
(2009) 11 OHC CK 0047
In the Orissa High Court

Oriental Insurance Company Ltd.

APPELLANT

Vs

Gouranga Charan Behera and Another

RESPONDENT

Date of Decision : 11-11-2009

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 170

Citation : (2010) 109 CLT 71 : (2010) 1 OLR 841 Supp

Hon'ble Judges : B.N. Mahapatra, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 (for short "the Act") filed by the Insurance Company challenging the legality & propriety of the Order Dated 28.11.2000 passed by the 2nd. Motor Accident Claims Tribunal, Cuttack, (for short "the Tribunal"). In Misc. Case No. 1041 of 1990, by which the Appellant Insurance Company has been directed to pay a sum of Rs. 70,000 to the claimant-Respondent with a consolidated cost of Rs. 250 along with interest " 6% per annum from the date of filing of the claim petition before the Tribunal, i.e., 7.11.1990 till its realization.

2. The case of the claimant-Respondent before the Tribunal in nutshell was that on 22.8.1990 while he was travelling in a bus bearing Registration No. OSU 4257 from Cuttack to his village Nimbera at about 2.30 P.M. the left side rear wheel tyres of the bus were suddenly burst, as a result of which the check plates of the bus over the said wheels moved upwards violently & hit against the claimant-Respondent who occupied a seat in the bus just above the left side wheel. In the said accident, the claimant-Respondent sustained severe fracture injury on his both legs. From the spot, he was taken to S.C.B. Medical College & Hospital, Cuttack for treatment, where he was admitted as an indoor patient. He remained there as an indoor patient till 4.9.1990. After being discharged from S.C.B. Medical College Hospital, Cuttack, he was further treated as an indoor patient in Paradeep Port Hospital up to 11.12.1990. The claimant having not been cured

despite all such treatment was referred to Rekula for Ayurvedic treatment. In spite of all these treatments, he was not fully cured & unable to walk properly. During the relevant period the claimant-Respondent was working as a peon in Paradeep Port Hospital & was getting a monthly salary of Rs. 2,200. Because of his ailment for the injury sustained in the accident, he remained on leave for 340 days & did not get leave salary for 241 days. Besides loss of income, he had also spent Rs. 40,000 towards his treatment. According to the claimant-Respondent, as the accident resulting the above injury took place due to the rash & negligent driving by the driver of the offending bus & the bus was duly insured with the insurance company, the owner & insurer of the offending vehicle are jointly & severally liable to pay the compensation to him.

3. Both the owner & the insurer of the offending bus contested the case by filing their written statements separately before the Tribunal. The owner of the offending bus while admitting that the alleged accident was caused due to accidental burst of tyres of his bus denied the allegation that the accident was caused due to rash & negligent driving by the driver of the bus. His further pleading was that the bus was duly insured with the Insurance Company under Insurance Policy No. 315105/2/0/MV/705/91 Comp which was valid till 30.3.1991 with effect from 31.3.1990 &, in case it is found that the accident was due to rash & negligent driving by the driver, then the Insurer would be liable to indemnify the owner in respect of the payment of compensation.

The Appellant-Insurance Company in its written statement while disputing the claim of the claimant-Respondent has denied its liability to pay any compensation as claimed by him.

4. On the above pleadings of the parties, the Tribunal framed five issues.

5. The claimant-Respondent examined three witnesses including himself as P.W. 1 & produced four documents marked as Exts.1 to 3/4 & also produced X-ray exposures marked as M.Os. I to III.

Neither the owner nor the Insurance Company has examined any witness nor produced any documents on their behalf.

6. Taking into consideration the oral & documentary evidence, the Learned Tribunal held that the claim case was maintainable & that the accident took place due to rash & negligent driving by the driver of the offending bus. It was also held that the claimant-Respondent is entitled to get a sum of Rs. 70,000 towards compensation with interest " 6% per annum & the Appellant Insurance Company is liable to pay the said amount of compensation as the offending bus at the time of accident was duly insured with the O.P. No. 2-Insurance Company.

