

(2017) 03 GAU CK 0031
In the Gauhati High Court
Case No : 19 of 2014

NEW INDIA ASSURANCE CO. LTD.

APPELLANT

Vs

ARUNIMA SAIKIA @ JAMUNA SAIKIA & ORS.

RESPONDENT

Date of Decision : 22-03-2017

Acts Referred:

Motor Vehicles Act, 1988, Section 39, Section 39, Section 173, Section 173, Section 192, Section 192 - Nece

Citation : (2017) 03 GAU CK 0031

Hon'ble Judges : Kalyan Rai Surana

Bench : SINGLE BENCH

Advocate : A. Ahmed, R. Baruah, D.K. Baidya

Judgement

1. Heard Mr. A. Ahmed, learned counsel for the petitioner as well as Mr. R. Baruah, learned counsel appearing for the respondent.

2. By this appeal under section 173 of the Motor Vehicles Act, 1988, the appellant has challenged the judgment and award dated 29.09.2012 passed by the learned Member, MACT, Nagaon, Assam in M.A.C. Case No. 202/06, by which a sum of Rs.4,30,402/- was awarded in favour of the respondent No.1/claimant on the death of her husband Late Dilip Saikia (hereinafter referred to as "the victim").

3. The case of the respondent as claimant in the said M.A.C. Case in brief is that on 26.10.2004, while the victim was waiting on the road side just opposite to his residence for a Nagaon bound bus, a motorcycle without any registration or a number plate, driven in great speed and in a rash and negligent manner by the respondent No.3, namely, Sri Mukul Bora, knocked the victim. It was claimed that as a result of the said road accident, the victim suffered grievous injuries on his head and right arm. He was brought to BP Civil Hospital, Nagaon, where he was admitted for two days from 26.10.2004 to 27.10.2004. Although the

attending doctors referred him to Guwahati Medical College & Hospital for better treatment, but the respondent No.1 could not do so because of financial problems and the victim was readmitted in the same hospital on 30.10.2004 and discharged on 31.10.2004. Thereafter, he was treated at home and he died after 85 days of the incident on 21.01.2005, leaving behind his wife (respondent No.1) and his 3 minor daughters. The respondent No.1 before cremation approached the police for post-mortem to be conducted on her husband, but as the police did not do so, her husband had been cremated without conducting any post-mortem.

4. By filing the above referred claim case, the respondent No.1 claimed a compensation of Rs.5,30,000/-. The respondent No.1 adduced evidence of 3 witnesses. She examined herself as PW-1. The respondent No.2, who is the owner of the offending vehicle was examined PW-2 and one Doctor, who gave the injury report was examined as PW-3. The appellant examined an Investigator of Insurance Companies, namely, Nirod Chandra Sarma as DW-1.

5. As per the evidence of PW-2, he and the respondent No.3 were both proceeding towards Nagaon from Borghat Chariali on his newly purchase Hero Honda Motorcycle which was being driven by the respondent No.3. He admitted that the victim, who was standing on the roadside, was hit and knocked down by his motorcycle, which was being driven at a fast speed in a rash and negligent manner. In his cross-examination, the PW-2 admitted that his motorcycle was no registration number of his motorcycle and it was registered after the accident. He also admitted that in the Accident Information Report (Ext.1), the column regarding particulars of driving licence was kept blank and there was no mention of driving licence in the Motor Vehicle Inspector's Report as well. He denied the suggestion that he was liable to pay the claimed amount to the claimant although the driver did not possess any driving licence at the time of the accident.

6. The respondent No.1 as PW.1 proved 16 Exhibits including Material Exhibit i.e. X-Ray plate as Exht.16. However, the said X-ray plate is not found in the trial court record. On perusal of the said Exhibits No. 1 to 11, which are certified copies of G.R. Case No.1859/04 (consisting of 11 pages), there is no reference that the respondent No.2, who was driving the vehicle at the time of the accident had a valid driving licence at the time of the accident or that the vehicle in question was duly registered before the jurisdictional District Transport Officer.

7. The appellant by examining DW-1 proved his investigation report dated 08.07.2008, wherein it is stated that at the time of death, the victim was suffering from jaundice. He also proved Ext.D, which is a statement by the respondent No.1, wherein the respondent No.1 had stated that at the time of death, the victim was suffering from jaundice. As a part of Ext.A, the DW-1 also proved certified copies of various documents forming part of Nagaon Police Station Case No.854/04 under sections 279/338 of the Indian Penal Code, which included a copy of the letter dated 11.11.2004 written by P&K Memorial Nursing Home, Nagaon to the Officer ?In-Charge, Nagaon PS. In the said letter, it is

mentioned that the victim was conscious and oriented and had abrasions on heads and feet, which were minor in nature. The other documents appended to Ext. A are (i) the report of the Motor Vehicle Inspector, Seizure List prepared on 08.11.2004, wherein it is mentioned that the motorcycle was purchased from Guwahati on 16.10.2004, (ii) Seizure List dated 26.10.2004, mentioning seizure of the offending motorcycle, (iii) the sketch map drawn by the police of the place of occurrence, showing that the victim was standing off the road.

