

(2019) 03 GAU CK 0039
In the Gauhati High Court
Case No : MFA 124 Of 2013

National Insurance Co. Ltd

APPELLANT

Vs

Shidul Islam @ Shahidul Islam And Anr

RESPONDENT

Date of Decision : 12-03-2019

Acts Referred:

Motor Vehicle Act, 1988 — Section 2(5), 2(6), 2(40), 147, 147(1), 147(1)(b), 147(1)(b)(i), 147(1)(b)(ii)
Evidence Act, 1872 — Section 114
Employee's Compensation Act, 1923 — Section 2(dd), 2(dd)(ii)(c)

Citation : (2019) 03 GAU CK 0039

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : R Goswami, N.N. B. Choudhury, M.H. Rajbarbhuiya

Final Decision : Dismissed

Judgement

Suman Shyam, J

1. Heard Mr. R. Goswami, learned counsel for the appellant. I have also heard Mr. N.N.B. Choudhury, learned counsel appearing for the respondent no.1 and Mr. M.H. Rajbarbhuiya, learned counsel representing the respondent no. 2.

2. This appeal has been preferred against the judgement and order dated 20/09/2012 passed by the learned Commissioner of Employees Compensation, Nagaon in NWC Case No. 04/2005, awarding a sum of Rs. 1,99,233/- as compensation to the respondent no.1 for the loss of earning capacity suffered by him. The appellant insurance company has been directed to deposit the amount.

3. This appeal was admitted to be heard on the following substantial question of law :-

"Whether the claimant/respondent no.1 is covered by policy of insurance as per provisions of Section 147 of the Motor Vehicle Act."

4. The basic facts of this case are not in dispute. The respondent no.1/ claimant was engaged as a "handyman- cum- cleaner" in a 709 mini bus bearing Registration No. AS-02A/0851 owned by the respondent no.2. On 29/07/2004, while the said vehicle was proceeding from Nagaon towards Guwahati, the claimant got down from the bus but while trying to get back to the vehicle, he fell down from the foot board and sustained grievous injuries. The claimant was treated in the BPC Hospital at Nagaon. An FIR was lodged, based on which, Nellie PS Case No. 851/2004 was registered by the Police. Due to the injuries sustained by the claimant in the said accident, his left leg was permanently damaged as a result of which, the claimant could not continue in his employment.

5. It is not in dispute that the accident occurred during the course of and out of the employment of the claimant. However, when the respondent no. 2 had refused to compensate the claimant for the loss of earning suffered by him due to the injuries sustained, claim case No. NWC 04/2005 was instituted by the claimant, which was disposed of by the impugned judgement and order dated 20/09/2012 awarding a sum of Rs. 1,99,233/- as compensation. While computing the amount of compensation, the salary of the claimant was taken as Rs. 3,000/- per month and his age at the time of accident as 22 years. The learned Commissioner had assessed the loss of earning capacity as 50%.

6. Mr. R. Goswami, learned counsel for the appellant/insurance company has submitted in all fairness that the factum of the accident is not in dispute nor does the appellant deny that the claimant had suffered grievous injuries resulting in loss of his earning capacity. However, since the claimant was employed as a handyman and no additional premium had been paid by the owner of the vehicle to cover the claim arising out of his liability towards the handyman of the vehicle, the appellant cannot be asked to bear the amount of compensation since a handyman does not come within the definition of an employee mentioned in the proviso (i) of Section 147(1)(b) of the Act of 1988. In other words, according to Mr. Goswami, the handyman of the mini bus is not included within the category of employees whose liability is covered under the statute even without any extra premium being paid by the insured.

7. To buttress his argument, Mr. Goswami has placed reliance on the decision of the Hon'ble Supreme Court rendered in case of Ramashray Singh Vs. New India Assurance Co. Ltd. and others reported in (2003) 10 SCC 664 to contend that the class of persons who would be covered under the proviso to Section 147(1) of the Act has been laid down by the Supreme Court in the aforesaid decision, according to which, handyman of a vehicle would not be covered under the statute. Mr. Goswami further submits that by following the law laid down in Ramashray Singh (Supra) this court has also held in National Insurance Co. Ltd. Vs. Konjengbam Ibo Singh and another reported in 2008(1) GLT 868 that except the Driver, Conductor and Ticket Examiner of a passenger bus, no other category of employee will be covered under the policy without the payment of additional premium.

