(1985) 02 CAL CK 0009

In the Calcutta High Court

Case No : A.O.O. No. 698 of 1982

National Insurance Company Ltd. — APPELLANT

Vs

Labanya Roy and Others — RESPONDENT

Date of Decision : 15-02-1985

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 103A, 31, 96(2)

Citation : (1985) ACJ 720

Hon'ble Judges : Sankari Prosad Das Ghosh, J;Ganendra Narayan Ray, J

Bench : Division Bench

Advocate : Biswajit Chowdhury, for the Appellant;Sailendra Bhusan Bakshi, Tapas Kumar Mukherjee and Paramesh Chatterjee, for the Respondent

Final Decision : Allowed

Judgement

Ganendra Narayan Ray, J.—This appeal is directed against the judgment and award passed by the Motor Accidents Claims Tribunal, Hooghly in M. A.C. Suit No. 25 of 1978.

2. The claimant Respondent No. 1, Labanya Roy made an application before the Motor Accidents Claims Tribunal, Hooghly claiming compensation in the prescribed form on account of the death of her son Jayanta Kumar Roy due to fatal injury suffered by him by lorry No. WGA 1622 on 22nd November, 1977. The claimant contended that because of the rash and negligent driving of the said lorry, her son Jayanta died and at the time of his death he was a student of Rishi Bankim Chandra College, Naihati and used to earn Rs. 150/- per month as private tutor and also from side business. She made a claim for a sum of Rs. 75,000/- on account of the death of her son. In the claim petition, Gurubala Mal was impleaded as the owner of the said lorry and Dilip Kumar Mal was also impleaded being the driver of the said lorry. The National Insurance Company Limited was also impleaded as the insurer of the said lorry. The opposite parties contested the said claim petition and filed written objections. It was contended

on behalf of Gurubala Mal and Dilip Kumar Mai, Respondent Nos. 2 and 3 in this appeal, that the said accident was not caused due to rash and negligent driving of the said lorry but the accident took place because of the negligence on the part of Jayanta who suddenly came in front of the said running lorry. It was also contended on their behalf that the claim for compensation was highly inflated and that the said Jayanta had no independent income at the time of the accident. The Appellant, National Insurance Company Limited, initially filed a written objection and contended that it was not liable because the accident had happened due to the fault of the said Jayanta and it also disputed the quantum of compensation claimed by the Applicant. Later on an additional written statement was filed on behalf of the Appellant and it was contended therein that the said lorry was insured by its erstwhile owner one Bimal Sarkar but at the time of the said accident the said lorry had been transferred in favour of Gurubala Mal and as the insurance policy lapsed because of the transfer effected at the time of the accident, the insurance company had no liability whatsoever under the insurance policy taken by the erstwhile owner. The insurance company, therefore, contended that they had been wrongly impleaded as a party in the said claim petition.

3. It appears that on the pleadings of the parties, the learned Tribunal framed 5 issues including the issue No. 5 viz. "Is the O.P. No. 2 the insurer of the offending vehicle at the relevant time". It appears that besides the claimant, 4 other witnesses were examined in support of the said claim petition and from the evidence it transpired that the said Jayanta was a student of B.Com. class in Rishi Bankim Chandra College and while he had been going on a cycle the lorry which had been travelling at a high speed knocked him down and as a result of such accident Jayanta died. It also transpired that the said Jayanta used to coach students up to VIII and IX standard in the houses of Manick Pal and Nirode Baran Sarkar and that he had independent earning as a tutor giving private coaching. From the evidence it also transpired that the said Jayanta was not negligent while going on cycle and the accident had taken place due to rash and negligent driving of Dilip Kumar Mal who had been driving the aforesaid lorry belonging to Gurubala Mai. On behalf of the opposite parties one Ranjit Kumar Ghose, a clerk attached to the Motor Vehicles Department of the Hooghly Collectorate, was examined as OPW 1. The said witness had stated that on 22nd November, 1977 the owner of the vehicle No. WGA 1622 was one Bimal Kumar Sarkar and he became the registered owner with effect from 11th February, 1975. Gurubala Mal became the registered owner with effect from 6th September, 1980. The register of the Motor Vehicles Department maintained in regular course of business was produced by the said witness and the same was marked as Exh. A. He had, however, stated that'' he had no personal knowledge about the transfer and ownership of the vehicle on 5th or 6th June, 1975 and he could not say what happened before March, 1980. The husband of Gurubala Mal, Sambhu Charan Mal was also examined as OPW 2 on behalf of the insurance company and the said witness had stated that his wife was the owner of vehicle No. WGA 1622 and

