

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**FMA 122 of 2018
CAN 2 of 2018 (Old No: CAN 9148 of 2018)
CAN 3 of 2019 (Old No: CAN 2345 of 2019)
National Insurance Company Limited
versus
Kusum Agarwal & Others
With
COT 34 of 2019
Smt. Kusum Agarwal & Others
versus
The National Insurance Co. Ltd.**

For the Appellant : Mr. Rajesh Singh, Advocate
For the Respondents : Mr. Hemendra Krishna Guha Roy, Advocate
Ms. Sunandita Ghosh, Advocate
Mr. Sujoy Guha Roy, Advocate
Heard on : 22.09.2022, 31.10.2022, 05.06.2023
Judgment on : 15.01.2024

Bivas Pattanayak, J. :-

1. This appeal is preferred against the judgment and award dated 30th May 2017 passed by learned Judge, Motor Accident Claims Tribunal, Bench IX, City Civil Court, Calcutta in MAC Case No.212 of 1987 granting compensation of Rs. 3,98,000/- together with interest in favour of the claimants under Section 110A of the Motor Vehicles Act, 1939.

2. The brief fact of the case is that on 9th January, 1987 at about 21:15 Hours while the victim along with one Pawan Kumar Bajoria was on a stationary scooter bearing No. WNH-60 on the western side of the non-

metalled portion of the Red Road at that time the offending vehicle bearing registration no. WBS-4872 (Private Bus) in a rash and negligent manner dashed the said scooter at the southern end of Mohammedan Sporting Club Tent, as a result of which the victim and Pawan Kumar Bajoria sustained serious injuries and immediately they were shifted to Medical College Hospital, where the attending doctor declared them as brought dead. On account of sudden demise of the victim, the claimants being the widow, mother and son filed application for compensation of Rs.5,50,000/- together with interest under Section 110A of the Motor Vehicles Act, 1939.

3. The claimants in order to establish their case examined two witnesses including the widow of the deceased and produced documents which have been marked as **Exhibits 1 to 6** respectively.

4. The appellant-insurance company keenly contested the claim application by filing its written statement. However, it did not adduce any evidence.

5. Since service of notice could not be affected upon the owner of the offending vehicle, upon prayer of the claimants, summons was directed by the learned Tribunal to be served through substituted service. The notice was served through substituted service which was accepted by the learned Tribunal. However, the owner of the offending vehicle failed to appear.

6. Despite service of notice of appeal upon the respondent no.4-owner of the offending vehicle through publication, the said respondent remained unrepresented.

7. Upon considering the materials on record and the evidence adduced on behalf of the claimants the learned Tribunal granted compensation of

Rs.3,98,000/- together with interest in favour of the claimants under Section 110A of the Motor Vehicles Act, 1939.

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

9. Mr. Rajesh Singh, learned advocate for appellant-insurance company submitted that in terms of Section 95(2)(b)(i) of the Motor Vehicles Act, 1939 the liability of the insurance company in respect of the persons other than passengers is limited to Rs. 50,000/- only and since the deceased-victim was not a passenger the insurer had no legal liability to pay any amount more than Rs. 50,000/-. He further submitted that without any additional or higher premium being taken to cover unlimited or higher liability than the statutory liability fixed, the liability of the insurer in respect of persons other than the passengers is limited to Rs. 50,000/- only and therefore the responsibility of payment of any amount over and above Rs. 50,000/- was solely of the owner of the offending bus and not of its insurer. Though the learned Tribunal accepted the argument of limited liability of the insurance company but failed to decide the said issue and erroneously directed the insurer to make payment of the total compensation awarded. To buttress his contention, he relied on the decision of Hon'ble Supreme Court passed in ***New India Assurance Co. Ltd. versus C.M. Jaya and Ors.***¹. In the present appeal in terms of order dated 2nd January 2020, the insurance company, by way of supplementary affidavit, filed a copy of policy of insurance of another vehicle, as similar to

