
(2000) 02 OHC CK 0006
In the Orissa High Court
Case No : Misc. Appeal No. 747 of 1996

Divisional Manager, New India Assurance Co. Ltd., Cuttack	APPELLANT
Vs	
Pranab Sundar Sahoo and Another	RESPONDENT

Date of Decision : 29-02-2000

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 166

Citation : (2001) ACJ 2014 : AIR 2000 Ori 146

Hon'ble Judges : P.C. Naik, J

Bench : Single Bench

Advocate : A.S. Nandy, for the Appellant; A.K. Bose and P.K. Giri, H.S. Mohanty and D.K. Bhoi, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Naik, J.—An award of Rs. 30,000/-passed against the insurer is assailed before this Court in this appeal.

2. The facts involved in this case lie in a narrow campus. On 12-8-1990 at about 12.15 p.m. the claimant-respondent No. 1 who was riding a bi-cycle was injured when a vehicle bearing registration number OAX 1883 knocked him down. The claimant sustained bodily injury and was removed to the headquarters Hospital, Balasore for treatment. The bi-cycle, which he was riding at the relevant point of time, was completely damaged. Alleging that the accident was solely due to rash and negligent driving, the claimant claimed Rs. 70,000/- as compensation from the owner and insurer of the vehicle.

3. The claim was resisted by the owner-respondent No. 2 on the ground that the accident was solely due to the negligence of the claimant, who, though was going on a bicycle, was holding the "DALA" of the truck with one hand and when the driver applied the brake, could not control himself and dashed against the vehicle which resulted in injuries on his person. The rashness and negligence of the driver was specifically denied. Alternatively, it was submitted that in case he was

held liable, the liability was to be saddled on the insurer i.e. New India Assurance Company Limited (appellant herein) with which the vehicle was insured at the relevant time.

The insurer also filed its written statement denying its liability and as is usual with the insurers, took all pleas on merits. No statutory plea which is available to it under the M.V. Act was advanced. What was pleaded is that the owner of the vehicle be called upon to produce the driving licence of the driver who was driving the vehicle at the relevant time, fitness certificate and route permit failing which adverse inference would be drawn against them and it would be presumed that the driver of the alleged vehicle had no valid licence at the time of the accident. The fact of insurance was admitted. The other averments made in the claim petition were denied for want of knowledge.

4. Oral and documentary evidence were adduced on behalf of the claimant. One witness was examined on behalf of the insurer and letter no. "nil" dated "nil" of inspecting authority O.M.V.D., Cuttack was produced and marked Ext. "A" with objection. No oral or documentary evidence was adduced by the owner of the vehicle. The insurance policy was also placed on record.

5. Placing reliance on the evidence adduced by the claimant, the Tribunal held that as the accident was due to rashness and negligence of the driver of the vehicle bearing registration number OAX 1883, the claimant was entitled to compensation which was assessed at Rs. 30,000/-. The plea of the insurance company that as the driver was unlicensed, no liability could be saddled on it was negatived on the ground that no such plea was raised in the written statement and that the mere production of a letter was not sufficient to get over the liability, for it was incumbent upon the authority to have examined the maker of the report who could have been cross-examined by the claimant.

6. The challenge to the award on merits and quantum has to be rejected on the short ground that such pleas are not available to the insurer being outside the scope of Sub-section (2) of Section 149 of the M.V. Act, 1988 which lays down the statutory defence that are available to an insurer. This is not a case where the insurer had obtained permission of the Tribunal in writing u/s 170 of the M.V. Act, 1988 to contest the claim on merits. Accordingly, the findings regarding negligence and quantum, not being open to challenge in appeal by the insurer, are affirmed.

7. The only question, therefore, which survives for consideration is whether the liability in the case at hand could be saddled on the insurer. According to the appellant, in view of Ext. A, the Tribunal ought to have held that as the driver did not possess a driving licence the insurer ought to have been exonerated from the liability. As has been observed in the earlier part of the judgment, the defences available to the insurer are limited and the plea that it is not liable because the vehicle was being driven by an unlicensed driver, is one such defence. However, it is well established that the burden to establish an exception, that is, a defence

by the Insurer, lies on it for which necessary foundation has to be laid. In the case at hand, such a defence/plea has not been taken in the written statement of the insurer. On the contrary, what has been averred in paragraph 6 thereof is that the applicant or owner should be called upon to produce the driving licence failing which it would be presumed that the driver of the vehicle did not have a valid licence at the time of the accident. Thus, the burden was sought to be placed on the applicant or owner to prove that the driver was licensed.

8. It is no doubt true that the witness examined on behalf of the insurer has produced a copy of the letter purported to be written by the licensing authority -- C.M.V.D., Cuttack to the effect that driving licence No. 356/86, Cuttack has not been issued to Birendra Das and hence, the driving licence seized in the case is a forged one. But it may be stated that in the absence of any plea of the insurer that the driver did not possess a driving licence or that his licence was a forged one, question of leading any evidence on that point could not arise. Further, in case the insurer wanted to establish this fact, it was required to produce the best evidence that was available which would be by production of the record relating to the licence in question. However, what has been produced, as has been observed above, is a letter which is not a certified copy of a public document. That apart, as there was no pleading to that effect, there was neither any issue nor, in fact, could it be said that the insurer was at issue, on the point that the driver in question did not possess a valid driving licence. This being the position, in the absence of any issue, any evidence on the point i.e. on the validity of the driving licence, has to be ignored. At any rate, the witness (O.P.W. 1) who is an Administrative Officer of New India Assurance Company, posted at Balasore has fairly admitted that he has no personal knowledge about the enquiry made with the transport authorities and that he has neither verified the case with reference to the police case nor has he made any enquiry with the licensing authority. In this view of the matter, the contention of the learned counsel for the appellant that no liability could be fastened on the insurer as the driver in question did not possess a valid driving licence, has to be rejected. It is ordered accordingly.

9. For the reasons aforesaid, the appeal fails and is dismissed.