8. The learned counsel for the appellant argued that the victim had died due to jaundice unconnected with the injuries sustained in the accident and that as per Ext.A, the deceased had only minor injuries in the accident, for which the said vital document was suppressed by the respondent No.1. As per Ext.4(1) and Ext.4(2), the victim had suffered head injury, but despite advice for a C.T. Scan of the head, no such investigation was done. It was submitted that the Ext.4(1) and Ext.4(2), i.e. the Discharge Certificates issued by B.P. Civil Hospital, Nagaon, were both manipulated documents, which would be apparent from overwriting contained therein.

9. The learned counsel for the petitioner urged this court to disbelieve the evidence of the PW-1 and PW-3 on the ground that as per the letter dated 11.11.2004 written by P&K Memorial Nursing Home, Nagaon (part of Ext.A), the victim only suffered minor injuries with abrasions on hands and feet in the road accident on 26.10.2004, but when the said victim was admitted in B.P. Hospital, Nagaon, as per Ext.4(1) and Ext.4(2), the victim had suffered head injury. Therefore, assuming but not admitting that the Ext.5(1) and Ext.5(2) i.e. Report of X-Ray could be believed, there is no way, such an injury would develop to "comminuted fracture" in L3 and L5 spine as shown in Ext.5(1), or fracture in the lower end of right radius of right forearm, as shown in Ext.5(2). It is submitted by the learned counsel for the appellant that medical certificates, prescriptions and medicine bills, as proved by the respondent No.1 as Ext.3 series, 4 series and 5 series are all documents manufactured to create evidence in this case.

10. It is argued that the respondent No.1 had concealed Ext.A and created a manipulated set of records, for which no credence ought to be given to Ext.2 (injury report), Ext.4(1) (Discharge slip), Ext.4(2) (Discharge slip) Ext.5(1) (X Ray report) and Ext.5(2) (X Ray report). The learned counsel for the appellant doubted Ext.5(1) and Ext.5(2) in the absence of the original X-ray report, which is found missing from trial court record, despite being mentioned in Evidence-in-chief of PW-1 as Material Ext.16. The learned counsel for the appellant also doubted the correctness of the entries made in Ext.4(1) and Ext.4(2) because it contained over-writings over relevant dates of admission and discharge respectively but also on the ground that as per the said certificates. It was also submitted that there was no complain of injury or fracture at forearm and spinal cord by the victim either before the P&K Memorial Nursing Home, Nagaon or before the B.P. Civil Hospital, Nagaon because in their respective discharge certificates marked as Ext.A, Ext.4(1) and Ext.5(1), there are no mention of any

such injury suffered by the victim. On the basis of those medical reports and discharge certificates, the learned counsel for the appellant has expressed his doubts on the competence of the concerned Doctor (PW-3), who could not detect "communitated fractures" in spine and the fracture in the right forearm of the victim till 05.11.2004. He further submits that the Discharge Certificates [Ext.4(1)] was signed by Dr. KN Goswami and the Discharge Certificate Ext.4(2)] was signed by Dr. S. Baruah, both of whom were not examined by the respondent No.1.

11. The learned counsel for the appellant also referred to the crossexamination of the Doctor (PW.3). He had admitted that during the stay of the victim in the B.P. Civil Hospital, Nagaon from 26.10.04 to 31.10.04, the fracture injury on the person of the victim was not found although the said civil hospital is equipped with relevant X-ray and machines for detecting such fracture injuries. He admitted that there was overwriting in Ext. 4(1) and Ext.4(2). He also admitted overwriting in the date in Ext.3(1). He further admitted that in his prescriptions at Ext.3(1) to Ext.3(3), the problems faced by the victim was not written. He also admits that after the fractures were detected what type of treatment was given to the victim are also not mentioned in Ext.3(1) to Ext.3(3). He also admits that the nature of injuries on the head of the victim is not described in details in his prescriptions and in the Ext.2 (i.e injury report).

12. The Learned counsel for the appellant, by relying on the decision in the case of B.M., United India Insurance Co. V. Prabhat Kumar Dhal and others, 2000 (1) TAC 594 (Ori), submits that as per the ratio of the said decision, because the doctors who provided initial treatment to the victim in terms of Ext.A, Ext.4(1) and Ext.4(2) were not examined, the evidence of PW-3 must be discarded. Moreso, because opinion was based only on surmises and conjunctures without referring to the original X-rays and also on the ground that it is practically impossible for a hospital to keep an indoor patient on two occasions from 26.10.2004 to 27.10.2006 and 30.11.2006 to 31.10.04 by recording a finding of the victim suffered a head injury but completely miss out "comminuted fracture" in L3 and L5 spine and in the right forearm. It is also argued that the injury report (Ext.2) is to also be discarded because there is no evidence in any of the documents exhibited by the respondent No.1 as to what treatment was given by the doctors to her husband for those alleged injuries, for which there is a total absence of any linkage between the death of her husband on 20.01.2005 with the accident which occurred on 26.10.2004.

