
(2010) 05 SIK CK 0002
In the Sikkim High Court
Case No : M.A.C. App. No. 1 of 2010

Branch Manager, New India Assurance Co. Ltd.

APPELLANT

Vs

Smt. Kusha Rai and Others

RESPONDENT

Date of Decision : 17-05-2010

Acts Referred:

Citation : (2011) ACJ 2275 : (2011) 1 TAC 263

Hon'ble Judges : Sonam Phintso Wangdi, Acting C.J.

Bench : Single Bench

Final Decision : Dismissed

Judgement

S.P. Wangdi, A.C.J.

1. By this appeal filed u/s 173 of the Motor Vehicles Act, 1988, the Appellant seeks to challenge the judgment dated 14th October, 2009 in Motor Accident Claims Tribunal Case No. 5 of 2006 by which death compensation of Rs. 8,89,500 was awarded in favour of the claimants who are the Respondents Nos. 1 and 2 in the present appeal the liability of which was fixed against the Appellant. The Respondent/claimant No. 1 is the wife and the Respondent/claimant No. 2 is the minor child of the deceased.

2. The facts of the case relevant for the purpose of disposal of this appeal are that on 26th June, 2003 the deceased Kul Bahadur Rai, who was a Class I Government Contractor, while proceeding to Niya Brum, South Sikkim from Lower Rangang by his own vehicle, a Tata truck bearing registration No. SK-03/2127, died on the spot when the truck met with an accident on reaching Robin Bhir near Niya Brum, South Sikkim at about 11.00 a.m. As per the claimants, the deceased at the time of his death, was 52 years old and used to earn an income of Rs. 10,000/- per month. The accident vehicle was insured with the O.P. No. 1, New India Assurance Company Limited. Gangtok, under cover note No. KOL/2002/022173. On the day of the accident it was being driven by O.P. No. 2, Shri Jit Bahadur Biswakarma @ Jiten Kalikotey. On being informed,

the police from the Rabongla Police Station registered Rabongla P.S. Case No. 1 (2) 2003 dated 26th February, 2003 under Sections 279/337/304A, I.P.C. against the driver of the vehicle. In the above circumstances, the claimants approached the Motor Accident Claims Tribunal with an application u/s 166 of the Motor Vehicles Act, 1988 praying for award of compensation of Rs. 9,99,500 against the Insurance Company who is the Appellant herein and the driver of the ill-fated truck arrayed as the Respondent No. 3 in the memo of appeal. The claim petition had been contested by the Appellant before the Claims Tribunal on ground which were of formal nature not be necessary to be elucidated as for the purpose of this appeal will appear hereafter. Written objection to the claim petition was filed by the O.P. No. 2 but need not be dealt with as being immaterial for the purpose of adjudication of the present appeal. The Motor Accident Claims Tribunal framed the following issues on the basis of the pleadings of the parties:

- I. Whether the deceased was a Government Contractor carrying construction work at the relevant time at Yangang, South Sikkim?
- II. Whether the vehicles involved in the accident was a goods vehicle owned by the deceased.
- III. Whether the deceased was travelling in the said vehicle carrying stones from the quarry to the site of construction.
- IV. Whether the vehicle was insured with the O.P. No. 1 ?
- V. Whether the claimants have locus standi to file the instant claim petition?
- VI. Whether the O.P. No. 2 had a valid licence to drive the vehicle involved in the accident? Whether he was driving the vehicle at the time of accident.
- VII. Whether the O.P. No. 1 was liable to pay the compensation?

3. Of the above, issues No. 2 and 3 are material as being relevant for the purpose of disposal of this appeal, since before this Court the only ground raised for assailing the award holding the Appellant liable for payment of the compensation is that, as the deceased was the owner of the Tata Truck which met with an accident causing his death, he was not covered under the Insurance Policy. The Motor Accidents Claims Tribunal after considering the evidence on record decided the issues in favour of the claimants/Respondent Nos. 1 and 2, having found that the truck involved in the accident was a goods vehicle owned by the deceased, and that the deceased at the relevant time was travelling in the said vehicle carrying stones from the quarry to his work site.

4. Mr. Sudesh Joshi, learned Counsel appearing on behalf of the Appellant, in support of the appeal drew attention of this Court to Section 156 of the Motor Vehicles Act, 1988 which is reproduced below for convenience:

156. Effect of certificate of insurance.--When an insurer has issued a certificate of insurance in respect of a contract of insurance between the insurer and the insured person, then--

(a) If and so long as the policy described in the certificate has not been issued by the insurer to the insured, the insurer shall, as between himself and any other person except the insured, be deemed to have issued to the insured person a policy of insurance conforming in all respects with the description and particulars stated in such certificate; and

(b) if the insurer has issued to the insured the policy described in the certificate, but the actual terms of the policy are less favourable to persons claiming under or by virtue of the policy against the insurer either directly or through the insured than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and any other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the said certificate.

5. It was submitted that the words " except the insured" appearing in both Clauses (a) and (b) of Section 156 most categorically establishes that insurance policies required u/s 147 of the Motor Vehicles Act, 1988 do not cover the owners of the vehicles. As per Mr. Joshi, the insurance policy in question being a "statutory" or an "Act" policy, covered only risk to third parties.

