
(2009) 11 OHC CK 0034

In the Orissa High Court

National Insurance Company Ltd.

APPELLANT

Vs

Kalyani Nayak and Another

RESPONDENT

Date of Decision : 13-11-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 170, 173

Citation : (2011) ACJ 1207 : (2010) 109 CLT 262 : (2010) 1 OLR 114 : (2011) 7 RCR(Civil) 2246

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 (for short, "the Act") filed by the Insurance Company against the award/judgment dated 27.12.1997 passed by the 2nd Motor Accident Claims Tribunal, Cuttack, (hereinafter referred to as "the Tribunal") in Misc. Case No. 1409 of 1991.

2. The case of the claimant-respondent No. 1 before the learned Tribunal in short is that on 18.11.1991 at about 9.30 P.M., the deceased while going from Kendrapara to Pattamundai by a Hero Honda motorcycle, a car bearing Registration No. ORA 1599 coming from backside at a terrific speed without blowing horn dashed against his motorcycle near Mulabasanta. As a result, the deceased was thrown away and sustained severe injuries on his person. Immediately thereafter, he was shifted to Pattamundai P.H.C. where he died after sometime. He was thirty years old at the time of his death and was earning Rs. 2,500/- per month from private service. The family members of the deceased were dependent on his income. As the deceased died due to rash and negligent driving by the driver of the offending car, the legal heirs of the deceased filed a petition before the Tribunal claiming compensation of Rs. 3,00,000/-.

3. Before the Tribunal, the claimant, the owner of the offending vehicle and the Insurance Company contested the case. On behalf of the claimant, three

witnesses were examined. The O.P. No. 2-Insurance Company also examined two witnesses. On behalf of the claimant four documents were produced and marked as Exts. 1 to 4. Opp. Parties produced eight documents marked as Exts. A to H/1.

4. On the basis of the pleadings made by the parties, the Tribunal framed the following five issues:

(i) Is the claim application maintainable?

(ii) Whether the death of the deceased was caused due to the rash and negligent driving of the vehicle ORA 1599 car?

(iii) Is the Insurance Company liable to pay any compensation?

(iv) Is the claim excessive and arbitrary?

(v) To what relief, if any, is the petitioner entitled?

5. Taking into consideration the evidence advanced both oral and documentary, the Tribunal came to the conclusion that death of the deceased-Dilip Nayak was caused due to rash and negligent driving by the driver of the offending car. The Tribunal further held that the claimant is entitled to get the amount of compensation and the Opp. Party, Insurance Company is liable to indemnify the Opp. Party No. 1, owner of the offending vehicle, for the compensation amount. With the said finding, the Tribunal awarded Rs. 1,70,000/- and directed the Insurance Company to pay the said compensation amount within one month with interest " 9% per annum from the date of filing of the claim petition, i.e., 21.12.1991 till the date of payment besides consolidated cost of Rs. 500/-. The Tribunal further directed that out of the award amount, Rs. 30,000/- shall be kept in shape of unencumberable fixed deposit in a nationalized bank in the names of the parents, namely, Bhikari Nayak and Kamal Devi jointly for a period of six years for the benefit of interest and a sum of Rs. 10,000/- be paid to them jointly. Out of the balance amount of Rs. 1,30,000/-, a sum of Rs. 1,20,000/- was directed to be kept in shape of unencumberable fixed deposit in a nationalized bank in the names of petitioner-Kalyani Nayak and her two minor children, namely, Prithraj Nayak and Abinash Nayak jointly for a period of 15 years for the benefit of interest and the balance amount of Rs. 10,000/- along with cost and interest to be paid to the claimant-petitioner.

Being dissatisfied with the above order of the Tribunal, the Insurance Company filed the present appeal.

6. Mr. Satpathy, learned Counsel appearing for the Insurance Company vehemently argued that the order of the Tribunal awarding compensation and making the Insurance Company liable is not sustainable since the vehicle in question, in fact, was not involved in the accident. Involving the same vehicle, three different cases, i.e., two MACT cases and one WC case were filed alleging that the same vehicle had met with accidents on three different dates within a span of two months. The owner of the offending car at different times stated the

name of the driver differently. Mr. Satpathy also challenged the quantum of compensation awarded by the Tribunal as high and excessive. While allowing deduction towards personal expenses from the gross income of Rs. 1,000/-, the learned Tribunal should have allowed 1/3rd of the gross income instead of allowing Rs. 200/- only. The age of the deceased at the time of death was 35 years and, accordingly, the correct multiplier should be 13 and, not 16 as held by the Tribunal. He further contended that the interest part as awarded " 9% per annum is high and excessive and the same should not be more than 7% per annum.

