
(2003) 04 OHC CK 0035
In the Orissa High Court
Case No : M.A. No. 320 of 1997

Divisional Manager, New India Assurance Co. Ltd.	APPELLANT
Vs	
Ushanta Kumar Choudhury ' Usmanta and Another	RESPONDENT

Date of Decision : 18-04-2003

Acts Referred:

Motor Vehicles Act, 1988 — Section 149

Citation : (2005) ACJ 266 : (2003) 95 CLT 769 : (2003) 1 OLR 644

Hon'ble Judges : A.K. Pattnaik, J

Bench : Single Bench

Advocate : Mahitosh Sinha, S. Tripathy and S. Mohanty, for the Appellant; R. Behera, K. Mohammad for Respondent No. 2 and L. Samantaray and V. Narasingh, for the Respondent

Final Decision : Allowed

Judgement

A.K. Patnaik, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 (for short, "the Act") against the judgment dated 31.3.1997 of the Second Motor Accident Claims Tribunal (SD), Berhampur, in M.A.C. No. 37/95 (105/94).

2. The facts briefly are that on 11.1.1994 at about 9.30 A.M. the respondent No. 1, while going on a bicycle near Karahandba on Sukunda-Berhampur Road, met with an accident with the truck bearing registration number ORG - 9215 which was coming from Berhampur side. Respondent No. 1 suffered some injury and filed a petition for compensation of Rs. 50,000/- u/s 166 of the Act which was numbered as M.A.C. Case No. 37/95 (105/94). In the said petition u/s 166 of the Act, the owner of the aforesaid truck (respondent No. 2, and the appellant were impleaded as opposite parties. Respondent No. 2 did not contest the claim of respondent No. 1 and was set ex parte, while the appellant filed written-statement and contested the claim of the respondent No. 1. One of the pleas taken by the appellant before the Tribunal was that the Insurance Cover Note for the truck bearing registration number ORG - 9215 was issued on 11.1.1994 at 6 P.M. whereas the accident took place on the same day on 11.1.1994 at 9.30 A.M.

Hence, the appellant was not liable to indemnify the owner of the truck for the accident which took place prior to the issue of the Insurance Cover Note. The Tribunal, however, rejected the aforesaid plea of the insurance company and held that the insurance policy commences from the mid-night of the previous day as per the decision of the Supreme Court in *New India Assurance Company Ltd. v. Ram Dayal and Ors.* 1990 ACJ (SC) 545, and subsequent decisions of various High Courts. The Tribunal held that in this case although the accident took place at 9.30 A.M. on 11.1.1994 and the policy was issued at 6 P.M. on 11.1.1994, the appellant was liable to indemnify the owner as regards payment of compensation. On the basis of the evidence adduced in the case, the Tribunal awarded a compensation of Rs. 17,300/- with interest at the rate of 9 per cent per annum from the date of the application (24.2.1994) till the date of realization. Further, if the appellant failed to pay the same within a period of thirty days, the appellant shall be liable to pay the interest at the rate of 15 per cent thereafter till realization. Aggrieved by the said judgment and award of the Tribunal, the appellant insurance company has filed this appeal.

3. Mr. Mahitosh Sinha, learned counsel for the appellant, submitted that the Insurance Cover Note (Ext. A) and the Insurance Policy (Ext. D) expressly indicated the date and time of commencement of the insurance of the truck ORG - 9215 as 11.1.1994 6 P.M. Thus, the insurance of the aforesaid truck cannot commence at any time before 6 P.M. on 11.1.1994 and as the accident took place much before 6 P.M. on 11.1.1994, i.e. at about 9.30 A.M., the appellant (insurer) was not liable but the owner was liable to pay the compensation. He further submitted that in *Oriental Insurance Co. Ltd v. Sunita Rathi and Ors.*, AIR 1998 SC 257, the Supreme Court distinguished its earlier decision in *Ram Dayal's* case (supra) and held that where along with the date, the time with effect from which the insurance policy is to commence is indicated, the insurance policy will be effective not from the mid-night of the previous day, but with effect from the time so indicated in the policy, Mr. Sinha vehemently argued that since in the present case the insurance policy clearly indicates that the insurance policy is to be effective from 6 P.M. of 11.1.1994, the aforesaid decision of the Supreme Court in *Oriental Insurance Company Ltd. v. Sunita Rathi* (supra) will apply and the earlier decision of the Supreme Court in *Ram Dayal's* case (supra) will not apply. Mr. Sinha alternatively submitted that if the Court takes a view that the insurance policy in the present case will be effective from the mid-night before 11.1.1994, then the case of the appellant is that the policy in Ext. D is invalid as it was obtained by the respondent No. 2 by suppressing the fact of accident on 11.1.1994, at about 9.30 A.M. from the appellant.

