

(1992) 05 GAU CK 0021
In the Gauhati High Court
Case No : M.A. (F) No. 1 (S.N.) of 1991

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Kailash Mehta and Others

RESPONDENT

Date of Decision : 05-05-1992

Acts Referred:

Motor Vehicles Act, 1988 — Section 173
Penal Code, 1860 (IPC) — Section 279, 304A, 337

Citation : (1993) ACJ 970

Hon'ble Judges : S.N. Phukan, J; S.K. Homchoudhury, J

Bench : Division Bench

Advocate : J.N. Sarna, B. Das, R. Choudhary and R.K. Choudhury, for the Appellant; J.N. Dub and V.K. Jindal, for the Respondent

Final Decision : Allowed

Judgement

S.K. Homchoudhury, J.—This appeal is directed against the award dated 26.6.1990 made by the learned Motor Accidents Claims Tribunal, Shillong, in M.A.C. Case No. 19 of 1988. "

2. Facts of the case in brief are that on 12.2.1984 one Sardanilal Mehta, husband of the respondent No. 1 and father of respondent Nos. 2, 3 and 4, was killed in a motor accident on the C.S. Road at Police Bazar, Shillong. Police found that the city bus bearing registration No. MLK 654 belonging to the respondent No. 5, Asha Rane Das Choudhary, was involved in the accident and the accident took place due to rash and negligent driving of the said vehicle. Police registered Shillong P.S. Case No. 33 (2) 84 under Sections 279/337/304A, Indian Penal Code, against the driver of the said vehicle. The respondent No. 1, Kailash Mehta, the widow of the deceased S.L. Mehta, on her behalf as well as on behalf of her minor children, made an application before the learned Motor Accidents Claims Tribunal, Shillong, on 14.10.1988 claiming compensation against the appellant insurance company as well as against the owner, namely, the respondent No. 5 for the death of her husband, S.L. Mehta, on 12.2.1984 in the

accident.

3. Late S.L. Mehta had been an employee of the Indian Air Force and in the claim application his income has been stated as Rs. 1,129.64 per month. The claim application was obviously time-barred. However, the learned Tribunal being satisfied that the claimants are prevented by sufficient reasons in preferring the claim application in time condoned the delay and the application was registered as M.A.C. Case No. 19 of 1988. After receipt of notice, the appellant, Oriental Insurance Co. Ltd., as well as the respondent No. 5, the owner, contested the claim by filing written objection. In the claim application the claimant has stated that the vehicle, namely, MLK 654 was insured against third party risk with the appellant, Oriental Insurance Co. Ltd., Shillong and policy certificate was No. .31413/17/500/ T/15/84 and the same was valid up to 19.7.1984. In sub-para 4 of para 24 of the application the claimant also stated that the vehicle was insured under a comprehensive policy issued by the appellant. The respondent No. 5, owner of the vehicle, in the written objection while denying and disputing the allegations made in the claim application involving her vehicle, has stated in para 8 that the vehicle was insured against third party risk with Oriental Insurance Co. Ltd., Shillong Police Bazar and the policy certificate number was 31413/17/400/T/15/ 84 and the policy was valid up to 19.7.1984. The appellant in the written objection did not specifically deny that the vehicle was insured with it against third party risk. However, taking a vague plea that whatever liability the insurance company had would be limited as per the agreement in the policy.

4. In the hearing, the claimant examined 9 witnesses including herself in support of her claim. The owner examined 3 witnesses to establish that the city bus bearing the registration No. MLS 654 might have been involved in the accident, but not the vehicle No. MLK 654 belonging to her. The appellant adduced no evidence. Although the learned Tribunal granted time to the appellant to produce copy of the insurance policy, the appellant failed to do so. The learned Tribunal thereafter by award dated 26.6.1990 held that the vehicle of the respondent No. 5 bearing registration No. MLK 654 was involved in the accident and that due to the rash and negligent driving of the vehicle the deceased was knocked down by it and was killed and determined the amount of compensation at Rs. 3,31,000/- to be payable by the appellant, Oriental Insurance Co. Ltd., alone. After the award was made, the appellant filed an application for review of the award passed by the learned Tribunal contending that by order dated 11.12.1989, the appellant was given opportunity to produce the policy No. 31413/17/400/T/15/84 which was valid up to 19.7.1984. But the Shillong Branch of the appellant having code number 31418 and not 31413 appellant has to make correspondence with other concerned offices to locate the policy and to submit within the date fixed. But no reply was received, for which the appellant was unable to produce the same till 20.4.1990. During 1986-87 office of the appellant at Shillong was shifted to the present building and old records were dumped in store room during the shifting. However, 2/3 days before filing of the review petition an officer of the appellant, while searching other documents, accidentally

