
(2018) 03 GAU CK 0057
In the Gauhati High Court
Case No : MACApp. 217 of 2010

NEW INDIA ASSURANCE CO. LTD

APPELLANT

Vs

MD. JOYNAL UDDIN @ JAINUL UDDIN BORBHUIYA and 2
ORS,

RESPONDENT

Date of Decision : 20-03-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2018) 03 GAU CK 0057

Hon'ble Judges : KALYAN RAI SURANA

Bench : Single Bench

Final Decision : Allowed

Judgement

1. Heard Ms. M. Choudhury, learned Counsel appearing for the appellant. None appears on call for the Respondent No. 1 (i.e. claimant. and

Respondent No. 2 (owner of the offending vehicle..

2. By this appeal under Section 173 of the Motor Vehicles Act, 1988 the appellant has challenged the judgment and award dated 10.08.2009, passed

by the learned Additional District Judge (FTC., Cachar, Silchar in MAC Case No.476 of 2005.

3. In the claim petition, the case of the Respondent No. 1 in brief is that on 29.03.2015, he had boarded a Mahindra vehicle bearing registration no.

MZ-01-A-5368 at Saiphai for going to Bhaga Bazar. At about 3.00 P.M., at a place about 1 (one. KM. from Saiphai, the said offending vehicle had

met with an accident due to rash and negligent driving by its driver. It was claimed that the Respondent No. 1 had sustained grievous and serious

injuries and he was immediately taken to hospital for treatment. It was stated that he had not recovered fully, and that he was also treated by a village

quack, further claiming that his treatment was still continuing. By filing the claim petition, the respondent No.1 had prayed for a compensation of

Rs.4,45,000/- (Rupees Four lakh forty five thousand only..

4. The appellant, who was arrayed as Opp. Party No. 3 in the claim petition, had contested the case by filing its written statement. The appellant

repudiated the claim on the ground that Respondent No. 1 was being carried in a private vehicle as a gratuitous passenger, which was in violation of

the terms and conditions of the insurance policy. The appellant has stated that the respondent No.1 did not have any disability certificate by a

orthopedic doctor of Silchar Medical College & Hospital (SMCH for short. and that no voucher to show his expenditure was submitted, as such, the

Respondent No. 1 was put to strict proof of his claim. The Respondent No. 1 had examined himself as PW-1 and the doctor was examined as PW-2.

The following documents were exhibited by the Respondent No .1:

- a. Accident Information Report (Ext.1.,
- b. Accident Report by police (Ext.2.,
- c. Discharge certificate by SMCG (Ext.3.,
- d. Medical slips (Ext.4 series.,
- e. Injury report (Ext.5.,
- f. Medical prescription (Ext.6.,
- g. Negative as well as photograph (Ext.7 and 8.,
- h. Bills and cash memos for Rs.21,144.30 (Ext.9 series..

5. The appellant had examined one Fakar Uddin Ahmed, Administrative Officer, as DW-1. A part of the insurance policy containing terms of the

insurance and certified copy of policy (in two sheets. was exhibited as Ext. A. The Schedule of particulars of premium was also exhibited as Ext. B.

6. By relying on the materials available on record, the learned Tribunal had held that as per the injury report (Ext.5., the Respondent No.1 had suffered

(1. fracture of lower third shaft of right femur, and (2. soft tissue injury on the right ankle. The learned Tribunal presumed that the Respondent No.1

was earning at least Rs.3,000/- (Rupees Three thousand only. per month as a mason. By relying on the decision of the Honâ??ble Supreme Court in

the case of United India Insurance Co. Ltd. Vs. Suresh K. K. & Anr., (2008. 12 SCC 657, and 2001

(2. GLT 137, it was held that the appellant was liable to pay compensation to Respondent No.

1. The compensation was computed as below:

(i. Pain and suffering : Rs.15,000/-

(ii. Medical expenses (as per cash memos. : Rs.20,487/-

(iii. Loss of income for 6 months : Rs.18,000/-

(iv. Diet and nutrition : Rs. 5,000/-

(v. Conveyance : Rs . 3,000/-

Total: : Rs.61,487/-

Accordingly, the Respondent No.1 was found to be entitled for a compensation of Rs.61,487/- (Rupees Sixty one thousand four hundred eighty seven

only. with interest thereon at the rate of 6% per annum from the date of filing of claim till payment.

