

(1985) 05 PAT CK 0023

In the Patna High Court

Case No : Appeal from Original Decree No. 13 of 1978

Oriental Fire and General Insurance Co. Ltd.

APPELLANT

Vs

Laxman Mahto and Others

RESPONDENT

Date of Decision : 16-05-1985

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2), 96(2)

Citation : (1986) 1 ACC 451 : (1985) ACJ 775 : (1987) 62 CompCas 881

Hon'ble Judges : Satyeshwar Roy, J;Abhiram Singh, J

Bench : Division Bench

Advocate : P.K. Banerjee, D.N. Chatterjee and S.K. Dutta, for the Appellant;
S.N. Lal and Triveni Mishra, for the Respondent

Judgement

Satyeshwar Roy, J.—Out of one bus accident, two claims were preferred u/s 110A of the Motor Vehicles Act ("the Act"), one by Subhas Chandra Prajapati for injuries sustained by him which was registered as MJC No. 145 of 1974 and the other by the legal representatives of the deceased, Ram Briksha Mahto, which was registered as MJC No. 133 of 1974. Both the cases were heard together and were disposed of by one judgment. Two appeals were filed by the opposite party of those two claim cases. Miscellaneous Appeal No. 12 of 1978(R) which arose out of MJC No. 145 of 1974 was dismissed on March 11, 1983. This appeal is confined to the award given in MJC No. 133 of 1974 for the death of Ram Briksha Mahto.

2. According to the respondents-claimants, mini bus No. BHN 5454 was going from Dhurwa to Ranchi and Ram Briksha was travelling in the same. The bus met with a serious accident near Hinor crossing due to rash and negligent driving by the driver. Ram Briksha died at the spot. The respondents filed an application u/s 110A of the Act for compensation of Rs. 75,000. The Tribunal allowed the claim and ordered that it shall be payable by the insurance company, the appellant, with interest from the date of the order till realisation at the rate of 6% per annum.

3. The appellant has challenged the quantum of compensation awarded. According to the appellant, since the evidence was that Ram Briksha was drawing a salary of Rs. 426 per month at the time of his death, the amount awarded was exorbitant because the multiplier used was imaginary. The award was liable to be reduced to less than Rs. 50,000. Moreover, the amount awarded by the Tribunal was in excess of the statutory limit and is liable to be reduced to the amount payable under law.

4. On behalf of the respondents, a preliminary objection was raised with regard to the maintainability of the appeal in view of Section 96(2) of the Act, It was also contended that on merits no case had been made out for any interference with the award.

5. Mr. Lal, learned counsel appearing on behalf of the respondents, submitted that the insurance company is entitled to defend the action on any of the grounds mentioned in Section 96(2) of the Act and as none of the grounds entitled the insurance company to challenge the quantum, the insurance company could not have defended the action on that ground either before the Tribunal or in this court in appeal. In support of his contention, Mr. Lal referred to a number of decisions of different High Courts.

6. Mr. Banerjee, learned counsel appearing on behalf of the appellant, submitted that there was no legal bar for the insurance company to challenge the quantum. He also urged that even if there be any such bar, it shall not apply if compensation is awarded beyond the maximum limit provided u/s 95(2) of the Act and the insurer is made to pay it. In support of his last contention, Mr. Banerjee relied on *The Howrah Insurance Co. Ltd. Vs. Shri Yuktinath Jha and Others*, .

7. With regard to the maintainability of the appeal, Section 96(2) of the Act is relevant which provides that the insurer to whom notice of any proceeding is given shall be entitled to be made a party thereto and to defend the action on any of the grounds mentioned therein.

8. As far back as in 1959, the Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , interpreted that sub-section and held (at page 64 of 29 Comp Cas (Ins.)):

"To start with it is necessary to remember that apart from the statute, an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96, however, gives him the right to be made a party to the suit and to defend it. The right, therefore, is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that Sub-section (2) makes available to an insurer ? "

9. The Supreme Court, after noticing the different clauses of Subsection (2), held that (at page 64):

"...an insurer made a defendant to the action is not entitled to take any defence which is not specified in it."

10. The law so laid down by the Supreme Court was consistently followed by it in its subsequent decisions. The decisions of High Courts cited by Mr. Lal on this point are based on that decision or some other decision of the Supreme Court to the same effect. I, therefore, did not think it necessary to refer to the decisions of the High Courts.

11. That being the clear legal position, we are to decide whether that decision must be interpreted to mean that even if the liability of the insurer is fixed at an amount higher than that provided in Section 95, he cannot challenge it. Precisely that was what Mr. Lal contended. Mr. Banerjee urged that in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, , the Supreme Court did not lay down that proposition of law as contended by Mr. Lal. Mr. Banerjee drew our attention to a decision of a learned single judge in *The Howrah Insurance Co. Ltd. Vs. Shri Yuktinath Jha and Others*, , in support of his contention.

12. The question that arose then : can it be said that there is no difference between an insurer who admits his liability but challenges the quantum and the insurer who altogether denies his liability ? By way of illustration, if in a proceeding, the insurer accepts his liability but contends that his liability will be a particular amount, if Mr. Lal's contention is correct, the Tribunal or the appellate court will not allow him to raise that question. A fortiori, that defence then will not be available even in a case where compensation is awarded on the basis of no evidence or in excess of the statutory limit. In my opinion, that is not the legal position. What Section 96(2) lays down are the grounds on which an insurer may contend that he has no liability at all. Challenging the amount claimed or awarded is not the same thing as denying the liability altogether. Similar point was raised in *Hindusthan General Insurance Society Ltd. v. Daya Nath Jha* [1970] 40 Comp Cas 796 (Pat). It was observed therein that an insurer may escape liability if he proves one or other of the grounds mentioned in Section 96(2), but that does not prevent the insurer from asking the court or the Tribunal not to pass a decree or an award for the exorbitant amount to which the claimant is not entitled in law. This decision was followed by the learned single judge in *The Howrah Insurance Co. Ltd. Vs. Shri Yuktinath Jha and Others*, . I, therefore, hold that the appellant is entitled to challenge the quantum of compensation allowed by the Tribunal.

