

(1989) 04 GAU CK 0010
In the Gauhati High Court
Case No : M.A. (F) No. 20 of 1979

Hindustan General Insurance Society Ltd. now National
Insurance Co. Ltd.

APPELLANT

Vs

Nilima Mahanta and Others

RESPONDENT

Date of Decision : 12-04-1989

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 108, 348, 94, 95

Citation : (1990) 2 ACC 364 : (1990) ACJ 267

Hon'ble Judges : J.M. Srivastava, J

Bench : Single Bench

Advocate : P. Sen, N. Chakravarty and A. Hazarika, for the Appellant; P.C. Kataki, J.M. Choudhury, H.K. Deka, S.N. Bhuyan, A.C. Buragohain and G. Gopal, for the Respondent

Final Decision : Allowed

Judgement

J.M. Srivastava, J.—M/s. Hindustan General Insurance Society Ltd., the appellant hereafter the company, is aggrieved by the award dated 7.8.1976 made by the learned Motor Accidents Claims Tribunal, Meghalaya, Shillong, making the appellant liable for Rs. 20,000/- out of a compensation amount of Rs. 50,000/- awarded to respondent No. 1.

2. The respondent No. 3, who was made liable for Rs. 30,000/-, has filed a cross-objection.

3. Briefly, the facts are that deceased J.C. Mahanta, husband of respondent No. 1, who was Asstt. Agricultural Marketing Officer, on 7.12.1968 at about 5 p.m. while travelling from Rangram to Tura in truck registration No. AST 252, owned by Santosh Kumar Das had met with an accident and as a result sustained grievous injury and had died. The respondent No. 1 claimed compensation.

4. The present proforma respondent No. 2 who was earlier the owner of the truck had transferred it to his son, the respondent No. 3.

5. The appellant and proforma respondents had contested the claim. The owners pleaded that the deceased had got on the truck loaded with cement bags which it was carrying, without the knowledge even of the driver, that there was no negligence, that on a slope bend on the road a buffalo had appeared and the driver turned the vehicle when the tie-rod end gave way, brakes failed, the truck hit the hill and capsized on one side. The deceased fell from the truck and cement bags fell on him. The appellant pleaded that under the law and the contract of insurance, it was not liable.

6. The learned Tribunal framed issues and made the award as stated earlier.

7. Mr. N. Chakravarty, learned counsel appearing for the appellant, has contended that the truck was a "goods vehicle". Under the law contained in Section 95(1) proviso (i) (c) of the Motor Vehicles Act, 1939, hereafter the Act, the appellant had no liability for compensation for the death of a passenger. Mr. Chakravarty has also submitted that under the terms of the insurance contract also there was no liability on the appellant.

8. Mr. AC. Buragohain, learned counsel for the respondent No. 1, has disputed the contention for the appellant.

9. The respondent No. 3, the owner of the truck, has filed cross-objection and Mr. J.M. Choudhury, learned counsel appearing on his behalf, has contended that there was no negligence and no liability for any compensation.

10. Be it stated that the respondent No. 1 did not file any appeal and the respondent No. 3 also did not file any appeal. It is in appeal by the company that the respondent No. 3 seeks to challenge the findings of the Tribunal, in regard to liability due to rash and negligent driving resulting in the said accident.

11. The questions which arise for determination are, firstly, that in so far as the appeal is concerned whether the appellant was liable for compensation and secondly, that whether the respondent No. 3 can in the cross-objection filed in this appeal by the company challenge the finding on merits on liability for compensation.

12. The undisputed established facts are that the motor vehicle was a goods vehicle. It was carrying full load of cement bags. The deceased got on the cement bags. The truck met with an accident, as a result of which the deceased was injured and died. Seven others had also died in the accident.

13. In so far as the first question is concerned Chapter VIII of the Act deals with insurance of motor vehicles against third party risks. Section 94 therein provides for necessity for insurance against third party risks.

