
(2006) 04 GAU CK 0018
In the Gauhati High Court
Case No : MAC App. No. 20 of 2005

National Insurance Co. Ltd	Vs	APPELLANT
Kanika Choudhury and Others		RESPONDENT

Date of Decision : 28-04-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(1), 149(2), 149(3), 149(4), 149(5)

Citation : (2006) 2 GLT 261

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Advocate : A. Lodh, for the Appellant; P.R. Barman and P. Dhar, for the Respondent

Final Decision : Allowed

Judgement

A.B. Pal, J.—This appeal is directed against the judgment dated 27.9.2004 passed by learned Member, Motor Accident Claims Tribunal, North Tripura, Kailashahar in Title Suit No. (MAC) 1999 awarding an amount of Rs. 1,70,200/- with interest at the rate of 9% per annum from the date of presentation of the petition on 15.11.1999 for the death of one Arup Kanti Choudhury in a vehicular accident on 30.3.1999. The National Insurance Company Ltd., being the insurer of the vehicle involved in the accident has been made liable to pay the said amount. Aggrieved, the insurer has filed the present appeal.

2.I have heard Mr. A. Lodh, learned Counsel for the Appellant, Mr. P.R. Barman and Miss P. Dhar, learned Counsel for the Respondents.

3. On 30.3.1999 a vehicle bearing No. TR-02-0363 (Tractor) owned by Golakpur Tea Estate, the third Respondent herein was proceeding from Jagannathpur Tea Estate to Golakpur Tea Estate. The deceased Arup Kanti Choudhury, who was a Compounder in the employment under Golakpur Tea Estate was behind the wheels. Though he was not the driver of the vehicle, under the instruction of the management of the said Tea Estate he was driving the vehicle on that fateful day

at about 8.45 a.m. However, the said vehicle met an accident causing grievous injury to him, which brought his end on the same day. He left behind his widow mother and wife with a baby who claimed compensation to the tune of Rs. 6,73,000/-.

4. The claim was contested by the owner as well as the Insurance Company. The owner of the vehicle contended inter alia that the deceased drove the vehicle without any authority or permission from the owner or the driver of the vehicle. According to the third Respondent, the vehicle was being driven by its driver, Babul Singh Sonar and the deceased along with others were in the vehicle proceeding towards Golakpur Tea Estate. On the way, the driver stopped the vehicle and went road side jungle to attend to nature's call when the deceased without taking permission from the driver went behind the wheel and drove the vehicle even though he had no driving licence. His unauthorized action was responsible for his death for which nobody except him shall be liable. It has been admitted that the deceased was an employee under the owner of the vehicle but denied the contention of the claimant-Respondents that he drove the vehicle under instruction of the owner of the vehicle as the regular driver was absent on that date. The National Insurance Company Ltd, the Appellant herein, however, had taken a different stand in their written statement contending inter alia that the deceased was not at all driving the vehicle on the date of accident. It was also not admitted by the insurer that the deceased was an employee of the Golakpur Tea Estate. It is not understood why such a defence was taken by the insurer when the owner in clear terms admitted that Arup Kanti Choudhury was an employee but he was driving the vehicle without any instruction. However, the insurer admitted that the vehicle was insured with them on the date of accident.

5. The learned tribunal after careful appreciation of the materials on record came to decide that the deceased Arup Kanti Choudhury died in the accident involving the vehicle TR-02-0363 without, however, touching the question about the liability of the deceased for his contributing negligence in the said accident. The other question whether the insurer can be made liable to pay the compensation in the given facts and circumstances of the case when it is admitted by the owner that the deceased, who had unauthorisedly driven the vehicle, had no licence has not been adverted to by the learned Tribunal.

6. It is noticed that the claimant-Respondents examined only three witnesses, two of them are claimants herein, and the third is one Dipendra Malakar who was traveling by the said vehicle. He stated in his deposition that the deceased was driving the vehicle under the order of the Jagannathpur Tea Estate authority (which is a branch of Golakpur Tea Estate) on 30.3.1999. When the vehicle was crossing one wooden bridge, it had fallen into a stream and thus the accident had taken place claiming the life of Arup Kanti Choudhury. Nothing could be brought out from his cross-examination to disbelieve the statement that the deceased was driving the vehicle under the direction of the management of the Tea Estate. He being an independent witness has no reason to make a false

statement and, therefore, his deposition must be considered with full credibility. The owner-Respondent examined only its Assistant Manager, who admitted that the deceased was driving the vehicle on 30.3.1999 but without any authority as the regular driver Babul Singh Sonar was very much on duty driving the vehicle. According to him, Arup Kanti Choudhury had no licence or experience in driving heavy vehicle and, therefore, he should not have made any attempt to drive the same when the regular driver, Babul Singh Sonar was attending to nature's call on the way. The story that Babul Singh Sonar was for a brief spell went to the jungle to attend to the nature's call and taking that opportunity the deceased had driven the vehicle and tried to cross the bridge over the stream cannot be accepted at its face value without corroborating evidence to that effect. From the deposition of the witnesses, claimants and the owner of the vehicle, the fact that have emerged is that Babul Singh Sonar was the driver of the said vehicle but on the fateful day he was absent and due to that reason Arup Kanti Choudhury was directed by the management to drive the vehicle from Jagannathpur Tea Estate to Golakpur Tea Estate. Admittedly, he had no licence to drive a heavy vehicle and had no experience of driving as stated by Assistant Manager of the Tea Estate. If the factual position that the vehicle was driven by the deceased under the order of the management of the Tea Estate though he had no driving licence is established, the question that falls for consideration is whether the insurer of the vehicle can be made liable to pay the compensation.

