
(2010) 02 GAU CK 0079

In the Gauhati High Court

Case No : MAC Appeal No's. 42, 43, 44, 45, 46, 47 and 48 (K) of 2007

New India Assurance Co. Ltd.

APPELLANT

Vs

Khenyei and Others

RESPONDENT

Date of Decision : 22-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 21, Order 41 Rule 27, Order 41 Rule 27(1)

Motor Vehicles Act, 1988 — Section 170

Citation : (2006) 1 GLT 972

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

Bench : Single Bench

Advocate : Imti imsong, for the Appellant; Tali Ao, for the Respondent

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—The aforesaid seven appeals are being disposed of by this common judgment since an identical legal issue is involved in all the appeals. In fact the appeals are also arising out of a common judgment based on identical facts.

2. Heard Mr. Imti Imsong, learned Counsel for the Appellants and Mr. Tali Ao, learned Counsel appearing for the Respondent No. 1/claimant. Other Respondents did not turn up despite being notified.

3. The Insurance Company has filed the aforesaid appeals against the judgment and order dated 3.8.2007 passed by the learned member, Motor Accident Claims Tribunal, Dimapur, Nagaland in MAC Case Numbers 1 of 2005, 3 of 2005, 4 of 2005, 5 of 2005, 6 of 2005, 7 of 2005 and 14 of 2005.

4. By the impugned judgment the tribunal has awarded an amount of Rs. 23,25,236.00 to the claimants for sustaining injuries in a motor vehicular accident on 29.7.2003. Since two vehicles were involved in the accident the tribunal fastened the award in the ratio of 2/3: 1/3. Two third award is directed

against the owner and insurer of Traylor Truck bearing registration No. HR-38/D/3604 (Traylor-Truck) and 1/3rd amount has been directed against the owner and insurer of Bus No. NL-06/B/0027. At the same time the tribunal has come to a finding that since both the vehicles were duly insured with M/s New India Assurance Company Ltd. the said company is liable to satisfy the entire award. Being aggrieved with this direction the Insurance Company has preferred the aforesaid appeals.

5. The owners and drivers of the offending vehicles did not contest the claim cases in the tribunal. Despite that the Insurance Company did not obtain leave of the tribunal u/s 170 of the M.V. Act, 1988 to contest the cases on merit. Hence in the present set of appeals the only question to be examined by this Court is as to whether the direction of the tribunal to satisfy the entire award by the Insurance Company is justifiable or whether the liability of the Insurance Company shall be confined to 1/3 amount of the award in respect to the passenger bus.

6. Before addressing the legal issue involved in the appeals it is desirable to bring on record the salient features of the cases.

6.1. On 29.7.2003 all the claimants were travelling in Bus No. NL-06/B/0027. At the relevant point of time the Traylor truck was carrying iron beams and coming from the opposite direction and one iron beam came out of the body of the truck and this iron beam perforated right side of the body of the bus causing grievous injuries to a good number of passengers including the claimant Accordingly the injured persons filed the claim cases alleging that the driver of the Traylor-Truck was responsible for the aforesaid accident. It was specifically averred that the driver of the truck drove the vehicle in a rash and negligent manner. Besides this, as per the claim cases after investigation charge-sheet was also filed against the driver of the Traylor Truck.

6.2. The Insurance Company contested the case by filing written statements and also adduced evidence. In the written statement, it was specifically pleaded that the Traylor-Truck was not insured with them. The relevant portion of the written statement is reproduced below:

That, as a matter of fact, the alleged offending vehicle bearing No. HR-38/D-6604 was not insured with the New India Assurance Co. Ltd., Telco Tied Unit, Telco Spare parts Building, Jamshedpur under Adityapur Divisional Office, Adityapur, Jamshedpur, Bihar as alleged by the claimant and the question of liability does not arise against the answering opposite party in the present case. As such, the answering opposite party has nothing to do in the present case.