The relevant part of Section 95 is as under:

(1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which?

(a) is issued by a person who is an authorised insurer or by a co-operative society allowed u/s 108 to transact the business of an insurer, and

(b) insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2)?

XXX XXX XXX

Provided that a policy shall not be required?

(i) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee?

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods vehicle, being carried in the vehicle, or

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(iii) to cover any contractual liability.

Explanation? XXX XXX XXX

(2) Subject to the proviso to Sub-section (1), a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely?

(a) where the vehicle is a goods vehicle, a limit of one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle....

14. On consideration of proviso (i) with its Clause (c) it appears that in the case of goods vehicle policy is not required for liability in respect of employees in the course of employment being carried in the vehicle.

15. Mr. Chakravarty, learned counsel for the appellant, has submitted that the law in Section 95, in respect of a goods vehicle, does not contemplate liability of the insurer, as in the present case, for the liability is confined to employees of a

person insured by the policy, i.e., in case of a goods vehicle as in the instant case, the provisions of Section 95(1) do not extend to or include the liability in respect of person like the deceased who was not an employee but who just got on the vehicle at Rangram for going to Tura.

16. The policy contract may be considered to see whether its terms cover any such liability, for a policy contract may provide for more liability than the minimum statutory liability as visualised in Section 95 said above.

17. Exh. A, the policy document, in its Section II deals with liability to third parties. Its Clause 1 (i) is "subject to the limits of liability", the policy will indemnify the insured against all sums including documents costs and expenses which the insured shall become legally liable to pay in respect of?

(i) death or bodily injury to any person caused by or arising out of the use of the motor vehicle.

(ii) xxx xxx xxx

18. Mr. A.C. Buragohain, learned counsel for the respondent No. 1, has argued that from the above it is clear that subject to limits, the appellant under the terms of policy contract is bound to indemnify, i.e., it is liable for the claim which the insured has to pay in respect of death of "any person", caused by or arising out of the use of the vehicle, that the deceased died in the accident which took place when the truck was undoubtedly in use for which the insured is liable and, therefore, the appellant is liable subject to the limits u/s 95(2)(a).

19. Mr. N. Chakravarty, learned counsel for the appellant, has argued that Section 95 as noted earlier does not visualise liability in respect of a person who is not an employee of the insured and hence Clause 1 (i) of the policy document referred above cannot be considered to enlarge the liability more than what it is in Section 95. Mr. Chakravarty has argued that under the further stipulation in proviso Clause (c) of Clause 1 in Section II of the policy contract the appellant could not be liable for a person like the deceased, who was in the said goods vehicle but was not an employee and could not be construed as having been in the vehicle by reason of or in pursuance of a contract of employment.

Proviso Clause (c) reads?

Except so far as is necessary to meet the requirements of Section 95 of the Motor Vehicles Act, 1939, in relation to liability under the Workmen's Compensation Act, 1923, the Society shall not be liable in respect of death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon or entering or mounting or alighting from the motor vehicle at the time of the occurrence of the event out of which any claim arises.

20. A Special Bench of this court in *New India Assurance Co. Ltd v. Satyanath Hazarika* 1989 ACJ 685 (Gauhati), has held that:

In the result, we answer the question referred to this Bench by stating that an insurer would be liable to indemnify the insured in respect of compensation awarded against him for the death of or bodily injury to a gratuitous passenger in all those cases which are pending before the Claims Tribunals or appellate authorities since 25th March, 1977. In other cases, the insurer would be liable in cases of the present nature if the particular policy covered the risk, and it shall be the burden of the insurer to satisfy by producing the policy that such a risk was not covered by the policy, if that was its case before the Claims Tribunal.

In the aforesaid case the court was not required to consider as to whether and to what extent the owner of the vehicle would be liable for picking up of passengers on way or give them lift in prohibition of statutory rules. This authority therefore is not applicable to this case, where in a goods vehicle carrying full load of cement, the deceased managed to get on it, and in the accident was killed.

