
(2010) 05 OHC CK 0024
In the Orissa High Court
Case No : M.A. No. 245 of 2000

Guru Charan Pattnaik and Others

APPELLANT

Vs

Bijay Kumar Pattnaik

RESPONDENT

Date of Decision : 07-05-2010

Acts Referred:

Evidence Act, 1872 — Section 114

Motor Vehicles Act, 1988 — Section 163A, 173

Citation : (2010) 110 CLT 535

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This appeal is directed against the impugned award dated 3rd September, 1999 passed in Misc. Case Nos. 92/90 & 173/90 by the Second Motor Accident Claims Tribunal, Cuttack (for short, "the Tribunal").

2. The case of the claimants before the Tribunal was that on 5.11.1989 at about 4 A.M. the deceased Janak Ranjan Pattnaik was standing near Somapur Bazar on Cuttack-Paradip road waiting for arrival of his fish in mini truck bearing registration No. OIU-2483. The offending mini truck coming from Paradip side lost its balance at the place of accident & suddenly swerved to its extreme right & ran over the deceased causing instantaneous death & capsized in Taladanda canal. At the time of death the age of the deceased was 28 years & he was earning Rs. 3,000 per month. With these averments, the claimants filed claim petition before the Tribunal claiming compensation of Rs. 2,06,000.

3. Opp. Party-Respondent No. 1 the owner of the offending vehicle entered appearance & filed written statement almost admitting the case of the claimants-Petitioners. It was averred that the mini truck was duly insured with Respondent-Opp. Party No. 2 M/s. Oriental Insurance Company Ltd., Link Road, Cuttack, covering the date of accident bearing Policy No. 31515/6/604/MV/84/89/Comp. valid from 13.1.1989 to 12.1.1990 & the Insurance Company was liable to pay

the compensation amount on his behalf, if any.

Opp. Party No. 2, the Insurance Company filed its written statement & contested the case. It called upon the claimants to prove the accident, death due to accident, income of the deceased & the insurance policy of the offending mini truck by adducing proper evidence. It was pleaded inter alia that the offending mini truck being a goods vehicle was not supposed to carry passengers & hence the Insurance Company was not liable to pay any compensation as claimed by the claimants. As many as four witnesses were examined on behalf of the claimants. None has been examined on behalf of the Respondents. The documents filed in Accident Misc. Case No. 92 of 1990 have been marked as Exts.1, 2, 3, 4 & 5. No document has been exhibited on behalf of Respondents. Certified copy of the MVI report & certified copy of the P.M. report filed by the claimants in Misc. Case No. 173/90 have been marked as Exts. 6 & 7 respectively.

4. Learned Tribunal taking into consideration the oral & documentary evidence came to the conclusion that the accident took place due to rash & negligent driving of the offending vehicle resulting in death of the deceased. The income of the deceased was determined at Rs. 1000 per month against claim of Rs. 3000 made by the claimants. Relying on the contents of the FIR & final report, the deceased was held to be traveling in the offending mini truck. The owner of the offending vehicle Respondent No. 1 was made liable to pay a sum of Rs. 1,34,000.

5. Mr. Sarangi, Learned Counsel appearing on behalf of the Appellants vehemently argued that determination of monthly income & multiplier as applied by the Learned Tribunal is extremely low. The Learned Tribunal has erred in relying upon the contents of the F.I.R. (Ext.2) & the final form (Ext. 5) & to hold that the owner of the offending mini truck was liable to pay the compensation. The author of the FIR Nakula Mallik, the Gram Rakhi was examined as P.W.2 who has categorically stated that the deceased Janak Ranjan Patnaik was standing along with the deceased Subash near a mini truck parked by the side of the Taladanda Cana]. He arrived ,at the spot after the accident & ascertained about the accident from the persons who were assembled at the spot & thereafter he asked one Kabi Bhoi to scribe the FIR. He specifically stated that he did not instruct the scribe to write in the FIR that five occupants in the mini truck died in the accident. In view of the evidence of P.W.2, Learned Tribunal has erred in law holding that the deceased was a passenger in the offending truck. The insurer neither pleaded nor proved the deceased to be a gratuitous passenger in the offending truck. The FIR (Ext.2) & the final report (Ext.5) having not been proved in the process of law, Learned Tribunal ought not to have relied upon those documents while determining the liability. It was nobody's case that the deceased was a gratuitous passenger in the offending vehicle. Mr. Sarangi relied upon some of the judicial pronouncements &, contended that the Court should not have relied on the FIR discarding the oral evidence led by the informant. The insurer also did not file the policy in the Tribunal in support of its contention that

