22.08.2023
Ct. 654
D/L 9 & 10
Kb/ab

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURIDICTION
APPELLATE SIDE

FMA 479 of 2022
With
CAN 3 of 2021

IffCO Tokio General Insurance Co. Ltd.
-Vs-
Saroj Devi Chopra & Ors.

With

COT 43 of 2021

Saroj Devi Chopra & Ors.
-Vs-
IffCO Tokio General Insurance Co. Ltd

Mr. Rajesh Singh
… for the appellant-Insurance Company

Mr. Krishanu Banik
… for the respondent Nos. 1 & 2 -claimants

This appeal is preferred against the judgment and award dated 29th July, 2019 passed by the learned Judge, Motor Accident Claims Tribunal, IXth Bench, City Civil Court, Calcutta in MAC Case No. 246 of 2015 granting compensation of Rs. 23,77,000/- together with interest in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 8th June, 2015 at about 21.05 hours, while the victim was proceeding on a motorcycle bearing registration no. WB-18B/7251 at that time the offending vehicle bearing registration No. WB-41C/1656 (Truck) in a rash and negligent manner dashed the motorcycle of the victim from behind near Premises No. 57, Strand Road, as a result of which the victim sustained grievous injuries and was removed to R.G. Kar Medical College and Hospital, Kolkata where he was declared brought dead by the attending doctors. On account of sudden demise of the victim, the claimants being the parents of the deceased filed application for compensation of Rs. 40,00,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

The claimants in order to establish their case examined five witnesses and produced documents, which have been marked as **Exhibits 1** to **17** respectively.

The appellant-insurance company also adduced the evidence of one witness and produced document, which has been marked as **Exhibit A**.

Since the respondent no. 3, owner of the offending vehicle did not contest the claim application, service of notice of appeal upon the said respondent stands dispensed with.

Upon considering the materials on record and the evidence adduced on behalf of the respective parties, the learned Tribunal granted compensation of Rs.23,77,000/- together with interest in favour of the claimants under Section 166 of the Motor Vehicles Act, 1988.

Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal, the insurance company has preferred the present appeal.

Challenging the impugned judgment and award of the learned Tribunal, the claimants have also preferred a cross objection being COT 43 of 2021.

Both the appeal and the cross objection are taken up together for consideration and disposal.

Mr. Rajesh Singh, learned advocate for the appellant-insurance company submits that the offending truck was not insured at the time of accident since the insurance premium for the said truck was paid in cash on 14th June, 2015 whereas the accident has taken place on 8th June, 2015. The agent of the insurance company committed fraud upon the insurer by issuing a backdated insurance policy in favour of the owner of the alleged offending vehicle after the said accident. The period of insurance coverage was fraudulently made to commence from 5th June, 2015, which was before the date of accident, which is clear from the face of it, since the premium of the insurance coverage of the offending truck was received by the insurance company in cash on 14th June, 2015 after the date of accident on 8th June, 2015. The insurance policy and its coverage in regular course is to take effect on or after the date of payment of premium and in no case there can be any retrospective effect given to the validity of the insurance policy and its coverage. Thus, the insurance company cannot be held liable to indemnify the owner of the alleged vehicle in the absence of any valid policy of insurance on the relevant date of accident. Since there is act of fraud by the agent so far as the issuance of policy is concerned, in the event the Court directs the insurance company to compensate, the insurance company shall be given liberty to recover the amount of compensation to be paid to the claimants from the owner of the alleged offending vehicle.

He further submits that from the evidence of O.P.W-1, the Investigating Officer of the case, it is manifest that the deceased was driving the motorcycle along with two pillion riders on the relevant date of accident, which is also corroborated by the facts disclosed in the FIR as well as charge sheet. When three persons travelled on the relevant date on a motorcycle, the possibility of imbalance and contributing to the accident cannot be brushed aside. The conduct of the victim and the pillion riders, who were travelling on the motorcycle, resulted in contributory negligence especially when their action is contrary to the statute, which does not allow to ride motorcycle with two pillion riders. He also submits that none of the persons travelling in the motorcycle including the victim on the relevant date had protective helmets on their head which is evident from the fact that there is no seizure of helmets by the investigating agency from the place of occurrence and thus, such fact lends support to contributory negligence of the victim. To buttress his contention, he relies on the decision of the High Court of Madras passed in ***Managing Director, Tamil Nadu State Transport Corporation (Coimbatore Division-I) Ltd. versus Abdul Salam and Ors***. reported in ***2003 (2) TAC 103***.

So far as the quantum of compensation is concerned, he submits that the learned Tribunal erred in granting an amount of Rs. 60,000/- under general damages whereas it ought to have allowed Rs. 30,000/- only under the conventional heads of funeral expenses and the loss of estate in view of decision of Hon'ble Supreme Court passed in ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in ***2017 ACJ 2700***. He also submits for scaling down the rate of interest on compensation from 10% per annum to 6% per annum bearing in mind the prevalent baking rate of interest. In the light of the aforesaid submissions, he prays for modification and/or setting aside of the impugned judgment and award.

