

(1994) 01 OHC CK 0017

In the Orissa High Court

Case No : Miscellaneous Appeal No. 64 of 1987

New India Assurance Company Ltd.

APPELLANT

Vs

Ashok Kumar Acharya and Others

RESPONDENT

Date of Decision : 07-01-1994

Acts Referred:

Motor Vehicles Act, 1939 — Section 110B, 95(2)

Citation : (1995) ACJ 189 : AIR 1994 Ori 220

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : P. Roy and S.K. Ghose, for the Appellant; L.M. Nanda and Bipin Ray, Debasis Panda, A.K. Mohanty, for the Respondent

Judgement

A. Pasayat, J.—New India Assurance Company Limited (hereinafter referred to as "New India") calls in question legality of the award made by the Member, Second Motor Accidents Claims Tribunal, Southern Division, Berhampur (in short, the "Tribunal").

2. A brief reference to the factual position is necessary for disposal of the appeal.

One Ashok Kumar Acharya (hereinafter referred to as the "claimant") lodged a claim u/s 110-A of the Motor Vehicles Act, 1939 (in short, the "Act") claiming compensation of Rs. 99,999.50 paisa from New India, Jamal Mahammad (respondent No. 2), P. K. Kar (respondent No. 3) and Oriental Fire Insurance Co. Ltd., (hereinafter referred to as the "Oriental"). Basis of claim is described as follows :

On 11-10-1984 one Baikuntha Bihari Mishra, who was working as Assistant Conservator of Forest asked the claimant to accompany him to go to Dhaupada on a motor bike bearing registration No. ORG 3484 on official duty. While they were proceeding towards Dhaupada from Sorada, a car bearing registration No. ORG 2969 dashed against the motor bike both the vehicles were going at a very high speed and were not observing requisite care and caution. The number of the

car dashed against the right leg of the claimant as a result of which he fell down on the road. The driver of the car stopped his vehicle, but instead of rendering any assistance fled away after noticing injury on the claimant. The claimant had to undergo a major operation of petellectomy under general anesthesia of right knee, quadriceps were repaired of right knee and skeletal skin was grafted on 29-11-1984. He was given traction on 1-4-1984. Since he was working as a Forester he found it difficult to carry on his normal duties. On account of physical disability arising out of the accident, he lost his job. P. K. Kar was the owner of the motorcycle which was insured with New India, while Jamal Mahammad was the owner of the car (ORG 2969). That is why they were impleaded in the proceeding before the Tribunal. There was no appearance by either Jamal or P. K. Kar. The stand of the New India before the Tribunal was that claimant being a pillion rider was not entitled to maintain a claim. So far as it was concerned. The Tribunal overruled this objection and held that the New India had liability. However, it was held that the entire award was to be equally paid by both the insurance companies. This direction was given on the basis of its conclusion that both the motor-cycle and the car were equally responsible and liable for the accident, and were to compensate the injured on equal proportion in normal course.

3. In support of the appeal, the learned counsel for New India has strenuously urged that the accepted position being that the claimant was a pillion rider, the Tribunal was not justified in directing portion of the award to be indemnified by it. The learned counsel for the Oriental, however, submitted that in order to fasten joint liability, a finding regarding contributory negligence was required to be arrived at. According to him, the conclusions of the Tribunal on the factual aspects are not correct. It is, however, accepted that a pillion rider cannot be construed to be a third party in respect of the vehicle on which he was travelling.

4. I shall first deal with the plea relating to the question whether there was contributory negligence. Though there is no statutory definition, in common parlance "negligence" is categorized as either composite or contributory. It is first necessary to find out what is a negligent act. Negligence is omission of duty caused either by an omission to do something which a reasonable man guided upon those considerations who ordinarily by reason of conduct of human affairs would do, or by doing something which a prudent or reasonable man would not do. Negligence does not always mean absolute carelessness, but want of such a degree of care as is required in particular circumstances. Negligence is failure to observe, for the protection of the interests of another person, the degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. The idea of negligence, and duty are strictly co-relative. Negligence means either subjectively a careless state of mind, or objectively careless conduct. Negligence is not absolute term, but is a relative one; it is rather a comparative term. No absolute standard can be fixed and no mathematically exact formula can be laid down by which negligence or lack of it can be infallibly measured in a given case. What constitutes negligence varies

under different conditions, and in determining whether negligence exists in a particular case, or whether a mere act or course of conduct amounts to negligence, all the attending and surrounding facts and circumstances have to be taken into account. It is absence of case according to circumstances. To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. If the answer is in the affirmative, it is a negligent act. Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of other's negligence. Whichever party could have avoided the consequence of other's negligence would be responsible for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See Charleworth on Negligence, 3rd, Edition, para 328). It is now well settled that in the case of contributory negligence, Courts have power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damages are reduced to such an extent as the Court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But, in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise. Where a person is injured without any negligence on his part but as a result of combined effect of the negligence of two other persons, it is not a case of contributory negligence in that sense. It is a case of what has been styled by Pollock as injury by composite negligence. (See Pollock's Torts, 15th Edition, p. 361).

