

(2002) 09 CAL CK 0019
In the Calcutta High Court
Case No : F.M.A. No. 421 of 1996

National Insurance Co. Ltd.		APPELLANT
	Vs	
Maya Rani Roy and Others		RESPONDENT

Date of Decision : 27-09-2002

Acts Referred:

Motor Vehicles Act, 1988 — Section 92A

Citation : (2003) ACJ 1028

Hon'ble Judges : Rajendra Nath Sinha, J;Aloke Chakrabarti, J

Bench : Division Bench

Advocate : Kamal Krishna Das, for the Appellant;

Final Decision : Allowed

Judgement

Rajendra Nath Sinha, J.—This appeal has been preferred challenging the award dated 12.11.1991 passed by the learned Additional District Judge, 1st Court, Midnapore in M.A.C. Case No. 334 of 1989.

2. In short the background may be stated that one Narayan Chandra Roy died out of an accident near Madpur Ghat on Bombay National Highway at about 9.55 a.m. in the district of Midnapore because of the offending vehicle (bus) WGB 3952 which was proceeding towards Kharagpur from Debra and the same was being driven very rashly and negligently and its front wheel burst out with terrific sound and capsized resulting in the death of the deceased victim on the spot. Amount of compensation was claimed as per the memorandum/petition to the extent of Rs. 3,50,000. Learned Tribunal assessed the same to the extent of Rs. 1,36,000 less paid Rs. 15,000 awarded to the petitioners u/s 92-A of the Motor Vehicles Act (the prior Act).

3. Admittedly, the new Act came into force on 1.7.1989. The appellant has challenged the quantum awarded by the Tribunal on the ground that as per the insurance agreement their liability was limited to the extent of Rs. 15,000 in case of a passenger and Rs. 50,000 if not a passenger, the above being the maximum

liability.

4. Learned Counsel for the appellant has urged that the learned Tribunal below has ignored the contents of the F.I.R., Exh. 3. The document, i.e., the F.I.R. had been ignored simply because the de facto complainant was not examined and did not prove the F.I.R. Learned Counsel has urged that in this instant case the said document was filed on behalf of the complainants themselves and that the document being the first in point of time which speaks in itself need not be proved by the maker of it like that of a criminal case. The said document goes to show that the said bus due to burst of one tyre capsized after taking a somersault causing some spot deaths and causing injuries to a large number of passengers.

5. Learned Counsel goes on urging that the learned Tribunal had adjudged the deceased being as a by-stander pedestrian and not a passenger of the said bus which cannot be supported by way of evidence within the four corners of the record.

6. We have been taken through the information sought in the petition:

Was the person of whom compensation is claimed travelling in the vehicle, if so, give the name of the place of starting of journey and destination.

As against the same it has been stated:

It is reported that the victim was coming from Debra to Midnapore and as a result of the accident he died on spot.

Then again as against item No. 23 of the questionnaire:

Is any other information that may be necessary in disposal of the claim?

As against that it has been stated:

That on 15.6.1989 at about 9.55 a.m. the victim coming from Debra towards Midnapore the offending vehicle WGB 3952 (bus) was proceeding towards Kharagpur from Debra side.

The offending bus was driven by driver of the said bus very rashly and negligently and the front wheel burst out with terrific sound and the said bus met an accident near Madpur Ghat on Bombay National Highway at about 9.55 a.m. As a result the victim died on the spot.

7. Learned Counsel has also drawn our attention to the evidence of P.W. 1, i.e., the widow of the deceased who has stated that her husband had been to his friend's house at Madpur and to return from Madpur to Midnapore he was standing near Madpur Ghat to avail of a bus. The same statement has also been made by P.W. 2 Biswanath Chakraborty who is stated to have been returning from Laoda on 15.6.1989 and at Madpur they got down from the said bus, so that he could meet some relative there. He asked Narayan Chandra Roy to wait near the bus stoppage and thereafter he found that the offending vehicle coming

at a high speed and knocked down some persons standing there and ran over certain persons including Narayan Chandra Roy and then capsized.

8. Learned Counsel goes on urging that the entire materials and the surrounding circumstances go to show that there is wide variance in between the said petition made in itself and that of the evidence. But on the plain reading of the F.I.R., Exh. 3, the statement made in the petition in itself, the post-mortem report, Exh. 8, goes to show that the deceased was a passenger and not a pedestrian and that had he been run over by the offending vehicle, the post-mortem report could have been otherwise in respect of the injuries.