7. Mr. Ajoy Kumar Mohanty, Learned Counsel appearing on behalf of the Appellant-Insurance Company vehemently argued that the case of the claimant-Respondent is based on falsity, fraud & the owner of the vehicle contested the case in collusion with the claimant-Respondent before the Tribunal to support his

case. Although the claimant-Respondent has stated in the claim petition that a police case was registered against the alleged accident in Tangi Police Station, no document was filed on behalf of the claimant-Respondent in support of such statement. On the other hand, the Appellant-Insurance Company has filed a certified copy obtained from the Tangi Police Station which shows that no police case was registered against the offending bus bearing Registration No. OSU 4257 having met with any accident on 22.8.1990. Hence, in absence of PS Case, the claim petition of the claimant filed before the Tribunal is not maintainable. It is further argued that to raise a question regarding non-involvement of vehicle, permission u/s 170 of the Act is not necessary. In any event, since the Insurance Company was allowed to cross-examine the witness it impliedly amount to grant of permission u/s 170 of the Act. The Tribunal committed error in law in not exhibiting the certificate issued by Tangi Police Station though same was produced before it. The Tribunal erroneously awarded a compensation of Rs. 70,000 along with interest " 6% per annum & made the Appellant-Insurance Company liable to pay the same to the claimant-Respondent.

8. Per contra, Mr. Biswajit Mohanty, Learned Counsel appearing on behalf of the claimant-Respondent, strenuously contended that the appeal preferred by the Insurance Company challenging the finding of facts as well as the quantum of compensation is-not maintainable since no permission of the Tribunal u/s 170 of the Act was obtained by the Insurance Company. In Column-2 of the memorandum of appeal the Appellant has stated that the Appellant having been permitted to avail all the grounds of defence u/s 170 of the M.V. Act, has preferred the present appeal. This averment of the Appellant is contrary to the materials available on record. No permission u/s 170 of the Act was ever granted to the Appellant-Insurance Company, rather by a reasoned Order Dated 25.11.1998, the Learned Tribunal rejected the application seeking such permission. Thus, the appeal is based on misrepresentation of facts, falsity & suppression of material facts & therefore it is liable to be dismissed.

9. On the rival contentions of the parties, the question which falls for consideration by this Court is whether it is open for the Insurance Company, the insurer of the offending vehicle, to file appeal on any ground other than those mentioned in Section 149(2), where its application made u/s 170 was rejected by the Tribunal, & the same is not challenged in the appeal. The provisions of Section 149(2) of the Act 1988, make it amply clear that an insurer of an offending vehicle can defend its case before the Tribunal on the grounds enumerated in the said Section. If for the reasons stated in Section 170 of the M.V. Act the Insurance Company is permitted by the Tribunal, it can contest the claim on all or any of the grounds that are available to a person against whom the claim has been made. Therefore, in absence of permission u/s 170 of the Act, an appeal can be preferred by the Insurance Company against the award of the Tribunal only on limited grounds in terms of Section 149(2) of the Act. In the present case, the Appellant-Insurance Company made an application on 25.11.1998 in terms of Section 170 the Act seeking permission of the Tribunal to

contest its case on all points on the ground that the owner of the vehicle was in collusion with the claimant. Vide Order Dated 25.11.1998, the Learned Tribunal rejected the said application. Thereafter, the said order of rejection was not challenged by the Insurance Company before any forum. No ground also has been taken in the appeal memo challenging the above order of rejection by the Tribunal. Therefore, the Appellant-Insurance Company cannot take the ground of non-involvement of the offending vehicle in the accident in the present appeal since such a ground does not come within the ambit of Section 149(2) of the Act.

