
(1995) 05 OHC CK 0009
In the Orissa High Court
Case No : M.A. No. 344 of 1992

Divisional Manager, National Insurance Co. Ltd.	APPELLANT
Vs	
Jayashree Rath and Others	RESPONDENT

Date of Decision : 01-05-1995

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 279, 304A

Citation : (1996) ACJ 472

Hon'ble Judges : R.K. Patra, J

Bench : Single Bench

Advocate : P. Roy, L. Dash and S. Roy, for the Appellant; B.M. Patnaik, P.K. Choudhury and S. Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Patra, J.—This appeal on behalf of National Insurance Co. Ltd. is directed against the judgment and order of the Third Motor Accidents Claims Tribunal, Puri, by which it has granted a sum of Rs. 7,20,000/- as compensation in favour of respondent Nos. 1 to 5 who are the legal representatives (widow, son, daughter and parents) of Sanjay Kumar Rath who died in the automobile accident.

2. The case of respondent Nos. 1 to 5 is that Sanjay Kumar Rath was a Mechanical Engineer and was working as Surveyor and Loss Assessor of general insurance companies at the material time. On 27.5.1987, respondent No. 6, P.V.L.N. Swamy, Branch Manager of the Oriental Insurance Co. Ltd., Cuttack (hereinafter referred to as "Swamy") and A.K. Behera, Development Officer of the Oriental Insurance Co. Ltd., Cuttack, came from Cuttack in the Premier Padmini car No. OAC 5166 belonging to Swamy to the residence of deceased Sanjay at Bhubanes-war and requested him to accompany them to Puri. On being so requested, Sanjay proceeded with them in the said car to Puri. In the same night while these three persons were returning from Puri at about 1 a.m.,

the car dashed against a concrete pillar standing at the extreme right side of the road. The said accident took place near Talapatna, a place little ahead of Sakhi-gopal on State Highway No. 8 (Puri-Bhubaneswar Road). The dashing of the car against the concrete pillar was so violent that the car went 30 to 40 feet away from the road and fell in a ditch. At that time Swamy was driving the car and Sanjay was sitting in the front seat of the car on the left side. As a result of the severe impact of the offending car with the concrete pillar, the front door opened automatically and Sanjay fell down from the car. The rear wheel of the car ran over the chest and head of Sanjay, who succumbed to the injuries while he was being taken to Capital Hospital, Bhubaneswar. The allegation of respondent Nos. 1 to 5 is that the accident took place due to the rash and negligent driving of the car by Swamy. On the basis of the above allegation, petition for compensation of Rs. 19,26,000/- was filed on behalf of respondent Nos. 1 to 5. According to them, the deceased was aged about 35 years at the time of accident and his average monthly income was more than Rs. 14,000/-. He was contributing Rs. 8,000/- towards his family. He would have lived up to 70 years of age and contributed towards the family a substantial amount for another 35 years.

3. The appellant filed written statement challenging the claim of compensation. While denying knowledge about the age, income and accident, it was asserted in the written statement that the appellant issued a policy in the name of Swamy which was valid from 11.2.1987 to 10.2.1988. It was further stated in the written statement that deceased Sanjay was a passenger in the car which was a private one and the insurer has no liability to pay any compensation inasmuch as the policyholder had not taken any advantage by paying additional premium to cover additional liability for unnamed passenger. The deceased was a gratuitous passenger and, as such, the insurer has no legal liability to pay any compensation. Swamy was opposite party No. 1 before the Claims Tribunal but he did not file any written statement. He, however, examined himself as OPW 2 and denied the allegations made in the claim petition. According to him, the deceased Sanjay was driving the car at the time of accident which occurred due to his rash and negligent driving.

4. The Motor Accidents Claims Tribunal held that it was Swamy who was driving the car at the time of accident. Sanjay died not due to his own negligence but on account of the injuries sustained by him in the accident caused by Swamy's rash and negligent driving of the car. The Tribunal rejected the plea of the appellant that the deceased being a gratuitous passenger in the offending car, the insurer has no liability to pay any compensation. Regarding quantum of compensation, the Tribunal held that the annual contribution of the deceased towards his family was Rs. 36,000/- and by applying the multiplier of 20, it assessed the compensation at Rs. 7,20,000/-.