9. Learned Counsel in his concluding portions of argument has urged that keeping in view of the insurance policy which is a limited one in respect of any passenger to the extent of Rs. 15,000 only and in the given circumstances the victim being a passenger, the liability of the appellant is limited to the extent of Rs. 15,000 as it was prior to this new Act which came into force on 1.7.1989. He has cited the decision *New India Assurance Co. Ltd. Vs. C.M. Jaya and Others*, , wherein it has been held that:

Under Section 95 (2)-Compensation-Liability of insurance company not taking any higher premium for payment of compensation to third party- Insurance company not liable to pay entire amount-Liability of the insurance company is limited to Rs. 50,000 in terms of insurance policy.

Be it noted that it is in respect of anybody other than the passenger of a bus. Another cited judgment is *Noorjahan (Tmt) Vs. Sultan Rajia Tmt alias Thaju and Others*, , wherein it appears that under the Motor Vehicles Act, 1939, Section 95(2)(b)(ii) [prior to amendment in 1982]-Motor insurance-Passenger risk-Limits of liability of the insurance company-In that case the deceased fell down from a bus while alighting as the driver moved the bus before the deceased got down- Whether the deceased was a passenger and liability of the insurance company was limited to Rs. 10,000 as per statute prevalent at the time of accident. The answer was held positive.

10. Another case has been cited in *New India Assurance Co. Ltd. Vs. Utpala Banerjee and Others*, In this case also it was held that u/s 95(2)(b)(ii) of the Act:

Compensation to be awarded to a passenger of a public service vehicle would be subject to limit as provided in Clause (ii) of Section 95(2)(b) of the Act.

This case considered the above reported decision in *Noorjahan (Tmt) Vs. Sultan Rajia Tmt alias Thaju and Others*, .

11. Learned Counsel for the respondent has relied heavily on the evidence of P.W. 2 and urged vigorously that the victim was pedestrian and not a passenger and had relied on certain decisions, viz.:

(i) *Oriental Fire & Genl. Ins. Co. Ltd. v. Nirmala Halder* 2001 (1) CLJ 615.

(ii) *M/s. United India Insurance Co. Ltd. Vs. B. Hemawati and Others*, .

(iii) New India Assurance Co. Ltd. Vs. Darshan Singh and Others, .

(iv) Smt. Anita Jena and Others Vs. Barot Chandra Pattnaik and Another, .

12. Learned Counsel goes on arguing that in the absence of any specific plea taken by the appellant in their written statement before the Tribunal they are not entitled to raise that point before this court. Admittedly, the aforesaid decisions and the law reigning in this field is that unless the same has been raised before the court below it cannot be raised for the first time herein the first appeal as this court is not a fact-finding court. The learned Counsel for the appellant in his reply has urged that he submitted a written argument before the learned Tribunal and has drawn attention to para 7 of the written statement wherein they have stated that the vehicle was covered at the material time under a policy of insurance issued to the opposite party subject to such terms and conditions and limitation thereof, and that it is for the petitioner to prove that the victim was a pedestrian and not a passenger and the onus is nowhere shifted to the respondent/defendant. The learned Counsel for the appellant has urged that as per ratio of the decision in New India Assurance Co. Ltd. Vs. C.M. Jaya and Others, , wherein the ratio laid down:

The liability of insurance company could be statutory or contractual. A statutory liability cannot be more than what is required under the statute itself. However, there is nothing in Section 95 of the Act prohibiting the parties from contracting to create unlimited or higher liability to cover wider risk. In such an event, the insurer is bound by the terms of the contract as specified in the policy in regard to unlimited or higher liability as the case may be. In the absence of such a term or clause in the policy, pursuant to the contract of insurance, a limited statutory liability cannot be expanded to make it unlimited or higher. If it is so done, it amounts to rewriting the statute or the contract of insurance which is not permissible.

13. In this instant case it appears that the point was raised in para 7 in the written statement which categorically states that the insurance company was bound by the document itself, i.e., Exh. A, the insurance policy. Admittedly, the policy contends about the limited risk to the extent of Rs. 15,000 only (as per law prevalent at the time of accident, i.e., 15.6.1989).

14. Keeping in view the aforesaid facts and circumstances we are of the view that the victim was a passenger of the offending vehicle and that the claim of a passenger is restricted to the extent of Rs. 15,000 as against the insurer.

15. Thus, the appeal succeeds. The impugned order is set aside and modified to the extent (before the Tribunal is to the extent of Rs. 15,000 and the balance amount is to be paid/recoverable as against the respondent No. 6 hereinbefore opposite party No. 1 before the learned Tribunal) as the insurer's liability to indemnify is to the extent of Rs. 15,000 only. We are, however, inclined to see that the aforesaid amount is paid with interest at the rate of 12 per cent per annum from the date of accident, i.e., 15.6.1989 as the award is the outcome of

the accident dated 15.6.1989.

Save except the aforesaid modifications, all other conditions contained in the order of the learned Tribunal are maintained. The deposit, if any, made by the appellant in this court may be withdrawn by the appellant.

Aloke Chakrabarti, J.

16. I agree.