
(2008) 09 GAU CK 0097
In the Gauhati High Court

New India Assurance Co. Ltd.

APPELLANT

Vs

City Lyngdoh and Others

RESPONDENT

Date of Decision : 24-09-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 146, 147, 166

Citation : (2010) ACJ 86 : (2009) 4 GLR 875 : (2009) 1 GLT 629

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Judgement

B.D. Agarwal, J.—The judgment and award dated 10.8.2007 passed by the learned Member, Motor Accidents Claims Tribunal, Shillong in M.A.C. Appeal No. 3 of 2007 has been assailed by two insurance companies. M.A.C. Appeal No. 3 of 2007 has been filed by the insurance company of the truck No. AS 01-K-5774 praying for exonerating the insurance company totally on the ground that the risk of the deceased was not covered under the policy. M.A.C. Appeal No. 4 of 2007 has been filed by the insurance company of truck No. AS 01-M 1929 basically to reduce the ratio of the liability arising out of composite negligence of the drivers of two vehicles. For easy reference, I would refer the insurance companies by their truck numbers in this judgment. Since the appeals are arising out of one and the same judgment, both the appeals are being disposed of by this common judgment.

2. Heard Mr. v.K. Jindal, learned senior counsel for New India Assurance Co. Ltd. (truck No. AS 01-K 5774) and Mr. A. Khan, the learned Counsel appearing for Oriental Insurance Co. Ltd. (truck No. AS 01-M 1929). Mr. C.P. Upadhaya, learned Counsel, represented the claimants. It may be mentioned here that owners and drivers of both the vehicles did not appear to contest the appeals despite being notified. It is further noted here that before the tribunal also, except the filing of written statement by the owner of truck No. AS 01-K 5774, the owners and drivers did not contest the claim applications.

3. Shorn of details, the factual matrix giving rise to the filing of claim petition

and passing of the impugned judgment are as follows:

The accident took place on 1.10.2003 at a place known as Lad Umroi on the national highway. The accident took place early in the morning at 7.30. Truck No. AS 01-K-5774 was coming from Guwahati and going towards Shillong, whereas truck No. AS 01-M 1929 was carrying goods from Shillong to Guwahati. Both these vehicles had a head-on collision resulting into the death of claimants' husband/father. The claim application was filed on 2.4.2004. The claim application was subsequently amended in the month of July 2005 only to incorporate an information that the accident took place due to rash and negligent driving of truck No. AS 01-K 5774 which dashed the other truck. The remaining particulars remained as it is. To establish the requirements to get compensation under the law of Tort, the claimants examined altogether six witnesses including independent witnesses from the village, medical officer and the investigating officer.

4. Both the insurance companies also filed their written statements taking usual pleas that their liability is subject to the proof of negligence of the driver of the insured vehicles; fulfilment of the terms and conditions of the policy, etc. The insurance company of truck No. AS 01-K 5774 also examined their assistant manager as OPW 1 whereby the insurance company raised a defence that the deceased was a gratuitous passenger and, as such, it had no liability to pay any amount of compensation. The said insurance company also filed a petition sometime in the month of March 2007 for summoning the driver as a witness. However, this petition was rejected on 4.4.2007 on the ground that the prayer was made at a belated stage and more so, on the ground that the insurance company did not take a specific plea that the vehicle was being driven on the basis of a fake driving licence. However, the insurance company of truck No. AS 01-M 1929 did not adduce any evidence either to disown its liability or to establish that the negligence of its driver was less in comparison to the negligence of the other driver.

5. On the conclusion of the inquiry, the Tribunal has awarded a sum of Rs. 4,15,500 (rupees four lakh fifteen thousand five hundred) with interest at the rate of 7.5 per cent per annum from the date of filing of the claim application and both the insurance companies have been held liable to pay the compensation on equal ratio. Being aggrieved with this award, the appeals have been filed.