4. Mr. L. Samantaray, learned counsel appearing for the respondent No. 1, on the other hand, submitted that as the truck was covered by a valid insurance policy, the insurer was liable to pay the compensation to the claimant and to get the same reimbursed from the owner if the defence of the insurer is that it was not liable in the facts and circumstances of the case. In support of this contention, Mr. Samantaray relied on the provisions of Section 149 of the Act and the

decision of the Supreme Court in *New India Assurance Co., Shimla Vs. Kamla and Others etc. etc.,* .

5. When the case was heard on 20.3.2003, the Court found that the name of the counsel for the respondent No. 2 (owner of the vehicle) had not been shown in the cause list and accordingly, the Court passed orders on 20.3.2003 for listing the matter for further hearing showing the names of Mr. R. Behera and K. Mohammad as the learned counsel appearing for respondent No. 2. On 3.4.2003 the case was listed showing the names of Mr. R. Behera and K. Mohammad as counsel for respondent No. 2 and yet no one appeared for respondent No. 2 before the Court on 3.4.2003. In the circumstances, the Court proceeded to hear the matter and reserved the case for judgment.

6. The carbon copy of the insurance cover note for the truck ORG - 9215 exhibited before the Tribunal as Ext. A gives the date of issue as "11.1.1994" and the period of insurance as "6 P.M. of 11.1.1994 to 10.1.1995", In the insurance policy exhibited before the Tribunal as Ext. D, the effective date of commencement of insurance for the purposes of the Act has been indicated as follows :

"Effective date of commencement of Insurance for the purpose of the Act From 6.00 P.M. 0" clock on 11/1/94 To Midnight on 10.1.95".

It is thus clear that the insurance in respect of the truck ORG-9215 was to commence from 6 P.M. on 11.1.1994. Since the accident in this case admittedly had taken place before 6 P.M. at about 9.30 A.M. on 11.1.1994, the appellant is not liable to indemnify the owner of the said truck for compensation on account of the said accident. This position of law has been clarified by the Supreme Court in *Oriental Insurance Company Ltd. v. Sunita Rathi* (supra). Paragraphs 2 and 3 of the said decision of the Supreme Court in *Oriental Insurance Company Ltd. Company v. Sunita Rathi* (supra) are quoted herein below :

"2 The motor accident occurred on 10-12-1991 at 2.20 P.M. It was only thereafter the same day at 2.55 P.M. that the insurance policy and the cover note were obtained by the insured, owner of the motor vehicle involved in the accident. There is express mention in the cover note that the effective date and time of commencement of the insurance for the purpose of the "Act was 10-12-1991 at 2.55 P.M. The applicability of the decision in *New India Assurance Co. Ltd. Vs. Ram Dayal and Others*, has to be considered on these facts. In our opinion the decision in *Ram Dayal's* case (supra) is distinguishable and has no application to the facts of this case. The facts of that decision show that the time of issuance of the policy was not mentioned therein and the question, therefore, was of presumption when the date alone was mentioned and not the time at which the insurance was to become effective on that date. In such a situation, it was held in *Ram Dayal's* case (supra) that in the absence of any specific time being mentioned, the logical inference to draw was that the insurance became effective from the previous midnight and, therefore, for an accident which took

place on the date of the policy, the insurer became liable. There is no such difficulty in the present case in view of the clear finding based on undisputed facts that the accident occurred at 2.20 P.M. and the cover note was obtained only thereafter at 2.55 P.M. in which it was expressly mentioned that the effective date and time of Commencement of the insurance for the purpose of the Act was 10-12-1991 at 2.55 P.M. The reliance on Ram Dayal's case (supra) by the Tribunal and the High Court was, therefore, misplaced. We find that in a similar situation, the same view which we have taken, was also the view in M/s. National Insurance Co. Ltd. Vs. Smt. Jijubhai Nathuji Dabhi and others, wherein Ram Dayal's case (supra) was distinguished on the same basis.

