IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK

FMA 787 of 2022
The New India Assurance Co. Ltd.
versus
Nanda Hazra & Anr.

For the Appellant-Insurance Company	:	Mr. Rajdeep Bhattacharyya, Advocate
For the Respondent No.1-Claimant	:	Mr. Ashique Mondal, Advocate Mr. Subhankar Mondal, Advocate
Heard on	:	25.07.2023
Judgment on	:	18.12.2023

Bivas Pattanayak, J. :-

1. This appeal is preferred against the judgment and award dated 28th March, 2022 passed by learned Additional District Judge-cum-Judge, Motor Accident Claims Tribunal, Fast Track, 1st Court, Diamond Harbour, South 24 Parganas in M.A.C. Case No. 145 of 2020 granting compensation of Rs.4,74,440/- together with interest in favour of the claimant-injured under Section 166 of the Motor Vehicles Act, 1988.

2. The brief fact of the case is that on 24th October, 2020 at about 3:30 A.M.while the victim-injured was returning to his house situated under P.S. Pathar Pratima from Kolkata on a Tata Sumo vehicle bearing registration no. WB-22U/7569 and when the said vehicle reached near Nischintapur Jamtala in front of shop of Kalipada Das, the said Tata Sumo in a rash and negligent manner dashed another vehicle bearing registration no. WB-41F/1247 which was coming from the opposite direction. Due to the said accident, the victim-injured received serious multiple bleeding injuries on all over his body and also received fracture injuries. Immediately the local people rescued the victim-injured and shifted him to Belpukur Hospital wherefrom he was removed to Diamond Harbour Govt. Medical College & Hospital and he was also treated by private doctors. In relation to the injuries sustained in the accident resulting in disablement and loss of earnings etc., the victim-injured filed application for compensation of Rs. 6,00,000/- together with future prospect and non-pecuniary damages under Section 166 of the Motor Vehicles Act, 1988.

3. The claimant-injured in order to establish his case examined three witnesses including himself and produced documents which have been marked as **Exhibits-1** to **10** respectively.

4. Though the appellant-insurance company as well as respondent no.2, owner of the offending vehicle entered appearance before the learned Tribunal by filing *Vakalatnama* but subsequently did not contest the claim application and the claim case proceeded *ex parte* against both of them.

5. In the aforesaid backdrop, by order dated 7th November, 2022, service of notice of appeal upon respondent no.2, owner of the offending vehicle was dispensed with in the present appeal.

6. Upon considering the materials on record and the evidence adduced on behalf of claimant, learned Tribunal disposing of the claim application *ex parte* against the insurance company as well as the owner of the offending vehicle granted compensation of Rs.4,74,440/- together with interest in favour of the claimant-injured under Section 166 of the Motor Vehicles Act, 1988.

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

8. Mr. Rajdeep Bhattacharyya, learned advocate for appellant-insurance company submitted that the learned Tribunal erred in determining the income of the victim at Rs. 6,500/- per month without any cogent evidence being produced in support of such income of the victim-injured. The learned Tribunal has made error in interpreting the proposition in ***Syed Sadiq and Others versus Divisional Manager, United India Insurance Company Limited***[1]. He indicated that in *Syed Sadiq (supra)* considering the professing of the victim as vegetable vendor, the Hon'ble Supreme Court considered the income of Rs. 6,000/- per month of the victim. In the case at hand, the victim is an employee of *Sakti Mata Cold Storage* at Kamar Kundu, Hooghly. However, the employer of the said cold storage has not been examined to precisely establish the profession and income of the victim.

He further submitted that the claimant-injured has not proved any bills towards medical expenses. However, the learned Tribunal while determining the compensation has allowed the medical expenses of Rs. 25,000/- which is erroneous and not sustainable in law. Further there is no evidence that the victim sustained permanent disability.

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[1] (2014) 2 SCC 735

Moreover, he submitted that on the relevant date of accident, the victim was travelling in the offending vehicle as a gratuitous passenger. The policy schedule-cum-certificate of insurance shows that third party premium has been paid to cover third party only. Since the victim-injured is not a third party, hence the insurance company cannot be held liable to pay compensation to the claimant-injured. In support of his submissions, he relied on the following decisions of the Hon'ble Supreme Court passed in:

i. ***Oriental Insurance Company Limited versus Sudhakaran K. V. and Others***[2]
ii. ***New India Assurance Company Limited versus Sadanand Mukhi and Others***[3]
iii. ***New India Assurance Company Limited versus Bismillah Bai and Others***[4]
iv. ***National Insurance Company Ltd. versus Balakrishnan & Another***[5]

In light of his aforesaid submissions, he prayed that the impugned judgment and award of the learned Tribunal should be set aside.

