
(1997) 05 OHC CK 0003

In the Orissa High Court

Case No : Miscellaneous Appeal No. 513 of 1995

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Janaki Swain and Others

RESPONDENT

Date of Decision : 14-05-1997

Acts Referred:

Citation : (1997) 2 OLR 54

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

Bench : Single Bench

Advocate : M. Sinha, for the Appellant; Sanjaya Kumar Samantaray and D. Dhar (Respdts. 1 to 7) Artatrana Mohanty and Archana Mohanty (Respdt.-8), for the Respondent

Judgement

P.K. Mohanty, J.—This is an appeal by the insurer. Oriental Insurance Company Ltd. against the award of the Second Motor Accident Claims Tribunal (SD), Berhampur directing the appellant to pay a sum of Rs. 1.08,000/- to the petitioners-respondents 1 to 7 with interest at the rate of 9 per cent per annum from the date of application till realisation.

2. The short facts of the case are that at about 1.00 A.M. in the night of 24/25.1.1992, while the deceased as travelling in a jeep bearing No. AAS-2099 towards Ballipadar, due to rash and negligent driving, the said jeep met with an accident and capsized near the Mile-stone No. 15 under Gangapur P.S. resulting in death of the deceased. The legal representatives of the deceased have claimed compensation of Rs. 2,00,000/-.

3. The owner of the vehicle filed a written statement contending inter alia that he had deputed the deceased to attend the repair work of the offending jeep and while returning after completion of the repair, it capsized and the deceased succumbed to the injuries. It is stated that the jeep in question was under a valid insurance policy with Oriental Insurance Company, respondent No. 2 and as such the insurer is liable to pay the compensation to the petitioners. The insurer, respondent No. 2, denied its liability to indemnify the owner inasmuch as the

quantum of compensation, it is said is high and excessive. The Claims Tribunal, on consideration of the evidence and materials on record, came to hold that the vehicle was validity under the insurance cover on the date of the accident inasmuch as the accident took place due to the rash and negligent driving of the driver. It was further found that the deceased at the relevant point of time was neither under the employment of the owner of the vehicle nor was a passenger for hire or reward. The learned Member of the Claims Tribunal, on taking into consideration several relevant factors, determined the compensation to be Rs. 1,08,000/- and held that the insurer is liable to pay the amount.

4. Sri M. Sinha, learned counsel appearing for the insurer-appellant, contends that the driver of the offending vehicle having no authorisation to drive any vehicle as a paid employee, the insurer is not liable to cover the liability of the insured, since absence of authorisation in the driving licence to drive as a paid employee would amount to driving the vehicle without a valid licence. The further contention of Mr. Sinha is that the vehicle having been transferred to the present owner, without the approval or sanction of the Insurance Company and without any endorsement in the Insurance Policy, the insurer has no liability under the policy. It is the submission of Sri Sinha, that in view of the materials on record the deceased being a paid employee of the owner of the offending vehicle, he is not covered under the policy and as such, the insurer is not liable to indemnify the owner, on his death resulting from the accident. It is further submitted that taking into consideration the contribution of the deceased to the family at Rs. 500/- per month, the age of the deceased at 50 years, the application of multiplier 13 is illegal or erroneous inasmuch as the maximum multiplier applicable to a case of fatal accident being sixteen, as held by the Apex Court, the proper multiplier in the facts and circumstances would be 5 or 6, inasmuch as compensation of Rs. 10,000/- on account of loss of estate assessed by the Tribunal was misconceived.

5. Mr. Samantaray, learned counsel for the claimants-respondents submits that the points raised by the learned counsel for the appellant are misconceived in law and contrary to the materials on record. It is further stated that there is no evidence on record to show that the deceased was an employee of the owner of the jeep nor there is any evidence to show that he was a passenger for hire or reward and as such, the award made by the Tribunal is not assailable in law. It is further contended that the submission of the learned counsel that the contention that the driver of the offending vehicle has no authorisation in his driving licence to drive a vehicle as a paid employee is not tenable for the first time in the present appeal, the insurer-having not taken such a plea at the initial stage before the Tribunal inasmuch as such a plea in an after-thought and cannot be entertained.

6. Having heard learned counsel for the parties and having gone through the evidence on record, I find that there is evidence to show that the deceased was procuring passengers for the owner of the jeep as well as for other owners and

for taking care of the jeep he was getting Rs. 400/- per month towards such procurement and maintenance. The owner of the vehicle, respondent No. 1, in his cross-examination has stated that the deceased was looking after the vehicles and was arranging passengers. He was sent with the vehicle on 24.1.92 while the same was going for the repair and while coming after the repair, the vehicle met with the accident. It is further stated that the deceased besides getting the amount from the offending jeep, he was also getting from Bijaya Senapati, another vehicle owner, whose vehicle also was looked after by the deceased. Rs.400/- per month.

