
(1983) 08 OHC CK 0019

In the Orissa High Court

Case No : Misc. Appeal No's. 54 and 58 of 1977

Oriental Fire and General Insurance Company Ltd. and etc.

APPELLANT

Vs

Smt. Narayanibai and Others

RESPONDENT

Date of Decision : 10-08-1983

Acts Referred:

Motor Vehicles Act, 1939 — Section 110(4), 110B, 95(1)

Citation : (1984) 2 ACC 316 : AIR 1984 Ori 43 : (1983) 56 CLT 415

Hon'ble Judges : P.K. Mohanti, Acting C.J.; G.B. Patnaik, J

Bench : Division Bench

Advocate : S.S. Basu, R. Mohanty, R. Sharma and S.C. Ghosh, for the Appellant; P.K. Misra, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Mohanti, Actg. C.J.

1. These two miscellaneous first appeals u/s 110-D of the Motor Vehicles Act, 1939 (to be referred to as the "Act") arise out of a common order of the Motor Vehicles Accidents Claims Tribunal (to be referred to as the "Tribunal"). Puri fixing the liability of the insurer at Rs. 50,000/- out of the total compensation of Rs. 1,01,200/- and the owner of the goods vehicle bearing No. WGB 2835 for payment of the balance amount to respondents 1 to 7. The appellant in M. A. No. 54/77 is the insurer and the appellant in M. A. No. 58/77 is the owner of the vehicle. Respondents 1 to 7 in both the appeals are the claimants.

2. Respondents to 7 filed an application u/s 110-A of the Act claiming compensation of Rs. 1,55,000/- for the death of one Radhashyam Gupta the husband of respondent No. 1 and the father of respondents Nos. 2 to 7, arising out of a motor accident which took place on 9-12-73 while he (the deceased) was travelling in the said goods vehicle from Calcutta to Karaniia with his goods. The accident occurred at 9.30 p. m. on the Karanjia-Jasipur road near Kalikapur when the vehicle went off the road and dashed against a big Sal tree. The vehicle

was completely damaged and the deceased who was sitting on the front seat died instantaneously at the spot. The driver and the other occupants of the vehicle also sustained injuries. The driver succumbed to the injuries on 12-12-73. It was alleged that the road at the place of accident was 20 to 25 feet wide and slopping towards Karanjia. Due to incessant rain the road was muddy, but the driver drove the vehicle rashly and negligently and did not take necessary caution for driving the vehicle on a muddy road. The deceased was a healthy man aged about 40 years. He was running a stationery-cum-grocery shop and had a flour huller. His monthly income was about Rs. 700/- and he was gradually prospering in his business. His personal expenditure never exceeded Rs. 150/-per month and he used to contribute the balance of his income for the maintenance of his family. The father and the grandfather of the deceased had lived up to ripe old age and the deceased was also expected to live at least up to the age of 70, if not more. So, he would have contributed for about a period of 30 years for the maintenance of the members of his family.

3. The appellant in M. A. No. 58/77, who is the owner of the vehicle, resisted the claim contending, inter alia, that there was no rashness or negligence on the part of the driver in driving the vehicle, but due to incessant and heavy rain throughout the day, the road was extremely bad and slippery and there was sliding down of a mass of earth just at the time of accident which violently pushed the vehicle beyond the road and the driver was not in any way responsible for the accident.

4. The appellant in M. A. No. 54/77, who is the insurer, filed a separate written statement denying the allegation of rash and negligent driving on the part of the driver and also denying its liability for the claim of compensation made in respect of the death of the deceased.

5. On a consideration of the evidence adduced by the parties, the Tribunal found that the accident occurred due to careless and negligent driving by the driver of the truck in question and that the claimants were entitled to compensation of Rs. 1,01,200/-.

