
(2006) 03 GAU CK 0109
In the Gauhati High Court

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Dongkholam and Others

RESPONDENT

Date of Decision : 29-03-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 165, 166, 170

Citation : (2006) 3 ACC 820 : (2007) ACJ 1973 : (2006) 2 GLT 1

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—By these appeals the insurance company has challenged the common judgment and award dated 26.3.2004 passed by learned Member, Motor Accidents Claims Tribunal, Dimapur, Nagaland awarding compensation to the claimants for the death of passengers travelling in a bus bearing registration No. NL 01-B 0273 belonging to Thangkhomang Sitihon, on the ground that death of the deceased passengers were not accidental arising out of the use of the motor vehicle but purely murder.

2. The facts leading to the filing of the present appeals in brief is that the claimants filed applications u/s 166 of the Motor Vehicles Act, 1988 (in short "the Act") claiming compensation for the death of the passengers travelling in the bus bearing registration No. NL 01-B 0273, stating, inter alia, that on 9.12.1996 at about 6.30 a.m. the vehicle was proceeding from Athibung to Dimapur via Jalukie with about 40 to 45 passengers, that while the bus was passing through a jungle area before Kiyevi village, some people coming from the opposite direction stopped the bus and informed its driver that they had definite information of the presence of some armed people in and around Jalukie area to attack innocent civilians travelling in any vehicle in that area and asked the driver to return back to Athi-bung and not to proceed any further towards Jalukie side but the driver in spite of the request made by the passengers not to proceed towards Dimapur further, did not pay any heed and continued to proceed towards

Dimapur and while the bus was negotiating a curve of the road a little while ahead some armed persons stopped the bus and fired indiscriminately resulting in the death of 28 passengers on the spot and other two in the hospitals. The claimants filed the claim applications claiming compensation for the death of such passengers contending that it was an accident which occurred due to irresponsibility and negligence of the driver and had the driver taken due care for the safety of the passengers or acted upon the information given as well as paying heed to the warning given by the passengers, the accident could have been averted. Learned Tribunal upon appreciation of the evidence on the record, both oral and documentary, awarded different sums as compensation ranging from Rs. 72,000 to Rs. 7,57,354. Hence the present appeals by the insurance company on the ground that the same was not an accident within the meaning of the Act but purely a murder, which occurred due to enmity between two communities.

3. I have heard Mr. B. Debnath, learned Counsel for the appellant and Mr. Imsoong, learned Counsel appearing on behalf of the claimants. None appears for the owner as well as the driver of the vehicle, who have been impleaded as respondent, in the present appeals. As agreed to by learned Counsel for the parties all the appeals are taken up for hearing and disposal analogously as was done by a single judgment and award passed by the learned Tribunal, the claim cases were disposed of.

4. Mr. Debnath, the learned Counsel for the appellant has submitted that the death of the passengers travelling in the vehicle in question was not an accident within the meaning of the Act but was purely a murder and, therefore, the claimants are not entitled to any compensation for the death of such passengers and consequently the insurance company is not liable to satisfy the award passed by learned Tribunal. Referring to the police report submitted by the S.I. Athang Zeliang, the officer-in-charge of Jalukie Police Station, who was examined as witness by the insurance company as DW 5, learned Counsel has submitted that the officer-in-charge of the police station, within whose jurisdiction the incident occurred, has stated in the said report that the death occurred to the passengers of the vehicle because of ambush by the underground miscreants who opened fire on the bus which resulted in the death of 30 passengers. Referring to the deposition of DW 5, i.e., the officer-in-charge of Jalukie Police Station, the learned Counsel has further submitted that the said witness in clear terms has deposed before learned Tribunal that upon investigation he found that there was no negligence on the part of the driver and the deaths were purely as a result of the ambush, which incident occurred due to enmity between the two communities and related to some previous violence between two communities. Learned Counsel submits that the said incident cannot be termed as accident within the meaning of the Act, which was in fact the murder simpliciter, for which the claimants are not entitled to any compensation. Replying to a pointed query made by the court about maintainability of the appeal by the insurance company in the absence of any permission u/s 170 of the Act, the learned Counsel for

