
(1987) 08 OHC CK 0036
In the Orissa High Court
Case No : Misc. Appeal No. 299 of 1984

Braja Kishore Mohanty

APPELLANT

Vs

M.C. Shyamasundar and Another

RESPONDENT

Date of Decision : 31-08-1987

Acts Referred:

Motor Vehicles Act, 1939 — Section 110D

Citation : (1988) 1 ACC 46 : (1989) ACJ 450 : AIR 1988 Ori 237

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : M.M. Das and N.N. Misra, for the Appellant; Ajaya Kumar Mohanty, (for No. 2), R. Mohanty and J. Mohanty, (for No. 1), for the Respondent

Judgement

S.C. Mohapatra, J.—Claimant is the appellant in this appeal u/s 110-D of the Motor Vehicles Act, 1939 (in short "the Act").

2. Admittedly, on 23rd December, 1978, in the night at about 9 p.m. the truck bearing registration No. MEM 9020 was coming on the National Highway No. 5 towards Cuttack. Between Chandikhole Chhak and Badachana it faced with an accident and the claimant sustained injuries.

3. Case of the claimant is that he was a pedestrian along with P. W. 6. The truck hit him from behind and thereafter it dashed against a culvert and was capsized. As a result of the accident, he sustained injuries and became unconscious. Ultimately, he lost his right hand on account of amputation. He claimed compensation of Rs. 1,20,000/-.

4. Despite notice, owner of the vehicle did not appear before the Tribunal. Accordingly, insurer was allowed to contest on merits also. It is the case of the insurer that the claimant was a gratuitous passenger in the truck and accordingly, under the terms of the policy, the insurer would not be liable.

5. The claim case was heard along with the claim case of the dependents of a deceased in the same accident. One set of evidence was recorded. Claimant-

appellant examined himself as P. W. 5 and another witness who is alleged to be his companion as P. W. 6. Insurer has examined one witness who lodged First Information Report in Badachana Police Station. Insurer has also proved in the insurance policy, the final report by the police and the First Information Report which have been marked as exhibits.

6. On consideration of the materials on record, the Tribunal has accepted that the accident was on account of the negligent driving of the vehicle. It, however, came to the conclusion that the claimant was one of the gratuitous passengers. Determining the just compensation to be Rs. 50,000/-, the Tribunal directed the owner to pay the same. The insurer was held not to be liable. Hence this appeal has been filed by the claimant.

7. Mr. M. M. Das, the learned counsel for the appellant, submitted that :

(i) on the materials the Tribunal sought to have held that the claimant-appellant was a pedestrian and not a gratuitous passenger in the truck;

(ii) the insurer sought to have been directed to pay the amount of compensation to the injured; and

(iii) the quantum of compensation ought to have been enhanced.

8. Mr. A. K. Mohanty, the learned counsel for the insurer-respondent No. 2, submitted that in this appeal by the claimant the insurer cannot be made liable since the claimant is not aggrieved by the order directing the owner to pay the compensation and the materials on record justify the finding that the claimant was travelling in the truck at the time of accident and the quantum of compensation fixed is justified.

9. u/s 110-B of the Act, the Tribunal is to specify the amount which is to be paid by the driver, owner or the insurer as the case may be. Where the Tribunal does not specify such amount to be paid by the insurer, even on the finding relating to its liability, the claimant can always make a grievance of the same. Mr. Mohanty relied upon a decision of Calcutta High Court reported in Kantilal and Bros. and Another Vs. Ramarani Debi and Others, where it was observed that the liability of the insurer having been fixed, appeal at the instance of the owner is not maintainable. It was also observed that the insurer cannot challenge the quantum of compensation fixed by the Tribunal since it does not come within the scope of Section 96(3) of the Act. On the facts of this case the said decision is not applicable. However, with respect to the Hon'ble Judges, I am not able to accept the said view. In case such view is taken, the quantum fixed by the Tribunal though unreasonable and arbitrary would become final. The appeal which is wide in scope would become limited in its scope which is not the intention of the Parliament.

10. The Tribunal would be justified in its finding that the insurer is not liable if its finding is that the appellant was a gratuitous passenger. Mr. Das, therefore, challenged the finding. The persons competent to speak in this regard would be

the driver of the vehicle, persons who have seen the appellant getting into the truck, persons who were accompanying the appellant on the truck, persons who have removed the appellant to the hospital immediately after the accident or who have seen the appellant being removed.

In this regard, P.W. 5 the appellant has examined himself and examined P.W. 6 to prove that he was a pedestrian who was hit by the truck. Insurer has examined O.P.W. 1 who lodged the first information report. The first information report and the final report have been proved to support the claim that the appellant was a passenger of the truck.