the policy does not cover the liability in respect of a gratuitous passenger. Hence, adverse inference should have been drawn against the insurer u/s 114(g) of the Evidence Act. The policy number was disclosed not only by the claimants in their claim application but also by the owner in his written statement.

6. Mr. Ajay Mohanty, Learned Counsel appearing for Opp. Party No. 2-Insurance Company vehemently argued that the appeal is not maintainable according to the provisions contemplated u/s 173 of the M.V. Act, 1988. As per the provisions contained in the said Section an aggrieved Party can only prefer appeal. In the instant case, the Appellants are not the aggrieved parties. Aggrieved party is the owner of the offending vehicle on whom liability to pay the compensation amount has been fastened. The Appellants in order to prove their case have filed certified copies of police papers on their behalf which were taken into evidence marked as Exts. 2, 3, 4, 5, 6 & 7. Relying on Ext.2, Learned Tribunal held that the deceased was a passenger in the goods vehicle at the time of accident & not a pedestrian as pleaded by the Appellants. Law is well settled that if a party relies on the document he cannot resile from the same. In support of his contention, Learned Counsel relied on a Judgment of the Apex Court in *Oriental Insurance Co. Ltd. v. Premalata Shukla and Ors.* AIR 2007 SCW 3591.

The deceased having been travelled as passenger in the goods vehicle, the Insurance Company is not liable to pay any compensation. The owner of the vehicle is liable to pay compensation. In support of his contention, he relied on the decision of *National Insurance Co. Ltd. v. Bommithi Subbhayamma and Ors.* 2005 (2) TAC 1 & *National Insurance Co. Ltd. v. Rattani and Ors.* AIR 2009 SCW 992. The Appellants have utterly failed to establish that the deceased was a pedestrian at the time of accident. As the case has been deliberately belated by the Appellants, they are not entitled to any compensation.

7. Mr. Sarangi in his reply submitted that the deceased was a bystander at the place of accident & was not a gratuitous passenger. Therefore, the decisions cited by Mr. Mohanty dealing with gratuitous passenger are not applicable to the present case. Moreover, a three Judges Bench of the Apex Court in *Amrit Lal Sood and Another Vs. Smt. Kaushalya Devi Thapar and Others*, , held that gratuitous passenger are also covered under a policy if it is a comprehensive policy. In the instant case, the policy is a comprehensive one. Therefore, even if accepting for the sake of argument that the deceased was a gratuitous passenger, the Insurance Company is liable to pay the amount of compensation. The Appellants are certainly aggrieved by the order under appeal which recorded erroneous findings contrary to the materials on record & on the basis of inadmissible evidence to exonerate the insurer from the liability. Further, the amount awarded was also not based on materials on record & was inadequate.

8. On the rival contentions the questions that fall for consideration by this Court are as follows:

(i) Whether the Appellants are persons aggrieved by the award of the Tribunal in

terms of Section 173 of the M.V. Act & are eligible to file appeal challenging the legality of the award as regards fastening the liability for payment of compensation on the owner of the vehicle, who preferred not to challenge the award in appeal.

(ii) Whether the Tribunal is justified to hold that the deceased Janak Ranjan Patnaik was travelling as a passenger in the offending vehicle bearing registration No. OIU 2483 & was not a bystander at the time of accident?