got the concerned papers relating to insurance of vehicle No. MLK 654 (bus) bearing policy No. 31413/0/201/MV/72/84 and certificate No. 31418/17/400/T/15/84 for the period from 20.1.1985 to 19.1.1986 with limited liability to cover a maximum amount of Rs. 50,000/-. The appellant also annexed copy of the certificate of the policy to the application. The learned Tribunal by order dated 21.9.1990 admitted the application for review of the award on the condition that the appellant insurance company would deposit half of the awarded sum in the court within 30 days for causing payment to the claimant and failing which the application for review would automatically stand rejected. The appellant could not deposit 50 per cent of the amount of compensation within 30 days and as such the review application stood automatically rejected. The appellant has, thereafter, approached this court in this appeal.

5. By order dated 15.2.1991 the appeal was admitted and it was further ordered that the operation of the impugned award would remain suspended on condition that the appellant would pay Rs. 50,000/- to the claimant within one month from that date. It has been submitted at the Bar that the amount of Rs. 50,000/- has been paid within one month. The appellant had also paid Rs. 15,000/- earlier on the principle of no fault liability as per provision of Section 92-A of the Motor Vehicles Act, 1939.

6. We have heard Mr. B. Das, learned counsel for the appellant and Mr. V.K. Jindal, learned counsel for the respondent Nos. 1 to 4. None appeared for the respondent No. 5. Mr. B. Das has assailed the impugned award mainly on the following grounds: (i) that the learned Tribunal has arbitrarily determined the amount of compensation to a highly excessive amount ignoring the settled principles of laws inasmuch as, although the monthly income of the deceased as per statement made in the claim application was Rs. 1,129.64, the learned Tribunal arbitrarily took the monthly income of the deceased at Rs. 2,013/- for calculating the amount of compensation and that the Tribunal has not made any deduction an account of uncertainty of life of the deceased and lump sum payment; and (ii) the appellant's liability as per insurance policy being limited to a maximum amount of Rs. 50,000/- the appellant could not be saddled with the liability to pay the entire amount of compensation.

7. Mr. Das, learned counsel for the appellant, has submitted that it is well settled that income on the date of accident Should form basis for calculating the amount of compensation payable to the claimant. The applicant in her application has stated that the monthly income of the deceased was Rs. 1,129.64. However, on the basis of solitary statement of the claimant's witness No. 4 (who was examined on 10.7.1989) "present salary of the deceased would have been Rs. 1,513/- plus Rs. 500/- as local allowances" the monthly income of the deceased has been taken at Rs. 2,013/-. The monthly income salary of the deceased on 10.7.1989 cannot form basis for calculating the amount of compensation payable to the claimant inasmuch as the accident took place on 12.2.1984. Mr. Das has further submitted that it is well settled that after working out the amount of

compensation deduction up to the extent of 30 per cent therefrom has to be made on account of uncertainty of life of the deceased and lump sum payment, while awarding the compensation. But the learned Tribunal had made no such deduction while awarding compensation.