he had given a letter to the National Insurance Company to the effect that the said vehicle was not insured in the name of Gurubala Mal on the date of the accident. The letter written by him to the insurance company was proved by him and was marked as exhibit B. The learned Tribunal after considering the evidence adduced by the parties, inter alia, came to the finding that the application for compensation was maintainable on the face of it. It may be noted in this connection that the said application was presented beyond the period of limitation and a prayer for condonation of delay was made by the Applicant on the footing that because of the great shock received by her on account of the premature death of her son in the said accident, she became physically and mentally unwell and could not present the application within the period of limitation. The learned Tribunal accepted the said case and condoned the delay in presenting the application. The learned Tribunal negatived the contention made on behalf of the insurance company that Gurubala Mal was not the owner of the offending vehicle at the time of the accident. It did hot accept the evidence given by Ranjit Kumar Ghose, a clerk in the Motor Vehicles Department, about the ownership of the said vehicle on the ground that he had stated in his deposition that he could not say about the ownership of the vehicle prior to March 1980. It came to the finding that Gurubala Mal was the owner of the said vehicle at the time of the accident. The Tribunal also held that on perusal of the claim application and also the written statements filed on behalf of the opposite party Nos. I and 3 admitting that the National Insurance Company was the insurer of the said vehicle, it should be held that the said insurance company had the liability to the extent of Rs. 50,000/- as contemplated under the law for the said accident. It accepted the case of the claimant that the deceased Jayanta had died due to rash and negligent driving of the offending vehicle and the driver of the lorry had the last opportunity to avoid the accident but he did not exercise due caution and diligence to avoid such accident. It has also accepted the case of the claimant that the deceased used to earn Rs. 150/- Per month as private tutor and from the side business and the claimant was entitled to compensation as monetary benefit to compensate the pain and suffering of the claimant in view of the premature death of her son. Although a claim for Rs. 75,000/- was made by her the learned Tribunal assessed the said compensation at Rs. 42,000/- . In view of the finding made by the learned Tribunal that the Appellant insurance company was liable under the law to the extent of Rs. 50,000/- , the award was passed against the Appellant for a sum of Rs. 42,000/- to be paid to the claimant within thirty days from the date of the said order. Being aggrieved by the said award against the opposite party No. 2, National Insurance Company only, it has preferred the instant appeal before this Court. The claimant namely the opposite party No. 1 has not preferred any cross-objection to the instant appeal.

4. Mr. Chowdhury, Learned Counsel appearing for the Appellant has contended that although in respect of a vehicle an insurance policy is issued, the policy essentially and basically is an indemnity to the person insured and such insurance policy does not run with the vehicle. He has submitted that after the