Dr. T.C. Mohanty, learned Senior Advocate appearing for the claimant-respondent No. 1, raised a preliminary objection on the point of maintainability of the appeal. It was contended that the appeal preferred by the Insurance Company challenging the finding of fact as well as the quantum of compensation is not maintainable since no permission u/s 170 of the Act was obtained by the Insurance Company. It was at best permissible for the Insurance Company to contest the case only on the grounds enumerated u/s 149(2) of the Act. In support of his contention, Dr. Mohanty relied on the decisions in National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, ; New India Assurance Co. Ltd. Vs. Mohini Charan Behera and Others, and Oriental Insurance Company Ltd. Vs. Smt. Bijayalaxmi Tripathy and Others, .

He further submitted that the Tribunal taking into consideration the evidence of all the witnesses came to the conclusion that the offending car was involved in the alleged accident, and in the said accident the deceased died. It was further submitted that the Insurance Company having admitted that at the time of accident Sri Parsuram Behera was driving the vehicle, as is evident from Ext.B/2, the Insurance Company could not be permitted to take the ground contradicting its own admission before the Tribunal. He also submitted that the Police paper itself shows that the offending car was involved in the accident and the driver involved in the accident was Parsuram Behera.

Mr. Satpathy further submitted that to raise a question regarding non-involvement of the vehicle, permission u/s 170 of the Act is not necessary.

7. On the rival contentions, the question that falls for consideration by this Court is as to whether it is open for the Insurance Company, the insurer of the offending vehicle, to file appeal on any ground other than those enumerated in Section 149(2) of the Act without permission of the Tribunal u/s 170 of the Act.

8. The provisions of Section 149(2) of the Act 1988, make it amply clear that the insurer of an offending vehicle can defend its case before the Tribunal on any of the grounds enumerated in the said Section. If for the reasons stated in Section 170 of the M.V. Act the Insurance Company is permitted by the Tribunal, it can contest the claim on all or any of the grounds that are available to a person against whom the claim has been made. In absence of permission u/s 170 of the Act, an appeal can be preferred by the Insurance Company against the award of

the Tribunal only on limited grounds in terms of Section 149(2) of the Act. Therefore, the present appellant cannot raise the question regarding non-involvement of the vehicle and quantum of compensation without obtaining permission of the Tribunal u/s 170 of the Act.

9. The above view of this Court is fortified by the decisions of the apex Court in National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others, ; Jagdish Prasad Pandey v. Darshan Singh and another, (2002) 9 SCC 527; Sadhana Lodh Vs. National Insurance Company Ltd. and Another, ; R. Mannakatti and Anr. v. M. Subramanian and Anr. (2005) 11 SCC 389; National Insurance Co. Ltd. Vs. Mastan and Another, ; Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, ; Oriental Insurance Co. Ltd. v. Syed Ibrahim and Ors. (2007) 11 SCC 512; and Calcutta High Court in Oriental Insurance Co. Ltd. v. Gurdial Singh and Anr. 2000(3) T.A.C. 61 (Cal.) and the judgments of this Court in United India Insurance Co. Ltd. Vs. Raj Kumari Sahoo and Others, ; and M.A. No. 111 of 2001, Oriental Insurance Co. Ltd. v. Gouranga Charan Behera and Anr. decided on 11.11.2009.

10. Apart from the above, the Tribunal while dealing with second issue, as to whether the death of the deceased was caused due to the rash and negligent driving by the driver of the offending vehicle bearing Registration No. ORA 1599 categorically held that no reliance can be placed on the materials placed on the records by Opposite Party No. 2 to come to a finding that the offending car was not actually involved in the accident. Therefore, unimpeachable direct testimony of P.Ws.2 and 3 and other materials placed on behalf of the claimant on record, lead to the conclusion that the offending car was being driven in rash and negligent manner, which caused the alleged accident resulting death of the deceased, Dilip Nayak.

11. In view of the above, the appeal fails and is dismissed as such.