7. The learned Counsel for the appellant has referred to the insurance policy and the terms and conditions thereof (Ext. A & Ext. B.. It is submitted

that the offending vehicle was insured only under the "Act liability" policy and as per the schedule of premium, the owner of the vehicle had paid

premium only for the third party risk and for the compulsory personal accident risk for owner-cum-driver and workmen's compensation for one

employee. In this regard, it is submitted that in the claim petition, the projected case of Respondent No.1 was that he was the passenger of the vehicle

between Saiphai to Bhaga Bazar, as such, there can be no doubt that the respondent No.1 was a gratuitous passenger, whose claim is not covered by

the insurance policy and, as such, it is submitted that the appellant is not liable to pay compensation to the Respondent No. 1, and such compensation

would be payable only by the owner of the vehicle, i.e. Respondent No.2..

8. In support of his submissions that a gratuitous passenger in a private car vehicle is not entitled for compensation from the insurer, the learned

Counsel for the appellant is prayed reliance on the following cases:

a. New India Assurance Co. Ltd. Vs. Asha Rani and others, (2003. 2 SCC 223.

b. National Insurance Co. Ltd. Vs. Bommithi Subbhayamma and others, (2005. 12 SCC 243.

c. United India Insurance Co. Ltd. Vs. Tilak Singh and others, III (2006. SLT 296.

9. The learned Counsel for the appellant has also referred to the case of Suresh K. K. (supra. and it is submitted that in said cited case, the claimant

was a coolie and, therefore, although the insurer was not held liable for paying compensation, it was directed that the insurer would make payment of

the compensation and would recover the amount from the owner. It is submitted that similarly circumstances do not exist in the present case, as such,

the appeal was liable to be allowed and the liability of paying compensation would fall only on the Respondent No. 2.

10. It is seen that it is a well settled principle that the word 'in person' as appears in Section 147(b.(i. shall not include gratuitous passenger. If

any authority is required for the same from the case of National Insurance Co. Ltd. Vs. Baljit Kaur, (2004. 2 SCC 1 may be referred to. The same

view is found to be reiterated in case of Asha Rani (supra., Bommithi Subbhayamma (supra. and Tilak Singh (supra..

11. However, it appears from a perusal of the evidence of the DW-1 that the said witness did not support the stand of the appellant. The said witness

of the appellant herein, in his cross-examination could not say whether the Respondent No.1 was a gratuitous passenger or not, as such, the evidence

of the DW-1 does not establish that the Respondent No.1 was a gratuitous passenger. Had the DW-1 been successful to establish his point that the

respondent No.1 was a gratuitous passenger in a private vehicle, there would have been no difficulty in accepting the arguments by learned Counsel

for the appellant that based on the insurance policy (Ext. B & Ext. A., as no premium was paid for any person except for the owner cum driver and

Workmen's Compensation insurance for one employee, no liability arises in respect of the injuries suffered by Respondent No.1.

12. In this context, it is deemed appropriate to quote examination and cross-examination of the D.W.-1 as recorded by the learned Tribunal is as

follows: 'On S/A The nature of the insurance policy of Vehicle No. MZ 01 A 5368 involved in this case is private Car-A Liability only policy. Such

type of policy does not cover any person (other than a passenger carried by reason or in pursuance of a contract of employment.. So person other

than the owner or his employee cannot be carried in the vehicle as per the terms of the insurance policy we did not accept any premium for coverage

other than the third party. In the instant M.A.C.T. case claimant Joynal Uddin alias Joynul Uddin Barbhuiya was carried as a passenger. So we have