7. The other question whether an appeal by the insurer on the ground traversed in the memorandum of appeal is at all admissible in view of Sub-section (2) of Section 149 of the Motor Vehicles Act, 1988 (for short "the Act") may be addressed in the first place. Section 149(2) of the Act provides as follows:

149(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment or award unless, before the commencement of the proceedings in which the judgment or award is given, the insurer had notice through the Court or, as the case may be, the Claims Tribunal of the bringing of the proceedings, or in respect of such judgment or award so long as execution is stayed thereon pending an appeal; and an insurer to whom notice of the bringing of any such proceeding is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely,-

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle:

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organized racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor-cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of dis-qualification; or

(iii) a conditions excluding a liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on ground that it was obtained by the non-disclosure of a material factor by a representation of fact which was false in some material particular.

8. It would appear from above that a person who is not duly licensed if drives a vehicle and while doing so meets an accident, the insurer has the right to defend the action on this ground. As has been seen above, it is the clear stand on the owner of the vehicle that the deceased was driving without authority and had no licence. Thus, apparently, if a vehicle is driven by a person without licence, it can be said to have violated the condition of licence for which the insurer cannot be held liable for payment of any compensation for the said accident. The appeal by the insurer is thus, maintainable as the grounds taken are covered by Sub-section (2) of Section 149 of the Act. The decision rendered in *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, though adumbrated vociferously by the Respondents has not been the basis in the present case.

9. In this case the Insurance Company, the Appellant herein denies its liability on the ground that the driver of the vehicle had no licence. It is no longer *res integra* even in such a case when the driver had no licence which amounts to violation of the condition of the policy, the Insurance Company cannot avoid the liability to pay to a third party who was involved in the accident. This position of law has been settled by the apex Court in *United India Insurance Company Ltd. Vs. Lehu and Others*, the apex court held as follows:

17...Thus under Sub-section (1) the insurance company must pay to the person entitled to the benefit of the decree, notwithstanding that it has become "entitled to avoid or cancel or may have avoided or cancelled the policy". The words "subject to the provisions of this section" mean that the insurance company can get out of the liability only on grounds set out in Section 149. Sub-section (7), which has been relied on, does not state anything more or give any higher right to the insurance company. On the contrary, the wording of Sub-section (7) viz. "no insurer to whom the notice referred to in Sub-section (2) or Sub-section (3) has been given shall be entitled to avoid his liability" indicates that the legislature wanted to clearly indicate that insurance companies must pay unless they are absolved of liability on a ground specified in Sub-section (2). This is further clear from Sub-section (4) which mandates that conditions, in the insurance policy, which purport to restrict insurance would be of no effect if they are not of the nature specified in Sub-section (2). The proviso to Sub-section (4) is very illustrative. It shows that the insurance company has to pay to third

parties but it may recover from the person who was primarily liable to pay. The liability of the insurance company to pay is further emphasized by Sub-section (5). This also shows that the insurance company must first pay, then it can recover. If Section 149 is read as a whole it is clear that Sub-section (7) is not giving any additional right to the insurance company. On the contrary it is emphasizing that the insurance company cannot avoid liability except on the limited grounds set out in Sub-section (2).

10. In the case on hand, the deceased cannot be said to be a third party, as he himself was driving the vehicle without licence. But admittedly, he was the employee under the owner of the vehicle and it has come into evidence from the mouth of an independent witness that he was driving the vehicle under the direction of the owner. This being the position, the owner of the vehicle, the third Respondent herein, cannot avoid the responsibility of paying compensation for the death of its employee under the Motor Vehicles Act or under the Workmen's Compensation Act. Law is also settled that the claimants may choose the forum for establishing their claim.

11. In view of the above factual and legal position, the amount of compensation awarded by the learned Tribunal is to be paid by the owner of the vehicle, the third Respondent herein and in no way the liability can be fixed on the insurer, the Appellant herein. But, taking the cue on the decision in United India Insurance Company Ltd. (supra) that the insurer should pay the amount of compensation to the claimants and later realise the same from the owner, this Court finds it appropriate to give a direction on the similar line.

12. The offshoot of the above discussion is that the owner of the vehicle, the third Respondent herein shall be liable to pay the entire amount of compensation along with interest payable thereon in terms of the judgment and award passed by the learned tribunal. But initially, the insurer, the Appellant herein shall make the payment to the claimant-Respondents and thereafter proceed for recovery of the same from the owner of the vehicle without entering into any separate proceeding but by approaching the learned Tribunal itself in accordance with the provisions contained in the Motor Vehicles Act.

13. The appeal is allowed to the above extent with no order as to cost.