¹ (2002) 2 SCC 278

the insurance policy pertaining to the present case, issued in respect of a third party coverage at the relevant point of time, which can be taken note of for deciding the aspect of limited liability of the insurance company. It would be apparent from the similar kind of policy of insurance issued by the insurer in the year 1987 in respect of another vehicle, from one of its offices, that the total premium of Rs. 240/- used to be taken for coverage of *'liability to public risk'* or third party statutory liability only. The *Guide Book for Motor Insurance Underwriting Including Schedule of Rates* for issuance of insurance policies approved by the *India Motor Tariff* reflects that at the relevant point of accident in the year 1987, the premium for *'liability to public risks'* for "CLASS B(1)- PASSENGER CARRYING VEHICLES (EXCLUDING PASSENGER RISK)" was Rs. 240/- and the said rate was in accordance with the requirements of Section 95(2)(b) of the Motor Vehicles Act, 1939. Therefore, the liability of the insurer in respect of the deceased victim would be limited to Rs. 50,000/- only. In light of his aforesaid submissions, he prayed that the impugned judgment and award of the learned Tribunal should be modified to the above extent.

10. Mr. Hemendra Krishna Guha Roy, learned advocate appearing on behalf of the respondents-claimants submitted that in present case at hand the insurance company has failed to produce the policy of insurance. In case the insurance company wishes to take defence in the claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. It is the duty of the party which is in possession of a document which would be helpful in doing justice in the cause, to produce the said document and such party

should not be permitted to take shelter behind the abstract doctrine of burden of proof. In support of his contention, he relied on the decision of the Hon'ble Supreme Court passed in ***National Insurance Co. Ltd. versus Jugal Kishore and others***². If the insurer fails to produce the insurance policy, the insurer will be liable to pay the entire amount awarded by way of compensation. When a claim is made for amount larger than that fixed by the Act, the liability of the insurer need not be restricted to prescribed minimum when the insurance company fails to bring the policy on record. To buttress his contention, he relied on the following decisions:

- i. ***Satya Wati Pathak and Others versus Hari Ram and Others***³
- ii. ***National Insurance Co. Ltd. Versus Narendra Kumar and Others***⁴

The insurance company has made a deliberate attempt to escape the liability by introducing a copy of the policy other than the one issued to the insured and such attempt has been made only to deprive the claimants of their rightful claim. The Motor Vehicles Act is a beneficial legislation, aimed at quick redressal to the victim of the accident and such attitude of the insurance companies to frustrate the object of the legislation should be deprecated by the courts. In support of his contention, he relied on the decision of Hon'ble Supreme Court passed in ***New India Assurance Co.***

² 1988 ACJ 270

³ AIR 1984 Del 106 (Delhi High Court)

⁴ AIR 1980 All 397 (Allahabad High Court)

Ltd. versus Kiran Singh and others⁵. In the aforesaid backdrop, he submitted that the ground of limited liability raised by the insurance company is not tenable and the appeal is liable to be dismissed.

11. Having heard the learned advocates for respective parties, the only issue which has fallen for consideration in the present appeal is whether the liability of the insurance company in respect of persons other than the passengers is limited to Rs. 50,000/- only in terms of Section 95(2)(b)(i) of the Motor Vehicles Act, 1939.

12. Before dealing with the aforesaid issue raised by the appellant-insurance company regarding limited liability, it may be pointed out that the insurance company has not produced the policy of insurance under which the offending bus was insured either before this court or the learned Tribunal. On 2nd January 2020, such fact was brought to the notice of this court by the respondents-claimants insisting that unless and until the relevant insurance policy been produced the appellants' plea of limited liability to the extent of Rs. 50,000/- should not be acceded to. The appellant-insurance company on the said date submitted that the policy of insurance may not be available because of passage of time. Upon due consideration of the aforesaid facts, this Court observed in its order dated 2nd January, 2020 as hereunder:

“... Even if a comparable policy of the relevant time is produced and a senior official of the insurance company takes responsibility in saying that the policy in this case would have been similar to the policy issued in respect

⁵ **2004 ACJ 1176**

of third party insurance at the relevant point of time, the document may be looked into.”