The Apex Court in *National Insurance Co. Ltd., Chandigarh Vs. Nicolletta Rohtagi and Others*, held that u/s 96(2) of 1939 Act, which corresponds to Section 149(2) of the 1988 Act, an Insurance Company has no right to be a party to an action by the injured person or dependants of deceased against the insured. However, the said provisions give the insurer the right to be made a party to the case & to defend it. It is, therefore, obvious that the said right is a creature of the statute & its content depends on the provisions of the statute. After the insurer has been made a party to a case or claim, the question arises what are the defences available to it under the statute. The language employed in enacting Sub-section (2) of Section 149 of the Act appears to be plain & simple & there is no ambiguity in it. It shows that when an insurer is impleaded & has been given notice of the case, it is entitled to defend the action on the grounds enumerated in Sub-section (2) of Section 149 of the 1988 Act, & no other ground is available to it. Sub-section (7) of Section 149 of the 1988 Act clearly indicated in what manner Section 149(2) has to be interpreted. The expression "manner" employed in Section 149(7) is very relevant which means an insurer can avoid its liability only in accordance with what has been provided for in Section 149(2). It, therefore, shows that the insurer can avoid its liability only on the statutory defences expressly provided in Section 149(2) of the 1988 Act. The Parliament, while enacting Section 149(2) only specified some of the defences, which are based on conditions of the policy & therefore, any other breach of conditions of the policy by the insured, which do not find place in Section 149(2) cannot be taken as a defence by the insurer. Permitting the insurer to take any other defence other than those specified in Section 149(2) would mean adding more defences to insurer in the statute which is neither found in the Act nor was intended to be included.

It is further held that Section 110-C(2A) of the old Act was inserted in the year 1970, which corresponds to Section 170 of the 1988 Act. The said provision provides that in course of an inquiry of a claim if the Tribunal is satisfied that there is a collusion between the claimant & the insured or the insured fails to contest the claim, the Tribunal for reasons to be recorded in writing, can direct that the insurer who may be liable in respect of such claim, shall be impleaded as a party to the proceeding & the insurer so impleaded shall thereupon have, without prejudice to the provisions contained in Section 149(2), the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made. The aforesaid provisions show two

aspects. Firstly, that the insurer has only statutory defences available as provided in Section 149(2) of 1988 Act &, secondly, where the Tribunal is of the view that there is a collusion between the claimant & the insured, or the insured does not contest the claim, the insurer can be made a party & on such impleadment the insurer shall have all defences available to it. Thus, unless an order is passed by the Tribunal permitting the insured to avail the grounds available to an insured or any other person against whom a claim has been made on being satisfied of the two conditions specified in Section 170, it is not permissible to the insurer to contest the claim on the grounds which are available to the insured or to a person against whom a claim has been made.

It is also held that the right of appeal is not an inherent right or common law right but it is a statutory right. If the law provides that an appeal can be filed on limited grounds, the grounds of challenge cannot be enlarged on the premise that the insured or the person(s) against whom a claim has been made has not filed any appeal. Section 149(2) of 1988 Act limits the insurer's appeal on those enumerated grounds & the appeal being a product of the statute, it is not open to an insurer to take any other plea other than those provided in Section 149(2) of 1988 Act. The view that a right to contest would also include the right to file an appeal is contrary to well established law that creation of a right to appeal is an act which requires legislative authority & no Court or tribunal can confer such right.

In Jagdish Prasad Pandey v. Darshan Singh and another, (2002) 9 SCC 527; Sadhana Lodh Vs. National Insurance Company Ltd. and Another, ; & R. Mannakatti and Anr. v. M. Subramanian and Anr. (2005) 11 SCC 389; the Apex Court considered the issue & held that it is not permissible for the Insurance Company to contest the claim unless the permission is granted by the Tribunal u/s 170 of the Act & permission can be granted only on either of the condition incorporated therein, i.e., the insured is in collusion with the claimants or the insured.