5. Before examining the merits of this appeal, it is relevant to note about the first information report lodged in respect of the accident and the follow-up action taken by the police. One Jagannath Mallik, Gramarakhi, filed the F.I.R. at

Satyabadi Police Station on 28.5.1987 at 5 a.m. stating therein that while he was returning to the police station at about 4 a.m. being accompanied by another Gramarakhi he noticed one car bearing registration No. OAC 5166 lying on the eastern side of the road near the Honey Browing Centre, Sakhigopal. The car was in a ditch being damaged after it having dashed against the concrete pillar and there was no occupant in the car. On the basis of the said F.I.R., police took up investigation. In the course of investigation, police examined one Dharendra Naik and Prabhakar Naik who in their statements recorded u/s 161, Criminal Procedure Code, stated that they were working as driver and conductor in a passenger bus No. OAU 45 and in the night of occurrence they left Puri at about 12.30 midnight. After they crossed Sakhigopal, a tall man with black complexion standing on the way gave signal to stop the vehicle. The vehicle was stopped and they noticed that a car had fallen in a ditch and the black complexioned person and another brought out one "injured" from the car and made him sit on the conductor's seat of the bus. Thereafter, the bus proceeded to Bhubaneswar. Their statements indicate that the injured (obviously Sanjay) was not dead at that time. Police after completion of investigation has filed charge-sheet against Swamy under Sections 279/304A, Indian Penal Code and Sections 113-B and 118-A of the Motor Vehicles Act.

6. The crucial question that arises for consideration is as to who was driving the offending car at the time of accident. The claimants assert that it was Swamy who was driving the car whereas Swamy as OPW 2 alleged that it was Sanjay who was driving the car. In support of their case, the claimants examined PWs 2 and 3 as eyewitnesses to the occurrence. To prove the case that it was Sanjay who was driving the car at the time of accident, Swamy examined himself as OPW 2. A.K. Behera who had accompanied Swamy and the deceased to Puri and was returning with them in the car was examined as OPW 1. He supported the version of Swamy.

7. PW 2 is one B.N. Singh. He stated that in that night of occurrence he was returning from Puri to Cuttack in a jeep along with his friend, one Dibakar Sahu and the jeep was being driven by Gopinath Haldar, PW 8. He stated that they stopped in the bazaar of Sakhigopal to take tea where he met the deceased along with two other persons who were also taking tea. According to PW 2, deceased Sanjay was known to him earlier. He (Sanjay) introduced Swamy to PW 2. After taking tea, Sanjay, Swamy and another person boarded the car and Swamy was at the steering whereas the deceased Sanjay sat by his left side on the front seat and the other person sat on the rear seat. After 2 to 3 minutes, they (PW 2 and others) proceeded in their jeep behind the car maintaining a distance of 200 to 300 feet. All of a sudden, the offending car swerved towards the right side of the road and dashed against the cement pillar. When they arrived at the spot, they found the deceased was thrown out of the offending car and was lying near the rear wheel of the car. PW 3, the driver of the jeep, corroborated the evidence of PW 2. On perusal of the evidence of PWs 2 and 3, I am satisfied that both of them were "got-up witnesses" for the following reasons.

None of them was examined by the police in the connected criminal case. PW 2 claimed to have known Sanjay earlier as friend. In view of such acquaintance, ordinary human conduct would have been to lift the "injured" in the jeep to the hospital instead of allowing the "injured" to be lifted in a bus. The explanation offered by PW 2 to the effect that the condition of the jeep did not permit to carry the injured is hardly satisfactory. He claimed to have fully remembered Swamy when he described him to be a black complexioned person. At the same time he failed to remember the stature and complexion of the other person who was also present along with Swamy. It is also doubtful, a tea-stall would remain open at a small place like Sakthigopal where there would be no traffic or travelling public at that odd hour. The tea was perhaps available at that hour to facilitate "Sanjay" to introduce Swamy with PW 2 so that the latter could see as to who was at the steering of the car after it left. If Sanjay was closely known to PW 2, he would have also rushed to the hospital but he conveniently kept himself out from the hospital. Admittedly, the occurrence night was a Savitri Amabasya night and the description of the appearance given by PW 2 in respect of Swamy is hardly believable in absence of any evidence to show that there was light to identify him. In these circumstances, the claim made by PWs 2 and 3 that they had seen Sanjay driving the vehicle at the time of accident does not inspire any confidence.