appellant has submitted that though the vehicle was insured by the appellant insurance company, its liability will come only in the event it is an accident within the meaning of the Act and in the instant cases as the incident occurred was not an accident, claimants are not entitled to any compensation under the Act and, therefore, insurance company can maintain an appeal, though it has limited right to appeal on the grounds as enumerated in Section 149(2) of the Act. The learned Counsel relying on a Division Bench of this Court in National Insurance Co. Ltd. Vs. Kasheni and Others, submitted that as claimants failed to prove by producing cogent evidence that the incident occurred on that fateful day was an accident and not murder, the learned Tribunal has committed illegality in passing the award in favour of claimants.

5. Mr. Imsoong, learned Counsel appearing on behalf of the claimants supporting the award passed by learned Tribunal has submitted that accident occurred because of carelessness of the driver as well as his negligence as in spite of the warning given by some persons in that locality not to proceed further as they had got definite information that some persons were out there in front to cause mischief and as in spite of the repeated request made by the passengers not to proceed further, the driver did not pay any heed to such warning and request and as a result of which the accident occurred and, therefore, the claimants are entitled to compensation under the provisions of the Act. Learned Counsel for the claimants has also submitted that in view of the facts and circumstances of the instant cases, keeping in view the deposition of the claimants as well as the driver of the vehicle, who was examined as DW 2, it is evident that the act of killing of the passengers travelling in the bus originally unintended and the same was caused in furtherance of felonious act and the passengers were killed because of negligence on the part of the driver and, therefore, it is an accident within the meaning of the Act, hence the claimants are entitled to compensation under the provision of the said Act. It has further been submitted by the learned Counsel that at the relevant point of time State of Nagaland was declared as disturbed area having abnormal situation and during the period the owner as well as the driver are required to take extra care so that no untoward incident happens arising out of the use of the motor vehicle, but in the instant cases it is evident from the evidences available on record that the driver in fact did not pay any heed to the warning given by other persons and also the request of the passengers not to proceed further and accident occurred due to sheer negligence on the part of the driver. Learned Counsel has further submitted that as the right to file an appeal by the insurance company against the award passed by the learned Motor Accidents Claims Tribunal is limited to the grounds enumerated in Sub-section (2) of Section 149 of the Act, the present appeals filed by the insurance company are not maintainable as the ground on which the insurance company is challenging the award by the present appeals is not the defence available to it u/s 149(2) of the Motor Vehicles Act. The learned Counsel in support of his contention placed reliance on the decisions of the Apex Court in Samir Chanda Vs. Managing Director, Assam State TPT. Corpn., and Smt. Rita

Devi and Others Vs. New India Assurance Co. Ltd. and Another,

6. The learned Tribunal heard and disposed of the claim cases analogously as the same arose out of the same accident and involving identical question of law as well as facts. The evidence of the claimants were recorded in each claim case but as the respondents in the said claim cases were same being the owner, driver and the insurance company, they led evidence common in all the cases. The owner and the driver of the vehicle were examined as DW 1 and DW 2 respectively. Insurance company examined three witnesses, namely, Ashish Kumar Bhattacharjee, company's investigator; I. Alemla Jamir, an employee of the insurance company and Athang Zeliang, the officer-in-charge of Jalukie Police Station, as DWs 3,4 and 5 respectively.

7. For the purpose of deciding the question whether the death of passengers of the vehicle was "accident" arising out of the use of the vehicle or was murder simpliciter, I propose to discuss the evidences on record which are relevant for the purpose of deciding the said question.

8. The deposition of the two claimants, namely, Veikhongah, who is the claimant in M.A.C. Case No. 49 of 1998 and who claims compensation for the death of her husband Henpao as well as the deposition of Lamkai, the claimant in M.A.C. Case No. 66 of 1998, who claims compensation for the death of his son, are important as they were travelling in the said bus on the ill-fated day and were witness to the occurrence. Similarly, the evidence of the driver, namely, Okendra Singh, who was examined as DW 2, is also equally important as he was the person who drove the vehicle on that day.