6.3. To establish the claim and the liability of the Insurance Company the claimants examined themselves as PW 1 and they also examined one medical officer as PW 2. On the other hand, the Insurance Company also examined one Senior Assistant of the Divisional Office, Dimapur to prove that the Traylor-Truck was not insured with them. While giving deposition the said witness of the Insurance Company (DW 1) also filed an affidavit executed by the Divisional

Manager of Adityapur Divisional Officer, Jamshedpur where the Tractor Truck was allegedly insured. In his affidavit the Divisional Manager, Jamshedpur reiterated that the Tractor-Truck bearing registration No. HR/38/D/3604 was not insured from their office. On the basis of pleadings and evidence from both the sides, the tribunal has held that the accident took place due to composite negligence of both the drivers of the vehicles. I have already mentioned earlier that as per pleadings and oral evidence of the claimants the accident had taken place solely due to rash and negligent driving of the Tractor Truck.

However, the tribunal has held that the driver of the bus was also responsible since there was no evidence that he made any attempt to avert the accident. By taking adverse presumption the 1/3rd responsibility/liability has been fastened upon the bus driver.

6.4. With regard to the insurance coverage the tribunal has held that the Insurance Company failed to rebut the claimants' evidence that the Tractor-truck was insured with M/s New India Assurance Company Ltd. and as such the entire award has to be satisfied by the Insurance Company alone.

7. After filing of the appeals the Insurance Company also filed an application, purportedly under Order 41, Rule 27 of the CPC seeking the leave of this Court either to allow them to adduce additional evidence or to consider the Motor Premium Register of the Telco Branch Office for the period from 21.3.2003 to 28.3.2003 to examine the correctness of the findings of the tribunal with regard to the insurance of the truck. It has been stated in the said application that the said document was not available at the Dimapur Branch at the relevant time and it was received only on 16.10.2007 and as such the said document should be considered as additional evidence. This document has been produced to show that no policy was obtained by the owner of the Tractor-Truck namely Sri Prem Singh. As per claimants evidence the policy was valid till 24.3.2004 and as per the evidence of DW-1 the policies are issued for one year and as such the owner of the Tractor-Truck must have obtained their policy on 25.3.2003. Hence, the Insurance Company has produced Motor Premium Register from 21.3.2003 to 28.3.2003, which does not show issuance of any policy in the name of Sri Prem Singh against any Tractor-Truck.

8. The learned Counsel for the Respondent No. 1 vehemently objected to the introduction of the aforesaid document as additional evidence. Besides this, the learned Counsel submitted that the claimant had given full details of insurance of the Tractor Truck in their claim application and reiterated in the oral evidence and as such the onus shifted upon the insurance company to prove that the Tractor Truck was not insured with them. In support of this contention the learned Counsel for the Respondent No. 1 cited the judgment of the Hon'ble Madras High Court rendered in the case of United India Insurance Company Limited Vs. R. Venkatesan and Dakshinamoorthy, and two judgments of Hon'ble Andhra Pradesh High Court rendered in the case of New India Assurance Company v. Shaikshabi reported in 1992 SCJ 281 and another one in New India Assurance

Co. Ltd. Vs. Shaik Ashabi and Others,

9. In the case of R. Venkatesan (supra) the Hon''ble Madras High Court has held that though the application of provisions of the CPC are limited but since the claimant had given details of the Insurance Policy in the claim application the burden shifted upon the Insurance Company to show that the vehicle was not duly insured with them. Be that as it may, their Lordships have held that the initial burden is upon the claimants. In the said cited case full details of the insurance policy was given. However, in the case before me only the number of Certificate of the insurance and the branch office of the insurance company was mentioned. In other words policy number was not given in the claim applications. Besides this, in the aforesaid cited case only one vehicle was involved, whereas in the case before me, two vehicles were involved and insurance company has admitted about policy coverage of the bus while denying the policy of the truck. Hence, the authority is distinguishable on facts.

10. In the other two cases the claimant had examined motor vehicle inspector to give the details of the insurance policy of the offending vehicle. However in the present case except giving hearsay statement that to the information of the claimants the Trailor-Truck was insured with the Appellant insurance-company, the source of information was not disclosed. Besides this, the claimants also did not summon any police officer from the police station where the offending vehicle (truck) was detained and its driver was arrested nor the seized documents were produced in the Court.