8. Mr. V.K. Jindal, learned counsel for the claimant-respondent, on the other hand, has raised a preliminary objection and has submitted that the insurance company is not entitled to challenge the quantum of compensation awarded by learned Tribunal. Learned counsel for the respondents has further submitted that due to revision of pay scale the monthly income of the deceased had increased and as such, the learned Tribunal was right in accepting the income at Rs. 2,013/- per month. We are unable to accept the contention of the learned counsel for the respondents that the insurance company cannot challenge the quantum of compensation awarded by the learned Tribunal in an appeal u/s 110-D of the Motor Vehicles Act of 1939 and now u/s 173 of the Motor Vehicles Act of 1988. A Division Bench of this court in the case of Hemendra Dutta Choudhury v. Arun Kumar Bordoloi 1988 ACJ 813 has held that an insurance company can challenge the quantum of award and also can question the finding regarding negligence of driver in an appeal filed by it u/s 110-D of the Motor Vehicles Act of 1939. There is no evidence on record that although the monthly income of the deceased on the date of accident was stated in the claim application at Rs. 1,129.64 due to revision of pay scale with retrospective effect monthly income of the deceased increased from Rs. 1,129.64 to Rs. 2,013/-. The monthly income of the deceased was increased due to revision of pay scale as contended by the learned counsel for the claimants-respondents is not supported by any evidence. On the question of monthly income of the deceased higher than what has been stated in the claim application, there is nothing on record except the solitary and vague statement of the claimants' witness No. 4, namely, "his present pay would have been Rs. 1,513/- plus Rs. 500/- as local allowance". The claimants' witness No. 4 was examined on 10.7.1989, whereas the accident took place on 12.2.1984. On a plain reading of the deposition of the claimants' witness No. 4 it becomes apparent that the monthly income of the deceased on 10.7.1989 would have been Rs. 1,513/- plus Rs. 500/- as local allowance. What would have been the income of the deceased subsequent to his death is not relevant for the purpose of determining the compensation. The actual income of the deceased on the date of accident has to be taken into consideration for the purpose of calculating the amount of compensation. In the instant case, the monthly income of the deceased on the date of accident was Rs. 1,129.64 and on the basis of which the compensation has to be calculated. It appears that the learned Tribunal on the basis of the aforesaid solitary vague statement of the claimants' witness No. 4, on mere conjecture and surmises, has taken the income of the deceased at Rs. 2,013/- per month and has thus erred in calculating the amount of compensation on the basis thereof.

9. We also find force in the submission of the learned counsel for the appellant that the learned Tribunal erred in awarding the compensation without making

deduction on account of uncertainty of life of the deceased and for lump sum payment from the calculated amount of compensation. It is well settled that deduction from the calculated amount of compensation to the maximum extent of 30 per cent thereof is to be made because of uncertainty of life and lump sum payment of compensation. For the above reasons award cannot be sustained and is liable to be set aside and the case should be remanded back to the learned Tribunal for determining the amount of compensation in accordance with law.

10. The appellant has filed an application under Order 41, Rule 27, Civil Procedure Code, for allowing to adduce additional evidence to file and prove documents in connection with insurance policy No. 31418/ 0/201/MV-72/84 on the ground that the appellant was confused with the number of policy quoted in the application claiming compensation inasmuch as the code number of the Shillong Branch of the appellant was 31418 and not 31413 and also that the policy was misplaced due to the shifting of office at Shillong from one building to another in the year 1986-87. The appellant's case is that as per the policy it is apparent that the appellant's liability is limited to the maximum amount of Rs. 50,000/- and under no circumstances the appellant can be saddled with the liability to pay compensation to the amount exceeding Rs. 50,000/-.

11. Mr. Jindal, learned counsel for the respondents, has vehemently opposed the prayer for reception of the insurance policy or paper connected therewith at this belated stage in this appeal. Mr. Jindal has submitted that the appellant ought to have produced the insurance policy but the appellant has failed to do so although the learned Tribunal had given opportunity to produce the same. The learned counsel for the respondents has also submitted that the claimant gathered the particulars of the policy from the documents seized by the police and beyond that she could not have any knowledge about the terms of the policy and that in sub-para 4 of para 24 of the claim application the claimant has specifically stated that the policy was a comprehensive one and that statement has neither been denied by the appellant nor rebutted by adducing evidence. It is also too late for the appellant to approach this court for reception of the insurance policy or any paper connected therewith in evidence and to take shelter under it. Mr. V.K. Jindal has also submitted that it is well settled that an insurance company must produce the insurance policy for doing justice in a case. In support of his contention the learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of National Insurance Co. Ltd. v. Jugal Kishore 1988 ACJ 270 (SC). In para 9 of said decision the Hon'ble Supreme Court held that:

(9) Before parting with the case, we consider it necessary to refer to the attitude often adopted by the insurance companies, as was adopted even in this case, of not filing a copy of the policy before the Tribunal and even before the High Court in appeal. In this connection what is of significance is that the claimants for compensation under the Act are invariably not possessed of either the policy or a copy thereof. This court has consistently emphasised that it is the duty of the party which is in possession of a document which would be helpful in doing

justice in the cause to produce the said document and such party should not be permitted to take shelter behind the abstract doctrine of burden of proof. This duty is greater in the case of instrumentalities of the State such as the appellant who are under an obligation to act fairly. In many cases even the owner of the vehicle for reasons known to him does not choose to produce the policy or a copy thereof. We accordingly wish to emphasise that in all such cases where the insurance company concerned wished to take a defence in claim petition that its liability is not in excess of the statutory liability it should file a copy of the insurance policy along with its defence. Even in the instant case had it been done so at the appropriate stage necessity of approaching this court in civil appeal would in all probability have been avoided. Filing a copy of the policy, therefore, not only cuts short avoidable litigation but also helps the court in doing justice between the parties. The obligation on the part of the State or its instrumentalities to act fairly can never be overemphasised.

12. In support of the contention that it is a case for reception of additional evidence at the appellate stage the learned counsel for the appellant has placed reliance on the decisions of the Hon''ble Supreme Court in the cases of K. Venkataramiah Vs. A. Seetharama Reddy and Others, and Bhagwan Swaroop and Others Vs. Mool Chand and Others, Learned counsel has also placed reliance on the decisions of other High Courts.

13. The learned counsel for the respondents in support of his contention has placed reliance on the decisions of the Hon''ble Supreme Court and other High Courts. The decisions of the Hon''ble Supreme Court on which the learned counsel has placed reliance are in the cases of State of U.P. Vs. Manbodhan Lal Srivastava, Municipal Corporation of Greater Bombay v. Lala Panchan AIR 1965 SC 1888 Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, and Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others,

14. In the case of State of U.P. Vs. Manbodhan Lal Srivastava, the Hon''ble Supreme Court has held that it is well settled that additional evidence should not be permitted at the appellate stage in order to enable one of the parties to remove certain lacunae in presenting its case at the proper stage and to fill in gaps. Of course, the position is different where the appellate court itself requires certain evidence to be adduced in order to enable it to do justice between the parties. In the case of K. Venkataramiah Vs. A. Seetharama Reddy and Others, the Hon''ble Supreme Court has held that under Order 41, Rule 27, Civil Procedure Code, the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial causes". There may well be cases where even though the court finds that it is able to pronounce judgment on the basis of record as it is, and it cannot strictly say that it requires additional evidence to enable it to pronounce judgment, it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. In the case of Municipal Corporation of

Greater Bombay v. Lala Panchan AIR 1965 SC 1888 Hon''ble Supreme Court has held that the appellate court has the power to allow a document to be produced and a witness to be examined but the requirement of the said court must be limited to those cases when it found it necessary to obtain such evidence for enabling it to pronounce judgment. This provision does not entitle the appellate court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in the case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In the case of Associated Hotels of India Ltd., Delhi Vs. S.B. Sardar Ranjit Singh, the Hon''ble Supreme Court in para 8 of the said decision held as follows:

(8) At the hearing of this appeal, the appellant moved an application for reception of the documents as additional evidence. The genuineness of the documents was disputed by the respondent. In the court below, the appellant made no attempt to prove these documents. We found no ground for directing a new trial Having regard to all these facts, we dismissed the application.

15. In the case of Shivajirao Nilangekar Patil Vs. Dr Mahesh Madhav Gosavi and Others, the Hon''ble Supreme Court has held that the basic principle for admission of additional evidence is that the person seeking admission of additional evidence should be able to establish that despite the best efforts such additional evidence could not have been adduced at the first instant. Secondly, the party affected by the admission of additional evidence should have an opportunity to rebut such additional evidence and thirdly, that additional evidence was relevant for the determination of the issue.