6. The question that arises for consideration in M. A. No. 54 of 1977 is whether the insurer is liable to indemnify the owner of the vehicle for the compensation payable by him in respect of the death of the owner of the goods who was at the time of the accident travelling in the vehicle carrying his goods. The legal provision in this connection is contained in Section 95 of the Motor Vehicles Act, 1939. The relevant part of the Section is reproduced below:

"95. (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which--(a) is issued by a person who is an authorised insurer, or by a co-operative society allowed u/s 108 to transact the business of an insurer, and (b) insures the person or classes of persons specified in the policy to the extent specified in Sub-section (2) against any liability which may be incurred by him or them in respect of the death of or bodily injury to any person

caused by or arising out of the use of the vehicle in a public place:--

Provided that a policy shall not be required-

(i) to cover liability in respect of the death, arising out of and in the course of his employment, or the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to any such employee-

(a) engaged in driving the vehicle, or

(b) if it is a public service vehicle, engaged as a conductor of the vehicle or in examining tickets on the vehicle, or

(c) if it is a goods vehicle, being carried in the vehicle: or

(ii) except where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, to cover liability in respect of the death of or bodily injury to persons being carried in or upon or entering or mounting or alighting from the vehicle at the time of the occurrence of the event out of which a claim arises, or

(iii) to cover any contractual liability, xx xx xx xx xx xx"

On behalf of the claimants reliance is placed on Clause (ii) of the proviso to Sub-section (1) of Section 95 which provides that unless a vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, it will not be necessary to insure against the death or bodily injury of any passenger in the vehicle. It is contended that the owner of the goods accompanying the goods in a goods vehicle hired by him is a passenger who was being carried for hire or reward. The point is not *res integra* though there is undoubtedly a conflict of judicial opinion. However, the view we are inclined to take seems to be supported by the decision of the Karnataka and Bombay High Courts where an elaborate and precise enunciation of the law has been made.

7. In the case of *Channappa Chanaviranna Katti v. Laxman Bhimappa Ba.iantri* AIR 1979 Kat 93 a goods vehicle was being used by its owner for carriage of goods. On 3-3-73 when the said vehicle was carrying goods it met with an accident as a result of which the owner of the goods who had hired the vehicle for carrying goods sustained fatal injuries and died. His legal representatives claimed compensation and the insurer took the stand of non-liability for the claim for compensation on the ground that the risk of such a person was not covered by the insurance policy issued in respect of the vehicle inasmuch as such risk was not required to be insured under the Act. A Division Bench after careful examination of the relevant provisions of Section 95 of the Act held as follows:

"It has to be mentioned at the outset that the policy of the law in making

provision for compulsory insurance of vehicle is to cover the risk of innocent third parties. If we consider the case of the owner of the goods (hirer of goods vehicle) who wants to convey his goods through a public goods-vehicle, will he be an innocent third party when he dies or suffers injury while accompanying his goods carried by a public goods vehicle, in the course of the user of the vehicle? Our answer to this question can only be in the affirmative for the simple reason that when the owner of the goods wants to convey his goods in a public goods vehicle, hired by him and accompany the goods for their safety, in the normal course of things, it would not be possible for him to ascertain before hand, the financial stability of the user of the vehicle, the expertise of the driver of the vehicle in driving it, or the roadworthy condition of the vehicle as would ensure his safety. When such a person travels as a passenger in a goods-vehicle which is used to advance the business interests of its owner and is permitted by law, it cannot be said that it is not a vehicle meant for carrying passengers for hire or reward, provided for in the exception to the first part of the proviso. In fact, in our opinion, the hire payable for carrying the goods must be deemed to include the hire for carrying the owner of the goods or his agent or servant who travels in the vehicle along with the goods for their safety, inasmuch as it is impossible for us to think of a binding obligation on the part of the owner of the goods vehicle to carry in it the owner of the goods, who hires the goods vehicle for carrying the goods. Moreover, such obligation to carry the owner of the goods along with his goods in a goods vehicle can only be as a business proposition as opposed to a gratuitous proposition. Hence, we have no doubt in our minds that the Legislature by enacting the exception contained in the first part of the proviso has thought of compulsory coverage by insurance the risk of owners of goods who are entitled to travel in a goods vehicle along with their goods in the event of any risk arising in the course of the user of the vehicle.

From this, it would follow that the goods vehicle with which we are concerned was a goods vehicle which was meant to carry along with the goods, passengers for hire or reward and fell within the exception contained in the first part of the proviso so as to require coverage of risk of the owners of goods travelling as passengers by compulsory insurance required to be taken in respect of the vehicle under Chap. VIII of the Act and Ext. D-1 is the policy of insurance which had been taken accordingly."