21. Mr. A.C. Buragohain, learned counsel for the claimant-respondent, has referred to a decision of this court in *Braj Mohan v. Beena Prabha Das* M.A (F) No. 7 of 1976; decided on 12.5.1987, but in that case it was held that the deceased was in the vehicle in pursuance of a contract and hence the insurance company was liable. On facts this case is different, the deceased in the present case was in the vehicle, not in pursuance of any contract. The stipulation in proviso Clause (c) clearly in my opinion excludes the liability of the appellant for the death of the deceased. The liability of the insurance company could arise only under operation of law or under contract of insurance. In my opinion neither u/s 95 of the Act nor under the policy contract, the insurance company could be held liable for compensation payable by the owner of the truck to the claimant. The impugned award making the appellant liable for a part of the amount of compensation is, therefore, erroneous, and should be set aside.

22. The respondent No. 3, the owner of the vehicle, shall be liable for the entire amount of compensation to the respondent No. 1.

23. In so far as the cross-objection by the respondent No. 3 is concerned, Mr. J.M. Choudhury, his learned counsel, has submitted that the respondent No. 3 can assail the finding in regard to liability on merits, even though the claimant-respondent No. 1 did not file any appeal, and the appellant too even could not assail the said finding on merits. On the other hand, Mr. A.C. Buragohain, learned counsel for the respondent No. 1, has submitted that the respondent No. 1 not having filed appeal the respondent No. 3 by cross-objection in appeal by the company cannot question the finding on merits of liability for causing death.

24. Order 41, Rule 22 of the CPC as amended in 1976 in its relevant part reads as follows:

Upon hearing respondent may object to decree as if he had preferred separate appeal?(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree but may also state that the finding against him in the court below in respect of any issue ought to have been in his

favour, and may also take any cross-objection, to the decree which he could have taken by way of appeal, provided he has filed such objection in the appellate court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the appellate court may see fit to allow.

[Explanation.-A respondent aggrieved by a finding of the court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far as it is based on that finding, notwithstanding that by reason of the decision of the court on any other finding which is sufficient for the decision of the suit, the decree is, wholly or in part, in favour of that respondent].

25. In Sub-rule (1) the words "but may also state that the finding against him in the court below in respect of any issue ought to have been in his favour, and may also take cross-objection" were added by Section 89 of the C.P.C Amendment Act, 1976 w.e.f. 1.9.1977.

26. The award of the Tribunal was made on 7.8.1976. The appeal was filed on 7.6.1978 after the said amendment had come into force w.e.f. 1.9.1977.

27. Under the amended Sub-rule (1) of Rule 22, a respondent without even cross-objection may state that the finding on any issue recorded against him should have gone in his favour. However, in my opinion the said amendment does not in any manner enlarge the scope before the amendment, of a cross-objection by a respondent, i.e., what the latter without a cross-objection may state, on a finding against him and/or in favour of a co-respondent as in the instant case, where the claimant co-respondent has not filed any appeal, where the appellant as in the present case could not even challenge the finding in regard to liability" on merits in the appeal and where quite obviously the contention of the respondent No. 3 is sharply against the finding in regard to liability on merits in favour of the claimant co-respondent, i.e., the interests of the claimant co-respondent which shall be vitally adversely affected.

