

(1992) 03 OHC CK 0028
In the Orissa High Court
Case No : M.A. No. 513 of 1989

National Insurance Co. Ltd.	Vs	APPELLANT
Prafulla Kumar Prusty and Another		RESPONDENT

Date of Decision : 25-03-1992

Acts Referred:

Motor Vehicles Act, 1988 — Section 110D

Citation : (1993) ACJ 1225

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : Deepak Mishra, Devahanda Mishra, P.N. Naik and Anil Deo, for the Appellant; S.K. Padhi, P.K. Mishra-2 and D. Mohapatra, for the Respondent

Judgement

S.C. Mohapatra, J.—This is an appeal u/s 110-D of the Motor Vehicles Act by the insurer.

2. On 24.9.1978 at about 9 a.m., claimant was going on his cycle. Near Bachelors' Barrack of the Unit-8 in the new Capital, Bhubaneswar, one Matador bus bearing registration No. ORP 5573 dashed against the claimant. After the impact, the vehicle dashed against right side culvert at that place and damaged the same. Cycle of the claimant was damaged and he was seriously injured with fracture on his right leg. Accordingly, claimant filed an application for compensation of Rs. 39,500/-.

3. Both owner and insurer contested the claim. Owner stated that on 11.9.1978, the vehicle was kept in the garage of one Natabar Pradhan for repair to whom the key of the vehicle was handed over. On the date of accident, vehicle was taken out of the garage by Lachhman and a helper of the garage, who had taken the key of the vehicle without the permission of the owner of the garage or of the owner of the vehicle, for their joy-ride. Neither Lachhman nor the helper had driving licence and accordingly, owner is not liable. Insurer also denied its liability since vehicle was in charge of the garage owner.

4. When the claim petition was taken up for inquiry on 29th January, 1982, claimant did not appear. Finding no material on record in support of the claim, application for compensation was dismissed. Misc. Appeal No. 203 of 1982 by the claimant was allowed on 26.11.1986 by this court with direction for enquiry by Tribunal and parties were also directed to appear before the Tribunal on 22.12.1986. During pendency of the proceeding claimant made prayer on 23.2.1987 to amend the claim petition enhancing his claim from Rs. 39,500/- originally claimed to Rs. 1,00,530/- asserting that he was still being treated and has spent Rs. 25,000/- for his treatment. This was allowed by the Tribunal on 9.12.1987. Order was not supported by reasons. Thereafter, claimant examined two witnesses and produced document in support of injuries and prescriptions and receipts of purchase of medicines in support of medical expenses. Owner of the vehicle examined himself and produced the insurance certificate, charge-sheet and order-sheet in the G.R. Case against Lachhman. Evidence of the vehicle being handed over to owner of garage on 11.9.1978 was produced by filing the receipt of the amount by the garage owner for repair of the vehicle.

5. On consideration of the materials on record, Tribunal held that injuries sustained by the claimant were on account of rash and negligent driving of the vehicle by Lachhman who was charge-sheeted in the G.R. Case for offences under Sections 279/338, Indian Penal Code, 1860. It awarded Rs. 20,000/- towards medical expenses, Rs. 10,000/- for loss of pleasure of life and mental shock and physical pain and awarded Rs. 20,000/- for loss of future prospects. Tribunal awarded cost of Rs. 500/-. Compensation was directed to be paid by the insurer. Accordingly, this appeal has been filed.

6. From the materials on record, it is clear that accident was on account of negligent driving of the vehicle by Lachhman who has been charge-sheeted for trial in criminal court. Accordingly, claimant is entitled to compensation.

7. Next question for consideration is determination of just compensation. V/hen the claim application was filed in 1978, a claim of Rs. 39,500/- was made in respect of the following:

- (1) Compensation for mental shock and physical pain Rs. 5,000/-
- (2) Expenses inclined in treatment, etc., so far Rs. 1,500/-
- (3) Future expenditure Rs. 3,000/-
- (4) Compensation for loss of pleasure of life Rs. 10,000/-
- (5) Compensation for loss of future career Rs. 20,000/-

