
(2008) 09 OHC CK 0021
In the Orissa High Court
Case No : Maca No. 939 of 2005

New India Assurance Company Ltd.

APPELLANT

Vs

Laxmi Sahu ' Disoi and Others

RESPONDENT

Date of Decision : 26-09-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 168, 173

Citation : (2008) 09 OHC CK 0021

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Advocate : B.C. Singh and R. Mohanty, for the Appellant; S.K. Sanganerla, P.C. Pattnaik and P.C. Mohapatra for Respondent Nos. 1 to 3 and M. Balakrishna Rao and R.K. Patnaik, for the Respondent

Judgement

B.N. Mahapatra, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 (hereinafter called as "the Act") filed by the Insurance Company against an award dated 06.04.2005 passed by the District Judge-cum-M.A.C.T., Phulbani (hereinafter called as the "Tribunal") in MAC No. 130/2002.

2. Bereft of unnecessary details, the facts of the case as stated by the claimant-Respondents in nutshell are that on 29.07.2002 at about 1.30 PM while the deceased-Raghunath Sahu was coming in a motorcycle as a pillion rider on the left side of the road, a bus bearing registration No. OR07 B 2124 coming in a high speed from the opposite direction dashed against the motorcycle on PWD road leading from Kalinga to Balliguda near Goibali Nala. Deceased-Raghunath Sahu and rider of the motorcycle fell down. They were taken to Baliguda hospital where they succumbed to the injuries. The further case of the claimants was that the deceased-Raghunath Sahu having a grocery business was earning Rs. 5,000 to Rs. 6,000 per month and was contributing Rs. 3,000 towards the maintenance of his family. With these facts the legal heirs of the deceased filed an application before the learned Tribunal claiming compensation to the tune of Rs. 6.0 lakhs.

3. The owner of the offending bus (Opp. Party No. 1) filed written statement

denying the claim of the Petitioners. According to him, the Opp. Party No. 2, who is the insurer of the bus is liable to pay the compensation since at the relevant time the bus was covered under a valid insurance policy.

Opposite party No. 2-Divisional Manager, New India Assurance Company Ltd. also filed a separate written statement denying the allegation of the Petitioner. It was pleaded by opposite party No. 2 that the driver of the offending vehicle had No. valid licence and the accident took place due to the negligence of the deceased and as such opposite party No. 2 was not liable to pay the compensation.

4. On the above pleadings, the learned Tribunal framed the following six Issues.

(i) Whether the accident occurred due to rash and negligent driving by the driver of the vehicle bearing registration No. OR-07B-2142 (Private bus namely "Malati")?

(ii) Whether the death of Raghunath Sahu, S /O Late Bachha Sahu, occurred due to the accident in question?

(iii) Whether the Petitioner is entitled to compensation and if so to what extent and from which of the Opp. Parties?

(iv) Whether the Insurance policy of the offending vehicle was valid at the time of accident?

(v) Whether the driver of the offending vehicle has a (vi) valid driving licence at the time of accident? Whether the Petitioner is entitled to any other relief?

5. After considering the oral as well as the documentary evidence and rival contentions of the parties, the learned Tribunal came to the conclusion that the accident took place due to rash and negligent driving of the driver of the offending bus and the deceased died due to the said accident. The insurance policy of the offending bus was valid on the date of accident. The driving licence of the driver was also valid at the relevant time of accident. The learned Tribunal held that the New India Assurance Company Ltd., the insurer of the offending bus is liable to pay compensation to the claimants. Learned Tribunal assessed the monthly income of the deceased at Rs. 3,000 and after deducting 1/ 3rd towards his personal expenses, the contribution towards his family was fixed at Rs. 2,000 per month. Taking into account the age of the deceased to be 28 years at the time of accident, the learned Tribunal applied 18 multiplier and assessed the compensation at Rs. 4.0 lakhs, which included the funeral expenses and loss of consortium. The learned Tribunal directed the Insurance Company, the insurer of the offending bus to pay the awarded amount of Rs. 4.0 lakhs with interest of 6% per annum with effect from date of application dated 09.12.2002 within two months from the date of its order. Learned Tribunal further directed that out of the compensation amount, Rs. 1.0 lakh each is to be kept in fixed deposit for a period of six years in any nationalized Bank in the name of Petitioners who are wife, daughter and mother of the deceased, with the condition that No.

withdrawal would be allowed without prior permission of the Court. The rest amount was directed to be paid to the Petitioners.

6. Being aggrieved by the impugned judgment, the Insurance Company filed the present appeal basically on following two grounds.

