
(1997) 05 PAT CK 0038

In the Patna High Court

Case No : Misc. Appeal No. 57 of 1988 (R)

National Insurance Company Ltd.

APPELLANT

Vs

Ram Khelawan Paswan and Another

RESPONDENT

Date of Decision : 06-05-1997

Acts Referred:

Motor Vehicles Act, 1939 — Section 110, 96

Citation : (1998) ACJ 821 : AIR 1997 Patna 236

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : Tapan Sen, for the Appellant; Mahesh Tiwary, for the Respondent

Final Decision : Allowed

Judgement

Ravi Nandan Sahay, J.—This Misc. Appeal is directed against the judgment and award dated 23rd April. 1988, passed by the 7th Addl. District Judge, Dhanbad-cum-Motor Vehicle Accidents Claims Tribunal in Title (M. V. Claim) Suit No. 44/83 whereby a sum of Rs. 50.000/- has been awarded as compensation to the claimant respondent on account of death of the son of the claimant-respondent in a motor vehicle accident.

2. The case of the claimant respondent was that on 21-12-81 while Naresh Paswan, deceased son of the claimant, was going to bazar on cycle he was dashed by a truck bearing registration no. BMW 2531. It was alleged that the driver of the said vehicle was driving the said truck in rash and negligent manner which resulted in the accident and the death of the deceased. The owner of the truck and the appellant insurance company appeared and filed their respective written statement opposing claim of the claimant on various grounds. The learned Claims Tribunal after going through the evidence and after hearing the parties assessed the compensation at Rs. 50,000/- and directed the opposite parties to pay the said amount of compensation.

3. Mr. Tapan Sen learned counsel appearing for the appellant Insurance

Company, assailed the judgment and award of the Claims Tribunal as being illegal and contrary to the facts and evidence on record. The learned counsel submitted that the Tribunal completely overlooked and ignored the defence taken by the appellant and has passed the judgment and award on conjecture and surmise. The learned counsel submitted that it was the specific case of the appellant Insurance Company that the vehicle was not insured by any valid policy of insurance but the Claims Tribunal neither framed an issue nor came to prima facie finding that the vehicle was insured with the appellant Insurance Company. According to the learned counsel, therefore, in absence of such finding the judgment and award against the appellant cannot be sustained in law.

4. On the other hand. Mr. Mahesh Tiwary learned counsel appearing for the claimant-respondent, submitted (but in the written statement filed by the owner of the vehicle, it was stated that the vehicle was insured with the appellant-Insurance Company. In that view of the matter the appellant cannot be allowed to raise this point at this stage and the judgment and award cannot be said to be bad in law.

5. Before appreciating the submissions made by the learned counsel, it would be useful to look into the certain facts and the evidence from the record of original case of the Claims Tribunal.

6. From the Claim Application, a copy of which is annexure I to the memo of appeal, it appears that in column 16, where the claimant is required to disclose the name and address of the insurer of the vehicle, the claimant stated that the name of the insurer of the vehicle is not known. It appears that subsequently an application was filed by the claimants for impleading the appellant National Insurance Company Ltd. as party which was allowed by the Tribunal by order dated 12-2-84. It further appears from the record that the owner of the vehicle filed his written statement on 17-7-84 and in the said written statement it was stated, inter alia, that the vehicle in question was insured with M/s. National Insurance Company Ltd. Para 4 of the written statement reads as follows -

"Para - 4 That the present proceeding is bad for non-joinder of Insurance Company inasmuch as the vehicle in question at the relevant time was insured with M/s. National Insurance Co. Ltd. having its registered office at 3, Middleton Street, Calcutta."

7. The appellant Insurance Company appeared and filed written statement on 22-7-85. In the said written statement, besides usual defence it was specifically denied that the vehicle was insured with it. Para 7 of the written statement reads as under:--

"Para 7:-- That the vehicle bearing No. 2531 which involved in this case was not insured with this defendant and has never been insured with this defendant and as such no claim against this defendant can stand".

8. On the basis of the facts stated in the claim petition as also in the written

statements filed by the owner and the Insurance Company the Claims Tribunal framed the following issues :--

- (i) Is there any cause of action?
- (ii) Is the suit maintainable in its present form.
- (iii) Is the suit barred by limitation?
- (iv) Is the suit bad for defects of parties?
- (v) Is the plaintiff entitled to compensation, If so; for what amount?
- (vi) To what relief or reliefs, if any, the plaintiff is entitled?

