

(1973) 02 OHC CK 0020

In the Orissa High Court

Case No : Misc. Appeals No's. 89 and 90 of 1968

B. Appa Rao

APPELLANT

Vs

Dunna Mukunda Rao and Another

RESPONDENT

Date of Decision : 23-02-1973

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A(1), 110A(2), 110D, 2(13), 2(14)

Citation : (1973) 39 CLT 488

Hon'ble Judges : S.K. Ray, J

Bench : Single Bench

Advocate : S.P. Raju and Y.S.N. Murty, for the Appellant; C.V. Murty and D.P. Mohanty, for the Respondent

Judgement

S.K. Ray, J.—These two appeals have been preferred u/s 110-D of the Motor Vehicles Act, 1939 (hereinafter referred to as "the Act") by the owner of the truck which caused the accident as a result of which Respondent No. 1 suffered physical injuries some of which were of permanent nature and his minor son, aged 3 years, was killed. M.A. No. 90/68 relates to the application for compensation numbered as M.J.C. No. 5/66, made by the Respondent No. 1, the injured, u/s 110-A(1)(b) of the Act as the legal representative of his deceased minor son, who died in the accident. M.A. No. 89 68 relates to the claim for compensation made in M.J.C. No. 666, by the same Respondent No. 1 u/s 110-A(1)(a) of the Act on account of injuries sustained by him in the accident. He claimed Rs. 40,000/- as compensation in M.J.C. No. 566, but was awarded only Rs. 2,000/-. He claimed compensation of Rs. 25,000 in M.J.C.C. No. 6 66, but has been awarded a sum of Rs. 5,680/-. The Claims Tribunal, in both these cases, has exonerated the insurer, Respondent No. 2 from all liabilities. Both the claim cases were disposed of by one order dated 11-5-1968 and therefore the two appeals being interconnected are heard together and will be governed by this common judgment.

2. The Appellant in both the appeals has raised a solitary point namely, that the

Claims Tribunal was in error in exonerating the insurer, Respondent No. 2, from liability which he had incurred by reason of certificate of insurance issued by him in favour of the Appellant by whom a policy of insurance in respect of the truck, involved with accident, has been affected in pursuance of the statutory provisions of the Act.

3. Before dealing with the sole point raised in these two appeals it is necessary to state the facts of the case in brief. On 21-6-1966 at about 7 a.m. Respondent No. 1 was proceeding to Jeypore on bicycle carrying his minor son, aged 3 years, in front, and truck No. O.R.K. 395 came in a high speed from the opposite direction and dashed against him. As a result of this accident, Respondent No. 1 was seriously injured and his minor son was killed instantaneously on the spot. The injured and his son were taken to the lady hospital. The boy was found to be dead. Respondent No. 1 was taken to the general hospital, Jeypore where some first aid was given to him and subsequently he was taken to the King George Hospital at Vizagpatanam where he remained as an in-patient from 21-6-1966 till 17-8-66. There is no dispute about the findings of the Claims Tribunal that due to the injuries suffered Respondent No. 1 is unable to open his mouth and thus, is unable to take solid food. This requires a special food to be prepared for him. He has lost the utility of the right hand little finger due to fracture. As earlier stated, he has got Rs. 2,000/- as compensation on account of death of his son and Rs. 5680/- for compensation for personal injuries suffered by him. Quantum of these compensations is not in controversy in these appeals.

The Appellant had effected a policy of insurance in respect of his truck O.R.K. 395 which is Ex. A-2. This policy had been issued by opposite party No. 2, the insurer, and premium has been paid till 22-7-1966, that is to say, liability in respect of the accident in question being a statutory liability u/s 95(1)(b) of the Act is covered by the said policy. Therefore, the insurer will be liable unless exempted either under any of the provisions of the Act or by reason of some special conditions in the policy.

4. The insurer, Respondent No. 2 has raised the following defenses:

(1) The driver of the truck O.R.K. 395, was not duly licensed to drive it because his licence entitled him to drive a light vehicle whereas the truck did not belong to that category of vehicle. The insurer, therefore, is not liable by reason of Section 96 (2)(b)(ii) of the Act.

(2) Since no claim has been lodged with the owner or insurer as required u/s 110-A(2) of the Act, the claim is not maintainable.

(3) In view of the finding of the Claims Tribunal that the driver was not in the employment of the owner, the insurer is exempted from the liability under the provisions of Clause 1(b) of the General Exceptions of the Insurance Policy.

5. It has been authoritatively decided by the Supreme Court in the case of British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, , that an

insurer cannot adopt any defence other than those contained in Sub-sections (2) and (6) of Section 96 of the Act. This is what their Lordships have said:

Apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. Sub-section (2) clearly provides that an insurer made a Defendant to the action is not entitled to take any defence which is not specified in it. When the grounds of defence have been specified, they cannot be added to. The only manner of avoiding liability provided for in Sub-section (2) is through the defences therein mentioned. Therefore when Sub-section (6) talks of avoiding liability in the manner provided in Sub-section (2), it necessarily refers to these defences. It cannot be said that in enacting Sub-section (2) the legislature was contemplating only those defences which were based on the conditions of the policy.