The above view was affirmed by subsequent decisions of the same High Court in the case of T.M. Renukappa Vs. Fahmida and Others, and in the case of United India Insurance Co. Limited, Bangalore v. Gangamma AIR 1982 KA 261.

8. In the case of Nasibdar Suba Fakir Vs. Adhia and Company and Others, a Division Bench of the Bombay High Court interpreted the expression "vehicle in which passengers are carried for hire or reward" occurring in Clause (ii) of the proviso to Clause (b). Sub-section (11) of Section 95 and held that when the owner of the goods enters into a contract of carriage of goods the contract is of a composite character.

The contract is not for carriage of goods the contract is for safe and convenient transport of the goods from the beginning till the end and the process of contract involves loading and unloading and safe carriage. The consideration which is paid by the owner of the goods for the transport of the goods is a composite consideration. It is a consideration for the transport of goods as well as for the incidental transport of the passengers accompanying the goods. Once it is accepted that the consideration paid by the owner of the goods included the consideration for his own carriage, it cannot be said that he was not carried in the vehicle for reward at the relevant time. Upon such findings their Lordships held as follows:--

"..... We are of the view that when a hirer of a goods vehicle for carriage of his goods is travelling by the said vehicle in connection with the carriage of the goods with the consent of the driver or owner of the goods vehicle in question, he must be deemed to be a passenger on the vehicle for reward within the meaning of Clause (ii) of the proviso to Section 95 (1) of the Act and hence the tortious liability of the owner towards him must be covered by the insurance policy contemplated by the said Section."

9. We are in respectful agreement with the view taken by the Karnataka and Bombay High Courts in the aforesaid decisions.

10. Mr. S.S. Basu, the learned counsel appearing for the insurer cited before us the following decisions where a contrary view has been taken

1972 ACJ 439: AIR 1972 Mad 495 South India Ins. Co. Ltd. v. P. Subramaniam 1967 ACJ 65 (Madh-Pra) South India Insurance Co. Ltd.. Indore v. Heerabai 1967 ACJ 82 Oriental Fire and General Insurance Co. Ltd. Vs. Smt. Gurdev Kaur and Others, , Oriental Fire and General Insurance Co. Ltd., v. Gurdev Kaur and 1977 ACJ 85: AIR 1977 Cal 341 Indian Mutual General Insurance Society Ltd., v. Manzoor Ahsan.

The view taken in these decisions is that a owner of the goods accompanying the goods in a truck cannot be said to be travelling in the truck by virtue of any contract of employment. But the point that the owner of the goods accompanying the goods in the truck hired by him answered the description of the passenger who was being carried for hire or reward was not urged in these cases.

11. Now coming to the contention raised on behalf of the appellant in M. A. No. 58/77. the first question that arises for consideration is whether there was rashness and negligence on the part of the driver in driving the vehicle at the relevant time. There is no direct evidence of any eye-witness to the occurrence. It is, however, not disputed before us that due to incessant rain the road at the place of accident was muddy and slippery and that at the place of accident the vehicle went off the road and dashed against a tree. It is in the evidence of P. Ws. 2 and 3 that the front part of the vehicle specially the driver's cabin was completely damaged and pressed and the goods were heavily damaged. P. W. 3 Ramesh Chandra Agarwala who arrived at the spot soon after the accident stated

that by the time of his arrival the deceased Radha-shyam Gupta had died and the driver had not come out of the cabin and he had to be pulled out. The driver had sustained severe injuries as a result of which he died on 12-12-73 at Karanjia Hospital. It is obvious that the vehicle struck against the tree with a great velocity.

12. When the vehicle goes to the off side of the road and strikes against a tree the principle of *res ipsa loquitur* is attracted. Once this principle is attracted, the burden shifts on to the owner and the driver to show that the vehicle was properly maintained and due diligence was exercised in driving the vehicle. It is not shown that there was any obstruction on the road or that there was an imminent danger in front, which the driver had to avert. In the circumstances of the case, the presumption is that the vehicle must have been driven in such a manner that it was not under the control of the driver. Unless the owner rebuts this presumption the claimants are bound to succeed. There is nothing to show that the accident occurred in spite of reasonable care and caution taken by the driver in driving the vehicle. The Tribunal rightly held that the owner failed to discharge the onus of proving want of negligence.

