

(1998) 02 OHC CK 0005

In the Orissa High Court

Case No : Misc. A. No's. 161 to 163 of 1989

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Banamali Lenka and Others

RESPONDENT

Date of Decision : 11-02-1998

Acts Referred:

Motor Vehicles Act, 1939 — Section 95, 95(1)

Citation : (1998) 2 ACC 561 : (1999) ACJ 535 : AIR 1998 Ori 163 : (1998) 86 CLT 162

Hon'ble Judges : P.K. Mohanty, J

Bench : Single Bench

Advocate : A.K. Mohanty, for the Appellant; S.D. Das, S.K. Choudhury, S.K. Samantaray, N.C. Pati and S. Mishra, for the Respondent

Final Decision : Partly Allowed

Judgement

P.K. Mohanty, J.—In all these three appeals, the Oriental Insurance Company Ltd. is the appellant against the award of compensation passed by the Motor Accident Claims Tribunal, Mayurbhanj in Claim Misc. Case Nos. 45, 49 and 51 of 1985. All the appeals are taken up together and heard analogously since they arise out of a common judgment and common questions of law are involved.

2. The short facts of the claimants' case was that the Van bearing registration No. ORS 5279 shuttled between the weekly markets and goods along with its passengers are carried in the vehicle. On 13-9-1985 when the claimants in Misc. Case Nos. 49 and 51 of 1985 and the deceased Prasanna Kumar Behera for whose death claim application No. 45 of 1985 has been filed, were travelling in the said van along with their merchandise, near Dantiamuhan crossing, due to rash and negligent driving of the driver, the vehicle went off the road and dashed against the road side tree causing injury to Bharai Sahu, claimant in Misc. Case No. 49 of 1985, and Banarasi Lanke, claimant in Misc. Case No. 51 of 1985 and Prasanna Kumar Behera died at the spot. It is claimed that deceased Prasanna had been carrying on business in purchase and sale of tobacco from which, he

used to have a monthly income of Rs. 1,200/-. He was aged 38 years at the time of accident and the legal representatives have laid a claim of Rs. 1,25,000/- in Claim Misc. Case No. 45 of 1985. The claimant in Misc. Case No. 49 of 1985, Bharat Sahu is aged 60 years at the time of accident who was carrying on business of coconuts and earning an income of Rs. 500/- per month. He sustained a fracture of the wrist and as such had undergone treatment and his hand was plastered for which he is unable to pursue his usual avocation and even he was not in a position to perform his normal work for about three months. Accordingly, his claim is to the tune of Rs. 15,000/-. Banamali, the claimant in Misc. Case No. 51 of 1985 claims that he was carrying on business and was earning an income of Rs. 1,100/- per month and there being a fracture on the right hand bone, he had to undergo treatment for the injuries he sustained in course of the accident and he was to be hospitalised at Baripada hospital from 13-9-1985 till 18-9-1985 and since he did not get desired result, he had to be shifted and treated at a Nursing Home at Cuttack from 18-9-1985 to 2-10-1985. Thus, his claim is Rs. 6,000/- towards treatment of the injury and a total claim of Rs. 36,000/- was made on all counts,

3. The owner of the vehicle in question Ranjit Patra (opp. party No. 1) filed a written statement denying the negligence on the part of the driver of the Van and according to him, the accident was an inevitable one. Opposite party No. 3, the Insurance Company, the present appellant, in its written statement denied the accident and the claim and its liability in each of the claim petitions. In paragraph 9 of the written statement, a plea was taken that in spite of thorough search, the Insurance Policy in respect of the alleged vehicle bearing No. 5279 (Van) involved in the accident could not be traced out in absence of full and correct particulars with regard to insurance policy or certificate of insurance. It rather called upon the claimants to produce the insurance policy. Interestingly, at paragraph-16 of the written statement it appears that the Insurance Company called upon the owner (opp. party No. 1) to produce the driving licence of the driver, the route permit, fitness certificate, R. C. Book, failing which, to draw presumption that there is a statutory violation of the condition as contemplated u/s 96 (2) of the Motor Vehicles Act.