5. Composite negligence, is not a term defined or explained. It should ordinarily mean that both acts of negligence operate at the same time so as to form one transaction, which gets so mixed up that it is not possible to separate the same in order to find out the whole fault in question. The principles of composite negligence are, when more than one person are responsible in the commission of the wrong, that the person wronged has a choice of proceeding against all or anyone or more than one of the wrong doers. Every wrongdoer is liable for the whole damage if it is otherwise made out. The primary distinction between "contributory negligence" and "composite negligence" is that in the former an act or omission on the part of the injured or deceased is involved, which has materially contributed to the damage. In the latter, a person is injured or his death occurs without any negligence on his part, but as a result of the combined

effect of the negligence of two or more other persons. There is cleavage of opinion on the question whether Tribunal can direct apportionment of the liability. In *New India Assurance Co. Ltd. Vs. Avinash*, ; *National Insurance Company Vs. Kastoori Devi and Others* and *Shanti Devi and Others*, , it has been held that in a case of composite negligence there is no method or indicia to bifurcate or apportion the liability. But in *Inder Singh Vs. Haryana State and Others*, *Darshani Devi and Others Vs. Sheo Ram and Others*, , and *Narinderpal Singh Vs. Punjab State and Others*, , a different view has been taken. In my view the latter view is in consonance with statutory intent as reflected in Section 110B of the Act (corresponding to Section 168 of the Motor Vehicles Act, 1988, hereinafter referred to as the "new Act"). It is clear that while awarding the amount in a case of composite negligence, the Tribunal can direct the payment of the entire compensation jointly and severally, but at the same time would apportion the liability between the two owners for their facility and if both the owners or two insurance companies, as the case may be, pay the amounts to the claimant in proportion as awarded by the Tribunal, there is no problem for the claimant. But if one of the parties liable does not want to honour the award of the Tribunal, it will be open to the claimant to recover the entire amount from the other, leaving such party to claim rateable distribution from the other.

Where negligent acts of two or more independent persons have between them caused damage to a third, the sufferer is not driven to apply any such analysis to find out whom he can sue. He is entitled, of course, within the limits set by the general rules as to remoteness of damage to sue all or any one of the negligent persons. It is no concern of his whether there is any duty of contribution or indemnity as between those persons though in any case he cannot recover in the whole more than his whole damage.

6. At this juncture, it is necessary to refer to the "doctrine of last opportunity". The said doctrine is said to have emanated from the principle enunciated in *Davies v. Mann* (1842) 10 M & W 546 which has often being explained as amounting to a rule that when both parties are careless the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. However, according to Lord Denning it is not a principle of law, but test of causation. (See *Davies v. Swan Motor Co. (Swansea) Ltd.* (1949) KB 291. Though in some decisions, the doctrine has been applied by Courts, after the decisions of the House of Lords in *The Volute* 1922 AC 129, and *Swadling v. Cooper* 1931 AC I, it is no longer to be applied. The simple test is what was the cause or what were the causes of the damage.

7. The case at hand cannot be said to be one where the principles of contributory negligence can be applicable because the victim did not contribute to the accident. That being the position, the further question that needs adjudication is whether New India can have any liability. In view of the undisputed position that the claimant was a pillion rider of the vehicle which was insured with New India, he cannot be construed to be a third party in respect of that vehicle. Therefore,

the liability if any was to be borne by Oriental, which was a party before the Tribunal. It is accepted by the learned counsel for the parties that Oriental has not questioned correctness of the award by filing any appeal or cross-objection, and in fact has paid the amount directed by the Tribunal to the claimant. Mr. Mohanty appearing for it submits that the amount being meagre, correctness of the award was not questioned though there were many legal points involved. The conclusion of the Tribunal regarding manner of accident is also assailed. In the absence of any definite material to disturb the finding of the Tribunal as regards manner of accident, I do not think it proper to accept the plea of Oriental regarding the conclusion of the Tribunal. In the ultimate analysis, the liability to indemnify the award is that of Oriental. New India's appeal is allowed.

8. Default rate of interest directed by the Tribunal cannot be sustained in view of Division Bench decision of this Court in Oriental Insurance Company Ltd. v. Haripriya Nayak 1992 (1) OLR 88. The balance amount of Rs. 7,650/- to be paid by Oriental, shall carry interest @ 6% from the date of claim till liquidation. The amount being meagre, it is desirable that the same be paid within two months from today. It is stated that the amount directed by the Tribunal has already been deposited by the appellant which has been withdrawn by the claimant. Since the amount has already been paid to the claimant, same be paid by Oriental to New India.

9. A cross-objection has been filed by the claimant for enhancement of quantum. The Tribunal has made an elaborate analysis of the fact situation and has quantified the award. I do not find any reason to enhance the quantum. The cross-objection is dismissed.

Parties to bear their respective costs in this appeal.