8. Mr. Goswami has also relied upon another subsequent decision of the Supreme Court in Sanjeev Kumar Samrat Vs. National Insurance Company Limited and others reported in (2014) 14 SCC 243, to contend that the insurer will not be liable to indemnify the insured with regard to any claim arising out of such employees who do not come within the purview of section proviso to 147 (1) (b). As such, submits Mr. Goswami, the impugned judgment and order dated 20.09.2012 is unsustainable in law and hence, liable to be set aside.

9. Mr. N.N.B. Choudhury, learned counsel for respondent no.1/claimant, on the other hand, contends that respondent no.1, who was working as the handyman-cum-cleaner was also entrusted with the additional responsibility to look-after the passengers and to collect fares. Since the respondent No 1 was the only employee who was collecting fares from the passengers, according to the learned counsel, his case would be covered under the proviso (i) to Section 147 (1)(b) of the Act of 1988. Mr. Choudhury has further argued that the insurance company has failed to produce the original policy documents so as to establish that no additional premium was paid in this case covering the other category of employees. He therefore, submits that in view of the aforesaid omission on the part of the insurance Company, adverse presumption under Section 114 of the Evidence Act is required to be drawn against the appellant.

10. By referring to a decision of this Court in the case of United India Insurance Company Ltd. Chennai Vs. Smt. Gaya Roy and another reported in 2015 STPL 5674 Gauhati, Mr. Choudhury has argued that a handyman will be covered under the Act of 1988 since he would come within the ambit of Employees Compensation Act, 1923.. Mr. Choudhury has also placed reliance upon another decision of this Court rendered in MFA 93/2008 (New India Assurance Company Ltd. Vs. Md. Harmuz Ali and another) to contend that the risk of the Driver, Conductor and Examiner of Ticket is statutorily covered and no extra premium is required to be paid in respect thereof.

11. Mr. M.H. Rajbarbhuiya, learned counsel for the respondent no.2/ owner of the vehicle contends that since the Insurance Policy has not been disputed by the appellant and considering the fact that the respondent no. 1 was an employee engaged in the vehicle owned by the respondent no. 2, hence, the learned Commissioner was correct in awarding the compensation with a direction upon the appellant/ Insurance Company to deposit the amount within 30 days.

12. I have considered the submissions advanced by the learned counsel for the parties and have gone through the materials available on record.

13. As noted above, the core question that would arise for consideration in this appeal is whether the claimant was statutorily covered under the insurance policy document. Section 147 of the Act of 1988 deals with requirement of Policy and the category of employees who are statutorily covered under the policy. Having regard to the substantial question of law arising in this appeal, it may be useful to reproduce Section 147 of the Act of 1988 here-in-below :-

"147. Requirement of policies and limits of liability. - (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; and

(b) insurers the person or classes of persons specified in the policy to the extent specified in sub - section (2) -

(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person, [including owner of the goods or his authorised 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 in a public place ;

(ii) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place;

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 this 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 carriage, being carried in the vehicle, or

(ii) to cover any contractual liability.

Explanation- For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

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

(a) save as provided in clause (b), the amount of liability incurred;

(b) in respect of damage to any property of a third party, a limit of rupees six thousand :

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective

for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) where a cover note issued by the insurer under the provisions of this Chapter or the rules made there-under is not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

14. A careful reading of section 147 of the Act of 1988 would go to show that a policy of insurance must be a policy which insures the person or classes of persons specified in the policy to the extent specified in sub - section (2). Proviso (i) of section 147 (1)(b) provides that a policy shall not be required to cover the liability in respect of death arisen out of and in course of his employment in case of employees mentioned therein which includes the driver of the vehicle, if it is a public service vehicle, the Conductor of the Vehicle or the Ticket Examiner and if it is a Goods Carriage vehicle, the employees being carried in the vehicle.

15. In the present case, there is no dispute about the fact that the mini bus bearing No. AS-02A/0851 owned by the respondent No 2 is a passenger vehicle and was being operated as a "stage carriage". Therefore, this case would come under the purview of para (i) (a) and (b) of the proviso to Section 147(1) (b) of the Act of 1988 which relates to passenger vehicles.

16. As per Section 2(40) of the M.V. Act, 1988, "stage carriage" means a motor vehicle constructed or adapted to carry more than six passengers excluding the driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey.

17. Section 2(5) of the Act of 1988 defines a "conductor", in relation to a stage carriage, which means a person engaged in collecting fares from passengers, regulating their entrance into, or exit from the stage carriage and performing such other functions as may be prescribed. The Conductor is required to hold a license under Section 2(6) of the Act of 1988. However, the Act of 1988 does not

define a "Ticket Examiner" nor does it make it mandatory for a ticket examiner to hold any licence.