6. Upon hearing the learned Counsel for both the sides, it appears to me that the following issues are to be appreciated and re-examined by this Court:

- (i) Whether the deceased was a gratuitous passenger in truck No. AS 01-K 5774?
- (ii) If so, whether New India Assurance Co. Ltd. could be totally absolved of its liability?
- (iii) Whether the ratio of compensation (50:50) as fixed by the Tribunal is to be interfered with by this Court?

(iv) Whether the Tribunal has awarded compensation, disproportionate to the earnings of the deceased and dependency of the claimants?

(v) Whether New India Assurance Co. Ltd. can be directed to satisfy its share of award at the first instance or the award should be directed against the owner?

Whether gratuitous passenger:

7. Mr. V.K. Jindal, learned senior counsel for the insurance company of truck No. AS 01-K 5774 submitted that the records and evidence would go to show that the deceased was a gratuitous passenger and not a handyman/cleaner in truck No. AS 01-K 5774, as has been claimed and held by the Tribunal. This submission was made on the basis of information disclosed in the claim application and the depositions of witnesses. On the other hand, Mr. C.P. Upadhaya, learned Counsel for the claimants submitted that the owner of the truck has admitted in written statement that the deceased was a handyman in his truck and, as such, no illegality has been committed by the Tribunal holding the insurance company to pay compensation on the principle of vicarious liability.

8. As noted earlier, the first claim application was filed in the month of April 2004 and the amended claim application was filed in the month of July 2005, i.e., after more than one year of the accident. In both these claim applications, it was stated that the deceased was a cultivator/labourer and self employed earning Rs. 6,000 (rupees six thousand) per month. Even in the oral evidence, the claimant, CW 1 reiterated that her husband was a cultivator and casual labourer. Mr. C.P. Upadhaya, learned Counsel for the claimants submitted that a handyman can also be termed as a labourer. I could have acceded to this interpretation provided some corroboration would have been available in this regard. However, I find from the record that CW 2 being a Sardar of a village has deposed that the deceased was a cultivator and a labourer and also did some kind of trade. There is no whisper in his deposition that deceased used to work in the trucks or motor vehicles either as a handyman or khalasi, etc. In fact, CW 2 has also issued an income certificate, Exh. 1 and in this certificate also there is no whisper of working in any vehicle even during non-season period. Strangely, CWs 3 and 4 being the witnesses from the same locality are stoically silent about the source of income of the deceased. In this way, independent witnesses have not supported the claimants' version that the deceased was in anyway engaged in the truck. Be that as it may, the police investigating officer, CW 6 has removed the confusion by giving a categorical deposition that the deceased was a passenger in the truck.

9. On perusal of the impugned judgment, I find that findings of the Tribunal that the deceased was a handyman in truck No. AS 01-K 5774 is solely based on the statement of the owner given in his written statement. It is needless to say that the averments made in the written statement cannot be considered as legal evidence and no finding on disputed questions can be rendered on the basis of pleadings. At the same time, the learned member of the Tribunal did not discuss the evidence of witnesses about the status of the deceased in the truck, which

had a direct bearing on the liability of the insurance company. On the other hand, when the insurance company sought to summon the driver of the truck to ascertain about the genuineness of his driving licence as well as the status of the deceased, the prayer was turned down vide order dated 4.4.2007.

10. In the case of The Oriental Insurance Company Limited Vs. Meena Variyal and Others, , the Hon''ble Supreme Court has held that in claim applications filed u/s 166 of the Motor Vehicles Act, 1988, drivers of the offending vehicles are necessary parties since they are the persons against whom awards can be passed. Only thereafter if it is proved that the driver was duly employed with a valid driving licence, the liability to pay compensation would shift upon its owner and if the vehicle is duly insured, the liability would further shift upon its insurance company. However, overlooking this legal requirement, the prayer was turned down, ignoring the importance of the testimony of the driver. In my considered opinion, even if the prayer was a belated one or without specific pleading, the prayer should have been acceded to readily since the testimony of the driver would have thrown sufficient light as to the manner in which the accident had taken place; status of the deceased while travelling in the vehicle and also about the legality of his driving licence. Be that as it may, being the first appellate court, I have looked into the evidence and hold that the finding of the Tribunal on this count is untenable on facts. Accordingly, the finding of the Tribunal that deceased was a handyman in the truck is hereby set aside. I hold that the deceased was a gratuitous passenger in truck No. AS 01-K 5774.