9. Veikhongah, PW 1, in M.A.C. Case No. 49 of 1998 and Lamkai, PW 1, who is claimant in M.A.C. Case No. 66 of 1998 were the witness to the occurrence. They have deposed before learned Tribunal that they on 9.12.1996 along with the persons, for whose deaths the claim petitions have been filed, were travelling by bus bearing registration No. NL 01-B 0273 from Athi-bung to Dimapur which started at about 6.30 a.m. and on the way before reaching Jalukie the bus was stopped by about three persons and told the driver not to proceed towards Dimapur because of rumour that there was likelihood of attack on the bus by some armed persons on the way. These witnesses have also deposed before the learned Tribunal that upon hearing of such probable attack some passengers requested the driver not to proceed further and objected to further proceeding but the driver did not pay any heed either to the warning given by those three persons or to the request and demand of the passengers travelling in the vehicle and proceeded towards Dimapur. It has further been deposed before the learned Tribunal that while the bus was travelling between Sericulture Farm and Kiyevi village in Jalukie some persons stopped the bus and fired indiscriminately from both the sides and as a result of which 28 passengers died on the spot and causing grievous injuries to some other persons, out of which two persons died in the hospital. Though the insured and the insurer cross-examined those witnesses, they were not cross-examined on the point of negligence on the part

of the driver for not paying heed to the warning as well as the demand of the passengers not to proceed further or about the occurrence took place thereafter. The statements of those witnesses, therefore, remain uncon-troverted and unchallenged.

10. Thangkhomang, the owner of the vehicle who was examined as DW 1 has stated about plying of the vehicle between Athibung to Dimapur on 9.12.1996, driven by Okendra Singh having a valid driving licence and also issuance of insurance policy by the appellant insurance company in respect of said vehicle bearing registration No. NL 01-B 0273, which met with an accident on 9.12.1996. This witness has stated that on that day he was in Dimapur and, therefore, has no personal knowledge about the accident. During cross-examination this witness has stated that he received a sum of Rs. 75,000 from the insurance company for the damage caused to the vehicle under own damage claim. The insurer also cross-examined the witness but nothing could be brought out during such cross-examination so as to prove that the vehicle was not plying on that day and/or that the accident did not occur and/or that the vehicle was driven by a person having no driving licence and/ or without all valid documents.

11. The evidence of Okendra Singh, DW 2, is very much significant because of the fact that he drove the vehicle on the ill-fated day as driver. The said witness in his deposition has stated that on 9.12.1996 he drove the vehicle and when the bus reached between the Sericulture Farm and Kiyevi village in Jalukie-Athibung Road coming from Athibung side, he saw 3/4 persons who stopped the bus and asked for documents of the vehicle, accordingly he handed over the documents. Some persons, thereafter, started firing at the bus as a result of which passengers of the bus were injured and killed. He has also stated in his deposition that he drove the vehicle with a valid driving licence, photocopy of which was also exhibited. During cross-examination by the claimants this witness has specifically stated that on the way between Athibung and Jahikie 2/3 persons stopped the vehicle and warned him not to proceed towards Dimapur for the fear of ambush and some passengers also strongly objected to proceed further to Dimapur, but as such untoward thing never happened earlier he did not pay any heed to the demand of the passengers as well as the warning given by those persons and proceeded towards Dimapur. He has also deposed that had he not proceeded towards Dimapur on the very day the accident would not have occurred. This witness has also admitted that he did not take much care about the safety of the passengers and also did not pay much attention to the passengers who objected to proceeding further towards Dimapur. Insurance company also cross-examined the said witness and during such cross-examination this witness has stated that he has the valid driving licence for driving the bus and after the incident he stopped driving any vehicle. To a suggestion given by insurance company he denied that he was forced to depose that he was at fault for proceeding further towards Dimapur and at his own wish he proceeded further. This witness also denied the suggestion that before starting the journey at Athibung he was warned of any ambush. DW 2 during

such cross-examination said that three persons stopped the vehicle and told the conductor, which he overheard, not to proceed ahead because the situation was not good. It has further been stated that after about 1 km from the place where he was warned, he saw one person standing in the middle of the road signalling the bus to stop and as soon as he stopped the vehicle he was asked for vehicle documents which he complied but suddenly other persons appeared and started firing indiscriminately at the bus killing and injuring passengers.