In National Insurance Co. Ltd. Vs. Mastan and Another, ; Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others, ; & Oriental Insurance Co. Ltd. v. Syed Ibrahim and Ors. (2007) 11 SCC 512; the Apex Court held that in a proceeding where the right of the insurer to raise the-defence is limited in terms of Section 149(2) of the Act, an appeal preferred by it against an award of the Tribunal must be confined or limited to that extent. It is permissible for the insurer to raise all other grounds provided it has been granted permission by the Tribunal to contest the claim on any of the grounds as envisaged u/s 170 of the Act.

This Court in United India Insurance Co. Ltd. Vs. Raj Kumari Sahoo and Others, , held that once the Insurance Company is not allowed to contest a proceeding on merit, it is axiomatic to hold that it does not have any right to file appeal challenging the award on merit. Filing of appeal is a statutory right to be conferred by Statute & cannot be said to be an inherent right. If the Legislature thought it fit to confer a right of filing appeal only on limited grounds, the

Insurance Company cannot be heard to say that it has got right to file appeal on any ground. The question of violating principles of natural justice does not arise. As is well-known, natural justice is not an embodied rule & where the provision of the Act itself excludes the applicability of principle of natural justice, Courts cannot infer that natural justice must be followed. The provisions contained in Sections 149 & 170 of the Act make it amply clear that apart from the provisions contained in Sections 149 & 170 of the Act, the Insurance Company has no other right.

In *Oriental Insurance Co. Ltd. v. Gurdial Singh and Anr.* 2000(3) T.A.C. 61 (Cal.), the Calcutta High Court relying on the decision of the Apex Court in *Shankarayya and Anr. v. United India Insurance Co. Ltd. and Anr.* 1993 (2) T.A.C. 379, held as follows:

4. We are of the view that aforesaid decision of the Supreme Court clearly applies to the fact of the instant case & the Insurance Company should have moved the Tribunal & obtained an order as indicated in the aforesaid Judgment of the Supreme Court. The failure of the Insurance Company to obtain an order in terms of Section 170 makes the appeal fatal & accordingly, following the aforesaid decision of the Supreme Court, we hold that the appeal is not maintainable & accordingly the same is dismissed.

5. We are of the view that since the appeal has been preferred when the Judgment of the Supreme Court has already come out the Appellant should pay cost assessed at Rs. 10,000 to the Respondent & such payment should be made within four weeks from date.

In view of the above, it is not open for the Insurance Company, the insurer of the offending vehicle, to file appeal on any ground other than those mentioned in Section 149(2), where its application made in terms of Section 170 was rejected by the Tribunal & the same is not under challenge in appeal.

The contention of Mr. A.K. Mohanty, Learned Counsel that since the Insurance Company was allowed to cross-examine the witnesses of the claimant, the permission u/s 170 of the Act has impliedly been granted. This Court is unable to accept such contention in view of the speaking order specifically passed by the Tribunal rejecting the prayer of the Insurance Company to grant it permission u/s 170 of the Act. Moreover, merely because the Insurance Company was allowed to cross-examine the witness produced by the claimant to establish his claim that cannot give right to the Insurance Company to raise any ground beyond what are enumerated in Section 149(2) in absence of permission u/s 170 of the Act.

10. The contention of Mr. A.K. Mohanty that in absence of an F.I.R. reporting the fact of accident in Police Station the claim case is not maintainable in Claims Tribunal does not merit consideration. The Karnataka High Court in *Meenakshamma v. B. Hanumanthappa and Anr.* 1997 (1) T.A.C. 50 (Kant), held that the claim is a summary civil proceeding wherein the claimant is required to prove the rash & negligent driving of the vehicle by independent evidence.

Hence, non-registration of a police case regarding the accident does not give rise to any adverse inference that no such motor accident occurred. The further contention of the Learned Counsel for the Respondent No. 2 that the Medical Officer, who is duty bound to report medico-legal case to the police, has not reported the same & this circumstance also is adverse to the claim of the claimant & has no merit. It is not unusual for a medical officer of the hospital in not reporting the medico-legal case to the police. The failure on the part of the Medical Officer to exercise the basic/primary duty to report the medico-legal case to the police is also no circumstance to deny the claim of the claimant if the evidence on record establishes the claim from other acceptable evidence.