13. Per contra, the learned counsel for the respondent has supported the judgment and award and stated that due to acute financial problems, the respondent No.1 could neither provide appropriate treatment to her husband nor she could conduct a C.T. Scan of the head of her husband despite being advised to do so. He further submitted that although the victim was first taken to P & K Memorial Nursing Home, Nagaon on 26.10.2004, but no treatment was taken there. The victim had taken treatment in only in B.P. Civil Hospital, Nagaon, as

such, it was quite natural for the respondent No.1 to mention only the treatment taken by her husband at B.P. Civil Hospital, Nagaon, for which, there was no infirmity in her evidence. The learned counsel for the respondent also submits that the learned Tribunal had given a justified and well considered reasoning in respect of his findings and, as such, the judgment and the award in favour of the respondent No.1 was on strong preponderance of evidence. It is submitted that what is projected as false evidence by the appellant, are nothing but minor discrepancies, which does not vitiate the findings recorded by the learned Tribunal. He submits that this is not a case for finding fault on the doctor for not being able to detect fracture injuries, but this is a case that only some days after the accident, the X Rays conducted on 05.11.2006 revealed the fracture as per Ext.4(1) and Ext.4(2). He submits that it is quite possible that because of the nature of fracture, the pain was manifested elsewhere, for which the doctors could not identify the fracture, but when the PW-3 became apprehensive of such injuries, he suggested the X-Ray examination to be done and ultimately, the same was detected. He submits that there is no material available for unsettling the said finding of facts in this appeal. He further submits that the appeal be dismissed by upholding the award passed by the learned Tribunal in the present case.

14. Having heard the learned counsel for the appellant and respondent No.1 and on the perusal of the materials available on the record, it appears that the victim was treated at P & K Memorial Nursing Home, Nagaon on 26.10.2004, where he was found to have suffered minor injuries. Admittedly, the PW-3 was not the first doctor to check the victim and even as per the evidence of PW-3, prior to his treatment, the victim was examined by two other doctors, who issued Ext.4(1) and Ext.4(2), and on all these three occasions, neither the victim complained of fracture at L3 and L5 at spinal cord or about fracture in the right forearm. In both the cases, there is bound to be pain and discomfort in arm movement and general movement of the body. Dictionary meaning of "comminuted fracture" in which a bone is broken, splintered or crushed into more than two fragments. Therefore, it is hard to believe that the victim would suffer such a fracture in L3 and L5 of spine as well fracture at lower end of right radius of the right arm and would still be able to move from 26.10.2004 to 05.11.2004 without making any complaint to the doctors examining him on 26.10.2004 and as indoor patient in hospital from 26.10.2004 to 27.10.2004 and from 30.10.2004 to 31.10.2004, take no treatment between 01.11.2004 to 04.11.2004 and there would be no record of what treatment the victim was given for such grievous injuries. Viewed from that angle, the withholding of Ext.A, and over-writing in Ext.4(1) and Ext.4(2) and missing Material Exhibit No.16, makes these Exhibits No. 2, 4(1), 4(2), 5(1) and 5(2) as well as non examination of authors of the Ext.A, Ext.4(1) and Ext.4(2) highly suspicious. Thus, by applying the ratio laid down by the Division Bench of this court in the case of Kailash Pathak V. Oriental Insurance Co. Ltd., 2003 (1) GLT 470, this court is of the view that the medical evidence of PW-3 as well as Ext.2, Ext.4(1), Ext.4(2), Ext.5(1) and Ext.5(2) are liable to be

totally ignored and rejected. Resultantly, the claim is rejected and the impugned judgment and award is liable to be set aside.

15. Moreover, it is seen that the Respondent No.2, who was the owner of the offending motorcycle was not registered at the time of the accident. Admittedly, as per the seizure list, the motorcycle was purchased at Guwahati on 16.10.2004, was being allowed by him to be driven by Respondent No.3, who made no attempt to prove that he had a valid driving licence at the time of the accident. Thus, it appears that the respondents No. 3 was driving the motorcycle in contravention of the provisions of section 3 of the Motor Vehicles Act, 1988, which is otherwise a punishable offence under section 181 of the said Act. Similarly, the respondent No.2 allowed his motorcycle to be driven on the date of the accident i.e. on 26.10.2004 without any registration, which is in contravention of section 39 of the Motor Vehicles Act, 1988 and the same is otherwise punishable under section 192 of the said Act. Therefore, the imposition and/or shifting of liability on the appellant is held to be bad in law, as such driving constitutes breach of conditions of insurance policy and, as such, it was only the liability of the respondent No.2 to pay compensation and the appellant could not have been saddled with any liability therefor. Nonetheless, in the present case in hand, the claim of the respondent No.1 has been rejected by setting aside the impugned judgment and award.

16. The appeal stands allowed and the judgment and award dated 29.09.2012 passed by the learned Member, MACT, Nagaon, Assam in M.A.C. Case No. 202/06, which is impugned herein, is set aside. The Registry may refund the statutory deposit made by the appellant. If in the meantime, the appellant has deposited any part of the award either before this Court or before the learned Motor Accident Claims Tribunal, Nagaon, the appellant is at liberty to claim refund of recovery thereof, as the case may be.

17. Let the LCR be returned.