9. In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Ashique Mondal, learned advocate for the respondent no.1-claimant submitted, at the very outset, that since the insurance company has neither contested the claim application nor taken leave to contest the

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[2] ***(2008) 7 SCC 428***
[3] ***(2009) 2 SCC 417***
[4] ***(2009) 5 SCC 112***
[5] ***(2013) 1 SCC 731***

claim application on all merits under Section 170 of the Motor Vehicles Act, 1988, hence the insurance company has no right of appeal to challenge the award on all merits. At best, the appeal of the insurance company can be pursued in respect of the grounds provided under Section 149 of the Motor Vehicles Act, 1988. In support of his contention, he relied on the following decisions passed in:

i. ***National Insurance Co. Ltd., Chandigarh versus Nicolletta Rohtagi and Others***[6]

ii. ***Josphine James versus United India Insurance Company Limited and Another***[7]

Mr. Mondal, learned advocate for respondent no.1-claimant in his usual fairness referring to ***United India Insurance Company Limited versus Shila Datta and Others***[8] indicated that though the correctness of proposition in *Nicolletta Rohtagi (supra)* has been referred to Larger Bench but the proposition in *Nicolletta Rohtagi (supra)* has not been overruled.

Further the appellant-insurance company in its grounds of appeal has not taken any plea that since the victim was not a third party, hence the insurance company is not liable to compensate and as such the insurance company cannot press such ground which has not been set forth in appeal. Be that as it may, it is settled position in law that in case of a gratuitous passenger the principle of pay and recovery is applicable even if it is found that the insurance company has no liability to compensate, bearing in mind the benevolent object of the Motor Vehicles Act, 1988. In

[6] ***(2002) 7 SCC 456***
[7] ***(2013) 16 SCC 711***
[8] ***(2011) 10 SCC 509***

support of his aforesaid contention, he relied on the following decisions passed in:

i. ***Manager, National Insurance Company Limited versus Saju P. Paul and Another***[9]

ii. ***Manuara Khatun and Others versus Rajesh Kumar Singh and Others***[10]

iii. ***Cholamandalam Ms. General Insurance Company Limited versus Tanushree Chakraborty and Others***[11]

iv. ***The National Insurance Co. Ltd. versus Smt. Urmila Singh** @ **Urmila Maurya & Ors.***[12]

10. Having heard learned advocates for respective parties, following issues have fallen for consideration:

Firstly, whether the insurance company can challenge the quantum of compensation without obtaining permission of the learned Tribunal under Section 170 of the Motor Vehicles Act.

Secondly, whether the insurance company as per terms of policy of insurance is liable to make payment of compensation to the victim who was travelling as a gratuitous passenger in the offending vehicle on the relevant date of accident.

11. With regard to the first issue whether the insurance company can challenge the quantum of compensation without obtaining permission from the learned Tribunal under Section 170 of the Motor Vehicles Act, it

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[9] ***(2013) 2 SCC 41***
[10] ***(2017) 4 SCC 796***
[11] ***2019 SCC OnLine Cal 2968***
[12] ***F.M.A.T. 1509 of 2012***

would be apposite to reproduce the observation of the Hon'ble Supreme Court in *Nicolletta Rohtagi (supra)* which is as follows:

> *"**26.** For the aforesaid reasons, an insurer if aggrieved against an award, may file an appeal only on those grounds and no other. However, by virtue of Section 170 of the 1988 Act, where in course of an enquiry the Claims Tribunal is satisfied that (a) there is a collusion between the person making a claim and the person against whom the claim has been made, or (b) the person against whom the claim has been made has failed to contest the claim, the Tribunal may, for reasons to be recorded in writing, implead the insurer and in that case it is permissible for the insurer to contest the claim also on the grounds which are available to the insured or to the person against whom the claim has been made. Thus, unless an order is passed by the Tribunal permitting the insurer to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170 of the Act, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made. Thus where conditions precedent embodied in Section 170 are satisfied and award is adverse to the interest of the insurer, the insurer has a right to file an appeal challenging the quantum of compensation or negligence or contributory negligence of the offending vehicle even if the insured has not filed any appeal against the quantum of compensation. Sections 149, 170 and 173 are part of one Scheme and if we give any different interpretation to Section 173 of the 1988 Act, the same would go contrary to the scheme and object of the Act."*