8. In the amendment petition only ground was that the treatment was continuing and expenditure up to that time was Rs. 25,000. In place of claim of Rs. 4,500/- claim was enhanced to Rs. 25,000/- in that regard. No reason in support of the prayer for enhancing the claim to Rs. 1,00,530/- was disclosed in the petition for amendment. Amendment application was casual in nature. Different heads of

claim in the original application have not been amended. In case this prayer would have been made in a civil court, it would have been rejected. Tribunal constituted by a Member of Superior Judicial Service (Senior Branch) of the State ought to have given a judicial approach to the application and ought to have passed the order with application of judicial mind specially when the same is inconsistent with rest of the assertions which remained unamended. Under the Rules made for claims before the Tribunal, a fee is payable on the claim amount. Tribunal has been given power to grant exemption from payment of fee. By an order dated 7.12.1978, exemption has been granted in respect of fee on claim of Rs. 39,500/-. When an application for amendment was made, no such application for exemption is forthcoming. Tribunal has not kept in mind this aspect of the matter. Exemption granted in 1978 cannot have universal application to enhanced claim subsequently. These circumstances are indicated to highlight how this claim application has been dealt with casually by parties as well as by the Tribunal. I cannot forget to blame the learned counsel for the insurer who should have been vigilant in this respect. I am of the view that claimant wanted to enrich himself by enhancing the claim amount taking advantage of the accident in which he sustained injuries.

9. Determination of just compensation depends upon the nature of injuries and their effect. X-ray report from the S.C.B. Medical College, blood transfusion discharge certificate, prescriptions of medicines and the medicines used in support of which some receipts have been filed indicate serious nature "of the injuries. The Orthopaedic Surgeon who is an Assistant Professor in M.K.C. Medical College Hospital, Berhampur, granted a certificate on 12.2.1986 where he gave the opinion that disability of the claimant is above 40 per cent. Taking nature of injuries into consideration, I am inclined to accept the claim of the claimant that for mental shock and physical pain he is entitled to Rs. 5,000/- as compensation as claimed by him originally. Towards loss of pleasures of life he is entitled to Rs. 10,000/- as compensation which was claimed by him originally. Towards loss of future career he is entitled to Rs. 20,000/- as claimed by him originally. In absence of any evidence of medical expenses after 1981 as found by the Tribunal, his claim of Rs. 4,500/- (Rs. 1,500 actual + Rs. 3,000/- for future) as claimed is accepted. I am inclined to make a guesswork and add Rs. 1,500/- more for further expenses. Thus, the claimant is entitled to compensation of Rs. 6,000/- on account of medical expenditure. Thus, mathematically calculated, claimant is entitled to compensation of Rs. 41,000/-.

10. Next question for consideration is the person who would be liable to pay the compensation. Since I have come to a conclusion that Lachhman was driving the vehicle, he is principally liable to pay the amount. Ignition key of the vehicle having been handed over by the owner to garage owner, I can safely draw an inference that he authorised garage owner or any other person taking the ignition key from the garage owner to drive the vehicle. Thus, owner of the vehicle is vicariously liable for payment of the compensation.

11. Since the owner is insured in respect of the vehicle, insurer is liable to pay the compensation of Rs. 41,000/-. However, Mr. Mishra, learned counsel for the appellant, submitted that Lachhman, the driver who caused the accident not having possessed of driving licence, insurer is not liable in view of terms of policy.

12. Under similar circumstances as in this case, Supreme Court considered the question of liability of the insurer in a decision reported in *Guru Govekar Vs. Miss Filomena F. Lobo and Others*, . In the said decision owner of the vehicle handed over the car for repair to the garage owner. Accident was on account of rash and negligent handling of the motor vehicle by an employee of the garage. It was observed: "When the owner of a motor vehicle entrusts his vehicle to a repairer to carry out repairs he is in fact allowing the repairer to use his vehicle in that connection. It is also implicit in the said transaction that unless there is any contract to the contrary, the owner of the vehicle also causes or allows any servant of the repairer who is engaged in the work of repairs to use the motor vehicle for the purpose of or in connection with the work of repairs and when such work of repairs is being carried out in a public place if on account of the negligence of either the repairer or his employee, who is engaged in connection with the work of repairs, a third party dies or suffers any injury either to his person or property, the insurer becomes liable to pay the compensation under the provisions of the Act. It was concluded: "Thus, on the facts of the case before us we are of the view that the insurer is liable to pay the compensation found to be due to the claimant as a consequence of the injuries suffered by her in a public place on account of the car colliding with her due to the negligence of the mechanic who had been engaged by the repairer who had undertaken to repair the vehicle by virtue of the provisions contained in Section 94 of the Act which provides that no person shall use except as a passenger or causes or allows any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance complying with the requirements of Chapter VIII of the Act. Any other view will expose innocent third parties to go without compensation when they suffer injury on account of such motor accidents and will defeat the very object of introducing the necessity for taking out insurance policy under the Act."

