

(1996) 05 AHC CK 0049
In the Allahabad High Court
Case No : F.A.F.O. No. 924 of 1989

Oriental Insurance Co. Ltd.	Vs	APPELLANT
Ram Vinay Singh and Others		RESPONDENT

Date of Decision : 10-05-1996

Acts Referred:

Motor Vehicles Act, 1988 — Section 173, 95, 96

Citation : (1996) 05 AHC CK 0049

Hon'ble Judges : S.K. Phaujdar, J

Bench : Single Bench

Advocate : Vineet Saran, for the Appellant; P.M.N. Singh and R.U. Ansari, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Phaujdar, J.—This appeal u/s 110-D of the Motor Vehicles Act (prior to amendment) read with Section 173 of the Motor Vehicles Act (after the amendment) is at the instance of the insurer against a direction upon it to pay a compensation of Rs. 90,000/- with interest to the respondents for a motor accident. The order appealed against was recorded on 7.7.1989 in Claim Petition No. 4 of 1987 by the Motor Accidents Claims Tribunal (District Judge), Azamgarh.

2. One Sudhakar Singh, a boy aged 14 years and a student of class 9 at the relevant time had died in a motor accident on 30.8.1986 as he was crushed under the wheels of a tractor driven rashly and negligently. Owner of the tractor and the insurer were sued by the bereaved parents of the deceased boy. Written statement was filed and witnesses were examined. Only thereafter the aforesaid order of compensation was passed and the liability was fixed on the insurer to pay the aforesaid sum.

3. The appeal was pressed by the appellant Oriental Insurance Co. Ltd. stating that the case was to be guided by the provisions of the Motor Vehicles Act that stood before amendment. It was stated that there was no issue framed by the

court below on the question of rashness and negligence in driving the vehicle and no compensation should have been awarded in the absence of any such issue and in absence of any finding that the motor vehicle in question was being driven with rashness and negligence at the relevant time. It was further contended that the Tribunal was pleased to dismiss the claim against the owner of the motor vehicle and upon such finding no liability could be fastened with the insurer as the insurer could be liable only to indemnify the owner when some responsibility is fixed with him.

4. The learned Counsel relied on certain case-laws in support of his contention. In the case of New India Assurance Co. Ltd. Vs. Surjit Kaur and Another, , a Division Bench of the Allahabad High Court held, in para 18 of the judgment that the liability of an insurer is for the purpose of indemnifying the owner. Where no award is made against the owner, the insurer cannot be made liable. In this case also no award was there against owners of the two trucks and as such opposite party No. 5 (the insurer) was not held liable. This case had followed a decision of the Allahabad High Court in the case of Abdul Ghafoor v. New India Assurance Co. Ltd. 1981 ACJ 340 (Allahabad). In the case of Abdul Ghafoor the court was of the view that u/s 95 of the Motor Vehicles Act the insurer is responsible for the liability which may be incurred by the owner in respect of bodily injury caused to any person by him or by his employees arising out of the use of a vehicle in a public place. Section 96 compels the insurer to satisfy the judgment against the person insured in respect of third party subject to conditions stated in it, viz., (i) that there should be a judgment for decree against a person insured, (ii) that the judgment is in respect of liability covered by the policy of insurer and (iii) that the liability, in fact, is covered by the terms of the policy. The court found that where the claim was liable to be dismissed as against the owner of the vehicle for neglect to take steps to serve notice of the claim on the owner, the insurer was not liable to the claimant and the claim could not be decreed as against the insurer. The learned Counsel submitted that on facts in the evidence before the Tribunal, negligence was not at all proved and even the owner of the vehicle was not, therefore, liable to pay any compensation and so the responsibility of payment could have never shifted to the insurer.

5. Certain facts are not disputed during the arguments. The death was caused by the use of a tractor belonging to the opposite party owner. The vehicle stood covered by a policy of insurance on the relevant date. The amount of compensation awarded by the Tribunal is also not under challenge. This court is, therefore, to see if at all there was any allegation of negligence and issue thereon, evidence to support the allegation of negligence and a finding thereon. This court is also to see what would be the effect of recording an order that the claim was dismissed against the owner whether such finding would vitiate the decree against the insurer.

6. Learned counsel for the respondents submitted that the issue No. 4 as framed by the court below sufficiently covered the question of negligence. It reads as

follows:

Whether the tractor in question was not entitled to be driven on the road and the driver and the owner are responsible for the accident.

It was further stated by the learned Counsel that the two witnesses PW 2 and PW 3 claim to have seen the incident and had spoken about the negligence on the part of the driver of the tractor. It was contended that although stress was laid on the absence of an issue nothing was stated about these witnesses and the finding of negligence arrived at by the court below on this point was not challenged at all.