28. I am inclined to think that what a respondent within the scope of Rule 22 of Order 41 may raise or state, has to have nexus with the appeal, for it is only when the appeal is there, that a respondent who has not preferred appeal, by virtue of Rule 22, gets the right to raise objection, for that reason called cross-objection, which itself obviously indicates, the limit or scope of what may be raised or stated by a respondent, that it has to be in relation to what is said in appeal as against the respondent, who then gets the right to object. Where the interest of a co-respondent is so linked with that of the appellant, that it must be affected perhaps it cannot be helped, for the respondent has the right to cross-objection on appeal filed, such as in a partition suit or the like. In Pannalal Vs. State Bombay and Others, the Supreme Court considered the matter in paras 15 to 18 as under:

(15) Whether or not a respondent can seek relief against any other respondent

by a cross-objection under Order 41, Rule 22, Civil Procedure Code, was a vexed question in the Indian courts for a long time. The present Order 41, Rule 22 has taken the place of the former Section 561 of the Code of 1882. Indeed, the provision as regards raising an objection by a respondent without a separate appeal appears even in the Code of 1859 as Section 348. The same provision in a little more detailed form was enacted in the Code of 1877 as Section 561. It was reproduced in the Code of 1882 also as Section 561 with slight amendments in these words:

Any respondent, though he may not have appealed against any part of the decree, may upon the hearing not only support the decree on any of the grounds decided against him in the court below, but take any objection to the decree which he could have taken by way of appeal provided he has filed a notice of such objection not less than seven days before the date fixed for the hearing of the appeal. Such objection shall be in the form of a memorandum, and the provisions of Section 541, so far as they relate to the form and contents of the memorandum of appeal shall apply thereto.

Unless the respondent files with objection a written acknowledgment from the appellant or his pleader of having received a copy thereof, the appellate court shall cause such a copy to be served, as soon as may be after the filing of the objection, on the appellant or his pleader, at the expense of the respondent.

(16) The question whether a respondent could by way of cross-objection seek relief against another respondent under these provisions was first raised before the court almost a century ago. Both the Calcutta and the Bombay High Courts held in a number of cases that ordinarily it was not open to a respondent to seek relief as against a co-respondent by way of objection, though in exceptional cases this could be done. [Vide *Burroda Soonduree Dossee v. Nobo Gopal Mutlick* 1864 SWR 294; *Maharaja Tarucknath Roy v. Tuboornnissa Chowdhraim* 7 SWR 39 (1); *Ganesh Pandurang v. Gangadhar Ram-krishna* 6 Bom AC 244 and *Anwar Jan Bibi v. AzmutAli* 15 SWR 26]. These decisions it is proper to mention were given under the Code of 1859 where Section 348 provided that "upon hearing of the appeal, the respondent may take any objection to the decision of the lower court which he might have taken if he had preferred a separate appeal from such decision." After this section was replaced by Section 561 in the Code of 1877 and the Code of 1882 the question whether a respondent can file an objection against another respondent came up before the court several times and the decision remained the same.

(17) The Patna and the Allahabad High Courts also took the view that as a general rule the right of the respondent to urge cross-objections should be limited to asking relief against the appellant only and it is only where the appeal opens up questions which cannot be disposed of properly except by opening up matters as between co-respondents that relief against respondents can also be sought by way of objections. The Madras High Court took a different view in *Timmayya v. Lakshmana* ILR Mad 215 and held that the words of section were

wide enough to cover all objections to any part of the decree and it was open to a respondent to seek relief under this section even against another respondent, and this view was reiterated by that court even after the Code of 1908 made an important change in the provision by using the word "cross-objection" in place of "objection". Ultimately however in 1950 a Full Bench of the Madras High Court in *Vadlamudi Venkateswarlu and Another Vs. Ravipati Ramamma and Another*, considered the question again and decided overruling all previous decisions that on a proper construction of the language, Order 41, Rule 22 confers only a restricted right on the respondent to prefer objection to the decree without filing a separate appeal; that such objection should, as a general rule, be primarily against the appellant, though in exceptional cases it may incidentally be also directed against the other respondents. The Lahore High Court which had earlier followed the former view of the Madras High Court also decided in *Jan Mohamed v. P.M. Razdon* AIR 1944 Lah 433, to adopt the other view held by the High Courts of Allahabad, Bombay, Calcutta and Patna. The Nagpur High Court has also adopted the same view. [Vide AIR 1948 377 (Nagpur)]

