
(2000) 06 OHC CK 0012
In the Orissa High Court
Case No : M.A. No. 261 of 1998

Divisional Manager, New India Assurance Co. Ltd.	APPELLANT
Vs	
Sanjukta Mallik and Others	RESPONDENT

Date of Decision : 19-06-2000

Acts Referred:

Motor Vehicles Act, 1988 — Section 112, 123, 124, 149, 170

Citation : (2001) 1 ACC 67 : (2001) ACJ 886 : (2000) 90 CLT 273

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : Mira Ghose, P.K. Tripathy and N.S. Ghose, for the Appellant; P.N. Mishra, B.N. Mishra, S.C. Samantray, N.C. Sahoo, S.P. Panda, S. Pattnaik, P.K. Muduli, A. Patnaik and S. Nanda, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Misra, J.—The insurer has filed this appeal u/s 173 of the Motor Vehicles Act, 1988, challenging the award passed by the 3rd Motor Accidents Claims Tribunal, Puri, directing the insurer to pay compensation of Rs. 1,74,600 with 12 per cent interest to the claimant-respondent Nos. 1 to 4.

2. The claimants-respondents are the legal representatives of deceased Purna Chandra Mallik. On 16.11.92 the deceased while travelling on the roof-top of the bus bearing registration No. OSP 2259 belonging to present respondent No. 5 was thrown from the roof as he dashed against the protruding branch of a tree. Subsequently, he died in S.C.B. Medical College & Hospital, Cuttack.

3. The owner did not contest the proceeding. The insurer filed written statement denying in general, the allegations made in the claim application.

4. The Tribunal found that the accident occurred due to negligence of the driver of the bus and accordingly, directed that the amount should be paid by the insurance company since there was valid insurance.

5. In this appeal, the learned counsel appearing for the appellant has raised an interesting but futile question. It has been contended that the deceased was travelling on the roof-top of the vehicle in contravention of the statutory provisions contained in Section 123 of the Motor Vehicles Act and as such the insurance company should not be made liable.

6. Section 123 of the Motor Vehicles Act is extracted hereunder:

123. Riding on running board, etc.- (1) No person driving or in charge of a motor vehicle shall carry any person or permit any person to be carried on the running board or otherwise than within the body of the vehicle.

(2) No person shall travel on the running board or on the top or on the bonnet of a motor vehicle.

Section 123(1) corresponds to Section 82 of the Motor Vehicles Act, 1939. However, Section 123(2) is a new provision.

7. In view of the provisions contained in Section 123 there cannot be any doubt that no person should be allowed to travel on the top of a motor vehicle and if any such person is allowed to travel, in violation of Section 123, such action would be punishable u/s 177 of the Motor Vehicles Act. Even the passengers who travel on the top of the vehicle can be proceeded for violation of Section 123(2) of the Act.

8. The question is as to whether the insurance company can be exempted from paying such compensation merely because the person in charge of the vehicle or even the passenger himself has committed a breach of statutory provision contained in Section 123 of the Motor Vehicles Act. Section 123 occurs in Chapter VIII of the Motor Vehicles Act under the heading "Control of Traffic". It contains many salutary provisions aimed at safe driving and minimising the risk to the passengers and public alike. For example, Section 112 of the Act makes provisions relating to speed limit of a vehicle and it lays down that a motor vehicle should not be driven at a speed exceeding the maximum speed limit or below the speed limit fixed under the Act, or under any other law for the time being in force. In view of the provision contained in Section 177, exceeding the speed limit is also punishable. In spite of such statutory prohibition, fact remains that many a time, a driver exceeds the speed limit often resulting in unfortunate accidents. Can it be said in such cases that the driver having violated the statutory provision, the insurance company should be exempted from paying compensation on the ground that there has been statutory violation on the part of the driver of the vehicle? Similarly, Section 124 prohibits a person to travel without ticket. Can it be contended that if such a person travelling without ticket is injured, compensation cannot be paid by the insurance company merely because there is a violation of the statute? Section 123 which prohibits travelling on the running board or on the top of a motor vehicle cannot be put on a higher pedestal even though such mode of travelling is punishable.

9. In this connection, it has to be seen that Section 149 lays down the defences which are open to the insurer. The relevant provisions contained in Sections 149(2) and 149(7) are extracted hereunder:

149. Duty of insurers to satisfy judgments and awards against persons insured in respect of third party risks.-

(1) xxx xxx xxx

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given the insurer had notice through the court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons 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 disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the nondisclosure of a material fact or by a representation of fact which was false in some material particular.

xxx xxx xxx

(7) No insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment or award as is referred to in Sub-section (1) or in such judgment as is referred to in Sub-section (3) otherwise than in the manner provided for in Sub-section (2) or in the corresponding law of the

reciprocating country, as the case may be.

A combined reading of Section 149(2) and Section 149(7) makes it clear that the defences available to an insurer are enumerated in Section 149(2) and the insurer cannot avoid the liability on any other grounds, subject, of course, to provisions contained in Section 170 of the Act.

10. Violation of prohibition contained in Section 123 obviously is punishable u/s 177. However, no other consequence is either contemplated in Section 123 or in Section 149 of the Motor Vehicles Act and the insurer cannot escape from its liability on the ground that there has been a violation of Section 123 of the Motor Vehicles Act prohibiting travelling on the running board or on the roof-top of the motor vehicle. It has been contended that since there is a statutory violation, insurance company should not be made liable. As already indicated, there may be statutory violation of provision contained in Section 112 or Section 124 or other similar provisions aimed at regulation of traffic, but violation of such statutory provision by the driver/owner of the vehicle, or even a passenger of the vehicle would not exonerate the insurance company from its liability.

11. As already noticed, similar prohibition had been there in Section 82 of the Motor Vehicles Act, 1939, though under the new Act, the prohibition is also directed against the passenger. In the decision *New India Assurance Co. Ltd. Vs. Punjab Government and Others*, , while dealing with a case of similar nature and considering the effect of Section 82 of the 1939 Act, it was observed that the prohibition contained in Section 82 does not furnish a ground to the insurer to escape from its liability and such provision is not an immunity clause for the insurer. Similarly in the decision of *Sri Inja Venkatrao Vs. Smt. Sundara Barik and Another*, , it was held that when the conductor and the driver had allowed a person to travel on the roof-top, it cannot be said that there was contributory negligence of the person and the insurance company was liable to pay the compensation. It is, of course, true that depending on the particular facts and circumstances, the very fact that a passenger travelling on the roof-top can be taken to be a contributory negligence on the part of such passenger. But such action of the passenger would not have the effect of exonerating the insurance company from its liability. The ratio of the decisions in *New India Assurance Co. Ltd. Vs. Punjab Government and Others*, and *Sri Inja Venkatrao Vs. Smt. Sundara Barik and Another*, , is still applicable to cases arising under the Motor Vehicles Act, 1988. The addition of Sub-section (2) of Section 123 does not provide any additional defence to the insurance company. The provision is aimed at protecting the passengers and not the insurance company.

12. For the aforesaid reasons, I do not find any merit in this appeal, which is accordingly dismissed.

There would be no order as to costs.