no liability towards him as per the terms of the policy. Ext. A is a part of the policy governing the terms of insurance of the motor vehicle involved in this case. Ext. B in 2 sheets is certified copy of policy schedule bearing particulars of premium taken from the insured alongwith other things in respect of the vehicle involved in this case. X X X for the claimant: . Passenger and occupant are separate things. Passenger is meant for paying fare to the owner of the vehicle or its driver. But occupants are not entitled to pay any fare. They may be the owners and family members of the owners including friends and relatives. I do not know whether gratuitous passenger/ occupants are entitled to get compensation even in a private vehicle. It is written in the plaint that the claimant Joinal Uddin was an occupant of the said vehicle. I do not know whether Joinal Uddin was the gratuitous passenger or not. In Ext. A it is not written that the gratuitous passenger and occupants are not entitled to any compensation. It is not a fact that we have not taken any premium under Ext. B for gratuitous passenger or occupants of the vehicle. I have no personal knowledge about the investigation of the case. I am a bonafide officer of the company. It is not a fact that we are under obligation to pay compensation to the gratuitous passenger and/or to the occupants of the vehicle and/or to the relatives and family members of the owner of the vehicle. It is not a fact that the claimant Jainul Haque is entitled to get any compensation.â??

13. The Court is conscious of the fact that when the Respondent No.1 had claimed in the claim petition that he had boarded the vehicle for going from one point to another point, it can be inferred that the vehicle involved in the accident was ferrying passengers. But, the appellant had examined a witness (DW-1. to prove the point and the said DW-1 in his cross-examine could not sustain his point, therefore, this is a case where the defence of the appellant was â??not provedâ??. The said witness i.e., DW-1 has stated that he was an Administrative Officer of the appellant. While in examination in-chief the DW-1 had stated that the Respondent No. 1 was carried as the passenger and so the appellant had no liability towards him, but in his cross examination as can be seen from what is quoted above, the said witness had not only made a distinction between the passengers and occupants by stating that passengers are required to pay fare but the occupant are not entitled to pay fare has created a situation where if one is

entitled to be called is a "occupant" he not required to pay fare. Moreover, the said witness had deposed to the effect that he does not know

whether the Respondent No.1 was a gratuitous passenger or not. The DW-1 had further stated that "it is not a fact that they had not taken any

premium under Ext. B from gratuitous passenger or occupants of vehicle", which in the considered opinion of this court amount to admission that

premium was paid for gratuitous passengers and occupants.

14. Therefore, in the cross examination the DW-1 is found to have deposed against the interest of the appellant and contrary to the documentary

evidence in form of Ext. B, which is otherwise clear on the point that no premium was taken to cover for the risk of anyone other than owner cum

driver and the Workmen's Compensation coverage for one employee. Therefore, during the cross-examination, DW-1 is found to have washed

away his former statement in his examination in-chief that they were not under any obligation to pay compensation to gratuitous passenger or the

occupant of the vehicle, because in his cross-examination, the DW-1 has categorically stated that he did not know whether the Respondent No.1 was

a gratuitous passenger or not.

15. Under the circumstances, there is no reason to interfere with the finding of the learned Tribunal, holding the appellant responsible for paying

compensation, accordingly, the appeal is not found sustainable.

16. Although, no infirmity is found with the impugned judgment and award, but the court is appalled with the quality of evidence given by a responsible

officer of the appellant of the rank of Administrative Officer, who has taken a stand in his cross-examination which is contrary to the statements made

in his evidence in-chief, and thereby the said official of the appellant has sabotaged the defence of the appellant, which was made in their written

statement. In the claim petition the present case of the Respondent No.1 was that he had boarded the vehicle from Saiphai to proceed to Bhaga Bazar

which indicates that he was travelling a gratuitous or a fare paying passenger, which was exactly the defence taken in the written statement of the

appellant, as well as in the examination in-chief of DW-1, but in his cross examination by denying that he had no knowledge of whether the

Respondent No. 1 is a gratuitous passenger or not and by denying the suggestion that no premium was taken under Ext. B from occupants or

gratuitous passenger, the said officer has admitted that premium for passengers and occupants were taken, and therefore, the defence of the appellant

was demolished. Under the circumstance, it is left open to the wisdom of the appellant to find out the reasons why their own officer has taken a

contrary stand and it is left open to their discretion to take appropriate steps, if so advised. This court can say no more as the court has not heard the

said witness, and one cannot be condemned unheard.

17. As a result the case stands dismissed by upholding the impugned judgment and award dated 10.08.2009 passed by the learned Additional District

Judge (FTC., Cachar, Silchar in MAC Case No.476 of 2005. There shall be no order for the cost.

18. Let the LCR be returned back.