7. I find that under issue No. 4 the court held that the tractor was legally authorised to be driven on the road and when he was " returning at the relevant time to the village from Lusi it was loaded with bricks. The Tribunal found from a discussion of the evidence that the two witnesses had seen the incident and there was nothing in the cross-examination to discard their testimony. He found from the statements of the doctor who had conducted the postmortem examination that there was rupture of the skull and the brain was also ruptured. It was clearly found that the owner opposite party could not escape the liability of the accident and he was found liable. On the other issue, the trial court dealt with the amount of compensation and the validity of the licence of the person driving the tractor.

8. Evidence of PWs 2 and 3 are before me. PW 2 has stated that he had seen the tractor coming in high speed and it was wobbling. This witness shifted to a safe distance from the tractor but Sudhakar was hit by the tractor and was run over under the front wheel. The driver of the tractor fled away after the incident. PW 3 has also described the incident as an eyewitness. According to him, tractor was coming in high speed, driven in a negligent manner, the deceased was coming on a cycle. On being dashed by the tractor he fell down and was crushed under the front wheel of the tractor.

9. It is, therefore, a case where there was an issue before the Tribunal touching the liability of accident. Evidence was there of rashness and negligence in driving and there was a finding on the point of negligence. It cannot, therefore, be said that the award was bad for absence of a finding on negligence on the part of the driver of the tractor for which the owner could be made vicariously liable.

10. On the next point urged by the appellant it is found that in the operative portion of the judgment the Tribunal had ordered that the payment of Rs. 90,000/-with 6 per cent interest would be made by the insurer (the present appellant). The Tribunal wrote another line hereafter that petition against opposite party Nos. 1 and 2 is dismissed. This operative portion certainly relieves the owner of any liability to pay. On this point and on this finding the learned Counsel for the appellant bases his argument that unless the owner was liable, the insurer could not be made liable. The two case-laws relied upon by him refer to interpretation of Section 95(2)(a) of the Motor Vehicles Act. In the case of

New India Assurance Co. Ltd. Vs. Surjit Kaur and Another, , the court found that Surjit was not travelling in one of the two trucks involved in the accident either in the course of the employment or in pursuance of a contract of employment. He was not entitled to travel in a goods vehicle not meant for carrying passengers on hire or gratuitously. In view of the provisions of Section 95(2)(a) of the Motor Vehicles Act, the insurer was not liable for the death of a passenger travelling in a goods vehicle either on hire or gratuitously. The court had quoted Section 95(2) (a) to state that 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) Where the vehicle is a goods vehicle, a limit of fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923, in respect of the death of, or bodily injury to, employees (other than the driver), not exceeding six in number, being carried in the vehicle.

11. The award in this case was set aside, as found from the judgment, mainly on this ground together with the ground that the claim was dismissed against the owner. In this case reliance was placed on the decision in the case of Abdul Ghafoor 1981 ACJ 340 (Allahabad).

12. In the case of Abdul Ghafoor 1981 ACJ 340 (Allahabad), however, the court was confronted with a situation where claim against the owner was dismissed for non-prosecution but the claim proceeded on against the insurer alone and it was found that the insurer, in the absence of liability of the owner, could not be directed to pay any compensation. The case at our hands differs substantially on facts from both the cases and the same interpretation of law may not, therefore, be given in the present case. Here is a case where a tractor was being driven rashly and negligently by a person having a valid licence and there was proof of negligence on the part of the driver in causing the accident resulting in the death of one Sudhakar. The negligence on the part of the driver would make the owner vicariously liable and in fact in deciding issue No. 4 the Tribunal recorded a finding in unambiguous term that opposite party No. 1 (meaning the owner of the tractor) was liable for the accident. The insurance cover at the relevant time is not denied at the trial or in this appeal before me. The only sentence on which the appellant relies is contained in the operative portion of the order to the effect "The petition against opposite party Nos. 1 and 2 is dismissed." This sentence cannot and must not be read in isolation and is to be read along with the other findings in the judgment. It is not a case where the Tribunal had found that the owner was not liable. Rather the Tribunal fixed the liability of the accident with the owner. The quoted sentence must, therefore, mean that the liability of final payment is not fastened with the owner but is fastened with the insurer only. It was not a case where the insurer was not liable to indemnify the owner. The trial court, certainly, should have been more careful in the use of the language. But as the appellate court we are to go not by the letters of the judgment but by the spirit of it. The letters spoke of dismissal no doubt but it was dismissal of the

liability of actual payment and not the dismissal of the liability under the accident. The insurer, therefore, cannot avoid payment on those grounds.

13. No other point was urged before this Court in the appeal. The appeal is accordingly dismissed with costs. Payment if not made earlier must be made within a month from today with interest up to date failing which it will be open for the Tribunal to proceed to recover the same in due course of law.