There is no evidence to give a finding where the appellant boarded the truck. It is not the case of the insurer that it made endeavour to find out the persons but failed. The names and addresses of the admitted travellers in the truck could have been ascertained by the insurer from the Badachana Primary Health Centre where the injured were treated, O.P.W. 1 who claims in the first information report to be coming to worship the deity found the truck facing the accident. In his deposition, he stated to be taking tea at a stall when the accident occurred. The tea-stall owner has not been examined to corroborate this version. Mr. Das submitted that the insurer could have examined the injured occupants of the vehicle to prove its case that the claimant was an occupant on the vehicle. When the officer who has submitted the final report has not been examined in this case such reliance should not have been placed on such a document since there were better evidence which have been withheld from the Tribunal. Relying upon the evidence of O. P. W. 1, Mr. Das submitted that the driver of the vehicle is a man of Andhra and there is no evidence that such driver has succumbed to the injuries on the accident. It is true that the husband of the claimant in the other case was a driver. But there is no evidence of the driver at the time of accident. Rather O. P. W. 1 has stated that he was not the driver of the vehicle though he was travelling. Mr. A. K. Mohanty, the learned counsel for the insurer-respondent No. 2 on the other hand submitted that the predicament of the insurer should be envisaged The owner has remained ex parte. The insurer is supplied with the police papers only. From the police papers, the name of the informant would be found and he has been examined. In such circumstances, no duty is cast on the insurer to the injured person.

I am inclined to agree with the submission of Mr. Das that on the facts and in the circumstances of the case, the insurer with slight endeavour could have found out the names of the injured from the Badachana P.H.C. to which hospital they were removed One of such injured at least could have been examined to prove the assertion of the insurer that the claimant was an occupant in the vehicle. In the circumstances, uncorroborated testimony of O. P. W. 1 should not have been the basis for the finding.

11. When a truck carries passengers, Rule 95 of the Orissa Motor Vehicles Rules is violated It becomes an offence u/s 112 of the Act. On the sole testimony of O.P.W. 1 and the statement in the first information report, it would not be

appropriate to come to the conclusion that a crime as committed On the other hand the evidence of P.W. 6 who claims to be accompanying the claimant is acceptable in this case. Mr. Mohanty, the learned counsel for the insurer submitted that the inconsistency in the evidence of P.W. 5 and that of the P.W. 6 should be taken note which had been given weight by the Tribunal. P.W. 6 stated that not finding a bus they were coming from Chandikhol by walk P.W. 5, the claimant stated that he had some personal work at Badachana He was commuting the distance by feet with P.W. 6 I am not able to find any inconsistency therein. Rather one statement supplements the other. On reading both the statements, it can be said that P.W. 5 had some personal work at Badachana and as they did not find a bus at Chandikhol which is at a short distance from Badachana, the appellant and P.W. 6 were walking the distance. On the way this unfortunate accident happened.

12. Thus, disagreeing with the finding of the Tribunal, I am inclined to hold that P.W. 5, the claimant was a pedestrian who was hit by the truck and he sustained injuries to lose his right hand ultimately by amputation. Thus, the finding of the Tribunal that the claimant is entitled to the compensation is upheld since from the nature of the accident negligent driving can be inferred. There being no dispute that the insurer would be liable to pay the compensation if the appellant was a pedestrian, I direct the insurer to pay the same.

13. Mr. Das submitted that the claimant should have been paid more than the amount awarded. I am not able to get any acceptable material to enhance the compensation in this appeal. Mr. Das submitted that the appellant was a Manager and lost the job on account of the accident. As is clear from the evidence of P.W. 1, the claimant left his job on his own. The nature of the job performed by the claimant and the inability to perform the same on account of the accident have not been proved for claiming higher compensation. Accordingly, there is no scope to enhance the amount.

14. In conclusion, no appeal having been filed against the finding of the negligent driving of the vehicle causing the accident, the same is confirmed. In this respect, the principle of *res ipsa loquitur* is also attracted In the absence of examination of any of the injured persons who were admittedly occupants of the truck the evidence of O.P.W. 1, is not sufficient to dislodge the evidence of claimant as O.P. 5 and his companion as P.W, 6 that P. W. 5 was a pedestrian when he was injured on account of the accident by the truck. The compensation determined at Rs. 50,000/- is just compensation.

15. In the result, the appeal is allowed in part to the extent that the insurer is made liable to pay the compensation of Rs. 50,000/-Now comes the question of interest. The insurer not being made liable before the Tribunal, interest of justice would be best served in case payment of interest " 6% from the date of application till the payment, if made within two months from today is directed. On failure to pay the amount with interest within the time stipulated, the amount of Rs. 50,000/- awarded shall carry interest " 10% per annum from the date of

application till the date of payment or realisation thereof. There shall be no order as to costs.