In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Krishanu Banik, learned advocate for the respondent nos. 1 & 2-claimants submits that the insurance company in their written statement has not made out any case of fraud by the agent of the insurance company in issuance of the policy of insurance. He also indicates that no steps have ever been taken by the insurance company for cancellation of the policy on such ground. Further no evidence of such fraudulent act of the agent has been led before the learned Tribunal in issuance of such policy of insurance. Once a policy is issued and it is found that it is valid at the time of accident, the insurance company under Section 149 of the Motor Vehicles Act is duty bound to compensate a third party. In support of his contentions, he placed reliance on the decisions of the Hon'ble Supreme Court passed in ***Oriental Insurance Co. Ltd. versus Inderjit Kaur and others*** reported in ***1998 ACJ 123*** and ***New India Assurance Co. Ltd. versus Rula and Others*** reported in ***2000 ACJ 630***.

He further submits that no case of contributory negligence has been made out by the appellant-insurance company in its written statement. There is also no evidence adduced by the insurance company in support of the contributory negligence of the deceased victim. Though on the relevant date of accident, the victim was travelling on the motorcycle with two pillion riders but such fact at best can be violation of law but *ipso facto* cannot result in contributory negligence of the victim in the absence of specific plea and evidence to that effect. Further none seizure of helmet cannot also lead to the fact that there was contributory negligence on the part of the victim. In support of his contentions, he relies on the decisions of the Hon'ble Supreme Court passed in ***Mohammed Siddique & Anr. Versus National Insurance Company Ltd. & Ors***. reported in ***(2020) 3 SCC 57*** and ***Anjana Narayan Kamble and others versus Branch Manager, Reliance General Insurance Company Ltd. and Another*** reported in ***2022 (3) T.A.C. 720 (SC)*** and another decision of this Court passed in ***FMA 2095 of 2014 (Sri Baidyanath Dhak & Anr. versus New India Assurance Co. Ltd. & Ors.)***.

He further submits that the claimants are entitled to an amount equivalent to 40% of the annual income of the victim towards future prospect. So far as general damages are concerned, he concedes that a sum of Rs.30,000/- under the conventional heads is only to be granted. He does not raise any objection with regard to the percentage of interest on the compensation amount argued on behalf of the appellant- insurance company.

Having heard the Learned Advocates for respective parties, following issues have fallen for consideration.

Firstly, whether the offending vehicle was validly covered by the insurance policy on the relevant date of accident. *Secondly*, whether the victim was guilty of contributory negligence. *Thirdly*, whether the Learned Tribunal erred in granting Rs.60,000/- under general damages instead of Rs.30,000/-. *Fourthly*, whether the claimants are entitled to an amount equivalent to 40% of the annual income of the victim towards future prospect and *lastly*, whether the interest on compensation should be 6% in stead of 10% granted by the Learned Tribunal.

With regard to the issue relating to validity and coverage of insurance policy on the relevant date of accident, it is found that the validity period of the insurance policy was made on and from 5th June, 2015 till 4th June, 2016 though the payment towards premium of such policy was made on 14th June, 2015. Mr. Singh, Learned Advocate for the appellant-insurance company has strenuously argued that there cannot be retrospective effect given to the coverage for which the premium has been paid on 14th June, 2015 and he also indicated of fraudulent activities on the part of the agent in issuance of such policy. *Per contra,* Mr. Banik, Learned Advocate for Respondents-Claimants has placed that since Insurance Policy was issued and was valid on the date of accident the insurance company is liable to make payment to the third party relying on *Inderjit Kaur (supra)* and *Rula (supra)*. Upon perusal of the written statement filed by the insurance company, it found that no case has been made out of any fraudulent activity of the agent in issuance of such policy. In the proceedings before the Learned Tribunal no evidence has also been led by the insurance company to primarily establish the fraudulent activity of its agent, if any, in issuance of such policy. Rather in Paragraph No. 4 of the written statement the insurance company admitted that the offending vehicle was covered at the material time under the policy of insurance issued by it and such insurance policy issued bearing no. 92800744 was valid from 05.06.2015 to 04.06.2016. The policy of the insurance was produced by P.W.1 Saroj Devi Chopra which has been marked as **Exhibit 12**. At the time of marking of the document as Exhibit, the insurance company did not raise any objection. That apart upon going through the cross examination of P.W.1 who produced the insurance policy, there is nothing in the evidence to suggest that such policy of insurance was challenged or objected to at the time of cross examination of the witness by the insurance company. To be precise no suggestion whatsoever has been given to the witness challenging the validity, veracity or acceptability of the said document namely, the insurance policy. It is now settled law that if a document is marked as exhibit on consent without reservation the contents are not only taken as evidence but are taken as admitted. In the case at hand even if for the sake of argument it is held that insurance policy has been exhibited not on consent but on formal proof dispensed with, the insurance company was free to examine witnesses on the question of validity, veracity and acceptability of such policy thereof or even lead evidence of rebuttal. The insurance company in the present case has not led to any evidence challenging the policy of insurance produced at the instance of the respondents-claimants. Since the insurance company has admitted the issuance of insurance policy and its coverage it cannot raise contention before the appellate Court that the same has been issued out of any fraudulent activity of the agent and make out a new case which has never been pleaded before the learned Tribunal. Further, it is pertinent to note that there are no materials that any steps have been taken on the ground of fraud of its agent for cancellation of such policy. Due to the aforesaid reasons arguments advanced on behalf of the insurance company falls short of merit. I find substance in the submissions of Mr. Banik relying on *Inderjit Kaur (supra)* and *Rula (supra)* that since the insurance company has issued policy which had valid coverage on the relevant date of accident it is duty bound to indemnify the third party.