(a) The learned Tribunal in MAC No. 126/2002 filed by the legal heirs of the motorcycle rider having held that the accident occurred due to contributory negligence of both the vehicles and the insurer of the offending bus was liable to pay 50% of the awarded amount, it should not have asked the insurer of the offending bus to pay the total amount of compensation to the claimants of the pillion rider who died in the said accident.

(b) The quantum of compensation awarded by the Tribunal is high and excessive.

Learned Counsel appearing on behalf of the Appellant submitted that out of the same accident two claim cases were filed before the learned Tribunal; one by the legal heirs of the deceased, rider of the motorcycle and the other by the legal heirs of the pillion rider deceased-Raghunath Sahu. The case filed by the legal heirs of the rider of the motorcycle was registered as MAC No. 126/2002 and the case filed by the legal heirs of the pillion rider, registered as MAC No. 130/2002. In MAC No. 126/2002 which was disposed of on 16.11.2004, the learned Tribunal has given a clear finding that the accident occurred due to the negligence on the part of driver/rider of both the vehicles. Learned Tribunal, therefore, apportioned the awarded amount 50: 50 and directed the insurer of the offending bus to pay 50% of the awarded amount. But, while deciding the claim case filed by the legal heirs of the pillion rider in MAC 130/2002, the learned Tribunal directed the insurer of the offending bus to pay the entire awarded amount which is unjust and illegal. In support of his contention he relied on a decision of this Court passed by a Division Bench in AHO No. 54/2000. The Learned Counsel further argued that since, it is a case of contributory negligence the legal heirs of the pillion rider should have impleaded the owner and insurer of the motorcycle as a necessary party and sued the owners and insurers of both the offending vehicles for compensation. According to the Learned Counsel, the present Appellant, i.e., the insurer of the offending bus is liable to pay 50% of the compensation amount.

7. Learned Counsel for the claimant-Respondents submitted that the ground of contributory negligence was never taken by the Insurance Company as well as the owner of the bus before the learned Tribunal. In their written statement No. specific pleading regarding contributory negligence of the driver /rider of both the vehicles was taken by the owner and/ or insurer of the offending bus before the learned Tribunal. He further stated that even in course of the proceeding before the Tribunal they have not adduced any evidence to that effect. Therefore, according to Learned Counsel, they cannot take such stand at the appellate stage. In support of his contention, he relied on the following decisions:

i) Chimajirao Kanhojirao Shirke and Anr. v. Oriental Fire & General Insurance Company Ltd., (Civil Appeal No. 1044 of 1992 decided by Hon'ble Supreme

Court on 26th July, 2000)

ii) New India Assurance Company Ltd. v. Debajani Sahu and Ors., 1999 (1) TAC 597 Orissa

It was further submitted that burden of proof lies on Insurance Company to prove negligence. In support of his contentions, he relied on decision of the Patna High Court in Laxmi and Company v. Savitri Devi Agarwal (Loyalka) and Ors., 1990 (2) TAC 51.

Learned Counsel further submitted that assuming that the rider of the motorcycle was negligent, the pillion rider had No. contribution towards the accident as a 3rd party. The Appellant is therefore liable to pay the entire awarded amount to the legal heirs of the pillion rider as 3rd party. In support of his contention he relied on following decisions:

(i) Balwanti Devi and Ors. v. Surjit Singh and Ors., 2004 (2) TAC 946 (Delhi),

(ii) New India Assurance Company Ltd., Allahabad v. Bhagwan Das and Ors., 2001 (1) TAC 248 (Allahabad), &

(iii) M. Padmanabha v. Union of India and Ors., 2000 (1) TAC 358 (Karnataka).

Learned Counsel for the claimants further submitted that in case of composite negligence claimants have options to sue the owner or the insurer of any of the vehicles for compensation. In support of his contention, he relied on the decisions in Sally Joseph v. Jose V. Jose, 2002 (2) TAC 391 (Kerala), Oriental Insurance Company Ltd. v. Smt. Parveen Juneja, 2002 (2) TAC 163 (P & H), Debaki Sahu and Ors. v. Administrator, Sri Jagannath Temple, Puri and Ors., 2000(2) TAC 102 (Orissa), Oriental Fire and Genl. Ins. Co. Ltd. Vs. Duryodhan Swain and Others, & Oriental Insurance Company Ltd. v. Narinder Kaur and Ors., 2002 (3) TAC 794 (P & H).

He further submitted that the compensation awarded by the learned Tribunal is on lower side. According to him, even if the income and multiplier, as determined by learned Tribunal, is accepted the award amount comes to Rs. 4.32 lakhs, but the learned Tribunal determined the same at Rs. 4.0 lakhs. His further case is that the Tribunal had not taken into consideration the future prospects and loss of income of the deceased. It has also not awarded any amount towards funeral expenses and loss of consortium, love and affection. The Court has implied power to grant more compensation with interest than the amount awarded by the Tribunal. Concluding the argument he submitted that the present appeal is liable to be dismissed.

