

(1994) 09 OHC CK 0020
In the Orissa High Court
Case No : Misc. Appeal No. 260 of 1990

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Martin Kanduna and Another

RESPONDENT

Date of Decision : 28-09-1994

Acts Referred:

Motor Vehicles Act, 1939 — Section 110B, 95(2)

Citation : (1996) 1 ACC 117 : (1995) ACJ 522 : AIR 1995 Ori 19

Hon'ble Judges : R.K. Patra, J

Bench : Single Bench

Advocate : S.S. Basu, P.K. Khuntia and G.P. Dutta, for the Appellant; P. Mohanty, B.P. Ray, A.K. Dalal and P.K. Misra, for the Respondent

Judgement

R.K. Patra, J.—The Second Motor Accident Claims Tribunal by the impugned judgment and order has awarded a sum of Rs. 1,01,406/- as compensation to respondent No. 1. The entire liability having been saddled on the insurance company, it has filed this-appeal challenging the quantum as well as its liability. Respondent No. 1 has also filed cross objection contending that the compensation awarded by the Tribunal is inadequate and he is entitled to a further sum of Rs. 92,600/- as compensation, The appeal and the cross-objection were heard together and are disposed of by this judgment.

2. Respondent No. I Martin Kandulana was reading in Class V in Baharupada U. P. School and was aged about 11 years at the relevant time. On 8-12-1988 he along with other students and teachers of the said school went to Mandira dam on picnic in the bus bearing registration number OAS 2064 which belonged to respondent No. 2. While they were returning in the night of 9-12-1988, the bus stopped near Bhursipali canal road at about 2.30 a.m. to enable the passengers of the bus to attend call of nature. The passengers got down and after attending the call of nature boarded the bus. It is the allegation of respondent No. 1 that when he was still attending call of nature on the left side of the canal road, the driver started the bus and drove it in rash and negligent manner and dashed

against him. As a result of this, he sustained bleeding injuries on his head and scalp and other parts of his body. He was immediately taken to the P. H.C. at Attabira in a jeep and was subsequently removed to V.S.S. Medical College & Hospital, Burla for further treatment. At Burla his head and brain were operated upon and he was treated as an indoor patient till 10-1-1989. His right side has been paralysed after the accident and he lost his power of speech. On the basis of the aforesaid allegations, respondent No. 1 claimed compensation of Rs. 1,95,000/- against appellant and respondent No. 2.

3. There is no dispute that on account of the accident which took place on 9-12-1988 at about 2.30 a.m. near Bhursipeli canal road, respondent No. 1 sustained injuries. There is also no denial of the fact that the bus OAS 2064 belonging to respondent No. 2 was involved in the accident. On behalf of respondent No. 1 three witnesses were examined. A.W. 1 is his father but not an eye witness to the accident. A.W. 2 was the teacher of the school in which respondent No. 1 was reading and who was one of the passengers who had accompanied the students in the picnic in the bus. He stated that near Bhursipali the bus halted because some boys wanted to attend call of nature. They accordingly got down from the bus. After sometime they got into the bus except respondent No. 1 who was still attending call of nature on the canal road side. This witness testified that the driver suddenly started the bus and drove in a rash and negligent manner dashing against respondent No. 1. As a result of the accident the bus capsized on the left side of the canal. Nothing seems to have been brought out in his evidence to discredit his testimony regarding the manner in which the accident took place resulting in the injuries on the person of respondent No. 1. A.W. 3 is the doctor in Burla Medical College and Hospital who treated respondent No. 1 from 9-12-1988 to 10-1-1989 as indoor patient. Ext. 1 is the discharge certificate issued by him. He testified that he conducted operation on respondent No. 1's head and broken pieces of his frontal bone were taken out. There was brain laceration on the left frontal area which was excised and repair was done, and the wound was closed in layers. According to the doctor, the injured had paralysis of his right side of the body with complete loss of speech at the time of his discharge from the hospital. He opined that respondent No. 1 is completely disabled. It was brought out in his cross-examination that the disablement sustained by him is to the extent of 60 per cent. There is no cogent reason to discredit the testimony of the doctor. The tribunal in view of the said evidence was of the view that 50 per cent earning capacity of respondent No. 1 was affected throughout his life on account of the disablement. Taking the worst view of the matter that he would have worked for at least 30 years as a labourer like his father and would have earned minimum of Rs. 600/- per month, the tribunal calculated the future loss of earning for 20 years as follows :

Rs. 600/- x 12 (months) x 30 (years) x 50/ 100 = Rs. 1,08,000/-

20 per cent of this amount, i.e. Rs. 21,600/- was deducted towards uncertainties

of life. Net loss of future earning was worked out at Rs. 86,400/-. The tribunal granted a sum of Rs. 10,000/- towards medicines and attendant charges. A further sum of Rs. 5,000/- was granted on account of the mental shock, pain and sufferings. Thus, the total amount of compensation computed by the tribunal is Rs. 1,01,400/-. The tribunal over-ruled the objection of the appellant that Us liability is limited to Rs.50,000/- by holding that the accident was caused to the respondent No. 1 not as a passenger but as a third party for which the liability of the insurer is unlimited.

4. Learned counsel for the appellant contended that the tribunal erred in holding that the injured respondent No. I was not a passenger but a third party at the time of the accident. It was alternatively submitted that assuming that he was not a passenger the liability of the insurer could not exceed Rs.50,000/- as provided u/s 95(2)(b)(i) of the Motor Vehicles Act, 1939. The counsel appearing for the respondent No. 1 on the other hand submitted that the respondent No. 1 at the relevant time cannot be held to be a passenger in as much as he "has not boarded the bus but was on- the road attending call of nature.

