
(1993) 08 GAU CK 0002
In the Gauhati High Court
Case No : M.A. (F) No. 5 (SH) of 1991

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Kalyani Roy and Others

RESPONDENT

Date of Decision : 18-08-1993

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 95

Citation : (1994) ACJ 818

Hon'ble Judges : D.N. Baruah, J

Bench : Single Bench

Advocate : V.K. Jindal, for the Appellant; L.R. Das and K.S. Kynjing, for the Respondent

Judgement

D.N. Baruah, J.—This appeal has been filed by the appellant insurance company (Oriental Insurance Co. Ltd.) against the award dated 27th June, 1991, passed by the Member, Motor Accidents Claims Tribunal, Shillong, in M.A.C. Case No. 11 of 1987. A mini bus No. MLK 2303 was involved in an accident on 2nd March, 1987 and as a result the husband of the claimant No. 1 and the father of the claimant Nos. 2 and 3 died. The claimants filed a case claiming compensation of Rs. 12,00,000/- (M.A.C. Case No. 11 of 1987). Seven issues were framed by the Member, M.A.C.T., Shillong. Eight witnesses were examined on behalf of the claimants and the respondent No. 4 examined 1 (one) witness. The owner also proved the policy, Exh. A. After closure of the evidence the Tribunal gave an award of Rs. 1,50,000. The Tribunal also held that the appellant insurance company is liable to pay the entire amount and accordingly the insurance company was directed to pay the awarded amount within a period of three months from the date of the award, failing which the awarded amount would carry interest at the rate of 12 per cent per annum. Against that award, the insurance company has preferred this appeal.

2. I have heard the learned counsel for appellant and respondent Nos. 1, 2 and 3 and also respondent No. 4.

3. During pendency of this appeal, the respondent No. 4 died and his legal heir, namely, Rubina Hay Diengdoh, was substituted. Mr. Jindal, learned counsel for the appellant, submits that the Tribunal failed to decide an important issue, namely, issue No. 5, "whether the deceased was a passenger or a pedestrian" and the liability of the insurance company depends on the decision of this said issue. Secondly, Mr. Jindal submits that the Tribunal committed manifest error by fixing the liability of paying the entire awarded amount on the appellant. This is contrary to the provisions of law and the condition of the policy of insurance. Mr. Das, the learned counsel appearing on behalf of claimants, however, disputes the submission of Mr. Jindal. Similarly, Mr. Kynjing, learned counsel for the respondent No. 4, also disputes submission of Mr. Jindal.

4. On the rival contentions of the parties, it is to be seen whether the impugned award is sustainable in law. Mr. Jindal draws my attention to the last line of the evidence of Tarun Baruah, S.I. of Police, MLP, CW 5, where he stated that the victim fell down from the footboard of the bus. From this evidence it is clear that the petitioner was a passenger and not a pedestrian. However, Mr. Jindal candidly submits that the CW 5 was not an eyewitness, his evidence is based on the statements recorded by him u/s 161, Criminal Procedure Code. Mr. Das, on the other hand, draws my attention to the portions of the evidence of PWs 6, 7 and 8. As per the evidence of the said witnesses, the deceased was a pedestrian. The evidence of CW 5 is based on the statements of the witnesses recorded u/s 161, Criminal Procedure Code and, therefore, his evidence cannot be relied on. On the other hand, there is positive evidence of PWs 6, 7 and 8, wherefrom it is abundantly clear that the deceased was not a passenger. Accordingly, I hold to be so and the insurance company is, therefore, liable to pay compensation in accordance with law.

5. The next contention of Mr. Jindal is that as per the terms of the policy of insurance the appellant is liable only to the extent of Rs. 50,000/-. He draws my attention to Exh. A. Exh. A contains the conditions of the liability of the insurance company. The limit of liabilities as per Exh. A is limited to the extent of Rs. 50,000/-. I quote that portion of the condition:

... limits of the amount of the company" s liability u/s II-1(ii) in respect of any one claim or series of claims arising out of one event: Rs. 50,000/-.

From the above, it is abundantly clear that the insurance company undertook to take risk of Rs. 50,000/- only. In this connection, Mr. Jindal has drawn my attention to a decision in National Insurance Co. Ltd. v. Jugal Kiskore 1988 ACJ 270 (SC). In the said case, the Supreme Court held thus:

...Even though it is not permissible to use a vehicle unless it is covered at least under an "Act only" policy it is not obligatory for the owner of a vehicle to get it comprehensively insured. In case, however, it is got comprehensively insured, a higher premium than for an "Act only" policy is payable depending on the estimated value of the vehicle. Such insurance entitles the owner to claim

reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle calculated according to the rules and regulations framed in this behalf. Comprehensive insurance of the vehicle and payment of higher premium on this score, however, do not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under Sub-section (2) of Section 95 of the Act. For this purpose a specific agreement has to be arrived at between the owner and the insurance company and separate premium has to be paid on the amount of liability undertaken by the insurance company in this behalf.

6. The owner of the vehicle in his written statement has stated that the vehicle was insured with the appellant insurance company and as such, he was not liable to pay any compensation even assuming that the accident did take place. However, there is neither any averment in the written statement nor is there any evidence to show that there was a special agreement between the owner of the vehicle and insurance company. Mr. K.S. Kynjing has also not been able to show that there is anything in this regard.

7. Mr. L.R. Das has drawn my attention to the decision of this court reported in United India Insurance Co. Ltd. Vs. Amitabha Dey and Others, but this decision has no application in the present case.

8. That being the position, the liability as per the policy, the appellant cannot be burdened with the entire amount, because the liability is only limited to the extent of Rs. 50,000/- as per Exh. A. Therefore, I modify the award dated 27th June, 1991, to the extent that the insurance company shall be liable to pay only to the extent of Rs. 50,000/- and the rest will have to be paid by the owner of the vehicle (respondent No. 4). Mr. Jindal states that at the time of filing of this petition, appellant insurance company had deposited a sum of Rs. 40,000/- and the claimants withdrew the said amount. The balance amount of Rs. 10,000/- will have to be paid by the insurance company to the owner of the vehicle and rest by the respondent No. 4.

With the above direction, this appeal is partly allowed.