8. In view of the rival contentions of both parties, the questions which fall for consideration by this Court are as follows:

(i) Whether in absence of a pleading before the Claims Tribunal with regard to contributory negligence on the part of the rider of the motorcycle any such ground can be taken for the first time before the High Court in appeal?

(ii) Whether it is obligatory on the part of the legal heirs of the deceased pillion rider to sue the owners and insurers of both the vehicles involved in the accident for compensation or they have an option to sue any of the owners and insurers of the vehicles involved in the accident?

(iii) Whether in case of a contributory negligence of two vehicles, the pillion rider in a motorcycle is entitled to get 50% of the awarded amount?

(iv) Whether the amount of compensation awarded by the Tribunal u/s 168 of the Act is just and proper?

9. The Appellant's case is that the accident in question occurred due to contributory negligence on the part of the rider of the motorcycle and the driver of the offending bus for which the Tribunal should direct the Appellant's insurance company to pay 50% of the total awarded amount. The claimant- Respondent's case is that the insurance company had not taken any specific pleadings regarding contributory negligence in its written submissions filed before the learned Tribunal and also No. evidence was adduced before the learned Tribunal to that effect. From the judgment of the Tribunal it appears that No. issue has been framed with regard to contributory negligence. It further appears that No. evidence was adduced before the Tribunal with regard to contributory negligence. The learned Tribunal has also not dealt with any such issue in its award.

this Court in *New India Assurance Company Ltd. v. Debajani Sahu and Ors.*, 1999 (1) TAC 597 Orissa held that in absence of any specific pleading regarding the alleged contributory negligence, such a contention of the Learned Counsel raised for the first time in appeal cannot be accepted. The Hon'ble Supreme Court in *Chimajirao Kanhojirao Shirke and Anr. v. Oriental Fire & General Insurance Company Ltd.*, SCC in Motor Accident Claims, decided on 26th July, 2000 held that once a stand in fact is taken, that fact could not be controverted by any legal proposition. In that case, the Insurance Company had not led any evidence to dissolve the stand taken in the written statement nor there was any application to amend such pleadings. The Apex Court held that the High Court was not correct to decide the issue through legal inferences dehors of and without adverting to the glaring facts on record.

There can be No. dispute to the settled legal proposition that the Court or Tribunal is not permitted to decide a case going out of pleadings of the parties nor the evidence led on a non-existing plea is permitted to be taken into consideration. (Vide *Sri Mahant Govind Rao v. Sita Ram Kesho and Ors.*, (1998) 25 IA 195 (PC); *Trojan and Co. Ltd. Vs. Rm. N.N. Nagappa Chettiar*, ; *Kishori Lal Vs. Mst. Chaltibai*, ; *Samant N. Balkrishna and Another Vs. V. George Fernandez and Others*, ; *Dalim Kumar Sain and Others Vs. Smt. Nandarani Dassi and Another*, ; *Dattatraya Vs. Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others*, ; *Bhoona Bi and Another Vs. Gujar Bi*, ; *Dr. R.K.S. Chauhan and Anr. v. State of U.P. and Ors.*; *Commissioner of Income Tax, Calcutta Vs. Park Hotel (P) Ltd.*, 15 Park Street, Calcutta-16, ; *Syed Dastagir Vs.*

T.R. Gopalakrishnasetty, ; Sankaran Pillai (Dead) by LRs v. V.P.Venuguduswami and Ors., AIR 1999 SC 3041; Life Insurance Corporation of India and Others Vs. Jyotish Chandra Biswas, ; Om Prakash Gupta Vs. Ranbir B. Goyal, ; and Ashutosh Gupta Vs. State of Rajasthan and Others,).

The Insurance Company had not adduced any evidence to the effect that the accident occurred due to the negligence of the rider/pillion rider of the motorcycle. Law is well settled that burden of proof lies on the Insurance Company to prove negligence. In a similar situation the High Court of Patna in Laxmi and Company v. Savitri Devi Agarwal, 1990 (2) TAC 51 held that it is well known that the burden of proof of contributory negligence is on the Defendant and it is not for the Plaintiff to prove the same. In the present case, the Appellant-Defendant has not discharged its burden of proving contributory negligence. In such a fact situation, the plea of contributory negligence taken by the insurance company before this Court for the first time does not merit consideration.

10. The further case of the Appellant is that claimants should sue the owners and insurers of both the vehicles involved in the accident for compensation. By not doing so, the Appellant is only liable to pay 50% of the compensation amount.