Composite negligence:

11. Mr. A. Khan, learned Counsel for the insurance company of truck No. AS 01-M 1929 submitted that this truck was loaded with goods and, as such, it can be inferred that there was less possibility of driving it in a zigzag manner. The learned Counsel also submitted that since the other truck was empty there was every possibility of hitting the loaded truck by coming on the wrong side.

11.1. From the written statement of Oriental Insurance Co. Ltd., I find that no such specific plea was raised before the Tribunal nor any evidence was proffered to prove that the ratio of negligence of truck No. AS 01-K 5774 was greater than truck No. AS 01-M 1929. At the same time, the investigating officer has admitted in the cross-examination that when he visited the site of accident within 15/20 minutes, he found both the trucks in the middle of the road with signs of head-on collision. It may also be noted here that the insurance company did not take any step to examine the concerned MVI or produced MVI reports that also could have been a basis to decide the percentage of negligent driving. There is also no evidence indicating that the driver of truck No. AS 01-M 1929 had made any attempt to avert the accident. At the same time, the fact that both the vehicles were found in the middle of the road with evidence of dashing each other are enough to hold that the drivers of both the vehicles were equally responsible for the accident.

Liability:

12. It was another contentious issue in the appeals. According to Mr. V.K. Jindal, learned senior counsel for the insurance company of truck No. AS 01-K 5774 submitted that neither the statutory policy covered the risk of the deceased nor the law permits any gratuitous passenger to be carried in a goods vehicle and, as such, his insurance company should be absolved from the liability to satisfy any part of the award. In support of his argument, the learned senior counsel relied upon the judgment of Hon"ble Apex Court rendered in the case of New India Assurance Co. Ltd. Vs. Asha Rani and Others, New India Assurance Co. Ltd. v. Vedwati 2007 ACJ 1043 (SC); and also the judgment of Hon"ble Karnataka High Court rendered in the case of United India Insurance Co. Ltd. Vs. Krishnappa and Another, .

13. In the case of New India Assurance Co. Ltd. Vs. Asha Rani and Others, the Hon"ble Supreme Court had the occasion to examine the contours of Section 147 of the Motor Vehicles Act with reference to its amendment in the year 1994. After adumbrating to the provisions of law and various authorities on the issue, their Lordships have held that, no doubt after the 1994 amendment the owner of the goods or its authorised representative travelling in the truck with their goods are covered under the statutory policies but any person not being the owner of the goods is not covered under the Act Policy. The relevant observations laying down the position of gratuitous passenger in goods vehicle are as below:

(26) In view of the changes in the relevant provisions in the 1988 Act vis-a-vis 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used, i.e., "a third party". Keeping in view the provisions of 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.

13.1. The aforesaid view has been reiterated in the case of Vedwati 2007 ACJ 1043 (SC), wherein the Apex Court has held as below:

(14) The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor.

Hon"ble Karnataka High Court has also taken a similar view in the case of United India Insurance Co. Ltd. Vs. Krishnappa and Another,

14. The liability of the insurance company, if any, can also be examined from a different angle. For this purpose, one has to look at Section 147 of the Motor Vehicles Act. The relevant provisions of Section 147 are reproduced below:

147. Requirements 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) insures 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 his 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.