13. Mr. Banerjee submitted that the statutory limit of compensation payable for the death of Ram Briksha was Rs. 5,000 as provided in Section 95(2)(b)(ii)(4). In M..A. No. 71 of 1979(R) disposed of on March 13, 1985 (*National Insurance Co. Ltd. v. Shanm Ahmad* [1987] 62 Comp Cas 811 (Pat)), it was held that (at page 813):

" In our opinion, there is no substance in this submission. When the Legislature made specific provision for payment of compensation to passengers with specific

reference to the carrying capacity of a vehicle, recourse cannot be had to Clause (4), if it is not a motor cab or a vehicle other than those specified in Clauses (I), (2) and (3). "

14. There is no substance in this submission of Mr. Banerjee.

15. Mr. Banerjee next urged that since there was no evidence about the carrying capacity of the vehicle involved in the accident, the compensation of Rs. 75,000 could not have been awarded. Alternatively, he urged that even if it was accepted, as urged by Mr. Lal, that the vehicle was registered to carry not more than 30 passengers, since the statutory compensation payable was Rs. 50,000, the amount, if awarded, in" excess of it must be paid by the owner of the vehicle and the appellant cannot be saddled with that liability.

16. In the case before the Tribunal, the respondents-claimants stated that the bus in question was a mini bus. It was not specified either in the application or during the course of trial what was the maximum carrying capacity of the vehicle. Mr. Lal submitted that the vehicle was registered to carry not more than 30 passengers and, according to him, this was taken into consideration by the Tribunal. Mr. Banerjee conceded that the Tribunal proceeded on the footing that the vehicle was registered to carry not more than 30 passengers. He, however, contended that in the absence of any evidence, the Tribunal could not have proceeded on this footing. Admittedly, the vehicle was insured with the appellant and the policy of insurance was with the owner and the duplicate and other records regarding this were with the appellant. It was not possible for the respondents-claimants to produce the policy of insurance or any connected paper. Neither the appellant nor the owner chose to produce the insurance policy. What the capacity of the vehicle was was within the special knowledge of the appellant. I am of the opinion that in such cases, an inference may be drawn that if the policy of insurance would have been produced, it would have supported the case of the claimants. It must be held that the vehicle was registered to carry not more than 30 passengers.

17. Mr. Banerjee submitted that on the basis of the evidence led by the respondents, the Tribunal could not have awarded Rs. 75,000 as compensation. In support of his submission, Mr. Banerjee relied on the evidence led by the respondents-claimants.

18. According to the claim application, Ram Briksha was the headmaster of Senior Basic School, Balanlong, and at the time of his death, he was drawing a salary of Rs. 438 per month. Further, from the evidence, it appeared that Ram Briksha was 40 years old at the time of his death. The Tribunal held that Ram Briksha would have put in service for 20 years more and that out of his salary he was spending Rs. 75 per month on himself. * On the basis of these figures, the Tribunal calculated the amount of compensation as Rs. 84,000, but as the respondents-claimants had claimed Rs. 75,000, that was allowed.

19. In Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and

Others, , it was held that (headnote of AIR);

" In calculating the pecuniary loss to the dependants, many imponderables enter into the calculation. Therefore, the actual extent of the pecuniary loss to the dependants may depend upon data which cannot be ascertained accurately, but must necessarily be an estimate, or "even partly a conjecture. "

20. The law so laid down still holds the field. I have already noticed that Ram Briksha was a teacher in a senior basic school. No evidence was led about the age of his superannuation. But as Ram Briksha was a Government servant, he would have been superannuated at the age of 58 years. Ram"Briksha would have continued in service for 18 years more. We have to take into consideration the uncertainties of life. I, therefore, hold that Ram Briksha would have continued in service for 15 years more. Again, since the amount would have to be paid in lump sum, there should be deduction of 10% from the total amount. As noticed earlier, the Tribunal held that out of his salary, Ram Briksha was spending Rs. 75 per month on himself. I find no reason to interfere with this finding. The reasonable compensation that the respondents would be entitled to in this case would be Rs. 56,000 odd, which is rounded off to Rs. 56,000. I hold that the respondents were entitled to a compensation of Rs. 56,000 for the death of Ram Briksha. The statutory liability of the appellant was Rs. 50,000.

21. Normally, the order should have been for payment of the whole amount by the appellant with liberty to it to recover 6,000 from the owner of the vehicle. But, in this case, in my opinion, that cannot be done. It appears from the record that the owner of the vehicle was made respondent No. 10 in the appeal. On June 30, 1982, a Bench of this court allowed three weeks" time to the appellant to take steps for substituted service of notice on him. It was also ordered that if the appellant failed to take steps within that time,, the appeal, as against respondent No. 10, would stand dismissed without further reference to a Bench. Because that order was not complied with, the name of respondent No. 10 was expunged from the appeal. It will thus appear that because of the negligence of the appellant, the owner of the vehicle was not before the court when the matter was heard. No liability, therefore, can be fastened on him. In the circumstances, it is ordered that the appellant shall pay to the respondents-claimants Rs. 56,000.

22. In the result, the appeal is dismissed with the modification of the compensation awarded by the Tribunal. It is ordered that the appellant shall pay Rs. 56,000 to the respondents-claimants with interest at the rate of 6% per annum from the date of award of the Tribunal till realisation.

Abhiram Singh, J.

23. I agree.