In the case at hand, the pillion rider has No. contribution for the occurrence of accident. In Sally Joseph v. Jose V.Jose, 2002 (2) TAC 391 (Ker.), the Kerala High Court held that 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. 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 wrongdoers. Every wrongdoer is liable for the whole damage if it is otherwise made out. 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.

In Debaki Sahu and Ors. v. Administrator, Sri Jagannath Temple, Puri and Ors., 2000 (2) TAC 102 (Orissa), this Court held that law is well settled that in case of composite negligence, the claimants are entitled to recover the amount from all the tort-feasors either jointly or severally.

In Oriental Fire and Genl. Ins. Co. Ltd. Vs. Duryodhan Swain and Others, has held that when an accident occurs due to composite negligence of both the drivers, both the owners are jointly and severally liable to pay the compensation.

The Punjab and Haryana High Court in Oriental Insurance Company Ltd. v. Narinder Kaur and Ors., 2002 (3) TAC 794 (P & H) has held that in cases where

more than one persons are responsible for the accident, the claimants are entitled to recover the whole of the composition awarded from one of the Respondents.

Therefore, in the present case, the claimants who are the legal heirs of pillion rider have not committed any error by suing the owner and insurer of the offending bus only for compensation.

11. Further plea of the Appellant is that the Claims Tribunal while awarding compensation in the case of rider of the motorcycle, who died in the said accident, directed the insurer of offending vehicle to pay 50% of the awarded amount. Therefore, the Tribunal was not justified to direct the Insurance Company of the offending bus to pay the entire amount of compensation determined by it to the legal heirs of deceased pillion rider. The Tribunal ought to have directed to pay 50% of the awarded amount by the insurer of the offending bus since both the claims arose out of the same accident. The argument advanced by the Learned Counsel for the Appellant is fallacious. Where an accident occurred due to negligence of drivers of two vehicles, the pillion rider of the motorcycle has No. role to play and he is entitled to get the entire amount of award.

Delhi High Court in *Balwanti Devi and Ors. v. Surjit Singh and Ors.*, 2004 (2) TAC 946 Del.) held that the deceased who was-a pillion rider in the scooter had not contributed to the accident in any manner whatsoever. He was merely a passenger in the scooter and did not have any control whatsoever, and the manner in which the driver manipulated the vehicle. The question of contributory negligence therefore does not arise at all.

In the present case the claimants are the legal heirs of pillion rider. Therefore, the learned Tribunal is justified in directing the Insurance Company of the offending bus to pay the entire amount of award to the claimants who are legal heirs of deceased pillion rider.

12. There is No. dispute that the deceased was coming in the motorcycle as a pillion rider and he died in the accident. In the claim petition, the claimants stated that the deceased was earning Rs. 5,000 to Rs. 6,000 per month. According to PW-I, the deceased was not only having a grocery shop, but he was also dealing with seasonal crops. Taking all these facts into consideration, the Tribunal held that the income of the pillion rider per month would not be less than Rs. 3,000 and on that basis it estimated the annual income at Rs. 36,000. Deducting 1/ 3rd of the said amount towards the expenses of the deceased, learned Tribunal determined his contribution towards his family at Rs. 24,000 per annum. Learned Tribunal has applied 18 multiplier since the deceased was only 28 years old at the time of accident. The Tribunal determined the compensation at Rs. 4.0 lakhs which is inclusive of funeral expenses and loss of consortium. In appeal No. infirmity or defect in the above finding of the learned Tribunal was pointed out by the Appellant. However, it is found that there is some arithmetical

error in calculation of compensation. On correct calculation, the compensation amount comes to Rs. 4,20,000 in stead of Rs. 4.0 lakhs as the learned Tribunal has assessed the deceased's contribution to his family at Rs. 2,000 per month and applied 18 multiplier. Therefore, the compensation of Rs. 4.32 lakhs appears to be just compensation. The Tribunal also directed payment of 6% interest per annum on amount of compensation from the date of application, i.e., 09.12.2002 which needs No. interference by this Court.

13. In view of the above, this Court requests the Insurance Company to pay the compensation of Rs. 4.32 lakhs along with 6% interest from the date of application, i.e., 09.12.2002 till the date of payment of compensation. The Insurance Company of the offending bus, i.e., the Appellant shall deposit the compensation amount within two months from the date of this order before the Tribunal. On receipt of the said amount, the Tribunal shall disburse the same in the manner as directed by it in its judgment. The statutory deposit of Rs. 25,000, deposited by the Appellant-Insurance Company with the Registry of this Court shall be refunded along with interest accrued thereon to the Appellant Insurance Company on production of receipt in support of deposit of the awarded amount with interest as indicated above before the Tribunal.

14. With above modification in the award amount, the appeal is disposed of.