3. It follows that the insurer cannot be held liable on the basis of the above policy in the present case and, therefore, the liability has to be of the owner of the vehicle. However, we find that the High Court, without assigning any reason, has simply assumed that the owner of the vehicle was not liable and that the insurer alone was liable in the present case. This conclusion, reached by the High Court, is clearly erroneous. The liability of the insurer arises only when the liability of the insured has been upheld for the purpose of indemnifying the insured under the contract of insurance. There is, "thus, a basic fallacy in the conclusion reached by the High Court on this point."

It will be clear from the aforesaid reasonings given by the Supreme Court that Ram Dayal's case (supra) was a case where there was no specific timing mentioned in the insurance policy and the Supreme Court held that in the absence of such a specific timing in the insurance policy, the insurance became effective from the previous mid-night. But where a specific time has been mentioned in the insurance policy, as in the present case, the insurance will be effective only from the time specifically mentioned in the insurance policy and not from the previous mid-night and in such a case, the owner is liable for the compensation.

7. Sub-sections (4) and (5) of Section 149 of the Act are quoted herein below :-

"149. Duty of insurers to satisfy Judgments and awards against persons insured in respect of third party risks :

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(4) Where a certificate of insurance has been issued under Sub-section (3) of Section 147 to the person by whom a policy has been effected, so much of the policy as supports to restrict the insurance of the persons insured thereby reference to any conditions other than those in Clause (b) of Sub-section (2) shall, as respects such liabilities as are required to be covered by a policy under Clause (b) of Sub-section (1) of Section 147, be of no effect :

Provided that any sum paid by the insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of this Sub-section shall be recoverable by the insurer from that person.

(5) If the amount which an insurer becomes liable under this Section to pay in respect of a liability incurred by a person insured by a policy exceeds the amount for which the insurer would apart from the provisions of this Section be liable under the policy in respect of that liability, the insurer shall be entitled to recover the excess from that person."

The Supreme Court held in the case of *New India Assurance Company Ltd., Shimla v. Kamla* (supra) :

"21. A reading of the proviso to Sub-section (4) as well as the language employed in Sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter-XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer *D. M., New India Assurance Co, Ltd., v. Ushanta Kumar Choudhury* were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this : When a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured."

Thus, from the aforesaid judgment of the Supreme Court, it is clear that when a valid insurance policy has been issued in respect of a vehicle, the insurer has to pay to third parties compensation whether or not there has been any breach or violation of the policy conditions and the amount so paid by the insurer to the third parties can be recovered from the insured if as per the policy conditions, the insurer had no liability to pay such amount to the insured. The provisions of Sub-sections (4) and (5) of Section 149 of the Act and the aforesaid decision of the Supreme Court in the case of *New India Assurance Company Ltd., Shimla v. Kamla* (supra) on which reliance has been placed by Mr. Samantaray, will apply only if at the time when the accident took place, the appellant was an insurer. But, as has been indicated above, at 9.30 A.M. on 11.1.1994 the appellant was not the insurer as the insurance had not commenced and was thus not liable as such insurer to pay compensation to third parties for the accident and it was the owner who was liable to pay the compensation to the respondent No. 1.

8. For the aforesaid reasons, the appeal is allowed and the impugned judgment of the Tribunal is set aside as against the appellant and instead, the respondent No. 2 will pay the compensation of Rs. 17,300/- with interest at the rate of 9 per cent per annum from the date of the application (24.2.1994) to the respondent

No. 1 within a period of three months from today failing which the respondent No. 2 will be liable to pay interest at the rate of 15 per cent per annum on the said compensation amount of Rs. 17,300/-from the date of the application till payment. The amount deposited by the appellant in this Court towards compensation will be refunded to the appellant. No costs.