12. Ashish Kumar Bhattacharjee, the investigator appointed by the insurance company to submit report about the occurrence on 9.12.1996, who was examined as DW 3, has exhibited his report submitted to the insurance company. This witness has deposed that the driver of the bus had a valid driving licence to drive the heavy vehicle including public service vehicle and the government has paid compensation to the next of kin of affected persons in the accident as the government has taken its liability of its failure to provide safety and security to the persons. This witness during cross-examination has stated that the main purpose of his investigation was to ascertain whether the driver of the vehicle had the valid driving licence to drive the heavy vehicle. During cross-examination by the vehicle owner, he has also stated that during his investigation he did not make inquiry from any independent witness to the occurrence or the people living in and around the place of occurrence or from insured or from the members of the deceased family.

13. Insurance company also examined another witness, namely, I. Alemla Jamir, as DW 4, who proved the insurance policy issued in respect of the vehicle in question and stated that the policy was covered for total 46 persons including the driver and conductor. During cross-examination by the claimant this witness has stated that the vehicle was insured covering the risk of the own damage as well as for the employees and the passengers and the claim made by the owner towards own damage has already been settled. This witness has also deposed that policy which was issued did not have any clause excluding risk for terrorist act.

14. The officer-in-charge of Jalukie Police Station was examined as DW 5 by the insurance company, who in his deposition has stated that after receiving the information he visited the site of the accident, which was between Sericulture Farm and Kiyevi village and he found that 28 persons were killed by the miscreants by ambushing the vehicle. He has further deposed that those persons stopped the vehicle and asked the conductor and driver to get down and thereafter closed the door of the bus and started firing discriminately killing 28 persons on the spot and injuring many others and thereafter the miscreants fled away from the scene. During the examination-in-chief he stated that the incident was not a vehicular accident but purely an ambush and in his opinion there was no negligence on the part of the driver and the occurrence took place because of rivalry between the two communities relatable to some previous incident of communal violence. During the cross-examination by claimant this witness has

stated that he was not present when the accident occurred and all the passengers killed were inside the bus at the time of incident. He has also stated that his statement during the examination-in-chief about the rivalry between two communities is his personal opinion/view only. During cross-examination by vehicle owner, this witness has admitted that he does not know what has happened between Athibung and the place of incident.

15. From the aforesaid discussion of the evidence on record it is, therefore, evident that though the driver and conductor were sufficiently warned by some persons about the probable attack by some armed persons and though some passengers demanded the driver that he should not proceed further towards Dimapur but to return to Athibung from where the journey started, the driver did not pay any heed to such warning and demands and proceeded towards Dimapur, as a result of which the accident occurred killing 30 passengers travelling in the vehicle. It is, therefore, evident that the necessary care required to be taken by the driver, that too, in the abnormal situation prevailing during that period was not taken which resulted in killing of the passengers while the vehicle was in use. The deposition of the claimants in M.A.C. Case Nos. 49 and 66 of 1998 as well as that of the driver of the vehicle, who was examined as DW 2 is very clear and specific in that regard. Evidence of the owner of vehicle, the insurance company's investigator and its other employee, who were examined as DWs 1, 3 and 4 respectively are not of much importance insofar as it relates to the cause of the accident as they were not present at that point of time as they were not travelling in the said bus on that day.