5. In view of the rival contentions it is necessary to examine whether at the time of accident respondent No. 1 was a passenger in the bus. There is no dispute that respondent No. 1 was one of the passengers in the offending bus who being carried on hire had gone on picnic and the accident took place on the return journey. Ext. A is the certificate of insurance which shows that the offending bus was comprehensively insured from 4-7-1988 to 3-7-1989 covering the date of accident. The said document further indicates that premium of Rs. 756/- was paid for 63 passengers at the rate of Rs. 12/ -. As the premium was paid for 63 passengers the tribunal relying on Section 95 (2)(b)(ii) (3) of the Motor Vehicles Act, 1939 held that the limit of liability of the insurer is one lakh rupees in all. This finding is not sustainable in law inasmuch as by the Motor Vehicles (Amendment) Act, 1982 (Act No. 47 of 1982) the aforesaid provision was deleted. The said Central Act No. 47 of 1982 has come into effect from 1-10-1982. Accordingly, by the date of the accident, different liabilities depending upon the number of passengers as provided in the parent Act was done away with. The law which should govern the case at hand is as follows :

"95. Requirements of policies and limits of liability.

XX XX XX XX

(2) Subject-to the proviso to Sub-section (1) a policy of insurance shall cover any liability incurred in respect of any one accident up to the following limits, namely.

(a) xx xx xx xx

(b) where the vehicle is a vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment,--

(i) in respect of persons other than passengers carried for hire or reward, a limit of fifty thousand rupees in all;

(ii) in respect of passengers, a limit of fifteen thousand rupees for each individual passengers;

XX XX XX XX"

The further reasoning of the tribunal that respondent No. 1 was not a passenger at the time of accident because of the fact that he was on the canal side road and was attending call of nature is perverse. The tribunal has taken a pedantic view of the matter. Merely because at the relevant time respondent No. 1 was not physically inside the bus, it did not make him a non-passenger. As already noted, he was a passenger being carried for hire in the offending bus. He continued to be a passenger of the offending bus from the place of the start till its destination. On his getting down from the offending bus for a short-while to attend call of nature, he did not cease to be a passenger of the bus. For the aforesaid reasons, I hold that respondent No. 1 was a passenger in the bus and in view of the provision contained in Section 95 (2) (b)(ii), the liability of the appellant has to be limited to Rs. 50,000/- only. The appellant in its written statement has, however, taken a clear stand that "the liability of the insurance company is limited to Rs. 50,000,"- as per provision u/s 95 (2){b} of the Motor Vehicles Act, 1939". In view of its admission of the liability to the extent of Rs. 50,000/- the judgment of the Tribunal needs necessary modification.

6. Let me take up the cross-objection filed by the respondent No. 1 which is for enhancement of compensation. The amount of compensation determined by the tribunal is meagre and the same should be enhanced. Respondent No. 1 was aged about 11 years and was reading in Class V at the relevant time. He was treated in the V. S. Section Medical College & Hospital, Burla from 9-12-1988 to 10-1-1989 as an indoor patient. A.W.3, the doctor who treated the respondent No. 1 deposed that he conducted operation of his head and the broken pieces of his frontal bone were taken out. There was brain laceration on the left frontal area which was excised and repair was done and the wound was closed in layers. He has certified in the discharge certificate Ext. 1 that the injured had paralysis on the right side of his body with complete loss of speech at the time of discharge. In his cross-examination he has stated that the injured cannot improve even if further treatment is given to him and the disablement sustained by him is to the extent of 60 per cent. In view of the medical evidence, the tribunal has come to hold that the disablement of the injured is permanent and his entire career has been blighted on account of the paralysis of his right side which is beyond repair. According to the tribunal the disablement of the injured has affected his earning capacity to the extent of 50 per cent throughout his life. The view of " the tribunal that he would have earned a minimum Rs. 600/- per month as a labourer does not appear to reflect the true position. Under the Minimum Wages Act, the wages of an unskilled worker has now been fixed at Rs. 25/- per day. Taking an over-all picture, in my opinion, his minimum earning should be reasonably fixed at Rs. 800/- per month which works out as follows :

Rs. 800 x 12 x 30 years x 50 ----- = Rs. 1.44.000/-

A sum of Rs. 28,800/-, i.e., 20 per cent of the said amount is hereby deducted towards uncertainties of life. Thus, his net loss of future earnings works out at Rs. 1,15,200/-. The tribunal has awarded a sum of Rs. 10,000/- towards medicines and other incidental charges and Rs. 5,000/- on account of mental shock etc. as non-pecuniary damages. This amount of Rs. 15,000 / - if added to Rs. 1,15,200/-, the net compensation comes to Rs. 1,30,200/-. In my considered opinion, this amount seems to be the just compensation payable to the respondent No. 1.

7. For the reasons mentioned above, the statutory liability of the appellant being Rs. 50,000/- only, the balance amount of Rs. 80,200/- has to be borne by the owner-respondent No. 2. The appellant pursuant to the direction of this court had deposited Rs.50,000/-. He is, therefore, directed to make necessary calculation of interest at the rate of 6 per cent per annum on the sum of Rs.50,000/- from the date of application dated 27-1 -1989 till the deposit was made and pay the said amount to respondent No. 1 within two months hence. The owner-respondent No. 2 is directed to pay the balance amount of Rs. 80,200/- with interest at the rate of 6 per cent per annum from the date of the claim application.

8. In the result, the cross-objection is allowed. The appeal is allowed in pArticle There shall be no order as to costs.