15. In the case of Ramashray Singh Vs. New India Assurance Co. Ltd. and Others, the Hon''ble Supreme Court was confronted with the question as to whether an Act Policy would also cover the risk of a khalasi/helper in a goods vehicle. The Apex Court answered the query in the negative interpreting the Proviso to Section 147(1). The law propounded by the Apex Court also needs to be reproduced, which is as below:

(10) The appellant's first submission was that Shashi Bhushan Singh was a passenger. The appellant's submission that the phrases "any person" and "any passenger" in Sub-clauses (i) and (ii) of Clause (b) of Section 147(1) are of wide amplitude, is correct. [See New India Assurance Company Vs. Shri Satpal Singh and Others,]. However, the proviso to the sub-section carves out an exception in respect of one class of persons and passengers, namely, employees of the insured. In other words, if the "person" or "passenger" is an employee, then the insurer is required under the statute to cover only certain employees. As stated earlier, this would still allow the insured to enter into an agreement to cover other employees, but under proviso to Section 147(1)(b), it is clear that for the purposes of Section 146(1), a policy shall not be required to cover liability in respect of the death arising out of and in the course of any employment of the

person insured unless- first: the liability of the insured arises under Workmen's Compensation Act, 1923, and second: if the employee is engaged in driving the vehicle and if it is a public service vehicle, is engaged as conductor of the vehicle or in examining tickets on the vehicle. If the concerned employee is neither a driver nor conductor nor examiner of tickets, the insured cannot claim that the employee would come under the description of "any person" or "passenger". If this was permissible, then there would be no need to make special provisions for employees of the insured. The mere mention of the word "cleaner" while describing the seating capacity of the vehicle does not mean that the cleaner was therefore a passenger. Besides, the claim of the deceased employee was adjudicated upon by the Workmen's Compensation Court which could have assumed jurisdiction and passed an order directing compensation only on the basis that the deceased was an employee. This order cannot now be enforced on the basis that the deceased was a passenger.

(Emphasis added)

16. Having analysed the issue from two angles and also in view of my finding that the deceased was a gratuitous passenger in the truck, I hold that New India Assurance Co. Ltd. has no liability whatsoever to indemnify the owner of truck No. AS 01-K 5774. I hold so because neither the deceased was an employee of the owner of the truck as a driver, nor a handyman nor was he engaged in the truck in any capacity. Even for a moment, the extreme case of the claimants that the deceased was a handyman in the truck, even then his risk was not covered by the policy since there was no payment of extra premium to cover the risk of handyman. Besides this, there is also no evidence that the deceased was travelling in the truck as owner of the goods. Hence, he was also not covered u/s 147(1)(b)(i) of the Act. Accordingly, New India Assurance Co. Ltd. is hereby absolved from its liability.

Indemnity at the first instance:

17. Mr. C.P. Upadhaya, learned Counsel for the claimants-respondents submitted that, since there is no dispute that truck No. AS 01-K 5774 was duly insured, this insurance company at least be directed to satisfy half of the award at the first instance and then recover the money from the owner. However, Mr. V.K. Jindal, learned senior counsel for the insurance company submitted that the legal principle in this regard laid down by the Apex Court in the cases of National Insurance Co. Ltd. Vs. Swaran Singh and Others, Sri Pramod Kumar Agrawal and Another Vs. Smt. Mushtari Begum and Others, and Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others, are not applicable in the case at hand inasmuch as, the theory of satisfying the decree at the first instance has been propounded by the Apex Court only in cases where the insurance companies dispute their liability on the ground of breach of policy conditions and not on the ground of policy coverage. However, as contended by the learned Counsel, in the present case, the question has been raised with regard to the coverage of the risk of the deceased altogether under the policy.

18. Having given my anxious consideration to the point, I hold that insurance company of truck No. AS 01-K 5774 cannot be fastened with any liability even at the first instance since the deceased was a gratuitous passenger. In other words, 50 per cent of the compensation amount has to be borne by the owner of truck No. AS 01-K 5774. The rest of the amount shall be paid by Oriental Insurance Co. Ltd., since truck No. AS 01-M 1929 was duly insured with this company.

Quantum:

19. Mr. A. Khan, learned Counsel for the insurance company of truck No. AS 01-M 1929 also submitted that Tribunal has awarded compensation disproportionate to the age and income of the deceased. In this regard, the learned Counsel submitted that the claimant herself has given a fake testimony with regard to the age of her husband and other evidence with regard to dependency are also insufficient. It was also contended that the learned Tribunal has also adopted a higher multiplier and, as such, the compensation should be suitably reduced.