9. From perusal of the issue's it is manifest that the Tribunal has not framed any issue as to whether the vehicle was insured with the appellant insurance company. The Tribunal in its judgment even did not consider the said question incidentally and there is no whisper in the judgment as to whether the vehicle was insured which is sine qua non for giving an award against the appellant insurance company. I have also gone through evidence adduced by the claimants. The claimants examined four witnesses. Not a single witness has said that the vehicle was insured with the appellant National Insurance Company Limited or any other Insurance Company, Curious enough, the owner of the vehicle did not participate in the hearing of the case inasmuch as no witness was cross-examined by the owner of the vehicle. The owner of the vehicle has not examined himself or any witness or produced a chit of paper to show that the vehicle was insured with the Appellant-Insurance Company. In view of the facts and evidence stated above, I have to see whether the judgment and Award passed by the Tribunal can be sustained in law.

10. As stated above, although the claimant subsequently impleaded the Appellant-Insurance Company as party, but the description of Policy, i.e., the Policy No., issuing branch of" the Insurance Company and the period of Policy etc. have not been disclosed in the claim application or in any other petition. From perusal of the written statement also, the owner of the vehicle did not disclose the description of the Policy under which the vehicle was insured. Even before this Court, the owner of the vehicle did not appear despite service of notice of this appeal. The question, therefore, falls for my consideration is whether in such circumstances when the Insurance Company specifically and categorically denies the insurance of the vehicle then the Tribunal would be justified in awarding compensation against the Insurance Company, and whether the law laid down by the Apex Court and various High Courts to the effect that the entire liability shall be fastened upon the Insurance Company for non-production of the Policy, shall apply.

11. I am of the definite view that unless and until it is disclosed by the Claimant or by the owner of the vehicle that the vehicle involved in the accident was insured by a valid Policy of insurance giving full descriptions no Award can be

passed against the Insurance Company, if the insurance of the vehicle is specifically and categorically denied by the Insurance Company. It is well settled that the insurance Policy is a contract entered into by and between the owner of the vehicle and the Insurance Company, whereby and where under the latter undertakes to indemnify the former in respect of death, bodily injury of any person and damage to the vehicle. subject to the terms and conditions contained in the said Policy. It is therefore, the primary duty of the owner of the vehicle to disclose the insurance particulars and prima facie prove that the vehicle was insured with the Insurance Company. On the basis of mere statement made in the written statement about the insurance of the vehicle by the owner without disclosing the particulars of the Policy, it cannot be held that non-production of the Policy by the Insurance Company will be fatal for it and the entire liability shall be borne by the Insurance Company.

12. I am aware of the decisions of the Apex Court as well as of various High Courts, wherein it has been held that it is the duty of the Insurance Company to produce the Policy, if it takes the defence that the liability of the Insurance Company is limited and restricted to the extent provided under the Act or under the Policy. But in no case, like the case in hand, the Award has been passed against the Insurance Company for non-production of the Policy, even if the very insurance of the vehicle is denied and disputed by the Insurance Company.

One can understand that the claimant., who had no concern with the vehicle, are not supposed to know the insurance particulars of the vehicle. It is true that the claimants may not know the insurance particulars, but the owner of the vehicle who appear, and contests the claim on the ground that the vehicle was insured by a valid Policy of insurance is bound to disclose the full description of the insurance Policy so that in the event the Insurance Company fails to deny the insurance of the vehicle and fails to produce the Policy, then the Tribunal or the Court may pass the Award against it.

13. In the case of National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, , the Supreme Court has held that where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is limited, it should file a copy of the insurance Policy. In the case above, the Supreme Court has held as under (at p. 723 of AIR) :

"Before parting with the case, we consider it necessary to refer to the attitude often adopted by the Insurance Companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This Court has consistently emphasised that it is the duty of the party who is in possession of a document which would be helpful in doing justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant

who are under an obligation to act fairly. In many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. We accordingly wish to emphasise that in all such cases where the Insurance Company concerned wishes to take a defence in a claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. Even in the instant case had it been done so at the appropriate stage necessity of approaching this Court in civil appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be over-emphasised."

As noticed above in the case of National Insurance Co. Ltd. (supra) the insurance of the vehicle was not denied or disputed by the Insurance Company; rather the dispute was with regard to its liability and therefore, that case will be of no help so far this case is concerned.