16. It is not the case of the insurance company that the driver had no valid driving licence or the bus was plying without any permit or the accident never occurred. The insurance company also does not dispute killing of 30 passengers travelling in the bus. It is evident from the report submitted by the investigator, DW 3, that the driver had the valid driving licence. The owner of the vehicle also deposed about having all the valid documents and permit. DW 4, the employee of the insurance company also deposed regarding insurance coverage and issuance of valid insurance policy in respect of the vehicle in question covering the risk of the driver, conductor as well as the 43 passengers. He has also deposed that the policy of insurance issued did not have any clause excluding the liability of the insurance company for any terrorist act. Learned Counsel for the appellant relying on the report submitted by the officer-in-charge of Jalukie Police Station, who was examined as DW 5 as well on the evidence of the said witness has submitted that the incident had occurred because of rivalry between two groups and the same was murder simpliciter and was not an accident within the meaning of the Act. DW 5 during cross-examination has specifically stated that his statement during examination-in-chief that incident occurred due to the rivalry between the two communities is his personal view/opinion only. Such personal opinion of the police officer cannot be the ground for holding that it was not an accident within the meaning of the Act. The appellant could not prove their plea that it was murder simpliciter and not accident within the meaning of

the Act, either through the witnesses examined by it or by cross-examining the PWs as well as DW 1 and DW 2.

17. The word "accident" has not been defined in the Act. Section 165 of the Act provides for constitution of the Motor Accidents Claims Tribunal for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both. Section 166 provides for filing of an application for compensation arising out of an accident of the nature specified in Sub-section (1) of Section 165. Therefore, the application for compensation for the death or bodily injury caused to a passenger of a vehicle in an accident arising out of the use of the motor vehicle, can be maintained before the learned Tribunal and just and adequate compensation can be awarded by such Tribunal for such accident.

18. The "accident", according to Black's Law Dictionary means:

An unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated.

19. The Apex Court in *Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another*, while examining the actual legal import of the words "death due to accident arising out of the use of the motor vehicle" and whether a murder committed arising out of the use of the motor vehicle can be an accident within the meaning of the Act, relying on the decisions in *Challis v. London & South Western Rly. Co.* (1905) 2 KB 154; *Nisbet v. Rayne & Burn* (1910) 2 KB 689 and *Board of Management of Trim Joint District School v. Kelly* (1914) AC 667 has held as under:

(10) The question, therefore, is: can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But, there are also instances where the murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident, and a "murder" which is an accident depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or the act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

20. In *Samir Chanda Vs. Managing Director, Assam State TPT. Corpn.,* the Supreme Court has held that the conductor and driver of the bus are required to take care of the passengers travelling in it and if such care is not taken it amounts to negligence and, therefore, the compensation is payable under the Motor Vehicles Act for the death or bodily injury to the passengers. In the said case, Supreme Court has held that an abnormal situation was prevailing during

the period when the bomb blasted inside the vehicle, the owner and driver are to take extra care by carrying a police escort, having not done so, they are liable for compensation under the Act.

21. A Division Bench of this Court in *National Insurance Co. Ltd. Vs. Kasheni and Others*, on which learned Counsel for the appellant placed reliance, held that in a given case the proximity between the use of the motor vehicle and the death or injury suffered by a person may not be direct and immediate; yet compensation may be awarded under the provisions of the Motor Vehicles Act. In other words, that even in a situation where the death or bodily injury is not directly caused by the use of the motor vehicle, yet if such death or injury has some relationship with the use of the motor vehicle, compensation can still be awarded under the Act. Motor Vehicles Act being a beneficial legislation must necessarily receive a liberal interpretation insofar as a claim of compensation is concerned. It has further been held that the burden that the act of killing of the driver or the passenger of a vehicle amounts to accident within the meaning of Motor Vehicles Act, is on the claimants and they by adducing cogent evidence have to prove that such act was an accident within a meaning of that Act. In the said decision the Division Bench of this Court after discussing the evidences on record has found that the said burden could not be discharged by the claimant to prove that death was caused by or arising out of the use of the motor vehicle so as to confer power and jurisdiction on learned Tribunal to award compensation.