transfer of ownership of the vehicle the insurance policy comes to an end. He has contended that the learned Tribunal failed to appreciate the facts of the case and erroneously proceeded on the footing that since the vehicle was insured at the relevant time with the insurance company, it was liable to the extent of Rs. 50,000/- under the law for the said accident caused to the deceased Jayanta. In support of this contention he has referred to a decision of the Madras High Court made in the case of The South India Insurance Co., Bombay Vs. Lakshmi and Others, . It has been held in the said decision that policy of insurance comes to an end when vehicle stands physically transferred by the owner. Section 31 of the Motor Vehicles Act cannot have the effect of keeping the policy alive qua third parties. Change of registration of owner u/s 31 of the Motor Vehicles Act is not a condition precedent for the transfer of ownership of the vehicle. It merely imposes an obligation both on the transferor and the transferee to notify the transfer. But noncompliance with Section 31 does not invalidate the transfer. He has also referred to a decision of the Delhi High Court in the case of The Oriental Fire and General Insurance Co. Ltd. Vs. Vimal Rai and Others, . It appears that the Delhi High Court has also held the same view. It has been held that transfer of motor vehicle is governed by the Sale of Goods Act and not by the Transfer of Property Act and such sale is completed on payment of consideration money coupled with delivery of possession irrespective of the fact that the said vehicle is registered or not with the Motor Vehicles Department. It has also been held that although certificate of registration is an important piece of evidence to ostensibly show the owner of the vehicle who has to pay taxes and perform the duties and obligations under the Motor Vehicles Act, the endorsement of transfer on the certificate is not a condition precedent and its absence does not make the transfer invalid. It may be noted that by the said decision the Division Bench allowed the appeal preferred by the Oriental Fire and General Insurance Company Ltd. against the decision made by a single Judge since reported in the case Vimal Rai and Others Vs. Gurcharan Singh and Others, . The Division Bench in the said case has further held that where the existence or subsistence of a contract of insurance is challenged or insurance company contends that the policy has lapsed or is not available to cover the liability of the purchaser of the vehicle, the restriction contained in Sub-section (2) of Section 96 is not attracted. Mr. Chowdhury has also referred to a decision of the Supreme Court made in the case of Panna Lal Vs. Shri Chand Mal and Others, . The Supreme Court has held that transfer of a motor vehicle is a valid transfer even when such vehicle is not registered with the Motor Vehicles Authority. Mr. Chowdhury has contended that u/s 103-A of the Motor Vehicles Act the certificate of insurance can be transferred in favour of the subsequent purchaser of a motor vehicle provided an application is made within the prescribed time and the prescribed manner and such transfer is accepted by the insurer. It appears that if 15 days prior to such transfer an application is made by the owner of the vehicle for transfer of an insurance policy in favour of the intending purchaser, the insurance company may accept such transfer of policy in favour of the intending purchaser. It has also been provided for in the said section that if the decision of the insurance company is not communicated within the prescribed time it will be deemed that such transfer has been accepted by the insurance company. Mr. Chowdhury has contended that no such application u/s 103-A had been made by Mr. Sarkar who was the previous owner of the said vehicle and in whose name the insurance policy had been issued and as such there was no occasion to transfer the certificate of insurance in favour of Gurubala Mai. Mr. Chowdhury has contended that when admittedly Gurubala Mal became the owner of the said vehicle and when the insurance company specifically stated that there was no insurance policy in favour of the said Gurubala Mal and the policy came to an end with the transfer, it was the duty of the Applicant to establish by leading proper evidence that the said Gurubala Mal was covered by the insurance policy for which the insurance company could be held liable for the said accident. He has submitted that the claimant should have called for the relevant document of insurance policy for the purpose of proving that the said Gurubala Mal was covered by the valid insurance policy. He has submitted that the basic burden of proof not having been fulfilled by the claimant, the learned Tribunal was absolutely wrong in passing the award only against the insurance company. Mr. Chowdhury has also referred to a Bench decision of this Court made in the case of Bir Singh and Another Vs. Sm. Hashi Rashi Banerjee and Others, . He has submitted that in the said decision also, the Division Bench has held that the insurance policy indemnifies the insured and it does not run with the vehicle and it comes to an end after the transfer of the said vehicle. He has submitted that in the facts of the said case the Division Bench, however, held that since the insurance company being in possession of relevant documents failed to produce the registers to show that the insurance policy had not been transferred in favour of the subsequent purchaser of the vehicle in question, an adverse inference should be drawn by the Division Bench against the insurance company and the award was therefore made against the insurance company. Mr. Chowdhury has, however, submitted that in the instant case there is no material on the basis of which such adverse inference can be drawn against the insurance company and it can be held that Gurubala Mal was also covered by a valid insurance policy for which the liability can be fixed on the insurance company.

5. Mr. Bakshi, Learned Counsel appearing in favour of the claimant Respondent No. 1 has, however, submitted that Chapter VIII of the Motor Vehicles Act is intended to give protection to the third parties suffering by the accident caused by the vehicle in respect of which the insurance policy has been issued. The said basic purpose of Chapter VIII cannot be lost sight of in deciding the respective claims of the parties and fixing the liability of the insurance company. In support of this contention, Mr. Bakshi has referred to a decision of the Supreme Court made in the case of New Asiatic Insurance Company Ltd. v. Pessumal Dhanamal Aswani 1958 65 ACJ 559 (SC) and has drawn our attention to Exh. A which is an extract from the motor vehicle register in respect of vehicle No. WGA 1622. He has submitted that it will appear from the endorsement made in the said vehicle register maintained by the Motor Vehicles Authority that the National Insurance