In the case of Satya Wati Pathak Vs. Hari Ram and Others, Bench of Delhi High Court took the same view that if the Insurance Company pleads in his defence that the liability was limited to a particular amount under the policy, then it is the duty of the Insurance Company to produce and prove the policy, failing which the Insurance Company shall be liable for the whole amount of compensation.

14. In the case of the Oriental Fire and General Insurance Company Ltd. v. Barun Kumar Pandey. 1989 BLJR 230 : AIR 1990 NOC 51 this Court while considering the similar question has held as under;

"Unfortunately, however, the appellant has not produced the policy of the insurance. It was the bounden duty of the insurer and/or the owner of the vehicle who were in possession of the said policy to produce the same before the learned Tribunal below."

"As in the instant case admittedly the insurer did not bring the insurance policy on record, in my opinion, it is estopped and precluded from raising the defence that its liability was limited to the statutory liability in terms of Section 95(2)(b) of the M.V. Act."

In the case of Benny Vs. United India Insurance Co. Ltd. and Others, , the Insurance Company took a defence by filing certified true copy of the insurance policy that its liability was limited under the policy. The owner of the vehicle contended that since the Insurance Company failed to file and prove the entire policy the entire compensation became payable by the Insurance Company. The Division Bench of the Kerala High Court considering the said contention has held as under:

"The limit of the insurer's liability is based on Exh.B.I which is a certified true copy of the insurance policy. It contains clauses regarding the limits of liability.

(i) Limit of the amount of the company's liability u/s 11-1(i)/8. 11-1(a):

(ii) Limit of the amount of the company's liability under Section 11-1(ii)/8-11-1(b)

In respect of any of the claims or series of claims arising out of any one event such amount as is necessary to meet the requirement of Section 95 of the Motor Vehicles Act, 1939." Learned counsel for the appellant, by reference to the first two limit clauses in the policy raised a contention that since the insurance company has not produced the entire policy the could not in a position to gauge the proper scope of those limit clauses. We fail to appreciate the said contention as it comes from the owner of the vehicle who wants to fasten the insurance company with the entire liability. It is also a statutory obligation of the owner of the vehicle to produce the insurance policy if the vehicle is covered by any such policy. Having failed to produce the insurance policy the owner cannot be heard to contend that the insurance company has produced only a truncated policy. 15. Apart from this, there is also another aspect of this case which compels me to remit the matter to the Tribunal. Although there is a specific denial by the appellant, Insurance Company that the vehicle was insured with it the Tribunal has not framed any issue nor has gone into this question and gave any finding whether the vehicle was insured with the appellant. Not only that the Tribunal passed a vague judgment and Award holding that the defendants, namely the owner and the Insurance Company are liable to pay the compensation assessed by him. It is well settled that the Tribunal in its judgment and Award must specify what amount of compensation is payable by the owner of the vehicle and how much amount is payable by the Insurance Company. The Tribunal has completely over-looked the fact that the owner of the vehicle has remained ex parte, in which case the Insurance Company will be entitled to put forward all the defences that are open to the owner of the vehicle u/s 110-C(2)A of the Motor Vehicles Act, 1939, which specifically states that if the person against whom the claim is made has failed to contest the claim, the Insurance Company shall have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.

16. Having regard to the discussions made above. I have come to the following conclusions;

(i) If the Insurance Company contests the claim by pleading specifically that the vehicle was not insured with it, then it is the duty of the Tribunal to frame the issue and at least to give a finding that as to whether vehicle was insured by a valid policy of insurance.

(ii) If such denial of insurance of the vehicle is made by the Insurance Company, then it is the duty of the owner of the vehicle to disclose in the written statement and in the evidence, the policy particulars of the vehicle and the copy of the policy, failing which the owner of the vehicle shall be bound to pay the entire compensation so awarded by the Tribunal.

17. In the result, this appeal is allowed and the impugned judgment and Award of the Tribunal are set aside and the matter is remitted back to the District Judge-

cum-Motor Vehicle Accidents Claims Tribunal, Dhanbad, to frame an issue, besides other issues, as to whether the vehicle in question was insured with the appellant-Insurance Company and then pass a fresh judgment after hearing both the parties and make an Award in accordance with law and keeping in mind the observations made hereinabove. However, there shall be no order as to costs.