13. It is stated by Mr. Mishra that in the decision of Supreme Court facts were different. In that case the car was being repaired in a public place and on account of rash and negligent handling of the car there was accident. In the present case, however, car was not repaired in a public place. It was unauthorisedly taken out by Lachhman who had no driving licence. Accordingly, insurance company would not be liable.

14. As has been laid down by this court in the decision reported in *The Orissa Cooperative Insurance Society Ltd. Vs. Gnnai Behera and Another*, onus lies on the insured to prove that the driver had no driving licence. This is also the effect of the decision of Andhra Pradesh High Court reported in *Indian Mutual Insurance*

Company now merged in the Indian Mutual Insurance Company now merged in The United India Fire and General Insurance Co. Ltd. Vs. Vijaya Ramulu and Others and the decision of Allahabad High Court in Digvijai Tewari Vs. Rakesh Prasad Pathak and Others, There is no acceptable material from which it can be held that Lachhman had no licence. Driving in a public place without licence is an offence under the Motor Vehicles Act, 1939. Charge-sheet filed against Lachhman indicates that allegation is of commission of offence under Sections 279 and 338, Indian Penal Code. In case he would not have a valid driving licence, Investigating Officer would not have left the offence from the charge-sheet filed. On facts, therefore, I am of the view that insurer has not discharged the onus. Principle laid down by Supreme Court that insurer is liable where there is implied permission of the owner, would be applicable in this case. Neither owner of the garage nor Lachhman has been examined to prove the circumstances under which the vehicle was being driven in the public place. Accordingly, insurer having failed to discharge the onus is liable for the compensation.

15. Mr. Mishra relied upon a decision of Gujarat High Court reported in Linkan Jivanji Vaghela Vs. Keshavbhai Nanabhai Patel and Others, where a mechanic having no driving licence was having test drive of the motor cycle when he caused the accident. While making the owner vicariously liable, it was held that insurer is not liable. Same is the view of Madhya Pradesh High Court in a decision reported in Damodar Singh Vs. Draupadibai and Others, where insurer was held not to be liable since mechanic who caused the accident was driving the tractor after repair for test, and had no licence. Punjab and Haryana High Court in the decision in Dharam Vir Vs. Krishna Devi and Others,), held that even owner of the vehicle is not liable. On the other hand, Madras High Court has taken the view in the decision reported in New India Assurance Co. Ltd. Vs. C.B. Shannkar and Others, , that in order to escape liability, insurer is not only required to prove that driver was not holding licence but also was required to prove that he was disqualified from holding licence. These decisions, however, require no consideration in this case in view of my finding that insurer has not discharged the onus.

16. On account of plea of absence of liability by insurer and the owner, claimant has been deprived of the just compensation. Claimant is also responsible for delay in finalisation of the claim before the Tribunal. Therefore, claimant would not be entitled to the full interest from the date of application till payment. In the circumstances, I am inclined to award interest of Rs. 29,000/- as a lump sum. In case insurer deposits with Tribunal a sum of Rs. 70,000/- (Rupees seventy thousand only) within three months from today, there would be no further liability. On failure to deposit the same as stipulated, compensation of Rs. 41,000/- shall carry interest at the rate of 12 per cent per annum from the date of application till deposit is made.

17. It has been brought to my notice by the learned counsel for the appellant that by order of the court Rs. 51,313/- has been deposited on 9.10.1990 in the

name of the Registrar. Registrar is directed to pay back the amount to the insurer to enable it to deposit the amount of Rs. 70,000/- within three months in the Tribunal. Tribunal shall pass necessary orders relating to investment of the amount for benefit of the claimant as would be deemed proper.

18. In the result, appeal is allowed in part. There shall be no order as to costs. However, cost of Rs. 500/- (five hundred) directed to be paid by the insurer is confirmed which shall be deposited along with the compensation and interest as directed.