1), he submits, there is no other iota of materials that on the date of incident, the claimant and the other occupants got down from the vehicle in order to urinate and thereafter the accident took place resulting in injury to the claimant while he was outside the offending vehicle. Rather the corroborative witnesses failed to establish the fact that the victim at the time of accident was outside the vehicle. Further both Pw2 and Pw3 deposed that they saw the victim lying on the road with pool of blood which implies that the victim was thrown out of the offending vehicle through the door of the car due to sudden impact. Thus in the event the victim being a passenger in the offending vehicle there cannot be a liability of the insurance company to compensate in the absence of *"Package policy"*. Further referring to the decision of Hon'ble Supreme Court passed in ***National Insurance Company Limited versus Balakrishnan & Another*** reported in ***(2013) 1 SCC 731*** he submits that the Hon'ble Court has extensively dealt with the matter concerning *"Act policy"* and *"Comprehensive policy or Package policy"* and laid down a clear distinction between the two. In the light of his aforesaid submissions, he prayed for setting aside the impugned judgment and award of the learned Tribunal.

Mr. Ashique Mondal, learned advocate for the respondent-claimant submits that the injured-victim, who is also the claimant herein is the best witness to depose about the manner the incident that took place on the date of incident, as the other occupants of the car who could have thrown light on the manner by which the actual incident took place has already expired. He further submits that the evidence of the claimant adduced in his examination in chief could not be rebutted in the cross-examination. Save and except some mere suggestions and denials there are no other materials emanating from the cross-examination to counter the evidence of claimant adduced in his examination-in-chief. Mere denials would not prove the defence case of the insurance company and he relied on the decision of Hon'ble Bombay High Court passed in ***New India Assurance Company Limited versus Samidrabhai and Others*** reported in ***2018 ACJ 1827.*** Moreover, the claimant has produced the best piece of evidence before the learned tribunal to establish its case by discharging its burden of proof whereas the insurance company in spite of getting opportunity did not produce the best evidence to thwart of the evidence injured claimant. Furthermore, the maker of the FIR is the son of the owner of the offending vehicle and as such is an interested party and is also not an eye witness to the occurrence and as such his statement in the FIR cannot be taken to be sacrosanct. Further he submits that PW-3 identified the victim-injured from railway identity card and informed the mother (PW2) of the claimant. The mother (PW2) of claimant has also deposed in clear terms that she was informed by PW-3. Both the witnesses have also stated that after they reached the place of occurrence they found the injured-victim lying on the road which fact presumes that the victim-injured was not inside the vehicle at the time accident and the finding of the learned Tribunal on such score holds good. He further submits that in Motor Accident Claims cases the standard of proof should be best of one of preponderance of probabilities and in support of his contention he relied on the decision of Hon'ble Supreme Court passed in ***Anita Sharma and others versus New India Assurance Company Limited*** reported in ***(2021)1 SCC 171***. In the aforesaid backdrop, submits that the evidence of claimant and corroborative evidence is very much acceptable to establish the manner of occurrence.

With regard to cross-objection for enhancement of compensation amount being COT 112 of 2019, Mr. Mondal, submits that the learned Tribunal did not take into account the future prospect and has wrongly adopted multiplier 15 instead of 16. He further submits for increasing the non-pecuniary damages as because the claimant has become totally bed-ridden due to the injuries sustained in the accident. Relying on the decision of Hon'ble Supreme

Court passed in ***Pappu Deo Yadav versus Naresh Kumar and Others*** reported in ***2020 SCC Online SC 752*** he submits that following the principal laid down in ***Pranay Sethi's*** case the Hon'ble Court observed that in case of injured future prospect @ 40% should be taken into consideration

Having heard the rival contentions of the parties at the first instance I proceed to consider the ground taken by the appellant-insurance company in the present appeal. Before delving into the merit I concur with the argument advanced on behalf of the appellant that an *"Act policy"* and a *"Package policy"* are distinct, relying on the decision of the Hon'ble Supreme Court in ***Balakrishnan (supra).***

Now the question that has fallen for consideration in this appeal is whether the insurance company in the facts and circumstances of the case is liable to pay the compensation or not. Bearing in mind the insurance policy of the offending vehicle is admittedly an *"Act policy"* covering third party so the principal aspect which has to be ascertained is whether the claimant was a third party or not.