4. The learned Tribunal framed seven issues and held on consideration of materials that the driver of the vehicle was responsible for the cause of the accident due to his negligence, applying the principles of *res ipsa loquitur*. In issue No. 4 as to whether deceased Prasanna Behera was entitled to travel in the vehicle, the Tribunal held that as owner of the goods, the occupants were entitled to accompany their goods in the vehicle. In Issue No. 5, as to whether the vehicle was insured with opp. party No. 3, the Tribunal found that even though opp. parties initially took a plea of non-admission of the fact of insurance cover of the vehicle on the relevant date, but at the time of hearing, it had not seriously challenged the fact of insurance, in as much as from the seizure list, Ext. 2, it was found that opp. party No. 3 was the insurer of the vehicle in question. The Tribunal determined a compensation of Rs. 70,000/- in Claim Misc.

Case No. 45 of 1985, Rs. 26,000/- in Claim Misc. Case No. 51 of 1985 and Rs. 7,500/- in Claim Misc. Case No. 49 of 1985 and the owner being held liable, the Insurance Company was to cover the liability.

5. Mr. Ajaya Kumar Mohanty, learned counsel for the appellant contends that the deceased as well as the injured-claimants being travellers in the vehicle as owners of the goods whereas the vehicle in question having been insured as a private Car and the policy having been issued for use of the vehicle for social, domestic and pleasure purpose only and not for carrying goods for hire and reward, the Tribunal could not have held the insurer liable to pay the compensation. The main thrust of the argument is that the vehicle having been insured as a private car, it could not carry the goods and passengers and carrying of such goods and passengers are in violation of the condition of the policy and as such, the insurer cannot be held liable. It is further contended that in absence of policy papers such as, First Information Report, Charge-sheet, M.V.I. report etc., the Tribunal could not have held, the driver guilty of rash and negligent driving solely on the basis of the testimony of P.W. 2. The assessment of compensation arrived at by the Tribunal was also challenged as unusually high and excessive.

6. The main question that arises for consideration is as to whether the vehicle in question was in fact insured as a Car containing any stipulation that it could not carry any goods or passengers for hire and reward and as to whether because of such contravention of the condition of the policy, the insurer is absolved of the liability to cover the liability of the owner.

7. Before proceeding to consider the submissions made, it is necessary to mention that while denying the liability, the appellant-insurer had taken a specific plea that in spite of thorough search, the policy is not traceable in the office and called upon the claimants and the owner of the vehicle to produce the policy for reference. But however, the learned Tribunal found from Ext. 2 that the appellant was the insurer of the vehicle. In the present appeals an application under Order 41, Rule 27, CPC for admitting the copy of the insurance policy in respect of the offending vehicle has been filed and by order dated 13-5-1994 this Court directed that the Misc. Case will be considered at the time of hearing of the appeal. In facts, the learned Tribunal has already held that the appellant is the insurer of the vehicle. In this circumstance, for the ends of justice and for a just decision of the case, I feel that the document should be admitted into evidence and so I do.

8. On a bare perusal of the insurance policy it reflects a very sad state of affairs as to how the insurance policies are dealt with. In the schedule to the insurance policy under the heading "Make and Year of Manufacture" neither the make nor the year of manufacture of the vehicle has been indicated. Similarly, under the heading "Type of Body" without mentioning the type of body and its description, it has been mentioned "Military disposal vehicle". Needless to say that the type of body is a description to identify a vehicle and Military disposal vehicle is

definitely not a type of body. A Military disposal vehicle may be a truck of different make and horse power, may be a jeep, a car of the like and, therefore, it conveys no meaningful particular of the vehicle which indicates the casual manner of dealing with the contract of insurance. The Horse Power of the vehicle has been (sic) to the policy. The policy is effective from 12-2-1995 to 11-2-1996 and thus, it covers the date of accident. Much emphasis is laid and it is submitted that the vehicle having been registered as a private car, carrying of goods or passengers are in violation of the condition of the policy. In absence of any description as to the make and year of manufacture and type of body including the Horse Power of the vehicle it does not stand to reason as to how the vehicle insured can be taken as a car only. I am persuaded and constrained to observe that the Insurance Company is the case at hand has taken the matter in a casual and cavalry manner. The insurance is a contract between the insurer and the insured and governed under the Insurance Act and the Policies are compulsory under the Motor Vehicles Act. If the insurer had undertaken the liability without describing the type of vehicle, make and year of manufacture, it has to be inferred that any vehicle bearing the chasis and engine number as described in the policy was the vehicle insured and in the present case as per the evidence and materials on record, it is a van.