6. It is further the contention of Mr. Joshi that even on a plain reading of Section 165 of the Motor Vehicles Act, 1988, also such policies would cover the risks to third parties only. Mr. Joshi laid emphasis on the following words appearing in Sub-section (1) of Section 165:

165. Claims Tribunals.--(1) A State Government may, by notification in the Official Gazette, constitute one or more Motor Accidents Claims Tribunals (hereinafter in this Chapter referred to as Claims Tribunal) for such area as may be specified in the notification for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both.

[Emphasis supplied]

7. Notwithstanding the above position, it was submitted that it was open for the insured to enter into an agreement with the insurer to cover other risks by payment of additional premium. As per Mr. Joshi, in the present case, the deceased had not entered into any such agreement, and, therefore, he would not be covered under the insurance policy. The learned Counsel referred to the following decisions in support of his submissions:

1. Samundra Devi and Others Vs. Narendra Kaur and Others, .

15. A contract of insurance as is well known is a contract of indemnity. In a case of accident, the primary liability under law for payment of compensation is that of the driver. The owner of the vehicle also becomes vicariously liable therefore. In a case involving a third party to the contract of insurance in terms of Section 147 of the Motor Vehicles Act, 1988 providing for a compulsory insurance, the

insurer becomes statutorily liable to indemnify the owner. Indisputedly, the Insurance Company would be liable to indemnify the insured in respect of loss suffered by a third party or in respect of damages of property. In a case, therefore, where the liability is fastened upon the insurer, the insurer could be bound to indemnify the insured unless the exceptions contained in Section 149 of the Act are attracted.

2. Dhanraj Vs. New India Assurance Co. Ltd. and Another, .

8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

9. In the case of Oriental Insurance Co. Ltd. v. Sunita Rathi, it has been held that the liability of an Insurance Company is only for the purpose of indemnifying the insured against liabilities incurred towards a third person or in respect of damages to property. Thus, where the insured i.e., an owner of the vehicle has no liability to a third party the Insurance Company has no liability also.

8. Mr. Ajay Rathi, learned Counsel appearing on behalf of the Respondents No. 1 and 2, on the other hand, submitted that on the day when the accident took place, the deceased was travelling as a passenger on the ill-fated truck on which the stones owned by him were being transported from his quarry to the work site where he was executing a contract work when the truck met with an accident causing his untimely death. Mr. Rathi referred to the evidence on record and drew attention to this Court to the following portion of the deposition of claimant No. 1 who deposed as P.W.1:

6. That my deceased husband was a Class I "A" Govt. Contractor by profession. During the relevant time the deceased was engaged in the construction of the road from Lower Ranging to Niya Brum, Yangang, South Sikkim. At the time of the accident the deceased was carrying stones/ boulders in the said truck from his quarry to the work-site driven by his driver i.e. the Opp. Party No. 2. Ext. 7 is Enlistment Certificate of my deceased husband issued by the PWD, Govt. of Sikkim indicating his grade in Class I "A" Govt. Contractor.

In cross-examination,

It is true that my deceased husband was the registered owner of Tata Truck bearing No. SK-03/2127. It is not a fact that at the time of the accident my deceased husband was not using the said vehicle to carry stones to his work site....

9. Reference also was made to the evidence on affidavit in chief and the cross-examination of the P.W. 2, portions of which are as follows:

7. That at the time of the accident the deceased was carrying stones in his Tata truck bearing registration No. SK-03/2127 from his quarry to the work-site driven by his driver, i.e. the Opp. Party No. 2. I also know the Opp. Party No. 2 personally being a fellow colleague. That Tata truck bearing registration No. SK-03/2127 was registered in the name of the deceased.

In cross-examination,

...it is not a fact that the deceased was not engaged in the said work. It is not a fact that the deceased was not carrying stones to the work site in the said vehicle on the relevant day....

10. Based on the above, the learned Counsel submitted that it was fully established that the deceased was carrying stones/boulders owned by him on the truck from the quarry to his work site and, therefore, the deceased fell within the meaning of "third-party" as contemplated under the relevant provisions of the Motor Vehicles Act, 1988 and, accordingly, covered under the insurance policy in question. Mr. Rathi placed reliance in the case of National Insurance Co. Ltd. v. Kishore Kumar Lalwani 2007 (1) TAC 418 (M.P.), paragraphs 10 and 11 of which are reproduced below:

10. In the present case, undisputedly the Respondent No. 1 was owner of his own Bus but the same was booked for a marriage party in which the Respondent was one of the members. The words "Public Place: and "Public Service Vehicle" are defined under Sections 2(34) and 2(35) of the Act respectively, which reads as under:

Section 2(34): Public Place means a road, street, way or other place, whether a thoroughfare or not, to which the public have a right of access, and includes any place or stands at which passengers, are picked up or set down by a stage carriage.

Section 2(35): Public Service Vehicle means any motor vehicle used or adapted to be used for the carriage of passengers for hire or reward, and includes a maxicab, a motorcab, contract carriage and stage carriage.