13. The next contention of the owner-appellant is that the Tribunal at Puri had no jurisdiction to decide the claim case. It appears that the accident occurred at a place within the jurisdiction of the Tribunal at Baripada in the district of Mayurbhani and the claim case was filed before that Tribunal. But subsequently by a Government notification the District Judge of Puri was constituted as an Additional Tribunal for the purpose of deciding this claim case. The notification is in the following terms:--

"Government of Orissa Works & Transport (Transport) Department.

NOTIFICATION Bhubaneswar the 10th October. "74.

No. TLC-77/74/14947/T. In pursuance of Sub-section (1) and (4) of Section 110 of the Motor Vehicles Act. 1939 (4 of 1939) and in partial modification of the notification of the Government of Orissa in the Transport Department No. 3411-TAB-4/58-T. dt. the 4th June, 1958 the State Government do hereby appoint the District Judge, Puri to be the Additional Motor Accident Claims Tribunal for the district of Mayurbhani for the purpose of adjudicating the claim of Srimati Narayani Bai for compensation in Motor Accident Claim Case No. 12 of 1974 pending in the file of District Judge, Mayurbhani and direct that the said case shall be transferred from the file of the District Judge, Mayurbhani to the file of District Judge, Puri for trial and disposal.

By Order of the Governor, Sd/- J.B. Singh Deputy Secretary to Government."

Relying upon the provisions of Section 110 (4) of the Act it is contended that the State Government is not empowered to constitute a Tribunal for the purpose of adjudication of a particular claim case and that it is only where two or more Claims Tribunals are constituted for any area that the State Government may, by

general or special order, regulate the distribution of business among them. In our opinion, the Government notification is of a composite character. Under the notification, the State Government constituted the District Judge of Puri as an Additional Tribunal for the district of Mayurbhani and transferred the claim case to him for disposal. We are of the view that it is in consonance with the provisions of Section 110 (4) that the case was transferred to the file of the Additional Tribunal at Puri for disposal. It may be noted that before the issue of the notification no evidence had been recorded in the proceedings by the Tribunal of Mayurbhani. In such a situation when the District Judge of Puri has been appointed as an Additional Tribunal for the district of Mayurbhanj, he had jurisdiction to decide the claim and there cannot be any legal bar to the disposal of the case by him. In fact, no issue was raised on the question of jurisdiction and it was not suggested at any stage of the proceedings that the case should be tried at Mayurbhani and not at Puri. In view of our above findings, we hold that the contention is devoid of any force.

14. The next contention of the appellants is that the compensation awarded by the Tribunal is high and excessive. The evidence on the side of the claimants that the deceased was earning Rs. 700/- per month from his business has not been materially shaken by cross-examination. The Tribunal came to hold that the deceased was earning a monthly income of Rs. 700/- at least and he was contributing not less than Rs. 500/- for maintenance of his family members; that such contribution to the family members would have continued at least for 15 years till the children were settled in their lives and for the remaining 10 years of his life he would have contributed at least half of his income i.e., Rs. 350/- for the maintenance of his wife. So his total contribution to the family for 15 years would have been not less than Rs. 90,000/- and contribution to his wife for 10 years would have been not less than Rs. 42,000/-. Thus, the total contribution during the remaining period of his life for the maintenance of his family would have come to Rs. 1,32,000/- After deducting 1/6th of the amount for various eventualities and uncertainty of life the total amount; would have come to Rs. 1,10,000/- and making a further deduction of 1/15th of the amount for the benefit accruing to the widow from the acceleration of her interest in the estate of the deceased and the possibility of wife dying earlier if the husband had lived full span of his life the compensation was assessed at Rs. 1,01,200/-. We see no cogent ground to reduce the amount of compensation.

15. There is, therefore, no merit in these appeals. We dismiss the appeals, hut without any order as to costs. The decision of the Tribunal is confirmed.

G.B. Patnaik, J.

I agree.