18. From a careful examination of the materials available on record, more particularly, the testimony of the claimant/respondent no. 1, I find that during his cross-examination, no question was put to the claimant so as to ascertain whether he had collected fares from the passenger and if not, whether there was any other employee who was functioning as the conductor in the vehicle. During cross-examination of the claimant, no suggestion was also made by the appellant that examining tickets or collecting fares from the passengers was not a part of his duty. There is also nothing on record to show that any other employee was collecting fares from the passengers. Under the circumstances a strong presumption would arise in favour of the claimant that while functioning as the handyman of the vehicle, he was also collecting fares from the passengers.

19. The expression handyman or cleaner is not a defined expression under the Act, 1988.

However, section 2(dd) of the Employee's Compensation Act 1923 defines an "employee".

As per subsection (ii) (c) of section 2(dd), a person recruited as a driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle will be an employee. Therefore, it is clear that even a helper or a cleaner will have to be treated as an employee for the purpose of the Act of 1923.

20. A handyman in a commercial vehicle is ordinarily referred to a helper who is required to perform various kind of duties which may include cleaning and up-keep of the vehicle, ensuring proper entry and exit of the passengers and collection of fares. In addition to that, a handyman may also be required to give signals to the driver standing at the door indicating as to when the vehicle is to be stopped and when to be started. The handyman may also be required to perform any other additional task which the owner or driver of the vehicle may want him to do. Therefore, the handyman is basically a helper in the vehicle whose primary job is to assist the driver in conducting the passenger vehicle properly. Having regard to the nature of job carried out by a conductor, ticket examiner and handyman, it is possible that all these category of employees may have to perform over-lapping duties. That apart, in a smaller vehicle like a mini bus, it may not always be viable for the owner to have more than two employees including the driver to operate the vehicle. Under such circumstances, the handyman may be required to carry out a multifunctional role including the role of a ticket examiner.

21. In Ramashray Singh (Supra), the employee who was a Khalasi in the vehicle met with an accident as a result of which he had died. The deceased employee of the vehicle owner had filed a claim petition under the Workman's Compensation Act seeking compensation from the owner and the Insurance Company. It was the contention of the insured that the phrase "any person" and "any passenger"

used in sub-clause (i) and (ii) of Clause (b) to Section 147 (1) would include all employees of the insured travelling in the vehicle. Negating the said argument, the Supreme Court has held that if the employee concerned is neither a driver nor conductor or examiner of tickets, the insured cannot claim that the employee would come under the description of "any person" or "passenger". It was further observed that mere mention of the word "cleaner" while describing the seat capacity of the vehicle did not mean that the cleaner was a passenger.

22. Similar view was expressed by the Supreme Court in the case of Sanjeev Kumar Samrat (Supra), wherein it was observed that proviso (i) (c) to Section 147(1)(b) would not cover any other kind of employee except an employee covered under the Act of 1923 and that too in respect of an employee carried in a vehicle. That was a case where the claim was pertaining to an employee who was travelling in a goods carriage vehicle.

23. In the case of Smt. Gaya Roy and another (Supra), the learned Single Judge of this Court had interpreted the provisions of Workman's Compensation Act, 1923 as well as Section 147(1)(b) of the Act of 1988 and held that no extra premium was required to be paid to cover the claim arising out of a handyman whose liability is covered under the Workman's Compensation Act, 1923. It was further held that in a public service vehicle, a conductor or a ticket examiner is also automatically covered by the insurance policy under Section 147(1)(b) of the Motor Vehicle Act, 1988.

24. Having regard to the facts and circumstances of the case as well as the ratio of the decisions referred to above, I am of the view that the claimant would undoubtedly come within the definition of employee under the Employees Compensation Act, 1923 and, therefore, the liability of the insured towards such employee would also be covered under the Act of 1988. It is no doubt correct to contend that save and except the three categories of employees, no other employee would be covered under the proviso (i)(b) of Section 147 (1) (b) of the Act of 1988. But as has been held above, the claimant in this case would come within the fold of "examiner of tickets" and therefore, covered under the statutory policy. As such, I am of the view that the learned Commissioner had rightly directed the appellant to deposit the amount of compensation holding the claim to be covered under the insurance policy.

25. For the reasons stated herein above, no interference with the impugned order dated 20/09/2012 is called for. The appeal is, therefore, held to be devoid of any merit and is accordingly dismissed.

Parties to bear their own costs. Send back the LCR.