11. Undisputedly the accident occurred at a public place by a public service vehicle. It is also proved by the evidence on record that Respondent No. 1 was travelling in the offending vehicle as a passenger being a member of the marriage party and not as a owner to supervise and control the bus. Since, the Respondent No. 1 was a passenger in a public service vehicle, may be owned by him, which met with an accident at public place, therefore, the Respondent No. 1 ought to have been treated as third party as laid down by Division Bench of this Court in the case of Oriental Insurance Company (supra) and his claim petition cannot be dismissed only on the ground that Respondent No. 1 was the owner of the vehicle.

[Emphasis supplied]

11. It was further submitted that the assertion on the part of the Insurance Company, the Appellant, that the insurance policy with regard to the truck was a "statutory" or an "Act" policy was incorrect in view of the fact that a high premium of Rs. 3,497/- had been said. As per Mr. Rathi, on a plain reading of the insurance cover note, it is not clear as to whether the policy was an "Act" policy or a policy covering other risks including the owner of the vehicle. The relevant portion of the cover note of the policy which was filed as Ext. 3 by the claimants/ Respondents was referred to specifically and would be useful to reproduce, which reads as under:

The insured described in Form "52" referred to below; having proposed for insurance in respect of Motor Vehicle(s) described therein and having paid the sum of Rs. 3,497/- as premium, the risk is hereby held covered under the terms of the Company's usual form of.... Policy applicable thereto (subject to any Special Condition mentioned below) unless the cover be terminated by the company by notice in writing in which case the insurance will thereupon cease and a proportionate part of the premium otherwise payable for such insurance shall be charged for the time the company had been at risk.

12. It was pointed out from the above that the nature of the policy having been left blank in the cover note, it could not be stated categorically that the policy was an "Act" policy only. In view of the above position, the learned Counsel submitted that the Appellant had failed to establish that the insurance policy was an "Act" policy and, therefore, the appeal deserved to be dismissed.

13. I have given thoughtful and anxious consideration to the rival contentions made by the parties, the entire records of the case and the evidence on the record, and I am of the view that the appeal cannot be sustained for the reasons stated hereafter. The fact that the deceased was the owner of the Tata truck bearing registration No. SK-03/2127 that met with the accident is an admitted position. The only question that arises for consideration is as to whether, in the circumstances of the case, the deceased was travelling in the vehicle as the owner or a passenger at the time of the accident. The evidence that have come on record, relevant portions of which have been reproduced above, clearly show that he was not travelling as the owner, but as a passenger who was the owner of the goods being transported in the truck. This Court finds support in it holding thus from the decision of the Madhya Pradesh High Court in the case of National Insurance Co. Ltd. v. Kishore Kumar Lalwani (supra), as the facts in that case is *pari materia* to the ones in the present appeal. The decisions cited at the bar by the learned Counsel on behalf of the Appellants lay down well-established principles of law. However, they are clearly inapplicable in the facts and circumstances of the present case.

14. Another aspect of the case when considered also leads this Court to draw the conclusion that the Appellant has not been able to discharge the burden of proof that the insurance policy was indeed an "Act" policy, and, therefore, was restricted to the statutory liability which is prescribed under the Act. It was

incumbent upon the Appellant Insurance Company to have produced a copy of the policy which if done would have certainly shed some light on this aspect. But they did not do so. It was rather left to the claimants to file the insurance cover note, Ext. 3, the authenticity of which has not been denied by the Appellant. The Branch Manager of the Appellant Insurance Company in fact categorically admitted its authenticity when he stated in his deposition as follows:

It is true that Ext. 3 is the original cover note issued by the New India Assurance Co. Ltd., M.G. Marg, Gangtok.

15. In the case of National Insurance Co. Ltd., New Delhi v. Jugal Kishore and Ors. 1988 (1) TAC 418. The Hon"ble Supreme Court in paragraph 10 has held as follows:

10. Before parting with the case, we consider it necessary to refer to the attitude often adopted by the Insurance Companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal.... This Court has consistently emphasised that 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. This duty is greater in the case of instrumentalities of the State such as the Appellant who are under an obligation to act fairly.... We accordingly wish to emphasis that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy alongwith its defence.... Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the Court in doing justice between the parties....

(Emphasis supplied)

16. The Appellant obviously has failed to discharge its responsibility in producing the best evidence i.e., the Insurance Policy, for which an adverse inference may be drawn against it. In the vague premises with regard to the nature of the policy, no conclusion could be arrived at as to whether the policy is an "Act" policy or otherwise. Considering the benevolent nature of the legislation, this Court deems it necessary to conclude that the policy is not an "Act" policy but one which is more comprehensive.

17. In the result, the appeal stands dismissed. It is directed that the compensation awarded by the Claims Tribunal be paid to the claimants/ Respondents on or before the expiry of 30 days of this order. While doing so, the award may be divided into two equal parts and the one falling in the share of the Respondent No. 2 who is a minor, may be deposited in a fixed deposit for five years in a Nationalised Bank and the other half be paid to the Respondent No. 2. Compliance report in this regard may be submitted to this Court within the period stipulated.