
(2009) 02 OHC CK 0038
In the Orissa High Court

New India Assurance Company Ltd.

APPELLANT

Vs

Muralidhar Swain and Others

RESPONDENT

Date of Decision : 04-02-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 171, 173

Citation : (2010) ACJ 1732 : (2009) 107 CLT 245 : (2009) 1 OLR 742 Supp

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

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 (hereinafter called as "the MV Act") filed by the New India Assurance Company Limited challenging the Judgment and award dated 25.05.2005 passed by the Second Motor Accident Claims Tribunal, Cuttack (hereinafter called as "the Tribunal") in Misc. Case No. 432/1993.

2. The short fact of the case, as stated by the claimant- Respondents in their claim petition, is that on 13.01.1993 at about 1.00 P.M. deceased-Ganeswar Swain while proceeding on a bi-cycle on the left side of the Express Highway, at Laxminarayanpur stoppage near Chhata, at about 1.00 P. M., the offending truck bearing Registration No. ORY-491 came at a very high speed without blowing horn in a most rash and negligent manner and dashed against the deceased, as a result of which, the deceased was thrown at a distance and sustained serious injuries. The deceased was taken to Chhata hospital for treatment and thereafter because of his alarming condition he was shifted to S.C.B. Medical College and Hospital, Cuttack. On the way to hospital, the deceased succumbed to the injuries and post mortem examination was conducted by the doctor over the dead body of the deceased. The deceased was serving as a teacher in a Government Upper Primary School and was getting salary of Rs. 2,343/- per month besides Rs. 1,000 per month from private tuition. He had a bright career ahead. The offending vehicle was validly insured with the New India Assurance

Company Limited having Policy No. 3155077103453 which was valid till 02.12.1993 and the driver of the offending vehicle was also having a valid driving licence bearing No. 355: 79-Cuttack at the time of accident. With this fact the claimant-Respondents filed claim petition before the Learned Tribunal claiming compensation of Rs. 4,00,000 from the Insurance Company as well as the owner of the vehicle making both of them liable them jointly and severally.

3. Opposite Party No. 2-Insurance Company filed its written statement on 06.02.1993 denying its liability. The owner of the offending truck who was Opp.Party No. 1 before the Tribunal was set ex parte on 12.09.1995.

4. On the above pleadings of the parties, the Learned Tribunal framed the following four issues:

(i) Is the case maintainable?

(ii) Whether the death of the deceased was caused due to the rash and negligent driving of the driver of the vehicle bearing registration No. ORY-491 ?

(iii) If the Petitioners are entitled to get any compensation and if so to what extent and from whom?

(iv) To what relief, if any, are the Petitioners entitled?

5. The claimants examined as many as three witnesses and produced five documents, which are marked as Ext.1 to 5, i.e., F.I.R., charge sheet, post mortem report, seizure list and pay particulars of the deceased respectively.

The Insurance Company neither examined any witness nor produced any document on its behalf.

6. After considering the oral and documentary evidence, Learned Tribunal held that the accident which resulted in the death of the deceased was caused due to rash and negligent driving by the driver of the offending truck. The monthly income of the deceased was held to be Rs. 3,343, i.e., Rs. 2,343 from salary & Rs. 1,000 from private tuition. Deducting 1/3rd towards personal expenses, his monthly contribution towards family was determined at Rs. 2,300 and accordingly, his annual contribution was determined at Rs. 27,600. Applying multiplier 12 the loss of dependency sustained by the claimant-respondents was determined at Rs. 3,31,200. The Learned Tribunal further awarded Rs. 800 towards the cost of funeral ceremony and Rs. 3,000 towards consortium. Thus, in total, the Learned Tribunal awarded Rs. 3,35,000 as just and reasonable compensation. Learned Tribunal further held that on the date of accident, the offending vehicle was insured with the Insurance Company and the driver had valid and effective driving licence and Opposite Party No. 2 being the insurer of the offending vehicle is liable to indemnify Opposite Party No. 1-owner of the offending vehicle for the compensation amount payable to the claimants.

With the above findings, Learned Tribunal directed the Opposite Party No. 2-Insurance Company to pay Rs. 3,35,000 to the claimant-Respondents within

thirty days together with the cost of Rs. 200 and interest at the rate of 9% per annum from 31.03.1997, i.e., the date on which the Opposite Party No. 2 entered appearance till realization. The Learned Tribunal further directed that out of the compensation and interest component, a sum of Rs. 1,00,000 in joint names of claimant-Petitioner Nos. 1 and 2, Rs. 2,00,000 in the name of Petitioner No. 3, Rs. 20,000 each in the names of Petitioner Nos. 4 & 5, and Rs. 50,000 in the name of Petitioner No. 6 shall be kept in shape of unencumberable fixed deposit in any Nationalized Bank for a period of six years for their future benefit and to pay the balance amount to Petitioner Nos. 1 to 3 jointly in shape of cash.

