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(2019) 06 GAU CK 0070

In the Gauhati High Court

Case No : Motor Accident Appeal No. 170 Of 2013

National Insurance Co Ltd APPELLANT

Vs

Alaka Rabha And Anr RESPONDENT

Date of Decision : 27-06-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 147(B), 147(i)(b), 166, 173

Citation : (2019) 06 GAU CK 0070

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : S Roy, K Sarma

Final Decision : Disposed Off

Judgement

Heard Ms. S. Roy, learned counsel for the appellant and Mr. K. Sarma, learned counsel for the respondent No. 1/Claimant. None appeared for the respondent No. 2.

2. This appeal under Section 173 of the Motor Vehicles Act, 1988 (For short 'M.V. Act') is directed against the Judgment and award, dated 17.12.2011, passed in MAC Case No. 99 of 2003, by the learned Member, Motor Accident Claims Tribunal (For short 'the Tribunal') at Goalpara whereby a sum of Rs. 5,94,448.00 is awarded as compensation on account of death of the husband of the claimant/ respondent No. 1 in a road traffic accident.

3. The case of the claimant/respondent No. 1 herein is that on 19.01.2003 at about 7 p.m., while her husband Binod Rabha along with one Manoj Kumar Rabha on pillion was riding a motorcycle bearing registration No. AS 18/4951(Hero Honda Splender), belonged to his friend, namely, Nizamuddin, from Tiapara side towards Goalpara and reached a bad shaped wooden bridge at Kokira, he pressed the brake and as a result, the motorcycle fell down to the river. Binod Rabha died on the spot and his companion pillion rider Manoj Kumar Rabha managed to save himself. The said motorcycle was insured with the

appellant/National Insurance Co. Ltd. and the policy was valid till 12.03.2003. The deceased was working as an Upper Division Assistant in P.W.D. (Roads) Division at Goalpara and he was drawing monthly salary of Rs. 6,691/-

4. The appellant/insurance company contested the case by filing a written statement. The owner of the motorcycle/respondent No. 2 herein did not contest the case and as such, proceeded ex-parte.

5. The appellant/insurance company in its written statement contended, inter alia, that as the pillion rider or driver of motorcycle is not covered under third party policy risk, it denied any liability to pay compensation and that under the policy of the said motorcycle, no extra-premium was paid for coverage of pillion rider or driver as well as that the accident occurred due to the negligence of the deceased. The appellant further contended by filing an additional written statement that the deceased was neither the 'owner' of the motorcycle nor a 'third party' and therefore, his heirs are not entitled to any compensation on account of his death.

6. It may be mentioned that the injured Shri Manoj Kumar Rabha also filed a claim case being MAC Case No. 115/2003 and by the instant impugned common judgment and award, dated 17.12.2011, his claim was dismissed.

7. Based on the above pleadings of the parties, the learned Tribunal framed the following issues:

(i) Whether the accident took place due to rash and negligent driving by the driver of the vehicle No. AS 18/4951 or the accident occurred arising out of the use of the said vehicle?

(ii) Whether the claimants are entitled to get any compensation if so, what should be just compensation?

(iii) Whether the Insurance Company or the owner is liable to pay compensation?

8. In order to establish the claim, the claimant/respondent No. 1 herein examined 3(three) witnesses including herself and the appellant/insurance company cross-examined them. The claimant exhibited as many as 9(Nine) documents.

9. Ms. S. Roy, learned counsel for the appellant/insurance company, has submitted that the claim is not sustainable in law as the deceased himself was driving the motorcycle, which did not belong to him. According to Ms. Roy, the accident occurred due to the fault and negligence of the deceased, who tried to cross a damaged bridge and as a result, fell down to the river Satipara. The deceased thus was a first party by reason of stepping into the shoes of the owner of the vehicle, the risk of whom was not covered by the insurance policy. Ms. Roy, the learned counsel for the appellant/insurance company has relied on the Judgments rendered by the Hon'ble Supreme Court in Oriental Insurance Co. Ltd. Vs. Jhuma Saha & Ors, reported in (2007) 9 SCC 263; New India Assurance Co.

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Ltd. Vs. Sadanand Mukhi & Ors, reported in (2009) 2 SCC 417 and National Insurance Co. Ltd. Vs. Ashalata Bhowmik & Ors., reported in 2018 0 Supreme (SC) 858.