In compliance to the aforesaid order passed by this court the Administrative Officer (Legal), Calcutta Regional Office-I of the insurance company filed supplementary affidavit annexing a copy of policy of insurance of another vehicle, which is similar to the insurance policy pertaining to the present case, issued in respect of a third party coverage at the relevant point of time. It is categorically stated by the Administrative Officer (Legal) in the supplementary affidavit that due to fire taking place in the year 2010 in the policy issuing office of the appellant-insurance company, the entire records of the Divisional Office prior to the year 2010 was destroyed in the said fire. Since this Court by dint of the aforesaid order after considering the rival contentions has already observed that a policy of insurance similar to the policy in this case issued in respect of third party insurance may be looked into, which has not been challenged before the higher court, hence there cannot be any quarrel regarding consideration of a similar policy of insurance issued with regard to third party insurance coverage at the relevant point of time. Upon perusal the copy of the policy of insurance **(Annexure B)** furnished along with the supplementary affidavit it is found that the premium towards ‘*liability to public risk*’ is Rs. 240/-. The policy of insurance of the offending bus **(Exhibit 2/1)** produced by the respondents-claimants also shows that the third-party premium paid is Rs. 240/-. Therefore, it is an admitted position that the premium paid towards ‘*liability to public risk*’ is Rs. 240/. The policy of insurance of the offending bus **(Exhibit 2/1)** does not reflect

payment of any additional or higher premium been made to cover unlimited or higher liability than the statutory liability fixed. The copy of the policy of insurance produced by the insurance company also shows that at the relevant time a premium of Rs. 240/- used to be paid for covering “*liability to public risk*”. There is precisely no materials to suggest that any additional or higher premium was paid for covering unlimited or higher liability than the statutory one fixed.

12.1. At this juncture, it is to be seen as to what would be the extent of liability of the insurance company when the premium paid towards “*liability to public risk*” is Rs. 240/-. In order to appreciate the aforesaid issue it would be apposite to reproduce Clause (b) of sub-section (2) of Section 95 of the Act of 1939 as it stood at the relevant time as hereunder:

“S. 95. Requirements of policies and limits of liability.

(1) x x x

(2) Subject to the proviso to sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely:—

(a) x x x

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,—

(i) in respect of persons other than passengers carried for hire or reward, limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passenger;

(c) x x x

(d) x x x ...”

On plain reading of the aforesaid Clause (b) which applies to the instant case it is apparent that the liability of appellant-insurance company could not be in excess of Rs. 50,000/- since admittedly the deceased victim falls within the category of “persons other than the passengers”.

Commercial vehicle tariff Clause B (1) (**Annexure C** of the supplementary affidavit) is reproduced hereunder for better appreciation:

**“4. CLASS B (1)-PASSENGER CARRYING VEHICLES
(EXCLUDING PASSENGER RISK)**

- (a) Buses (including Tourist Buses) whether used for hire or reward or otherwise.
- (b) Hotel/ School Omnibuses.
- (c) Airline Buses.

Maximum Passenger capacity standing wherever mentioned in the R.C. Book.	Licensed carrying including passengers wherever mentioned	Premium for		
		Own Damage Cover	Liability to the Public Risks	‘Act Only’
Not exceeding 18 Seats		Rs. 280 plus 1.10% on I.E.V.	Rs. 240/-	Rs. 200/-
Not exceeding 36 Seats		Rs. 360 plus 1.10% on I.E.V.	Rs. 240/-	Rs. 200/-
Not exceeding 60 Seats		Rs. 440 plus 1.10% on I.E.V.	Rs. 240/-	Rs. 200/-
Exceeding 60 Seats		Rs. 545 plus 1.10% on I.E.V.	Rs. 240/-	Rs. 200/-

Note 1. Minimum value of vehicles for premium computation will be as follows irrespective of any lower values declared for insurance :

Maximum Licensed Passenger Carrying Capacity :

<i>Not exceeding 18 Seats</i>	<i>: Rs. 15,000/-</i>
<i>Not exceeding 36 Seats</i>	<i>: Rs. 25,000/-</i>
<i>Not exceeding 60 Seats</i>	<i>: Rs. 40,000/-</i>
<i>Exceeding 60 Seats</i>	<i>: Rs. 50,000/-"</i>

The aforesaid tariff rates also show the premium for “*Liability to the public risks*” for Class (B)-(1)-PASSENGER CARRYING VEHICLES (EXCLUDING PASSENGER RISK) is Rs. 240/-. Therefore, bearing in mind the amount of premium paid and Clause (b)(i) of sub-section (2) of Section 95 it goes without saying that the liability of the appellant-insurance company is limited to Rs.50,000/- only.

12.2. In *C.M. Jaya (supra)* the 5-Judges Bench of the Hon’ble Supreme Court, holding that the liability of appellant insurance company is limited to Rs. 50,000/- in the circumstances where no additional or higher premium was paid to cover unlimited or higher liability than the statutory liability fixed, observed as follows.