From the evidence of the injured-claimant(PW1), it is found that he has categorically stated that on the date of incident he along with one Suroj De and the driver was returning from Howrah Station towards Chinsurah and when they reached near Maheshpur under Polba P.S, the driver stopped the vehicle he and Suroj De got down from the vehicle in order to urinate. Thereafter, Suroj De boarded the vehicle and the driver all on a sudden started the car with high speed. He tried to stop the car but the driver without stopping dashed him, due to which he sustained injuries. On going through the cross-examination of witness-claimant (PW1) it is found that his evidence as above has remained unshaken. Save and except mere suggestions nothing substantial has cropped up during cross-examination to disbelieve the witness-claimant (PW1). It is pertinent to note that the claimant is the injured-victim in this case and has also witnessed the accident. The claimant has also adduced the evidence of his mother (PW-2) and one independent witness (PW-3), who informed his mother. PW-3 deposed that he saw two persons were inside the car with bleeding injuries and another person was lying by the side of the road with pool of blood and he further went on to depose that he was informed by the other persons regarding the identity of the injured-claimant from his identity card. He has also deposed that he informed the mother of the claimant. PW-2 mother of the claimant also deposed that she was informed by an unknown boy and thereafter she rushed to the spot and found her son lying by the side of the road with pool of blood and two persons were inside the car with bleeding injuries. The above evidence of both the aforesaid witnesses has remained unshaken in cross-examination. Mr. Paul, learned advocate for the appellant-insurance company tried to impress upon the court that there might occasion that the door of the car broke down and the complainant fell on the road due to sudden impact of the accident. I failed to accept such proposition as advanced on behalf of the appellant-insurance company for reason that the police during the course of investigation did not make any seizure of any broken door of the car from the place of occurrence, although, mechanical test was undertaken. Thus such contention on behalf of the appellant-insurance company does not stand to reason.

In view of the above discussion from the evidence on record it manifests that the claimant was outside the vehicle when he was dashed by the offending vehicle resulting in injuries and thus the claimant was a third party. The policy of the vehicle being an *"Act policy"* covers such liability and the insurance company cannot disown from compensating the injured-claimant who sustained injuries in the said accidents.

Accordingly, the appeal falls short of merit and is liable to be dismissed.

Now I proceed to consider the cross objection being COT 112 of 2019.

Mr. Mondal, learned advocate for the respondent-claimant submits that the income of the claimant should have been considered @ Rs. 4,500/- per month. Although, such argument has been pressed into service, however, it is found from the materials on record that no supportive documents have been produced before the learned Tribunal. The incident has been taken place in the year 2010 and bearing in mind the price index prevailing at that period of time, I do not find any perversity in the order of the learned tribunal considering the income of the claimant to the extent of Rs. 3,000/- per month.

With regard to the multiplier on going through the judgement of the learned tribunal, I find that a multiplier of 15 has been adopted for calculating the compensation however in view of the observation of Hon'ble Supreme Court made in ***Sarala Verma versus Delhi Transport Corporation,*** reported ***2009 (2) T.A.C. 677*** the multiplier should be 16 as on the date of accident, admittedly, the claimant was aged 32 years.

Further following the observation of the Hon'ble Supreme Court made in ***National Insurance Company Limited versus Pranay Sethi and others*** reported in ***2017 ACJ 2700*** as well as ***Pappu Deo***

Yadav (supra) an amount equalling to 40% of the annual income should be added towards future prospect.

Last but not the least Mr. Mondal argues vociferously for enhancement of non-pecuniary damages. It appears from the impugned judgement that an amount of Rs. 3,50,000/- has been allowed towards non-pecuniary damages by the learned tribunal. Bearing in mind the extent of permanent disability and also that the victim cannot move without assistance the non-pecuniary damages is enhanced to the extent of Rs. 4,00,000/-.

In the aforesaid backdrop, the compensation is calculated as hereinunder.

Monthly Income...........	Rs. 3,000/-
Annual income(3000/-x12)......	Rs. 36,000/-
Add: Future Prospects @ 40%.....	Rs 14,400/-
	Rs. 50,400/-
Adopting Multiplier 16	
(Rs.50,400/-X16)	Rs.8,06,400/-
Disability (50%)	Rs. 4,03,200/-
Medical Expenses	Rs. 4,81,007/-
Non-pecuniary damages	Rs. 4,00,000/-
	Rs.12,84,207/-

Thus the claimant is entitled to a compensation amount of Rs. 12,84,207/- together with interest @ 6% interest per annum from the date of filing of the claim application till realisation.

The learned advocate for the insurance company submits that an amount of Rs. 19,55,572/- as well as statutory deposit of Rs. 25,000/- has been made before the learned Registrar General, High Court, Calcutta.

Accordingly, the aforesaid already deposited along with accrued interest be adjusted against the entire compensation amount together with interest. Balance amount, if any, shall be deposited by the appellant-National Insurance Company Limited Company by way of cheque with the learned Registrar General, High Court, Calcutta within a period of five weeks from date. Upon such deposit the learned Registrar General, High Court, Calcutta shall disburse the amount in favour of the claimant on satisfaction of his identity.

With the aforesaid observation, the appeal fails. The cross objection being **COT 112 of 2019** stands allowed. All connected applications, if any, stand disposed of. Interim order, if any, stands vacated.

Department is directed to register a FMA no. against the present FMAT.

Urgent photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

(Bivas Pattanayak J.)