20. To appreciate the aforesaid submissions, I had browsed the record and to my dismay I find that the claimants did not come with clean hands. Even the learned Member of the Tribunal also appears to have decided the case in a slipshod and perfunctory manner, totally oblivious to his responsibilities as a judge. It is needless to say that judges do not perform any executive or ministerial job but their work is in the nature of sacred and divine, while rendering justice to the parties. A few such instances of lackadaisical handling of the case have already been mentioned earlier in this judgment regarding non-impleading/ non-summoning of the driver on the prayer of the insurance company. Few other serious lapses in the proceeding are mentioned below:

(i) In the amended claim application, there was no mention of the age of the claimant No. 1. The relevant line in the second page of the claim application remained blank.

(ii) The amended claim application was also not signed either by any one of the claimants or by their counsel. However, the judgment has been rendered on the basis of the amended claim application.

(iii) I have also noticed that while giving deposition in the court, the wife of the deceased disclosed her age being 25 years whereas in both the claim applications which were filed at an interval of more than one year, the age of claimant No. 1 was shown to be 30 years. However, learned Member of the Tribunal did not think it necessary to get a clarification from the claimant as regards gross discrepancy with regard to the age of the claimant No. 1. I have also noticed that in the cross-examination, CW 1 has deposed that her eldest daughter was 18 years old and from this statement also, a duty was cast upon the Tribunal to make further enquiry with regard to the age of CW 1 and her husband.

(iv) Learned Member of the Tribunal also did not insist upon the claimants to

disclose the age of the children of the deceased in the claim applications nor insisted its office to put an office seal in the claim applications, which assumes significance in the present case since the age of the claimant No. 1 appears to have been inserted in the affidavit (unsworn) after putting white fluid.

(v) The amended claim application was accepted without there being any signature of the claimants or their lawyer nor was it supported by any authenticated verification/affidavit.

(vi) In the written statement of Md. Naushad, owner of truck No. AS 01-K 5774, the verification was incomplete inasmuch as, neither the name nor the age of the deponent nor even the date of verifying the written statement was given. I have already mentioned earlier that the Tribunal is not in the habit of putting office seal or signature of any assistant on the pleadings of the parties. This may give room to the parties to tamper with the records to their suitability, at any point of time.

20.1. Amidst the above lacunae in the proceeding I find that according to CW 1 her husband was 35 years old whereas according to the doctor the deceased was 37 years. Having regard to the fact that the deceased has left behind as many as seven children and the eldest being 18 years old, the Tribunal ought to have accepted the medical opinion. In this situation the deceased could have been placed in the age bracket of 35-40 years and multiplier of 16 ought to have been accepted. However, instead the Tribunal has adopted the maximum multiplier of 17. Be that as it may, keeping in mind the large number of dependants and also the spirit of the law, I am not interfering with the quantum of compensation, which has been assessed on the basis of Rs. 100 (rupees one hundred) per day earning of the deceased.

21. In the result, M.A.C. Appeal No. 3 of 2007 stands allowed whereas M.A.C. Appeal No. 4 of 2007 stands dismissed. Precisely, the impugned award is hereby upheld with the modification that 50 per cent of the award shall be satisfied by Oriental Insurance Co. Ltd. and the remaining amount shall be payable by the owner of truck No. AS 01-K 5774. Since the appeal of New India Assurance Co. Ltd. has been allowed, the Registry is directed to refund the statutory deposit of Rs. 25,000 (rupees twenty-five thousand) to the insurance company against proper receipt. This insurance company shall also be at liberty to recover the amount of Rs. 25,000 (rupees twenty-five thousand) paid to the claimants under "no fault liability" clause from the owner of truck No. AS 01-K 5774.

22. The Registry is directed to place a copy of this judgment before the Hon'ble Portfolio Judge of Shillong, who may reflect the observations made in this judgment against the learned Member of M.A.C.T., Shillong in his ACR, if his Lordship so pleases.

23. Return the LC record with a copy of this judgment.