6. In view of this decision of the Supreme Court, the only defences which are admissible are only those which are covered by Section 96(2) of the Act. It appears to me that only defence No. (1) enumerated in para 4 above is the only possible defence available to the insurer to avoid liability, though none of those three defences was adopted in the counter filed by the insurer. Thus, defence Nos. (2) and (3) cannot be considered. Further, so far as defence No. (3) is concerned, there is no breach of the condition 1(b) of General Exceptions of the policy, because the truck was being driven by a driver holding a licence and trained for the purpose. Even though he may not be in the general employment of the owner he must be taken to have been engaged to drive the truck for that particular occasion. Further, the finding of the Claims Tribunal that the driver was not in the employment of the owner is not sustainable on the evidence on record. That now leaves defence No. (1) for consideration.

7. The evidence discloses that the insurance policy was in force on the date of accident. The insurance policy has complied with the requirements of Chapter VIII of the Act, and, therefore, the insurer will be liable to the maximum limit statutorily fixed in Section 95(2) of the Act, unless defence No. (1) is made out, because Section 96 of the Act provides that it is the duty of insurer to satisfy judgments against a person insured in respect of third party risks as if he were the judgment debtor in respect of the liability. The defence No. (1) raised for the first time in this Court appears to be covered by Sub-section (2) of Section 96 which provides conditions under which the insurer will be exempted from liability. Sub-section (2) read as follows:

(2) x x x x

(b) x x x x

(ii) a condition excluding driving by a named person or person or by any person who is not duly licensed, or by any person who has been disqualified for holding

or obtaining a driving licence during the period of disqualifications.

x x x

The question for determination, therefore, is whether the driver of the truck at the time of the accident is a person who has not been duly licensed to drive the vehicle. The contention by the learned Counsel for the insurer is that the licence of the driver shows that he was entitled to drive a light vehicle, and the truck which caused accident being a medium vehicle, the driver who drove it must be deemed to be a person, who was not duly licensed to drive that motor vehicle. Reliance is placed on the evidence of police officer, p.w. 4 to prove that the truck was a medium mortar vehicle. He has deposed as follows:

I examined the licence No. 1269 BTR of 1964 later on and found that the driver was authorised to drive light vehicles only and it was valid up to 11-5-1967. The vehicle was medium vehicle. The driver was not authorised to drive that vehicle...

I did not seize the licence of the deceased driver. I saw his licence on the very day I examined him."

Medium motor vehicle, heavy motor vehicle and light motor vehicle have been defined in the Act. Section 2(14) defines "medium motor vehicles as any motor vehicle other than a motor cycle, "invalid carriage, light motor vehicle, heavy motor vehicle or road roller. Section 2(9) defines "heavy motor vehicle" as a transport vehicle or omnibus the registration laden weight of which or a motor car or tractor the unladen weight of which exceeds 11, 000 kilograms. Section 2(13) defines "light-motor vehicle" as a transport vehicle or omnibus the registered laden weight or motor car or tractor, unladen weight of which does not exceed 4000 kilograms. The licence of the driver is not an exhibit in this case and if the evidence of the police officer is to be believed, then the driver is entitled to drive a transport vehicle or omnibus the registered laden weight of which does not exceed 4000 kilograms. The truck in question is obviously a transport vehicle and the driver was entitled to drive that truck unless its registered laden weight exceeds 4000 kilograms. There is no evidence in this case that the registered laden weight of the truck ORK 395 exceeded 4000 kilograms. Therefore, there is no evidence that the truck in question was not a light motor vehicle. The onus is on the insurer to establish his immunity from liability under the particular ground set forth in Section 96(2)(b)(ii) of the Act. He having failed to do so, he cannot escape the liability and is bound to satisfy the judgment against the Appellant who is the insured. It has not been shown that the amount of liability determined against the insured exceeds the sum assured payable under the policy effected by insured in respect of the truck or the limits of liability of the insurer as provided in Section 95. The insurer, therefore, must pay to the Respondent No. 1 in both the appeals, namely M.A. Nos. 89 and 90 of 1968, who is the person entitled to the benefit of the awards, the entire amounts of compensation plus the consolidate sum of Rs. 50/- awarded.

8. In the result, therefore, both the appeals are allowed and it is ordered that the

insurance company, namely Respondent No. 2 shall pay Rs. 5680/- to Respondent No. 1 in M.A. No. 89, 68 and Rs. 2000/- to Respondent No. 1 in M.A. No. 90, 68 with consolidated costs of Rs. 50/-. The Appellant in each appeal is thus exonerated from any liability to pay the compensation awarded. The same having been statutorily fastened on the insurer, Respondent No. 2.

Both appeals are allowed with costs.