“7. The liability could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, limited statutory liability could not be expanded to make it unlimited or

higher. If it is so done, it amounts to re-writing the statute or the contract of insurance which is not permissible.”

Bearing in mind the aforesaid proposition, since it is found that the premium paid towards “*liability to public risk*” is Rs. 240/- and there is no case made out and/or materials to suggest of payment of any additional or higher premium to cover unlimited or higher liability than the statutory liability fixed, hence the liability of the insurance company will be to the extent of Rs. 50,000/- as provided in the statute.

12.3. It is urged on behalf of the respondents-claimants relying on *Jugal Kishore (supra)*, *Satya Wati Pathak (supra)* and *Narendra Kumar (supra)* that it is the duty of the insurer to file a copy of the insurance policy and in the event it fails to do so, it has to satisfy the entire compensation amount.

In *Jugal Kishore (supra)* it was noted that the policy of insurance under which the offending vehicle was insured was not filed either before the Tribunal or before the High Court. A photostat copy of the policy of insurance was filed before the Hon’ble Supreme Court. The appeal of the insurance company was allowed holding its liability fixed at Rs. 20,000/- in terms of Clause (b) sub-section (2) of Section 95 since the details of the premium did not indicate of payment of additional premium. Though the Hon’ble Supreme Court taking into consideration the fact that in many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or copy thereof, it emphasized that in all such cases where the insurance company concerned wishes to take defence in

the claim petition that its liabilities is not in excess of the statutory liability it should file a copy of insurance policy along with its defence yet it never laid down any proposition that on failure to produce the policy of insurance it would make the insurance company liable to satisfy the entire compensation amount. For the aforesaid reasons, I most humbly differ from the decision of Delhi High Court in *Satya Wati Pathak (supra)* and the decision of Allahabad High Court in *Narendra Kumar (supra)* relied upon in this regard by the respondents-claimants.

12.4. Mr. Guha Roy, learned advocate for the respondents-claimants relying on the decision of Hon'ble Supreme Court in *Kiran Singh (supra)* tried to impress upon the Court that the insurance company since made a deliberate attempt to escape the liability by introducing a copy of the policy other than the one issued to the insured, hence such attitude of the insurance company should be deprecated and the appeal should be dismissed. In *Kiran Singh (supra)* it was urged on behalf of the insurance company that the original policy issued by the company had an endorsement affixed to it by which '*I.M.T. 13*' was incorporated as a term of the policy, and, therefore, the premium paid by the owner could fetch only to the tune of Rs. 30,000/- as compensation per passenger. The insurance company produced the true copy of the policy before the Tribunal however did not lead evidence to prove the copy of the policy. The copy of the insurance policy produced by the Bank manager at the instance of the owner did not have the endorsement '*I.M.T 13*'. The Tribunal as well as the High Court concurrently held, based on evidence, that the copy of the so-called policy produced by the insurance company cannot be treated as a

valid document in the absence of proof thereof. Such finding of both the courts was not interfered with by the Hon'ble Supreme Court. It was also noticed that the Schedule attached to the policy indicated excess payment of premium made to cover risk of 43 passengers. In such circumstances the Hon'ble Supreme Court observed that the company has made a deliberate attempt to escape the liability by introducing a copy of policy other than the one issued to the insured. From the facts of the aforesaid case, it manifest that the copy of policy of insurance produced by the insurance Company was pitted against the copy of the insurance policy produced and proved by the Bank Manager at the instance of the owner of the vehicle. The facts involved in the cited decision is quite distinguishable from the case at hand to the extent that there is no material to suggest that there was deliberate attempt of the part of the insurance company to escape liability by introducing a policy of insurance of another vehicle. Rather the policy of insurance of another vehicle of the similar nature has been furnished by way of supplementary affidavit in terms of order of this court. Therefore, the argument advanced on behalf of respondents-claimants for dismissal of the appeal on such ground falls short of merit.

12.5. Accordingly, following the observation of the Hon'ble Supreme Court in *C.M. Jaya (supra)* and *Jugal Kishore (supra)* and bearing in mind the provisions embodied under Clause (b)(i) of sub-section (2) of Section 95 of Act of 1939 the insurance company shall have limited liability to the extent of Rs. 50,000/-.

13. The respondents-claimants in the present appeal has filed a cross objection being **COT 34 of 2019** which is taken up for disposal.