11.1. The correctness of the decision rendered in *Nicolletta Rohtagi (supra)* has been referred to a Larger Bench in *Shila Datta (supra).*

11.2. In *Josphine James (supra),* the Hon'ble Supreme Court after considering its decision rendered in *Nicolletta Rohtagi (supra)* and in *Shila Datta (supra)* observed as follows:

> *"**20.** The said order was reviewed by the High Court at the instance of the appellant in view of the aforesaid decision on the question of maintainability of the appeal of the Insurance Company. The High Court, in the review petition, has further reduced the compensation to Rs 4,20,000 from Rs 6,75,000 which was earlier awarded by it. This approach is contrary to the facts and law laid down by this Court. The High Court, in reducing the quantum of compensation under the heading of loss of dependency of the appellant, was required to follow the decision rendered by three-Judge Bench of this Court in Nicolletta Rohtagi case and earlier decisions wherein this Court after interpreting Section 170 (b) of the MV Act, has rightly held that in the absence of permission obtained by the Insurance Company from the Tribunal to avail the defence of the insured, it is not permitted to contest the case on merits. The aforesaid legal principle is applicable to the fact situation in view of the three-Judge Bench decision referred to supra though the correctness of the aforesaid decision is referred to larger Bench. This important aspect of the matter has been overlooked by the High Court while passing the impugned judgment and the said approach is contrary to law laid down by this Court.*
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> ***21.** In view of the aforesaid reasons, the Insurance Company is not entitled to file an appeal questioning the quantum of compensation awarded in favour of the appellant for the reasons stated supra. In the absence of*

> *the same, the Insurance Company had only limited defence to contest in the proceedings as provided under Section 149 (2) of the MV Act. Therefore, the impugned judgment passed by the High Court on 13.1.2012 reducing the compensation to Rs 4,20,000 under the heading of loss of dependency by deducting 50% from the monthly income of the deceased of Rs 5,000 and applying a multiplier of 14, is factually and legally incorrect. The High Court has erroneously arrived at this amount by applying the principle of law laid down in Sarla Verma v. DTC instead of applying the principle laid down in Baby Radhika Gupta case regarding the multiplier applied to the fact situation and also contrary to the law applicable regarding the maintainability of appeal of the Insurance Company on the question of quantum of compensation in the absence of permission to be obtained by it from the Tribunal under Section 170 (b) of the MV Act. In view of the aforesaid reason, the High Court should not have allowed the appeal of the Insurance Company as it has got limited defence as provided under Section 149(2) of the MV Act. Therefore, the impugned judgment and award is vitiated in law and hence, is liable to be set aside by allowing the appeal of the appellant."*

11.3. Thus it culls out from the aforesaid decision that though the Hon'ble Court in *Shila Datta (supra)* expressed its reservation against the correctness of the legal position in *Nicolletta Rohtagi (supra)* decision on various aspects and the same has been referred to a Larger Bench but the same has not been overruled yet. Hence, the ratio in *Nicolletta Rohtagi (supra)* is still applicable in the present fact situation. Therefore, following the decision rendered by three-Judge Bench in *Nicolletta Rohtagi (supra)* and observation in *Josphine James (supra)* in the absence of permission obtained by the insurance company from the Tribunal to avail the defence of the insured under Section 170 of the Act, it is not permitted to contest on all merits. Thus the insurance company has no right to maintain the appeal on the question of quantum of compensation awarded to the claimant in the absence of permission to be obtained by it from the leaned Tribunal under Section 170 of the Act. In the present case at hand, the appellant-insurance company has not contested the claim application and the same has been disposed of *ex parte* meaning thereby that the insurance company has not taken leave under Section 170 of the Motor Vehicles Act, 1988 to contest the claim on the grounds which are available to the insured or to the person against whom the claim has been made, hence it has no right to challenge in appeal the quantum of compensation awarded by the learned Tribunal. However, in the absence of such permission under Section 170 of the Act, the insurance company had only limited defence to contest in the proceedings as provided under Section 149(2) of the Act. Therefore, the argument advanced on behalf of the insurance company challenging the findings of the learned Tribunal with regard to the income of the victim, medical expenses granted and nature of disability of the victim relating to determination of quantum of compensation is not sustainable.