Thus, in absence of a PS Case reporting the fact of accident at the Police Station, a claim petition is maintainable in Claims Tribunal & a claimant is entitled to compensation, if evidence on record establishes the claim from other acceptable evidence. Admittedly, in the case at hand no P.S. Case has been registered in Tangi P.S. under which jurisdiction the accident claimed to have taken place. According to the claimant-Respondent, after sustaining the injuries in the accident he was admitted in the S.C.B. Medical College & Hospital, Cuttack for treatment. The medical treatment papers of S.C.B. Medical College & Hospital, Cuttack, was summoned through the Tribunal which were accepted to be bed-head ticket, discharge certificate, pay slip as Exts. 1 to 3. M.Os. I to III are x-ray exposures of the patient. The bed-head ticket reveals the history of the injuries sustained by the claimant on 22.8.1990 as "road traffic accident at about 2.15 P.M., before Badachana bus stand on N.H.5". It further reveals that the patient sustained multiple injuries & bleeding from injury sites of both the legs.

The claimant-Respondent examined himself as P.W.1. He also examined a co-passenger as an independent witness to the accident as P.W.2. PW-2, in his evidence, stated that on 22.08.1990, he was travelling in a bus bearing Registration No. OSU 4257 in which the claimant was also a co-passenger. The bus was running at high speed near Tangi, where tyres of two wheels on left side of the bus were burst & in that accident the claimant-Petitioner sustained bleeding injuries on both his legs, as the plate of the bus dashed against his legs. In cross examination by Opp. Party No. 1 he stated that he has seen the accident & it was not a fact that the bus was running at a normal speed at the time of accident. In cross-examination by Opp. Party No. 2 he stated that it is not a fact that he has not seen the accident. PW-3, the conductor of the offending bus in his evidence stated that he had seen the alleged accident, which took place on 22.08.1990 at about 2.00 PM on the road at a little distance from Tangi towards Govindpur. While the offending bus was moving towards Orataghat from Cuttack, the left side rear wheels of the offending bus were burst, as a result, the check plates over the said wheels turned to upwards violently. Due to the said accident, injured Gouranga Behera who was sitting on the rear seat of the bus sustained severe injuries on his both the legs. He along with others took the injured Gouranga to S.C.B. Medical College & Hospital, Cuttack in another bus for treatment. In cross-examination by O.P. No. 2, he confirmed that the claimant-

Respondent was moving in the bus as a fare paying passenger. Thus, in cross-examination nothing contrary was elicited from the mouth of PWs 2 & 3 to disbelieve their statements that on 22.08.1990, the claimant-Respondent was travelling in the offending bus & sustained injuries on his legs as the left side rear wheels of the offending bus were burst. The Opp. Parties neither examined any witness nor produced any evidence to disprove the evidence produced by the claimant. It is quite natural that a person who sustains multiple injuries in a road traffic accident rushes to hospital first for immediate treatment instead of going to Police Station to lodge an F.I.R. In the hospital, it is the duty of the Medical Officer first to attend the injured & to report Medico-legal case to police. There is nothing on record to show that any such step has been taken by the Medical Officer who attended the injured-claimant. Merely because the Medical Officer failed in his duty to inform the police about the road traffic accident faced by the claimant, the latter should not suffer.

In view of the above, the claim of the claimant-Respondent cannot be denied merely because a police case is not registered in the concerned police station.

11. Further contention of Mr. A.K. Mohanty is that the Tribunal committed a wrong in not exhibiting the certificate issued by Tangi PS to the effect that on 22.08.1990 no accident took place within their jurisdiction though the said certificate was produced before it. This Court is unable to accept such a contention since no evidence was led by the insurance Company before the Tribunal to prove the said certificate stated to have been issued by the Tangi Police Station.

12. In the result, the appeal filed by the Insurance Company fails & is dismissed.