16. From the decisions of the Hon''ble Supreme Court referred to by learned counsel for both parties, it is apparent that an appellate court may allow additional evidence if it requires such evidence to enable it to pronounce judgment and/or for any substantial cause. In the instant case, according to the claimant as well as the owner-respondent, the policy number or certificate number of the policy issued against third party risk in respect of the vehicle No. MLK 654 (bus) was 31413/17/ 400/T/15/84 and the same was valid up to 19.7.1984. Mr. Jindal has submitted that the claimant-respondent invariably was not aware either of the insurance policy or of any paper in connection therewith. The claimant's statement regarding the policy number and nature of the policy was based on the information gathered from the documents seized by the police in connection with Shillong P.S. Case No. 33 (2) 84 under Sections 279/337/304A, Indian Penal Code, against the driver of the bus No. MLK 654. There cannot be any dispute that ordinarily, the claimant could not have knowledge about the insurance policy or any matter connected therewith. However, in the instant case, the respondent No. 5, the owner, has also quoted identical certificate number of the insurance policy. No doubt, the insurance company being a public undertaking has the obligation to act fairly and to file copy of the insurance policy or papers connected therewith to assist the Tribunal

to see whether the policy was subsisting on the date of accident and if so, what was the extent of liability of the insurer. In the instant case, the appellant did not file the policy or any paper connected therewith in spite of being given time by the learned Tribunal. The perfunctory manner in which the appellant insurance company contested the case is reprehensible. If the appellant was confused due to quoting of wrong number of policy or certificate of the policy and/or could not find out the policy issued by it, minimum thing expected of it was to file an application before the learned Tribunal, stating that the code number of policy of Shillong Branch of the insurance company was not 31413 but 31418 and no such policy could be issued by the appellant from its Shillong Office or that the paper connected therewith was misplaced.

17. We are of the view that for the above laches on the pail of the appellant the learned Tribunal would have been justified in penalising the insurance company to pay the entire amount of compensation if the learned Tribunal had no alternative source to lay-hand on any paper in connection with the policy. In the instant case the owner of the vehicle in her written statement stated that the vehicle was insured with the appellant, namely, the Oriental Insurance Co. Ltd., Shillong and the insurance policy certificate No. was 31413/17/400/T/15/84 and that the policy was valid up to 19.7.1984. That apart, the claimant got the same number of policy certificate from the documents seized by police in connection with Shillong P.S. Case No. 33 (2) 84. The responsibility of the owner is not discharged only by quoting the insurance policy or number of certificate thereof. But for insuring against third party risk, the owner would have been solely liable to pay compensation. As such, the owner was also duty-bound to produce the paper connected with the insurance policy to satisfy the learned Tribunal that the vehicle was insured against third party risk and the policy was subsisting on the date of accident as well as the extent to which his liability has been indemnified by the insurer under the terms of the policy. The learned Tribunal ought to have called upon the respondent No. 5, the owner, to produce the relevant papers in connection with the insurance policy with a view to finding out the extent of liability undertaken by the insurance company as per terms of the policy. The learned Tribunal could have also called for the documents of the insurance policy seized by the police in connection with Shillong P.S. Case No. 33 (2) 84. To steer clear of the confusion and/or obscurity created due to referring one insurance policy by the claimant and the owner on one hand and another policy number by the appellant insurance company, on the other hand, we hold that the parties should be allowed to lead additional evidence to file and prove the insurance policy or papers connected therewith in their possession.

18. We have already held that the impugned award cannot be sustained and the case should be remanded to the learned Tribunal for making award in accordance with law. As such instead of receiving additional evidence in appeal, we direct the learned Tribunal to allow the parties to adduce additional evidence to the limited extent of filing and proving the insurance policy or papers connected therewith. The learned Tribunal may also call for the relevant papers seized in connection

with Shillong P.S. Case No. 33 (2) 84 from the appropriate authority.

19. For the reasons stated above, the appeal is allowed and the impugned award is set aside. The case is remitted back to the court of the learned Tribunal for deciding the case in accordance with law in the light of decision in this appeal after allowing the parties to adduce additional evidence to the limited extent of filing and proving the insurance policy and/or papers connected therewith. The learned Tribunal shall dispose of the case expeditiously preferably within a period of 3 months from the date of receipt of the records. The learned Tribunal shall proceed to dispose of the case with notice to the parties. We make no order as to costs.