12. In the aforesaid backdrop, the second issue as to whether the insurance company as per terms of policy of insurance is liable to make payment of compensation to the victim who was travelling as a gratuitous passenger in the offending vehicle on the relevant date can be considered. Admittedly on the relevant date of accident the victim was travelling in the offending vehicle as a gratuitous passenger. The victim thus was not a third party. Upon perusal of policy schedule-cum-certificate of insurance **(Exhibit 8)**, it is found that the said policy is a private car liability policy under which only third party premium has been paid to cover third party only. Therefore, the said policy to all intent is an *'Act policy'*. At this stage, the question which arises is whether in case of a gratuitous passenger the insurance company can be held liable to make payment of compensation.

12.1. In *Sudhakaran K. V. (supra), the Hon'ble Supreme Court has observed as follows:*

> *"**17.** This Court in a catena of decisions has categorically held that a gratuitous passenger in a goods carriage would not be covered by a contract of insurance entered into by and between the insurer and the owner of the vehicle in terms of Section 147 of the Act. (See New India Assurance Co. Ltd. v. Asha Rani)*
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> ***18.** A Division Bench of this Court in United India Insurance Co. Ltd. v. Tilak Singh extended the said principle to all other categories of vehicles also, stating as under: (SCC p. 412, para 21)*
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>> *"21. In our view, although the observations made in Asha Rani case were in connection with carrying passengers in a goods vehicle, the same would apply with equal force to gratuitous passengers in any other vehicle also. Thus, we must uphold the contention of the appellant Insurance Company that it owed no liability towards the injuries suffered by the deceased Rajinder Singh who was a pillion-rider, as the insurance policy was a statutory policy, and hence it did not cover the risk of death of or bodily injury to a gratuitous passenger."*

> ***19.*** *The submission of Ms Bhat, learned counsel, however, is that this Court should not extend the said principle to the vehicles other than the goods carriage. As at present advised, we may not go into the said question in view of some recent decisions of this Court viz. National Insurance Co. Ltd. v. Laxmi Narain Dhut, Oriental Insurance Co. Ltd. v. Meena Variyal and New India Assurance Co. Ltd. v. Vedwati.*
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> ***20.*** *The provisions of the Act and, in particular, Section 147 of the Act were enacted for the purpose of enforcing the principles of social justice. It, however, must be kept confined to a third-party risk. A contract of insurance which is not statutory in nature should be construed like any other contract.*
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> ***21.*** *We have noticed the terms of the contract of insurance. It was entered into for the purpose of covering the third-party risk and not the risk of the owner or a pillion-rider. An exception in the contract of insurance has been made i.e. by covering the risk of the driver of the vehicle. The deceased was, indisputably, not the driver of the vehicle.*
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> ***22.*** *The contract of insurance did not cover the owner of the vehicle, certainly not the pillion-rider. The deceased was travelling as a passenger, stricto sensu may not be as a gratuitous passenger as in a given case she may not (sic) be a member of the family, a friend or other relative. In the sense of the term which is used in common parlance, she might not be even a passenger. In view of the terms of the contract of insurance, however, she would not be covered thereby."*

12.2. The decision in *Sudhakaran K. V. (supra)* has been followed in *Bismillah Bai (supra)* holding that the insurance company cannot be held liable to pay compensation to the claimants in case of gratuitous passenger.

12.3. In *Sadanand Mukhi (supra),* the similar proposition of law was reiterated holding that the insurance company is not liable to pay compensation in respect of a person not being a third party.

12.4. In *Balakrishnan (supra),* the Hon'ble Supreme Court has observed as follows:

> *"**21.** In view of the aforesaid factual position, there is no scintilla of doubt that a "comprehensive/package policy" would cover the liability of the insurer for payment of compensation for the occupant in a car. There is no cavil that an "Act Policy" stands on a different footing from a "Comprehensive/Package Policy". As the circulars have made the position very clear and the IRDA, which is presently the statutory authority, has commanded the insurance companies stating that a "Comprehensive/Package Policy" covers the liability, there cannot be any dispute in that regard. We may hasten to clarify that the earlier pronouncements were rendered in respect of the "Act Policy" which admittedly cannot cover a third party risk of an occupant in a car. But, if the policy is a "Comprehensive/Package Policy", the liability would be covered. These aspects were not noticed in the case of Bhagyalakshmi (supra) and, therefore, the matter was referred to a larger Bench. We are disposed to think that there is no necessity to refer the present matter to a larger Bench as the IRDA, which is presently the statutory authority, has clarified the position by issuing circulars which have been reproduced in the judgment by the Delhi High Court and we have also reproduced the same."*

12.5. Bearing in mind the aforesaid observation of Hon'ble Supreme Court since the policy of insurance is an *'Act policy'* covering only third party and not a *'Comprehensive/package policy'* covering the occupant in the vehicle and the victim being a gratuitous passenger and not a third party, hence the insurance company cannot be held liable to pay compensation.