7. Mr. Debasis Das, Learned Counsel appearing on behalf of the Appellant-Insurance Company has submitted that at the time of accident the driver of the offending vehicle did not possess a valid and effective driving licence. Even though a letter bearing No. 875 dated 09.02.1996 issued by the R.T.O. Cuttack showing validity of the license up to 16.08.1991 was filed before the Learned Tribunal on 17.10.2000, the Learned Tribunal committed error in not accepting the same. It was erroneously held by the Learned Tribunal that the driver had a valid and effective driving licence at the time of accident.

It was further argued that determination of income of the deceased from private tuition at Rs. 1,000 is excessive and based on no material and the interest at the rate of 9 % per annum, as awarded by the Learned Tribunal, is also at higher side which should have been 6% as per bank's rate.

Mr. Das further submitted that in view of the decision of the Hon'ble Supreme Court in Oriental Insurance Co. Ltd. Vs. Shri Nanjappan and Others, , the owner of the vehicle may be directed to furnish adequate security for the entire amount, which the insurer would pay to the claimants.

8. Mr. D.P.Sarangi, Learned Counsel for the Respondents submitted that the Appellant-Insurance Company neither filed the policy nor proved that any condition of the policy was violated. The Appellant-Insurance Company did not take any specific plea in its written statement that the driver of the offending vehicle had no valid driving licence on the date of accident. Therefore, the Appellant cannot take any new ground/plea in the Appellate Court. In support of his contention, he relied on a decision of this Court in Divisional Manager, Oriental Insurance Company Ltd. v. Kanaklata Mohanty and Ors. 2005 (2) TAC 109 Ori. He further argued that even though the letter bearing No. 875 dated, 09.02.1996 stated to have been issued by the R.T.O., Cuttack was filed before the Tribunal on 17,10.2000, no further step was taken by the Appellant to prove the same to be a genuine document. Therefore, even though R.T.O.'s letter is on Tribunal's record, it has no significance due to lack of pleadings and proof. Copy of the letter of the R.T.O. dated 9.2.1996 was never served on the Respondents at any point of time and not even a copy thereof was filed before the Tribunal for the Respondents. Thus, the claimant- Respondents are taken to surprise by the new plea taken by the Appellant at this belated stage.

Mr. Sarangi, further submitted that even though the monthly income of the deceased was stated to be Rs. 3,343/- in the claim application, the same was not specifically denied by the Appellant in its written statement. PW -1 categorically stated that the deceased, who was the headmaster/ head Pandit of the school, was earning Rs. 1,000/- from private tuition. The Insurance Company in spite of prolonged cross-examination squarely failed to discredit the statement of PW-1. Even no suggestion was given to PW-1 denying the monthly income of the deceased. In view of the above, the Tribunal rightly held that the monthly income of the deceased from private tuition was Rs. 1,000/-.

It was also submitted that during the relevant time as the interest on the fixed deposit was 9 %, the Learned Tribunal has rightly allowed the same, but the same should have been allowed from the date of filing the claim petition, i.e., 22.06.1993, and not from the date of appearance of the Appellant before the Tribunal, i.e., 31.03.1997.

Concluding his argument, Mr. Sarangi, submitted that the Learned Tribunal should have granted compensation of Rs. 4,00,000 towards loss of dependency, as claimed by the claimant-Respondents instead of determining the compensation at Rs. 3,35,000. It is further argued that this Court has power to grant higher compensation as just compensation even if it is not claimed by the claimant. In support of his contention, Learned Counsel for the Respondents relied on the decision of the Hon'ble Apex Court in *Sabitri Mallick and Ors. v. Haldhar Bhuyan and Anr.* 2000 (2) T.A.C. 142 (Ori) and *Tamil Nadu State Transport Corporation v. Vasanatha and Ors.* 2006 (2) T.A.C. 1004 (Mad.).

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

(i) Whether, on the facts and circumstances of the case, Learned Tribunal is justified to hold that the driver of the offending vehicle had valid driving licence at the time of accident?

(ii) Whether, on the facts and circumstances of the case, the amount of compensation of Rs. 3,35,000 awarded by the Learned Tribunal is just compensation?

(iii) Whether, on the facts and circumstances of the case, the Tribunal is correct in awarding 9% interest from the date of appearance of the Appellant-Insurance Company before the Tribunal, i.e., 31.03.1997 till the date of realization?

(iv) Whether right of recovery of the amount of compensation from the owner of the offending vehicle should be given to the Appellant-Insurance Company and the owner of the vehicle should be asked to furnish security with the Insurance Company to make payment of compensation amount to the claimants ?

10. So far as first question is concerned, the Learned Tribunal relying on Exts. 2 and 4 held that at the time of accident the driver of the offending vehicle had a valid and effective driving licence. Ext.2 is the charge sheet, which indicates that

the driver had a driving licence bearing No. 355-79-80 Cuttack renewed up to 20.10.1994. According to Mr. Das, as per the letter issued by the R.T.O., Cuttack dated 09.02.1996 the driving licence was last renewed up to 16.08.1991 and, accordingly, it was argued that the driver had no valid licence at the time of accident. Mere filing of a letter from the R.T.O., Cuttack, does not cast any obligation on the Learned Tribunal to accept the same as evidence unless it is proved.