22. In the instant cases from the aforesaid discussion of evidence on record it is amply clear that no care was taken by the driver for safety of the passengers travelling in the vehicle and the driver in fact did not pay any heed to the warning given by some persons and also to the demand of the passengers not to proceed further. Because the driver had proceeded further, the passengers travelling in the said bus were killed arising out of the use of the motor vehicle. Had the driver not proceeded further and paid heed to such warning and demand the said accident could have been avoided. Therefore, negligence of the driver was duly proved. From the evidences as discussed above it is also clear that it was an unintended and unforeseen injurious occurrence and the same was not caused in furtherance of any other felonious act and, therefore, it is an accident within the meaning of Motor Vehicles Act, 1988. The claimants are, therefore, entitled to compensation under the provisions of the said Act.

23. Insurance company in the present appeals has not challenged the quantum of compensation awarded by learned Tribunal, rightly so, as no permission to contest the claim on all grounds available to the owner of the vehicle, apart from grounds available to the insurance company u/s 149(2) of the Act was obtained by the insurance company from the learned Tribunal as required u/s 170 of the Act.

24. I shall now deal with the point raised by the learned Counsel for the claimants regarding maintainability of the present appeals by the insurance company, as no permission as required u/s 170 of the Act was obtained by the

insurance company from the learned Tribunal.

25. It is an admitted position of fact that no such permission u/s 170 of the Act was obtained by the insurance company. Section 149 of the Act imposes the duty on the insurers to satisfy judgments and awards against the persons insured in respect of third party risks. Sub-section (2) of Section 149 provides that the insurance company shall be entitled to defend the action on any of the grounds, namely:

149(2)(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely-

(i) a condition excluding the use of the vehicle-

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached where the vehicle is a motor cycle; or

(ii) a condition excluding driving by a named person or persons or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

26. The Supreme Court in a number of decisions including in Smt. Rita Devi and Others Vs. New India Assurance Co. Ltd. and Another, has held that the insurance company cannot have a wider defence on merit than what is available to it by way of statutory defence and, therefore, in the absence of any permission u/s 170 of the Motor Vehicles Act, the appeal filed by the insurance company on any ground other than the defence available u/s 149(2), is not maintainable.

27. In the instant cases the insurance company has challenged the award passed by the learned Tribunal on the ground that the incident occurred on 9.12.1996 arising out of the use of the motor vehicle was not an "accident" within the meaning of the Act as the killing of the persons travelling in the vehicle was murder simpliciter. The said defence having not been available to the insurance company within the meaning of Section 149(2) of the Act, the insurance company in fact cannot maintain present appeals challenging the award passed by the learned Tribunal, but this Court having gone into the merit of the case, is

not dismissing the appeals as not maintainable.

28. It appears from the judgment and award passed by the learned Tribunal that though in a number of claim cases claim for compensation was made on behalf of the minors also, no direction has been issued by the learned Tribunal for depositing certain amount out of the awarded amount of compensation in fixed deposit account in the name of the such minors. It also appears from the record that in the M.A.C.T. Case Nos. 76, 77, 78 and 79 of 1997 as well as in M.A.C.T. Case Nos. 49, 53, 54 and 60 of 1998 there were minor claimants. The Tribunal is, therefore, directed to invest 50 per cent of the awarded amount in a fixed deposit scheme in any nationalised bank having branch in Dimapur in the name of the minor claimants in each claim case till they attain the age of majority, subject to verification of the present age of the such minors by learned Tribunal. The Tribunal is also directed to release the amount of compensation payable in each claim case to the claimant(s) by account payee cheque(s) drawn in the name of such claimant(s).

29. In view of the aforesaid discussions and the reasons given, I am of the view that there is no merit in the appeals filed by the appellant insurance company and, therefore, deserve to be dismissed, which I accordingly do. The judgment and award passed by the Tribunal is, therefore, upheld subject to the aforesaid directions. However, keeping in view the facts and circumstances of the instant cases, I do not make any order as to costs.