10. Per contra, Mr. K. Sarmah, learned counsel for the claimant/respondent No. 1 herein, has submitted that the deceased along with one of his friends namely, Manoj Kumar Rabha was driving the motorcycle, which belonged to his another friend to drop his said companion, who was a pillion rider. Mr. Sarmah has further submitted that as no third party risk was covered by the insurance policy, the claim of the injured Manoj Kumar Rabha was rightly rejected. However, as the deceased was a Government employee, having left behind his wife, the claimant/ respondent No. 1 herein and 2 (two) children, and he was driving on the strength of a valid driving license and, further, the policy was being valid on the date of the accident that took place on the public road, the claim is maintainable and as such, the appeal may be dismissed upholding the well reasoned judgment and award of the learned Tribunal.

11. I have given due consideration to the above arguments advanced by the learned counsel of both sides and perused records.

12. A perusal of the impugned judgment and award reveals that he learned Tribunal decided all the above issues in the affirmative in MAC Case No. 99/2003. So far the issue No.

(i) is concerned, the learned Tribunal, based on evidence, oral and documentary, adduced by the claimant/respondent No. 1 herein, observed that the accident took place due to the bridge over Satipara river was in a bad shape which the deceased driven motorcycle could not cross. There was no caution notice as to the bad condition of the bridge as the P.W. 3, Mahendra Ray, an adjacent resident deposed to and corroborated by P.W. 1, Alaka Rabha, the claimant/wife of the deceased as well as P.W. 2, Manoj Kumar Rabha, who at the relevant time was pillion rider of the offending motorcycle. Learned Tribunal also observed that from Ext. 1, the G.D. Entry of Agia Police Out Post, Ext. 2, the Accident Information Report, Ext. 3, the Inquest Report, Ext. 4, the Post mortem report and Ext. 6, the driving license of the deceased, it transpires that the motorcycle was insured with the appellant/insurance company and the motorcycle was driven by the deceased under a valid driving license as well as that the accident occurred due to use of the said vehicle by the deceased, which are not in dispute. With regard to the issue No.(ii), the learned Tribunal relied on Ext. 5, the salary certificate of the deceased and Ext. 6, the driving license and came to the conclusion that the date of birth of the deceased was being 15.08.1964, he was aged 38 years+ and net salary was Rs. 4566/- pm. Calculated thus, the aforementioned awarded amount was assessed to be the compensation and the amount was directed to be paid by the appellant/insurance company as the motorcycle was insured with it and it was driven by the deceased under a driving license, which was valid on the date of the accident.

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13. There is no dispute that the deceased died on the spot while driving the offending motorcycle belonged to one, Nizam Uddin, under a valid driving license and tried to cross a bridge, in which the motorcycle slipped off to the river and the deceased succumbed to his injuries, while his companion pillion rider, Manoj Kumar Rabha (P.W. 2), somehow managed to save his life.

14. The appellant/insurance company of the offending motorcycle raised 2 (two) issues, firstly, that the accident occurred due to rash and negligent driving of the motorcycle by the deceased, and that there was third party coverage only in the insurance policy which made the legal heirs of the deceased disentitled to any compensation under the M.V. Act and the Insurance Act. The appellant/insurance company, however, did not adduce any evidence, oral or documentary, to discharge its onus of prove to the contrary of the claim and evidence of the claimant in its support, aforementioned.

15. Turning to the issue of alleged rash and negligent driving of the offending motorcycle, it is noticed from the evidence of P.Ws. 1, 2 and 3 that the accident occurred when the deceased tried to cross a wooden Satipara bridge, which was in a bad shape and witnessing such a condition, he abruptly pressed the brake and as a result, he fell down to the river. There was not even a caution notice on either side of the bridge, conspicuously appealing to the passersby as stated by P.W.-2, an adjacent resident. The accident took place at around 6.30/7 p.m., i.e. in the darkness of the night of the winter season. A detail narration of the alleged unworthy condition of the bridge has not come in evidence and on the other hand, the motorcycle was driven at a normal speed. The appellant/insurance company has not adduced any evidence to show that the deceased had the opportunity to avert the accident and that due to such rash and negligent driving, the accident occurred. Therefore, this Court is of the opinion that the accident did not occur due to rash and negligent driving of the motorcycle by the deceased.