Company was shown as the insurer in respect of the said vehicle and such insurance policy covered the period from February, 1972 upto 4th September, 1981. He has contended that it is, therefore, quite evident that at the time of the accident the said National Insurance Company was the insurer concerning vehicle No. WGA 1622. Since the insurance policy and all registers relating thereto were in the custody of the said insurance company, it was their duty to produce the said registers for the purpose of establishing that Gurubala Mal had no coverage under any valid insurance policy issued by the said insurance company at the time of the accident. In the absence of production of such policy and relevant registers, an adverse inference must be drawn against the insurance company that the said insurance policy had been issued in favour of the lawful owner and not in favour of the erstwhile owner Mr. Sarkar. He has also relied on the Bench decision of this Court made in Bir Singh and Another Vs. Sm. Hashi Rashi Banerjee and Others, . He has submitted that for non-production of relevant registers by the insurance company the Division Bench in Bir Singh and Another Vs. Sm. Hashi Rashi Banerjee and Others, , drew adverse inference against the insurance company and although it was an admitted case that after the insurance policy was issued in favour of the previous owner the said vehicle had been transferred in favour of the subsequent owner, the Division Bench on the basis of such adverse inference had come to the finding that the insurance policy must have been issued and/or continued in favour of the subsequent owner and on that basis passed an award against the insurance company. Mr. Bakshi has submitted that in the instant case also similar view should be taken by this Court and the award made by the learned Tribunal against the insurance company should be accepted to be a valid award and no interference is called for in the facts and circumstances of the case. Mr. Bakshi has also submitted that although the learned Tribunal has specifically come to the finding that due to rash and negligent driving by the Respondent No. 3, the driver of the said vehicle, the said fatal accident had taken place, it is unfortunate that the learned Tribunal has not passed the award of compensation also against the Respondent Nos. 2 and 3 and the said award was passed only against the Appellant. Mr. Bakshi has, however, submitted that under Order 41, Rule 33 of the CPC the court is quite competent to pass the award against the opposite parties 1 and 3, viz., Respondents 2 and 3 in the instant appeal, although no cross-objection has been filed by the claimant-Petitioner, the Respondent No. 1, against the award passed only against the insurance company. Mr. Bakshi has drawn our attention to illustration under Order 41, Rule 33, CPC and has submitted that in the facts of the case the appeal court is quite competent to pass such award against the Respondent Nos. 2 and 3. It may be noted in this connection that the said Respondent Nos. 2 and 3 have not appeared and contested the instant appeal at the time of hearing although from the records of this Court it transpires that appearance has been made in favour of the said Respondents. In our view, Mr. Bakshi is justified in his contention that although no cross-objection has been preferred by the Respondent No. 1, viz., the claimant Petitioner in the claim petition, under Order 41, Rule 33 of the Code we are competent to pass an award against the

Respondent Nos. 2 and 3 if we are satisfied from the facts and circumstances of the case that the said Respondent Nos. 2 and 3 are also liable to suffer an award of compensation.

6. After considering the respective submissions of the Learned Counsel about the liability of the insurance company it appears to us that the insurance policy gives an indemnity to the person taking insurance and such insurance policy, though issued in respect of a vehicle, does not run with the vehicle. The law is well-settled that after the ownership of the vehicle is transferred, the insurance policy comes to an end unless, according to the terms of the policy and also u/s 103-A of the Motor Vehicles Act, the insurance policy is transferred in favour of the subsequent purchaser. Unfortunately, there is no material in the instant case to show that such transfer of insurance policy had ever been applied for or the insurance policy issued in favour of the previous owner had in fact been transferred. It is true that the insurance company being in custody of the policy and the registers relating to the insurance policy is in a position to produce such documents to show as to in whose favour the insurance policy stands at the relevant time. There is no manner of doubt that in appropriate cases, for non-production of the documents lying in the special custody of the parties an adverse inference can be taken by the court. But we do not think that in the instant case on the score of adverse inference the liability for compensation on account of the insurance policy can be fixed against the insurance company, as was done in the facts and circumstances concerning the case reported in Bir Singh and Another Vs. Sm. Hashi Rashi Banerjee and Others, . It is unfortunate that the claimant-Petitioner laboured under a wrong impression that the insurance policy ran with the vehicle and simply because in the motor vehicle register the insurance policy issued in favour of the previous owner was recorded for the period when the accident had taken place, it should be presumed that the said insurance policy also covered the subsequent purchaser, viz., Gurubala Mal. It, however, appears to us that the learned Tribunal has specifically come to the finding that due to rash and negligent driving of the said vehicle the said fatal accident had taken place causing the death of Jayanta Kumar Roy, the son of the claimant-Petitioner. We have already held agreeing with the submissions made by Mr. Bakshi that under Order 41, Rule 33 of the Code, the award can be varied by this Court and the award of compensation can be passed by this Court against the Respondent Nos. 2 and 3 although no cross-objection has been preferred by the Respondent No. 1 against the award of compensation made solely against the present Appellant, viz., National Insurance Company Limited. In our view, in the facts of the case and also in view of the specific finding by the learned Tribunal that such accident had taken place due to rash and negligent driving of the said vehicle, the award of compensation should be passed against the opposite party Nos. 1 and 3, viz. Respondent. Nos. 2 and 3 herein.

7. We, therefore, allow this appeal and set aside the award passed against the Appellant for a sum of Rs. 42,000/- and in lieu thereof we direct that the Respondent Nos. 2 and 3 be held liable both jointly and severally for the said

sum of Rs. 42,000/- since assessed as an adequate compensation for the aforesaid accident. The Respondent Nos. 2 and 3 are directed to make payment of the said sum of Rs. 42,000/- within one month from today. In default the claimant Respondent No. 1 will be entitled to enforce the award made by us by executing the same.

8. In the facts of the case, however, we make no order as to costs in this appeal.

Sankari Prosad Das Ghosh, J.

9. I agree.