With regard to the second issue relating to contributory negligence of the victim it is found at the very outset that no such fact of contributory negligence of the victim has been pleaded in the written statement. That apart no evidence has been led from the side of the insurance company to establish the factum of contributory negligence on the part of the victim in the said accident. Mr. Singh, learned advocate for appellant-insurance company has vociferously argued relying on decision of High Court of Madras in *Abdul Salam (supra)* that since three persons were travelling in the motor cycle on the relevant date of accident the conduct of the persons clearly indicates of contributory negligence especially when their actions were contrary to the statute. In the cited decision specific case was pleaded that the deceased was travelling in the motor cycle as a pillion rider along with another deceased. Whereas in the case at hand no such specific pleadings has been made in the written statement.

Now the question arises whether driving motor cycle along with two pillion riders *ipso facto* lead to contributory negligence of the victim or not. It is a fact that P.W.2, Santosh Kumar Shaw, who was one of the pillion rider deposed in cross-examination that no such person by the name of Sandip Sharma sustained injuries in the same accident. However, O.P.W.1, Pintu Biswas, Investigating Officer, in clear terms stated that in the said accident one person died and two other persons sustained injuries namely Santosh Shaw and Sandip Sharma. The F.I.R, and the charge sheet also shows that on the date of accident there were two pillion riders. Thus P.W.2 did not state correctly of the number of pillion riders. Accordingly, from the materials on record, it is manifest that there were two pillion riders on the motorcycle driven by the victim on the relevant date of accident. In a similar situation, the Hon'ble Supreme Court in *Mohammed Siddique (supra)* negating the finding of High Court that a motor vehicle meant for only two persons to ride was carrying, besides the driver, two persons on the pillion would undoubtedly have added to the imbalance observed as follows:

> *"12. But the above reason, in our view, is flawed. The fact that the deceased was riding on a motor cycle along with the driver and another, may not, by itself, without anything more, make him guilty of contributory negligence. At the most it would make him guilty of being a party to the violation of the law. Section 128 of the Motor Vehicles Act, 1988, imposes a restriction on the driver of a two wheeled motor cycle, not to carry more than one person on the motor cycle. Section 194 inserted by the Amendment Act 32 of 2019, prescribes a penalty for violation of safety measures for motor cycle drivers and pillion riders. Therefore, the fact that a person was a pillion rider on a motor cycle along with the driver and one more person on the pillion, may be a violation of the law. But such violation by*

itself, without anything more, cannot lead to a finding of contributory negligence, unless it is established that his very act of riding along with two others, contributed either to the accident or to the impact of the accident upon the victim. There must either be a causal connection between the violation and the accident or a causal connection between the violation and the impact of the accident upon the victim. It may so happen at times, that the accident could have been averted or the injuries sustained could have been of a lesser degree, if there had been no violation of the law by the victim. What could otherwise have resulted in a simple injury, might have resulted in a simple injury, might have resulted in a grievous injury or even death due to the violation of the law by the victim. It is in such cases, where, but for the violation of law, either the accident could have been averted or the impact could have been minimized, that the principle of contributory negligence could be invoked. It is not the case of the insurer that the accident itself occurred as a result of three persons riding on a motor cycle. It is not even the case of the insurer that the accident would have been averted, if three persons were not riding on the motor cycle. The fact that the motor cycle was hit by the car from behind, is admitted. Interestingly, the finding recorded by the Tribunal that the deceased was wearing a helmet and that the deceased was knocked down after the car hit the motor cycle from behind, are all not assailed. Therefore, the finding of the High Court that 2 persons on the pillion of the motor cycle, could have added to the imbalance, is nothing but presumptuous and is not based either upon pleading or upon the evidence on record. Nothing was extracted from PW3 to the effect that 2 persons on the pillion added to the imbalance.