12.6. Now it is to be seen whether in case of gratuitous passenger the insurance company can be directed to pay compensation at the first instance and then recover the said amount from the insured in accordance with law.

12.7. In the decision of Hon'ble Supreme Court passed in *Saju P. Paul (supra)*, the Hon'ble Supreme Court observed as follows:

> *"**26.** The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in Baljit Kaur and Challa Upendra Rao should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The Insurance Company has already deposited the entire awarded amount pursuant to the order of this Court passed on 1-8-2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent 1) may be allowed to withdraw the amount deposited by the Insurance Company before this Court along with accrued interest. The Insurance Company (the appellant) thereafter may recover the amount so paid from the owner (Respondent*

> *2 herein). The recovery of the amount by the Insurance Company from the owner shall be made by following the procedure as laid down by this Court in Challa Upendra Rao."*

12.8. In the decision of Hon'ble Supreme Court passed in *Manuara Khatun (supra)*, the Hon'ble Supreme Court following the observation in *Saju P. Paul (supra)* has observed as follows:

> *"**15.** This question also fell for consideration recently in National Insurance Co. Ltd. v. Saju P. Paul wherein this Court took note of entire previous case law on the subject mentioned above and examined the question in the context of Section 147 of the Act. While allowing the appeal filed by the insurance company by reversing the judgment of the High Court, it was held on facts that since the victim was travelling in offending vehicle as "gratuitous passenger" and hence, the insurance company cannot be held liable to suffer the liability arising out of accident on the strength of the insurance policy. However, this Court keeping in view the benevolent object of the Act and other relevant factors arising in the case, issued the directions against the insurance company to pay the awarded sum to the claimants and then to recover the said sum from the insured in the same proceedings by applying the principle of "pay and recover"."*

12.9. Following the proposition of laid down by the Hon'ble Supreme Court in *Saju P. Paul (supra)* and *Manuara Khatun (supra)* even in case of a gratuitous passenger the insurance company is to pay the compensation amount and then recover the said amount from the insured in accordance with law.

12.10. In a similar situation, this Court in *Tanushree Chakraborty (supra)* and in *Smt. Urmila Singh @ Urmila Maurya & Ors. (supra)* applied the principles of pay and recovery.

12.11. Mr. Mandal, learned advocate for respondent no.1-claimant has strenuously urged that since the ground that the victim was travelling as a gratuitous passenger and is not covered under the policy of insurance has not been set forth in the grounds of appeal, therefore, the insurance company is debarred from raising the same during hearing of the appeal. Although such argument is pressed into service on behalf of respondent no.1-claimant, however, on going through the grounds set forth in the memorandum of appeal it is seen that such ground that the insurance company has no liability to pay compensation as per the insurance policy has been set forth. Thus, the argument advanced on behalf of the respondent no.1-claimant is short of merit.

13. In view of the above discussion, the quantum of compensation arrived at by the learned Tribunal is affirmed. The appellant-insurance company is directed to satisfy the award at the first instance. It is found that appellant-insurance company has deposited a sum of Rs. 5,25,848/- vide OD Challan No. 875 dated 22nd June, 2022 in terms of order of this court dated 7th June, 2022 and statutory deposit of Rs. 25,000/- vide OD Challan No. 642 dated 7th June, 2022 before the registry of this Court.

14. Learned Registrar General, High Court, Calcutta is directed to release the aforesaid amount together with accrued interest in favour of respondent no.1-claimant upon satisfaction of his identity.

15. Liberty is granted to the appellant-insurance company to recover the said amount of compensation satisfied from the owner of the offending vehicle in accordance with law.

16. With the above observation, the appeal stands disposed of. No order as to costs.

17. All connected applications, if any, stand disposed of.

18. Interim order, if any, stands vacated.

19. Let a copy of this judgment be forwarded to the learned Tribunal along with lower court records for information in accordance with rules.

20. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)