9. A "Van" has not been defined under the Motor Vehicles Act. In absence of any definition, it has to be understood in its common parlance. According to the Chambers Dictionary (New Edition), : Van" means, a large covered wagon, a light vehicle used in transporting goods. It is contended that in terms of the policy the limitation for use was, social, domestic and pleasure purposes and, therefore, if the vehicle is used for hire, the insurers incurs no liability. The injured person as well as the deceased were admittedly passengers of the vehicle travelling in it as the owner of the goods carried in it. Now the question arises, as to whether, a person travelling in a goods vehicle as the owner of the goods would be covered under the policy. The Full Bench of this Court in New India Assurance Company Ltd. Vs. Kanchan Bewa and Others, , on elaborate discussion and on consideration of several conflicting judgments of different High Courts including this Court, has set the matter at rest. It has been held that proviso 2 to Section 95 (1) (b) did not apply to person carried in a goods vehicle for hire or reward and it is restricted to passenger carried in a service vehicle. Owner of goods, who has hired a goods vehicle does not become a person travelling in a vehicle in pursuance of a contract of employment and even if he is carrying his goods after hiring the vehicle, the vehicle does not become a vehicle meant for a passenger for hire and reward and, therefore, it would not come within the ambit and scope of proviso 2 to Section 95 (1) (b) of the Motor Vehicles Act, 1939. In that view of the matter, the decision of the Tribunal that the deceased the injured persons being passengers in the offending vehicle as owners of the goods are to be covered under the policy, cannot be sustained in law. The owner of the goods does not become a person travelling on the vehicle in pursuance of a contract of employment and even if he is carrying his goods after hiring the vehicle, the

vehicle does not become a vehicle meant for carrying the passenger for hire and reward and, therefore, it would not come within the scope and ambit of Proviso 2 of Section 95(1)(b) of the Motor Vehicles Act, 1939.

10. Considering the case from another angle, it is the case of the appellant-Insurance Company that the vehicle was insured as a motorcar and as such neither the goods nor the passengers could have been carried in the vehicle, which is in violation of the condition of the policy. Let us examine the contention. "Motor Car" has been defined u/s 2 (16) of the Motor Vehicles Act, 1939 as follows :--

"motor car" means any motor vehicle other than a transport vehicle, omnibus, road-roller, tractor, motor cycle or invalid carriage;"

"Motor vehicle" has been defined under Subsection (18) of Section 2 of the Motor Vehicles Act, 1939 as follows :

"Motor vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises;"

The appellant-Insurance Company is not in a position to say, as to whether the vehicle was in fact a Car, as is their stand, or a Van, as deposed to by the witnesses. The policy in question does not indicate the necessary particulars and description of the vehicle insured.

11. The Tribunal in its finding under Issue No. 4 has held the vehicle to be a "Van" and the injured and deceased having been found to be the owners of goods carried in the van, were held to be entitled to accompany the goods in the vehicle as owners of the goods, in that event, whether the vehicle is covered by the policy is a private Car or a Van, does not make much of difference. The insurer-appellant, in any view of the matter, cannot be held responsible for covering the liability of the owner of the vehicle because of the contravention of the provision. Thus, the finding of the learned Tribunal that the amount payable to the claimants are still within the limit of the Insurance cover and opp. party No. 3 is to pay the amount cannot be sustained in the eye of law.

12. In the result, while affirming the award so far as the question of compensation is concerned. I hold that the owner of the vehicle (opp. party No. 4) is liable to pay the awarded compensation with interest and the insurer-appellant is not liable to cover the liability of the owner in any event.

The appeal is thus, allowed in part.