13.1. Mr. Guha Roy, learned advocate for respondents-claimants submitted that the learned Tribunal erred in determining the income of the victim of Rs. 3,000/- per month whereas it ought to have determined the income at Rs. 5,000/- per month since the victim at the time of accident had passed chartered accountancy examination (Inter) and business management intermediate examination and was employed in different companies. He also submitted that the claimants are entitled to an amount equivalent to 40% of the annual income of the deceased towards future prospect and general damages of Rs. 70,000/-. In support of his contention, he relied on following decisions.

- i. ***Jitendra Khimshankar Trivedi and others versus Kasam Daud Kumbhar and others*⁶;**
- ii. ***Nagar Mal and others versus Oriental Insurance Co. Ltd. and others*⁷;**
- iii. ***Kisku Maino Murmu versus United India Insurance Co. Ltd. and another*⁸.**

The respondents-claimants lodged caveat being no. 2709 dated 25th July, 2017. The instant appeal was filed on 24th August, 2017. By order dated 16th November, 2017, the operation of the impugned order was stayed for a limited period. Upon mentioning by learned advocate for respondents-claimants (caveators) that without serving the copy of the stay application upon them, the appellant-insurance company moved the application for stay, the stay application was once again listed and was taken up on 9th

⁶ **2015 ACJ 708**

⁷ **2018 ACJ 971**

⁸ **2022 ACJ 1872**

January, 2018. On the said date the respondents-claimants were permitted to withdraw Rs. 2,00,000/-. Although the service of notice of appeal was dispensed with since the respondents-claimants were represented by their learned advocate yet from the aforesaid chronology of facts it is deemed that the respondents-claimants had notice/knowledge of the instant appeal on 9th January, 2018. Order 41 Rule 22 of the Civil Procedure Code provides as hereunder:

“[R 22] Upon hearing, respondent may object to decree as if he has preferred a separate appeal.-(1)

Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection to the decree which he could have taken by way of appeal provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

- (2) *x x x*
 (3) *x x x*
 (4) *x x x*
 (5) *x x x ”*

Bearing in mind the aforesaid provisions, the cross objection is to be filed by the respondents within one month from the date of service on him or his pleader of notice of the date fixed for hearing the appeal or within such further time as the appellate court may see fit to allow. The respondents-claimants being the caveators appeared before the court on 9th January, 2018 and hence by necessary implication they had deemed

notice/knowledge of the hearing of the appeal of the said date. There is no order passed in the appeal extending any further time to file such cross objection. The records reveal that the cross objection has been filed on 2nd April, 2019. The cross-objection should have been filed within 8th February, 2018. The report in respect of delay, if any, in filing cross-objection was kept pending subject to verification of the connected appeal. Be that as it may, there is delay of almost 416 days in filing the cross objection. The respondents-claimants have not filed any application seeking condonation of delay in filing the cross objection. Accordingly, the cross-objection filed by the respondents-claimants is liable to be dismissed being barred by limitation.

14. In light of the aforesaid discussion, the appeal is hereby allowed to the extent of limiting the liability of appellant-insurance company to Rs.50,000/- together with interest on such rate and from such date as granted by the learned Tribunal. It is made clear that the rest amount of compensation determined by the learned Tribunal together with interest shall be paid by respondent no.4-owner of the offending vehicle.

15. The cross objection being **COT 34 of 2019** stands dismissed being barred by limitation.

16. It is found that the insurance company in terms of order of this Court dated 16th November, 2017 has deposited a sum of Rs. 13,58,679/- vide OD challan no. 2240 dated 7th December, 2017 and statutory deposit of Rs. 25,000/- vide OD Challan no. 1466 dated 11th September, 2017 before the registry of this Court. Since it is informed that the respondents-claimants have not withdrawn the amount of Rs. 2,00,000/- in terms of

order of this Court dated 9th January, 2018, hence no order for return of the said amount is passed.

17. The learned Registrar General, High Court, Calcutta is directed to release the amount of Rs. 50,000/- together with interest in favour of the claimants in equal share upon satisfaction of their identity.

18. Upon satisfaction of the extent of limited liability of the insurance company as indicated in the foregoing paragraph, the remaining amount shall be refunded to the insurance company.

19. There shall be no order as to costs.

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

21. Interim order, if any, stands vacated.

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

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

(Bivas Pattanayak, J.)