(iii) Whether the Insurance Company or the owner of the offending vehicle is liable to pay the amount of compensation to the Appellants?

(iv) Whether the amount of compensation, as determined by the Tribunal, is the just compensation?

9. The first question relates to preliminary objection raised by Mr. Mohanty regarding maintainability of the appeal. According to Me Mohanty, only a person aggrieved by the award of the Tribunal can file an appeal before this Court in terms of Section 173 of the M.V. Act. The Tribunal fastened the liability for payment of compensation on the owner of the vehicle. The aggrieved party in the present case is the owner of the vehicle, who has not challenged the award being aggrieved by the same. In such a situation, the claimant-Respondents cannot be said to be the persons aggrieved so far as the liability to pay the compensation amount which is fastened on the owner of the vehicle. Mr. Sarangi, on the other hand, submitted that basically the Appellants have challenged the award on two grounds, viz., (i) wrong determination of the quantum of compensation by the Tribunal, & (ii) recording of erroneous findings by the Tribunal basing upon inadmissible evidence contrary to the material on record exonerating the insurer from liability which has caused immense hardship to the Appellant to realize the amount of compensation.

Paragraphs 10 & 16 of the claim petition which are relevant for the purpose of answering Question No. 1 read as follows:

(10) Has the person in respect of whom compensation is claimed, travelling by the vehicle involved in the accident? If so, give the name & place of starting of journey & destination 16) Name & address of the Insurer of the Vehicle NO Oriental Insurance Co. Ltd., Link Road, Cuttack, represented through it's Branch Manager, "Policy No. 31515/6/604/MV/84/89/Comprehensive Valid from 13.1.89 to 12.1.90.

Thus, the claim of the claimant-Petitioners under paragraph. 10 is that the person in respect of whom the compensation is claimed was not travelling in the vehicle involved in the accident. As per paragraph 16, the insurer of the offending vehicle was Oriental Insurance Go. Ltd., Link Road, Cuttack, having Policy No. 31515/6/604/MV/84/89/Comprehensive valid from 13.01.89 to 12.1.90. Findings of the Tribunal being contrary to the above claims of the claimant-Petitioners made in paragraphs 10 & 16 of the claim petition, the

Petitioners are certainly the persons aggrieved so far their claim with regard to not travelling in the offending vehicle & liability of the insurer of the offending vehicle for payment of compensation are concerned.

The Apex Court in *Thammanna Vs. K. Veera Reddy and Others*, , while dealing with meaning of expression "aggrieved person" held as follows:

Although the meaning of the expression "person aggrieved" may vary according to the context of the statute & the facts of the case, nevertheless, normally, "a person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. As per James, L.J., in *Re Sidebotham* referred to by this Court in *Bar Council of Maharashtra v. M.V. Debholkar & F.A. Desai V. Roshan Kumar*.

Merely because the owner of the vehicle has not preferred any appeal challenging the award of the Tribunal by which liability has been fixed on him, the claimants should not suffer, if they are otherwise entitled to get the compensation amount from the insurer of the offending vehicle. There may be a case where owner of the vehicle wants to challenge the Judgment of the Tribunal fixing liability to pay amount of compensation on him but due to stringent financial condition, the owner of the vehicle may not be able to deposit with the High Court Rs. 25,000 or 50% of the award amount whichever is less, as required by Section 173 of the M.V. Act to maintain the appeal before the High Court. In such peculiar circumstances, it would not be possible on the part of the claimants to realize the amount of compensation from the owner of the vehicle who is not able to maintain an appeal before the High Court because of financial stringency. If the insurer of the offending vehicle is otherwise liable to pay the compensation & the Tribunal has wrongly fastened the liability on the owner of the vehicle, there is no reason why the claimants cannot maintain an appeal in the High Court challenging the findings of the Tribunal. In the instant case, the specific case of the Appellants is that relying on the inadmissible evidence the Tribunal has recorded erroneous findings to exonerate the insurer from its liability.