7. P.W.1 is the son of the deceased. He has clearly stated that his father was arranging passengers for the vehicles at Ballipadar and he was looking after the vehicles belonging to opp. party No. 1 and another Bijaya Kumar and on the relevant date, while coming in the jeep he met with an accident. P.W. 2 is Jhadia Pradhan, another occupant of the vehicle. He has stated that while the vehicle was going from Berhampur to Ballipadar at 1.30 A.M. due to the rough and negligent driving of the driver it capsized causing injuries to the deceased and ultimately he succumbed to the injuries. On a reading of the evidence, it is clear that the deceased was not an employee of the owner of the jeep but was a person, who used to procure passengers for the various vehicles in the stand and thus, was not an employee under respondent No. 1. In view of the evidence on record, it is also clear that on the relevant date of the accident, the deceased was an occupant of the vehicle, he having been sent by the owner along with the vehicle for repair and was returning after the necessary repairs. Thus, the contention of the learned counsel that the deceased was either an employee of the owner of the offending jeep or that he was a passenger for hire or reward is without any substance. Law is fairly settled that an occupant of the vehicle not for hire or reward, a gratuitous, passenger is a third party and in that event, the insurer is to cover the liability of the owner. A reference may be made to the decision reported in Tathagata Satapathy Vs. Raghunath Mohapatra and Others, for the proposition that a gratuitous passenger in an offending vehicle is a third party entitled to compensations.

8. Now coming to the next question raised by the learned counsel for the appellant that he driver of the offending vehicle having no authorisation in his driving licence to drive a vehicle as a paid employee, it will be deemed as if he had no, driving licence, is also to be rejected. Such a plea was not taken at initial stage before the Tribunal nor any document like the driving licence was produced and now this plea being taken for the first time in the present appeal. In that view of the matter without going to the merits of the case as to whether in absence of an endorsement in the driving licence authorising the driver to drive the vehicle as a paid employee, it is to be noted that such a plea having not been raised before the Tribunal and no document having been proved, showing absence of any such endorsement, it cannot be allowed to be raised for the first, time in the present appeal. The next contention of the [earned counsel that in view of the transfer of the vehicle in the name of the present owner, having not

been approved and/or sanction, the insurer is not liable to cover the liability of the owner, is also to be, rejected. The vehicle in question is admittedly insured with the appellant-insurance company and admittedly, the transfer has been effected in the name of respondent No. 1. In the strict sense of this term, the insurer has undertaken to cover the liability of the owner of the vehicle in question, which has been insured with it and therefore the transfer of the ownership of the vehicle does not absolve the insurer thereof from the liability incurred due to use of such vehicle.

9. However, coming to the question of quantum of compensation, the contention of Mr. Sinha, learned counsel for the appellant that taking into account the age of the deceased i.e. 50 years, the income and the contribution to his family and such other relevant consideration, the multiplier 13, as applied by the Tribunal is erroneous has ample force and needs consideration. The deceased admittedly was 50 years at the time of accident. He was contributing Rs. 500/- to the family. The age of the dependent widow is about 35 years with children. The apex Court in a recent decision while holding that the multiplier method in determining compensation is scientific and reasonable, have held that the maximum multiplier to be applied for determining the compensation in a fatal accident case should not exceed eighteen; The fact that the deceased was 50 years is one of the considerations in applying the multiplier and determining the compensation. The multiplier 13 applied in the facts and circumstances of the case is not in consonance with the settled principle of law for such determination. The maximum multiplier available in any given case is 18. Taking into consideration the totality of the circumstances of the case and the age of the deceased, the age of the dependants, the contribution of the deceased to the family maintenance, the lump sum payment etc., I am of the considered opinion that the reasonable multiplier would be 10 in the instant case. Thus, applying the multiplier 10, taking the monthly contribution of the deceased at Rs. 500/- per month, the compensation comes to $\text{Rs. } 500 \times 12 \times 10 = \text{Rs. } 60,000/-$. The Tribunal has awarded a sum of Rs. 5,000/- towards consortium, Rs. 5,000/- for pain and grief of the family due to the death, Rs. 10,000/- towards proper protection of the children in absence of their father and Rs. 10,000/- as the loss of estate, in total Rs. 30,000/-. It appears that the Tribunal in the facts and circumstances of the case, could not have awarded in addition to the compensation determined on applying the multiplier method of a further sum due to the loss of protection to the children in absence of their father and therefore, I feel the amount of Rs. 10,000/- that has been awarded towards loss of protection " Rs. 2,000/- for a minor child in the facts and circumstances of the case cannot be considered reasonable, nor can it be sustainable. Further, the claimants are entitled to a consortium loss of pleasure of life and loss of estate and taking all relevant factors into consideration I determine an amount of Rs. 2.5,000/- towards other compensatory losses. Accordingly, the claimants are entitled to a sum of $\text{Rs. } 60,000/- + \text{Rs. } 25,000/- = \text{Rs. } 85,000/-$ with interest " 9% per annum from the date of the claim as has been awarded by the Tribunal.

Taking into consideration the age of the widow and the dependant children it is directed that out of the total sum payable a sum of Rs. 5,000/- be paid to respondent No. 2, a sum of Rs. 45,000/- be kept in fixed deposit with the stipulation for monthly payment of interest to respondent No. 1 for the maintenance of the family. A sum of Rs. 7,000/- in the name of each of the respondents 3 to 7 be kept in fixed deposit for a period of 6 years, renewable each 6 years. All the aforesaid deposits shall be made in a Nationalised Bank with instruction and stipulation that the amount in deposit can only be withdrawn with the leave of the Tribunal.

The amount deposited by the appellant in this Court and kept in fixed deposit, be returned to the appellant along with accrued interest. The appellant is directed to deposit the entire awarded amount before the Second Motor Accident Claims Tribunal (Southern Division), Berhampur within a period of two months from the date of judgment with the accrued interest.

The appeal is allowed in part to the extent indicated and the award of the Second Motor Accident Claims Tribunal (Southern Division), Berhampur in M.A.C.No. 555/92 (377/92) is modified accordingly.