8. Swamy as OPW 2 in his evidence stated that at the time of accident Sanjay was driving the said car. Swamy is an interested witness. Charge-sheet having been filed against him by the police in respect of the incident, he would naturally try to take the plea of denial. A.K. Behera who was examined as OPW 1 was the third occupant in the offending car. He was the Development Officer in the insurance company in which Swamy was the Branch Manager. He stated in his evidence that the deceased Sanjay was driving the car at the relevant time. Be that as it may, the extent of damage caused to the car, the injury sustained by Sanjay, the injury sustained by Swamy can also be taken into consideration to ascertain as to who was driving the vehicle at the relevant time. The Motor Vehicle Inspector inspected the vehicle on 28.5.1987 at 4 p.m. at the spot. His report is Exh. 16. No doubt, he has mentioned in his report that the driver of the vehicle died due to the accident. He mentioned the name of the driver in the report as "S.K. Rath". He, however, clarified in the course of investigation of the case by stating that on local enquiry during his inspection of the "accident vehicle" some people informed him that probably the person who died was the driver and with that impression he wrote in his report that the driver of the vehicle died due to the accident. His clarification is Exh. 17. His report, Exh. 16, would show the extent and the area of damage caused to the car. They are as follows:

Front L. H. S. bumper, wings, headlamps, engine bonnet, front and rear W/S glass with weather strip complete body damaged. Front grill, indicator and parking lights, radiator, fan, water pump, front chassis and suspension, front shock absorbers damaged, steering wheel slightly bent, triller has been broken.

Exh. 14 is the certified copy of the postmortem report of Sanjay. The car having dashed against the concrete pillar had suffered damage on its left side as mentioned above. If Swamy had taken his seat on the left side of front seat of the car, he would not have escaped with minor injuries like contusion 1" x 1/2" on left parietal region and abrasion 1/2" x 1/2" on the elbow joint as evident from the injury report, Exh. 1. The car being admittedly a right hand driven vehicle, he was obviously at the steering. Having regard to the injuries sustained by Sanjay and the damage caused to the car, he was not driving the vehicle but was sitting on the left side front seat. The accident speaks for itself and tells its own story. In view of the aforesaid, I have no hesitation to hold that Swamy was driving the vehicle at the time of accident and Sanjay was sitting to the left of Swamy on the front seat.

9. It was strenuously argued on behalf of the appellant that Sanjay being a gratis passenger, the insurance company is not liable to pay any compensation. In other words, the appellant's contention is that the insurer has no liability under the statute or the contract of policy as the insured had not taken the comprehensive policy by paying additional premium to cover legal liability for unnamed passenger. The appellant being the insurer is in possession of the insurance policy and the said policy having not been produced either before the Tribunal or before this court in course of hearing, an adverse inference has to be drawn to the effect that had such policy been produced it would have gone against the contention of the appellant.

10. The last question that falls for consideration is the quantum of compensation awarded in the case. The Tribunal has recorded a finding that the annual contribution of Sanjay towards his parents, wife and children would be around Rs. 36,000 and by applying the multiplier of 20, it has determined the compensation at Rs. 7,20,000/- on the count of loss of dependency. In view of the total amount of compensation the Tribunal did not feel inclined to grant any compensation on the count of loss of consortium as well as compensation for mental shock and loss of pleasure in life. In *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others*, the Supreme Court has observed that the multiplier method is logically sound and legally well established. Determination of compensation by deducting certain percentage towards uncertainties of future life from the aggregate of the entire future earnings for over the period the life expectancy was lost was held to be unscientific. The Apex Court took note of the fact that in English courts the operative multiplier rarely exceeds 16 as maximum. The application of multiplier of 20 being on a higher side, I reduce the same to 16 and determine the compensation on the count of loss of dependency at Rs. 5,76,000/- (Rs. 36,000 x 16). In the case of *Susamma Thomas (supra)*, the Supreme Court besides awarding compensation by applying the multiplier has also awarded for loss of consortium and loss of estate. As already indicated, in the case at hand, the Tribunal did not grant any compensation towards loss of consortium or towards mental shock, etc. The widow of Sanjay was aged about 32 years and their son

was aged about 9 years and daughter was aged about 4 months at the time of accident. Having regard to the facts and circumstances of the case, it would not be wrong on my part to award a further consolidated amount of Rs. 1,00,000/- towards loss of consortium and for mental agony, etc. It is accordingly ordered that respondent Nos. 1 to 5 are entitled to receive a total compensation of Rs. 6,76,000 with interest thereon at the rate of 6 per cent per annum from the date of claim, i.e., 22.7.1987. Out of the awarded amount, a sum of Rs. 1,50,000/- each be kept in shape of fixed deposit in the name of each of respondent Nos. 1 to 3 for a period of 10 years in any nationalised bank. The balance amount may be released in favour of respondent Nos. 1 to 5 within two months hence failing which interest at the rate of 9 per cent shall be payable on Rs. 6,76,000/- from the date of claim.

11. With the aforesaid modification in the amount of compensation, the appeal is dismissed. No costs.