In the present case, it is found from the record that the Appellant-Insurance Company filed a petition on 17.10.2000 requesting the Learned Tribunal to allow one month time to prove the letter of the R.T.O. However, the hearing of the case was adjourned to 14.03.2001. Thereafter, no step whatsoever was taken by the Appellant-Company to prove the authenticity of the said letter. No petition was filed to summon the persons to whom the Appellant desired to examine, more particularly, the author of the letter dated 09.02.1996, i.e., the R.T.O., Cuttack. At no point of time, any petition was filed naming the witnesses. The Insurance Company also could have brought witnesses and produced before the Tribunal for examination without asking for the summons. No such step has also been taken by the Appellant- Insurance Company. The Insurance Company refrained itself from adducing evidence either oral or documentary. Thus, the case of the claimant virtually remained un-rebutted as the Insurance Company failed to prove that during the relevant time the driver of the offending vehicle had no valid and effective licence. Moreover, in the written statement no specific ground has been taken to the effect that the driver of the offending vehicle did not have a valid licence at the time of accident. In such a fact situation, the Learned Tribunal is fully justified in not accepting the letter of the R.T. O. dated 09.02.1996 as evidence, and rightly relying on Exts. 2 and 4 it held that the driver of the offending vehicle had a valid driving licence during the relevant time.

11. The second question relates as to whether the amount of compensation awarded by the Learned Tribunal is just compensation. Mr. Das, learned Counsel for the Appellant-Insurance Company submitted that the monthly income as determined by the Learned Tribunal at R6.3,343 is at the higher side. Mr Learned Counsel for the Insurance Company submitted that the Learned Tribunal without any supporting material should not have determined the monthly income of the deceased at Rs. 1,000 from private tuition. However, he did not dispute the salary income of the deceased who was working as a Head Pandit in Satabatia Upper Primary School. He has also no grievance with regard to the multiplier applied by the Tribunal considering the age of the deceased.

PW-1 is the widow of the deceased who stated in her evidence that besides the salary income, the deceased was also earning Rs. 1,000 by doing private tuition. The Insurance Company failed to discredit the said statement by cross-examining her in that regard. Even no suggestion was given to PW -1 at the time of cross-examination denying the income of the deceased from tuition. PW-3 supported the evidence of PW-1 to the effect that the deceased was doing private

tuition and was getting Rs. 1,000 per month. Moreover, in Column-6 of the claim petition the claimants have clearly stated that the monthly income of the deceased was Rs. 3,343, which was not specifically denied in the written statement filed before the Learned Tribunal. In view of the above, the monthly income of the deceased from private tuition as determined by the Learned Tribunal at Rs. 1,000 cannot be held to be without any basis. Accordingly, the loss of dependency as worked out at Rs. 3,32,200 on the basis of monthly income of Rs. 3,343 of the deceased appears to be reasonable. The amount of compensation as determined by the Tribunal at Rs. 3,35,000, besides Rs. 800 and Rs. 3,000 awarded towards funeral expenses and consortium appear to be just compensation.

12. The third question relates to award of interest at the rate of 9% from the date of appearance of the Appellant-Insurance Company before the Tribunal, i.e., 31.03.1997 till the date of realization. Mr. Das, Learned Counsel submitted that 6% interest should have been allowed as per the bank rate instead of 9%. In support of his contention, Learned Counsel has not brought any material to the notice of this Court.

13. Mr. Sarangi, on the other hand, submitted that the Apex Court in H.S. Ahammed Hussain and Another Vs. Irfan Ahammed and Another, , allowed 9% interest from the date of the claim till the realization in view of the change in the economy and the policy of the Reserve Bank of India. Thus, the Learned Tribunal has rightly allowed interest at the rate of 9%. Keeping in mind the provisions of Section 171 of the M.V. Act the Learned Tribunal should have" allowed 9% interest from the date of filing of claim petition, i.e., 22.06.1993 instead of from the date of appearance of Appellant- Insurance Company before the Tribunal, i.e., 31.03.1997.

14. In view of the findings that at the time of accident the driver of the offending vehicle had a valid driving licence and the offending vehicle was covered by a valid insurance policy, the Appellant-Insurance Company is liable to pay the amount of compensation to the Respondent-claimants and no right of recovery can be given to the Insurance Company to recover the said amount from the owner of the vehicle.

15. In the fact situation, the Insurance Company is directed to deposit the amount of compensation, as indicated above, before the Tribunal within a period of two months from today along with interest at the rate of 9% from the date of the claim application filed before the Tribunal till the date of realization. On receipt of the revised compensation amount, the Tribunal shall disburse the entire awarded amount to the claimants in the manner it has directed to be disbursed to the claimants in the award. The Insurance Company is entitled to get refund of the statutory amount of Rs. 25,000 deposited in this Court along with interest accrued thereon on production of receipt in support of deposit of the amount of compensation, as it dicated above, before the Learned Tribunal.

With the above directions the appeal is dismissed. No order as to costs.