11. On the hand, the Insurance Company examined one Senior Assistant to depose that the Trailor Truck was not insured with them. As noted earlier while giving oral testimony the said witness also produced one affidavit executed by the Divisional Manager from Jamshedpur under whom Telco Branch falls. Be that as it may, DW-1 was an official witness and he had the authority to represent both Dimapur and Jamshedpur Office. Despite this fact the tribunal has held that the Insurance Company could not prove that the Trailor Truck was not insured with them. In my considered opinion, the tribunal has taken an extreme view to fasten the liability upon an insurance company for the vehicle which was not insured with them.

12. As mentioned earlier the Insurance Company has submitted Motor Premium Register of Telco Branch wherefrom the Trailor Truck owner had allegedly taken the policy. In this regard the learned Counsel for the Respondent No. 1 submitted that this document should not be considered since the Insurance Company failed to produce the same before the tribunal, despite having all the opportunities. The learned Counsel for the Respondent No. 1 also referred to the judgment of the Hon''ble Kerala High Court given in the case of Smti Achamma v. Dhanraj Singh reported in AIR 1998 Kar 318 and the judgment of Kerala High Court reported in the case of New India Assurance Co. Ltd., Cochin Vs. V.N. Thankappan and Others,

13. In my considered opinion, both the aforesaid judgments are based on different facts and not identical to the situation of the case in hand. In the case of Smti Achamma (supra) the Petitioner wanted to produce certain documents only to counter certain observations made by the trial Court in a tenancy dispute. Those documents were however, not considered necessary by the High Courts. Similarly, in the case of V.N. Thankappan (supra) additional evidence were not admitted by the High Court stating that Order 41, Rule 21(aa) CPC was not applicable since the document was admittedly available with the Appellant. However, in the case before me, the Motor Premium Register was not available at Dimapur Division at the time of giving evidence by senior Assistant of the said office.

14. In the case of Mahavir Singh v. Naresh Chandra, reported in (2001) 1 SCC 309, the Hon''ble Supreme Court laid down the guidelines to invoke Order 41, Rule 27 Code of Civil Procedure. Their Lordships have held that the appellate Courts may allow additional evidence to enable it to pronounce judgment under 3rd circumstance. Referring to the judgment of Syed Abdul Khader v. Rami Reddy AIR 197 SC 553, their Lordships have held that when the appellate Court finds itself unable to pronounce judgment owing to a lacuna or defect in the evidence as it stands, it may admit additional evidence. The Apex Court has further held that the ability to pronounce a judgment is to be understood as the ability to pronounce a judgment satisfactory to the mind of the Court delivering it.

15. In my considered opinion, it is a fit case wherein the discretionary power of the appellate Court given under Order 41, Rule 27(1)(b) should be exercised to do substantial justice to the Appellant. Besides this, Clause (aa) is also to some extent attracted since the document, the Insurance Company intends to tender as additional evidence, was not in their possession at the relevant time. Besides this, the said application under Order 41, Rule 27 was filed on 7.11.2007 and despite notice to the Respondents no written objection has so far been filed. Although the learned Counsel for the Appellant prayed that the matter may be remanded to the tribunal so that the documentary evidence may be proved by examining witnesses from Telco Branch, however, learned Counsel for the Respondent No. 1 objected the prayer and prayed that the appeal be decided in the High Court itself on the basis of the materials and document available here.

16. Having regard to all the evidence and documents, I am persuaded to consider Motor Premium Register of New India Assurance Company Ltd., Telco Branch Office which has been filed through Misc. Case No. 42(K) of 2007, supported by an affidavit as an additional evidence. Having considered the said document along with oral testimony of DW-1 and the affidavit of the Divisional Manager of Jamshedpur, I hold that the Trailer-Truck, bearing registration No. HR-38/D/3604, was not insured with the Appellant Insurance Company. Consequently, M/s New India Assurance Company is not liable to satisfy 2/3rd of the award as directed by the tribunal. However, the remaining findings of the tribunal, including the amount of compensation and the rate of interest, are not

interfered with.

17. With the aforesaid modification in the impugned judgment the appeals stand allowed. The Statutory Deposit made by the Insurance Company shall be refunded to the Appellant Insurance Company.