16. Coming to the second issue that as the insurance policy covered only third party risk, the legal heirs of the deceased, who stepped into the shoes of the owner of the motorcycle, are not entitled to any compensation, it is noticed that the relevant insurance policy was not exhibited during trial of the case by the appellant/insurance company, which set up the plea. Pertinently, it may be mentioned that the jurisdiction of the Tribunal extends to a third party claim only. The claimant's witnesses constantly denied the suggestion that the claimant/respondent No. 1 is not entitled to any compensation as the policy did not cover any first party risk.

17. In Oriental Insurance Co. Ltd. case (supra), the Hon'ble Supreme Court held as herein below extracted.

"10. The deceased was the owner of the vehicle. For the reasons stated in the claim petition or otherwise, he himself was to be blamed for the accident. The accident did not involve motor vehicle other than the one which he was driving,

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the question which arises for consideration is that the deceased himself being negligent, the claim petition under Section 166 of the Motor Vehicles Act, 1988 would be maintainable.

Liability of the insurer-Company is to the extent of indemnification of the insured against the respondent or a injured person, a third person or in respect of damages of property. Thus, if the insured cannot be fastened with any liability under the provisions of Motor Vehicle Act, the question of the insurer being liable to indemnify insured, therefore, does not arise.

11. In Dhanraj Vs. New India Assurance Co. Ltd. & Anr.-2004(8) SCC 553, it is stated as follows:

"8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle or damage to any property of a third party caused by or arising out of the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

10. In this case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4989 paid under the heading "Own damage" is for covering liability towards personal injury. Under the heading "Own damage", the words "premium on vehicle and non-electrical accessories" appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out. In this case there is no such insurance."

12. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147(b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

18. In New India Assurance Co. Ltd. (Supra), the Hon'ble Supreme Court referred to its earlier decision rendered in Jhuma Saha case, reported in (2007) 9 SCC 263, wherein it was held thus:-

"13. The additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle. If that be so, Section 147 (I) (b) of the Motor Vehicles Act which in no uncertain terms covers a risk of a third party only would be attracted in the present case."

19. Again, in a recent judgment rendered in National Insurance Co. Ltd. (supra), the Hon'ble Apex Court reiterated its earlier view as follows-

" 7. We have carefully considered the submissions of the learned counsel made at the Bar and perused the materials placed on record. It is an admitted position

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that the deceased was the owner-cum-driver of the vehicle in question. The accident had occurred due to the rash and negligent driving of the vehicle by the deceased. No other vehicles was involved in the accident. The deceased himself was responsible for the accident. The deceased being the owner of the offending vehicle was not a third party within the meaning of the Act. The deceased was the victim of his own action of rash and negligent driving. A claimant, in our view, cannot maintain a claim on the basis of his own fault or negligence and argue that even when he himself may have caused the accident on account of his own rash and negligent driving, he can nevertheless make the insurance company to pay for the same. Therefore, the respondents being the LRs of the deceased could not have maintained the claim petition filed under Section 166 of the Motor Vehicles Act".

20. In the instant case, P.W. 1, the claimant/respondent No. 1, the wife of the deceased, stated that her husband was not a paid driver of the owner of the motorcycle namely, Nizam Uddin. She (P.W. 1) further denied the suggestions of the appellant/insurance company that her deceased husband was not a third party under the policy of insurance and that he was not having P.A. coverage of the policy making her disentitle to any compensation. The appellant/insurance company also put similar suggestions to the P.W.2, who was the pillion rider of the offending motorcycle, which he denied. P.W. 2 further stated that the motorcycle was taken by the deceased on verbal permission of its owner. The issue of rash and negligent driving of the motorcycle on the public road by the deceased is already decided above in the negative and as such, the claim petition is maintainable under Section 166 of the M.V. Act. There is however, no verifiable policy document being exhibited by the appellant/insurance company in course of examination of the claimant's witnesses or by way of examining some witness in support of the plea of the appellant aforementioned. Therefore, this Court is constrained to answer this second issue on non coverage of policy in the negative.

21. For the reasons, set forth above, the appeal stands dismissed. Return the LCRs.

This disposes of the appeal.

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