13. Therefore, in the absence of any evidence to show that the wrongful act on the part of the deceased victim contributed either the accident or to the nature of the injuries sustained, the victim could not have been held guilty of contributory negligence. Hence the reduction of 10% towards contributory negligence, is clearly unjustified and the same has to be set aside.”

In *Anjana Narayan Kamble (supra)*, the Hon'ble Supreme Court observed as follows:

> *"7. In the present case, there is no such evidence of contributory negligence except fact of three riders on the motor cycle and of not wearing helmet by the deceased. Therefore, in view of the enunciation of law, we find that the High Court was not justified in deducting 30% of the amount of compensation assessed by the Tribunal for the reason that the deceased was triple riding the Motor Cycle or was not wearing a helmet. The violation of rules for driving a motor cycle is not a ground to deduct the amount of compensation awarded unless there is proof of either the accident could have been averted or the impact could have been minimized."*

Bearing in mind the aforesaid observation of Hon'ble Court since there are no evidence of contributory negligence only that the victim was travelling along with two pillion riders on a motorcycle and that the helmets were not seized by the investigating agency cannot *ipso facto* result in contributory negligence of the victim. Due to above reasons, I most humbly differ from the proposition of High Court of Madras made in *Abdul Salam (supra)* in this regard.

With regard to the next issue relating to the general damages it is found that the learned Tribunal has granted general damages under the conventional heads of funeral expenses and loss of estate to the tune of Rs.10,000/- and Rs.50,000/- respectively. However, following observation of Hon'ble Supreme Court in *Pranay Sethi (supra)*, the claimants, being the parents are entitled to general damages under the conventional heads of funeral expenses and loss of estate to the tune of Rs.15,000/- and Rs.15,000/- respectively.

With regard to the future prospect, it is found that at the time of accident the victim was of 30 years of age and was on fixed salary. Following the observation of Hon'ble Supreme Court in *Pranay Sethi (supra)*, the claimants are entitled to an equivalent amount to 40% of annual income of the victim towards future prospect.

Coming to the last issue relating to rate of interest on the compensation amount, it is found that the Learned Tribunal has granted 10% per annum of interest on the compensation amount. However, bearing in mind the prevailing banking rate of interest, the compensation amount shall carry interest @ 6% per annum from the date of filing of the claim application till payment.

Other factors have not been challenged in this appeal.

Bearing in mind the aforesaid, calculation of compensation is made hereunder.

<u>Calculation of Compensation</u>

Monthly income	Rs.21,954/-
Yearly income (Rs.21,954/- x 12)	Rs.2,63,448/-
Add: Agency Commission	Rs.9,071/-
Total income	Rs.2,72,519/-
Add: 40% of the total income towards future prospect	Rs.1,09,008/-
	Rs.3,81,527/-
Deduction:1/2 towards personal and living expenses	Rs.1,90,763/-

	Rs.1,90,764/-
Multiplier 17 (1,90,764/- x 17)	Rs.32,42,988/-
Add: General damages Loss of estate: Rs.15,000/- Funeral expenses: Rs.15,000/-	Rs.30,000/-
Total compensation	Rs.32,72,988/-

Thus the total compensation comes to Rs.32,72,988/- together with interest @ 6% per annum from the date of filing of the claim application till payment.

It is found that the Insurance Company has deposited a sum of Rs.23,77,000/- vide OD Challan no. 357 dated 2nd May, 2022 and has also deposited an amount of Rs.25,000/- vide OD Challan no. 2379 dated 7th January, 2020. Both the aforesaid deposits together with accrued interest may be adjusted against the entire compensation amount and the interest thereon.

Accordingly, the appellant-insurance company is directed to deposit the balance amount of compensation of Rs. 8,70,988/- together with interest at the rate of 6% per annum from the date of filing of the claim application till payment by way of cheque before the learned Registrar General, High Court, Calcutta within six weeks from date.

The respondents-claimants are directed to deposit *ad valorem* court fees on the amount of compensation, if not already paid.

Upon deposit of balance amount of compensation and the interest as indicated above, the learned

Registrar General, High Court, Calcutta shall release the aforesaid amount in favour of the respondent nos. 1 & 2 (claimants) in equal proportion upon satisfaction of their identity and payment of *ad valorem* court fees, if not already paid.

With the aforesaid observations, the present appeal and the cross-objection stand disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent. No order as to costs.

All connected applications, if any, are also disposed of.

Interim order, if any, stands vacated.

Urgent certified photocopy of this order, if applied for, be supplied to the parties expeditiously upon compliance of all necessary legal formalities.

(**Bivas Pattanayak, J**.)