In view of the above, I have no hesitation to hold that the Appellants are the persons aggrieved by the order of the Tribunal by which the insurer was exonerated from its liability on the ground that the deceased was a gratuitous passenger in the offending vehicle contrary to Petitioners' claims made in paragraphs 10 & 16 of the claim petition.

10. The second question is as to whether the deceased-Janak Ranjan Pattnaik was travelling as a passenger in the offending vehicle or was a by-stander at the time of accident. The finding of the Learned Tribunal in this regard is that the deceased Janak Ranjan Pattnaik along with one Subash Chandra Mohapatra was travelling in the offending mini truck at the time of accident as passengers & they had died due to rash & negligent driving by the driver of the said truck. To come to such conclusion, the Learned Tribunal relied on the contents of the F.I.R.

stated to have been filed by one Grama Rakhi & the final report (Ext.5). According to Learned Tribunal, the final report discloses that in the F.I.R. P.W.2- Grama Rakhi mentioned that one mini truck coming from Paradeep side dashed against a parking truck & capsized into the canal water causing death of the sleeping helper & five occupants including the deceased Janak Ranjan Patnaik. While dealing with issue No. 2, the Tribunal recorded its findings as follows:

P.W. 2 is a gramarakhi & he lodged F.I.R. at the P.S. about 1 1/2 hours after the accident. It is stated by him that on 5.11.89 at about 4 A.M. he had come to Taladanda canal to attend the call of nature. At that time a truck had parked near Taladanda Canal facing towards Paradeep & both the deceased persons had stood near that truck. He attended the call of nature & thereafter while he was using water in the canal he heard a sound. Then he came to the road & found that the offending mini truck had fallen inside the water in the ditch & deceased Subash Chandra Mohapatra had fallen in that ditch. P.W.3 claims to have seen the occurrence. According to him, on 5.11.89 at about 4 A.M. the offending Mini Truck coming from Paradeep side in a high speed suddenly swerved to its right & dashed against both the deceased persons & two others who were standing on the road & ran over another person sleeping in front of the parking truck & thereafter entered into Taladanda canal.

In the cross examination, the evidence of P.Ws. 2 has not been controverted. P.W. 3 is the eyewitness. Evidence of P.Ws. 2 & 3 show that the deceased Janak Ranjan Pattnaik & one Subash Chandra Mohapatra stood near the truck. According to P.W. 3, the occurrence witness, at about 4 A.M. the offending mini truck coming from Paradeep side in high speed suddenly swerved to its right & dashed against both the deceased persons who were standing on the road & also ran over another person who was sleeping in front of the parking truck & thereafter entered into Taladanda canal. In cross-examination, nothing contrary has been elicited from the mouth of PW -3. Virtually the evidence of PW s 2 & 3 remained unshaken. Learned Tribunal has not assigned any valid & cogent reason for disbelieving the evidence of P.Ws. 2 & 3. The Learned Tribunal has simply satisfied itself by the contents of the F.I.R. & final report. There is no reason why much weight has been given by the Learned Tribunal to the contents of the F.I.R. & the final report ignoring the un-impeached evidence of P.Ws. 2 & 3.

This Court in Smt. Anita Jena and Ors. v. Sarat Chandra Patnaik and Anr. (83) 1997 CLT 506, held that the Court should not rely on F.I.R. discarding the oral evidence of the informant. In Nanhu Singh Vs. Jaheer and Others, held that version as per the F.I.R. should not be given preference over the testimony of the witness recorded before the Tribunal. This Court in Mataji Bewa and Others Vs. Hemanta Kumar Jena and Another, , held that positive evidence laid before the Tribunal has to be accepted as evidence & the contents of the charge sheet cannot be treated as evidence in a claim proceeding. It is emphatically observed that the Tribunal must rely upon the evidence laid before it. Similar view has also been expressed by this Court in of United India Ins. Co. Ltd. v. Dhana Bhotra and

Ors. 2008 (1) CLR 168 & National Insurance Co. Ltd. Vs. Asha Lata Rout and Others, .