(18) In our opinion, the view that has now been accepted by all the High Courts that Order 41, Rule 22 permits, as a general rule, a respondent to prefer an objection directed only against the appellant and it is only in exceptional cases, such as where the relief sought against the appellant in such an objection is intermixed with the relief granted to the other respondents, so that relief against the appellant cannot be granted without the question being re-opened between the objecting respondent and other respondents, that an objection under Order 41, Rule 22 can be directed against the other respondents, is correct. Whatever may have been the position under the old Section 561, the use of the word "cross-objection" in Order 41, Rule 22 expresses unmistakably the intention of the legislature that the objection has to be directed against the appellant. As *Rajamannar, C.J.* said in ILR 1950 Mad 874 : *Vadlamudi Venkateswarlu and Another Vs. Ravipati Ramamma and Another*,

The legislature by describing the objection which could be taken by the respondent as a "cross-objection" must have deliberately adopted the view of the other High Courts. One cannot treat an objection by a respondent in which the appellant has no interest as a cross-objection. The appeal is by the appellant against a respondent. The cross-objection must be an objection by a respondent against the appellant.

We think, with respect, that these observations put the matter clearly and correctly. That the legislature also wanted to give effect to the views held by the different High Courts that in exceptional cases as mentioned above an objection can be preferred by a respondent against a co-respondent is indicated by the substitution of the word "appellant" in the third paragraph by the words "the party who may be affected by such objection".

29. The law enunciated and elucidated above is not in my view affected by the amendment in 1976, which only permitted a respondent to urge without filing a

cross-objection that a finding on any issue against him should have gone in his favour. The amendment permits a respondent to state, which earlier he could only by a cross-objection, now without it. The scope of what a respondent can state and that he can state against the appellant as a general rule as laid down by the Supreme Court in Pannalal Vs. State Bombay and Others, is still the same and only in exceptional cases, where the interests of a co-respondent are so linked or intricately mixed with that of the appellant, that the interest of a co-respondent getting affected cannot be helped or avoided, that a respondent may state that a finding against him should have gone in his favour.

30. For the aforesaid reasons, I hold that in the present case the respondent No. 3 cannot be permitted to assail the finding that he is liable for compensation, to the claimant-respondent No. 1, who has not filed any appeal or even a cross-objection and the appellant in its appeal has only challenged the finding that it has to pay only a part of the compensation allowed to the claimant-respondent.

31. Moreover, even if the matter of liability for the death of J.C. Mahanta is considered, I am inclined to think that the finding of the Tribunal cannot be said to be unjustified or incorrect. Mr. J.M. Choudhury, learned counsel for the respondent No. 3, has argued that there was no evidence, since Nilima Mahanta, the claimant who was the only witness, admittedly was not present at the time, that the accident had occurred due to rash or negligent driving. It may be noted that the respondent in the written statement had stated that the accident took place when the fully loaded truck on a bend due to appearance of a buffalo on the road, on application of brakes, tie-rod end broke and hit the hillside and capsized. The owner respondent did not examine even the driver, who was the employee of respondent No. 3. The argument that it was for the claimant to produce the driver is not acceptable. The learned Tribunal did not commit any error in holding that the accident took place due to rash and negligent driving of the said vehicle. I am also not inclined to accept the version in the written statement that the deceased got on the vehicle without the knowledge of the driver of the vehicle, for the obvious reason that it is highly improbable and it is more probable that the deceased got on the vehicle on some understanding with the driver.

32. I am, therefore, inclined to think that the finding of the learned Tribunal is correct and that the respondent No. 3 was liable for compensation for the death of J.C. Mahanta.

33. For the aforesaid reason the appeal is allowed. The impugned award apportioning liability to the appellant for compensation payable to claimant-respondent No. 1 is set aside. The entire compensation shall be payable by the respondent No. 3. The cross-objection is dismissed. In the circumstances the parties shall bear their own costs.