Moreover, the order of the Tribunal is silent at whose instance the F.I.R. (Ext. 2) & final report (Ext. 5) were produced before the Tribunal & who had proved the same. In view of the above, this Court is of the considered view that the Tribunal is not correct to hold that the deceased was travelling in the offending truck at the time of accident. On the other hand, as claimed by the claimants, the deceased was a bystander at the time of accident. In the fact situation, the decisions cited by Learned Counsel for the Insurance Company are of no help to the Opp. Party-Insurance Company.

11. The third question relates as to who is liable to pay the amount of compensation to the Appellants. The Learned Tribunal relying on the decision of this Court in New India Assurance Company Ltd. Vs. Kanchan Bewa and Others, , held that the owner of the vehicle is liable to pay the compensation amount as the deceased was travelling in the offending truck, which was a goods vehicle.

Mr. Mohanty, Learned Counsel appearing on behalf of the Insurance Company also relies on some decisions to support the above view of the Learned Tribunal. Mr. Sarangi, Learned Counsel for the Appellants relying on the Judgment of the Apex Court in Ambritlal Sood and Anr. (supra) contended that a three judges' bench of the Apex Court held that gratuitous passengers are also covered under a policy if it is a comprehensive policy. Be that as it may, since this Court is of the view that at the time of accident the deceased was a bystander & as per the seizure list marked as Ext. 4/1, the offending mini truck was duly insured with Opp. Party No. 2-Oriental Insurance Co. Ltd. covering the date of accident, the Opp. Party No. 2 is liable to pay the compensation to the Appellants.

12. The fourth question is as to whether the amount of compensation determined by the Tribunal is just compensation. The Tribunal in this regard relying on the post-mortem report marked as (Ext. 7) came to the conclusion that the deceased Janak Ranjan Pattnaik was aged about 28 years at the time of his death in the accident. He was carrying fish business. There is no documentary evidence on record to show that he was earning Rs. 3,000 per month from fish business.

With the above observation, the Learned Tribunal assessed the monthly income of the Appellant at Rs. 1,000. Perusal of order of the Tribunal reveals that the Tribunal has not given any reason for assessing the monthly income of the deceased at Rs. 1,000. It further reveals that no evidence was adduced on behalf of the claimants to show that the income of the deceased per month was Rs. 3,000. No evidence/material was brought to the notice of this Court by the Learned Counsel appearing on behalf of the Appellants in support of the contention that the Appellant was earning Rs. 3,000 per month. At this juncture, a reference is made to the 2nd schedule appended to the Motor Vehicles Act in terms of Section 163-A of the M.V. Act. The said schedule prescribes notional income at Rs. 15,000 per annum for compensation to person who had no income

prior to the accident. Therefore, fixation of income of the Appellant who was carrying on fish business at Rs. 1,000 per month i.e. Rs. 12,000 per annum does not stand to any logic. In this situation, the annual income should at least be taken at Rs. 15,000 though not more. Learned Counsel for the Appellants relying on the decision of the Apex Court in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , submitted that the appropriate multiplier is 17. Applying the said multiplier & allowing 1/3rd towards personal income, the amount of compensation is determined at Rs. 1,70,000 (Rs.10,000 x 17).

So far as the cost & interest parts are concerned, the Tribunal has rightly allowed the same at Rs. 500 & 9% interest per annum on the amount of compensation from the date of filing of the claim case i.e. 21.02.1990 till the date of payment.

13. In view of the above, the Opp. Party No. 2-Oriental Insurance Company is directed to pay the above compensation amount along with 9% interest from the date of filing of the claim petition till the date of actual payment before the Tribunal. The compensation amount shall be paid within two months from today. After deposit of the compensation amount along with interest as indicated above, the Tribunal shall disburse the same in favour of the claimants in the similar manner indicated in award.

14. In the result, the appeal is allowed to the extent indicated above.