

(2008) 02 GAU CK 0073
In the Gauhati High Court

Oriental Insurance Company Ltd.

APPELLANT

Vs

Kitbokson War and Others

RESPONDENT

Date of Decision : 13-02-2008

Acts Referred:

Motor Vehicles Act, 1988 — Section 149, 163A, 166, 168

Citation : (2008) ACJ 2847 : AIR 2008 Guw 77 : (2008) 2 GLT 496

Hon'ble Judges : H. Baruah, J

Bench : Single Bench

Judgement

H. Baruah, J.—Heard Mr. V. K. Jindal, learned Counsel for and on behalf of the appellant, M/s. Oriental Insurance Co. Ltd. and also heard Mr. H. Mongkhlaw, learned Counsel for and on behalf of the respondent.

2. The appellant, M/s. Oriental Insurance Company Ltd. by presenting this instant appeal has challenged the legality and correctness of the judgment and order dated 28-5-2007 passed in MAC Case No. 13/2007 by the learned Member, MACT, Shillong.

3. An accident took place at Ryngdang-briew under Umiam Police Station, Ri-Bhoi District on Guwahati Shillong Road of 24-12-2004 at 7-45 p.m. and in the said accident a Maruti Car being registration No. ML 05C-5768 belonging to respondent No. 1 herein got damaged on being hit by a Truck bearing registration No. TR IC-1592 belonging to respondent No. 2 herein. The owner, respondent No. 1 as claimant filed an application u/s 166 of the MV Act, 1988 seeking compensation for the damage caused to his vehicle from the insurer of the Truck, the appellant; the owner, the respondent No. 2 and the driver, the respondent No. 3. The appellant alone contested the claim by filing written statement on all grounds since the owner and the driver failed to appear and contest despite due service of notice. Before the learned Tribunal, in support of the claim, the respondent No. 1 adduced evidence both oral and documentary. The appellant herein, the opposite party in the claim petition also adduced evidence both oral and documentary in support of its case. The learned Tribunal

at the conclusion of the enquiry awarded a total sum of Rs. 1,10,618.00 under two different heads with interest @ 7.5% on the amount from the date of filing of the application. Feeling aggrieved thereby this instant appeal has been filed by the insurance Company, the insurer of the Truck bearing registration No. TR IC-1592.

4. Mr. V. K. Jindal, learned Counsel for and on behalf of the appellant, M/s. Oriental Insurance Co. Ltd. at the very outset has challenged the impugned judgment and award mainly on two grounds:

a) that the learned Tribunal committed error in holding that the driver Badal Bhowmick had a valid driving license thereby holding the appellant company liable for compensation;

b) that the learned Tribunal awarded the compensation on surmise and conjecture.

5. In regard to the answer to the first point that has been raised by Mr. Jindal, it is submitted that driving license No. 5538/Tri stood in the name of one Bholanath Saraj, not in the name of Badal Bhowmick, the respondent No. 3. Another driving license bearing No. 5538/Tri also stood in the name of one Nepal Chandra Das. Annexure-1, Annexure-2 and Annexure-4 which is a confirmation letter issued by the licensing authority, West Tripura, according to Mr. Jindal makes the position of the case very clear and transparent that driving license No. 5538-/Tri did never stand in the name of Badal Bhowmick. Learned Tribunal according to Mr. Jindal committed error in holding that the respondent No. 3, the driver must have had a valid and genuine driving license on the relevant point of time. Learned Counsel for the claimant failed to justify the reasoning of the learned Tribunal in this context. The grounds of acceptance offered by the learned Tribunal are apparently not surviving and acceptable Mr. Jindal argued. In view of the submissions so raised by Mr. Jindal, learned Counsel for and on behalf of the appellant, the judgment so rendered by the learned Tribunal is carefully perused wherefrom it is found that the finding on this issue is not based on evidence rather on presumption. It is also argued by the learned Counsel for the appellant that learned Tribunal ought to have accepted and acted upon the evidence of the surveyor of the appellant company who made a detailed investigation with the matter. The confirmation letter issued by the licensing authorities gives a boost to the evidence of the surveyor.

6. During the course of argument, Mr. V.K. Jindal also argues that for the proof of existence of a valid license in the name of Badal Bhowmick, the respondent No. 3, the owner of the said offending Truck did not come forward to prove that the driver, the respondent No. 3 had a valid license at the relevant point of time. To prove such aspect, the burden is always on the owner of the said vehicle. Shri Jindal in support of his contention has relied on the decision in the case between Santosh Kumar v. Jagdish Prasad reported in AIR 2007 (NOC) 1865 wherein it was held by the Hon'ble Madhya Pradesh High Court, Gwalior Bench as under:

(A) Motor Vehicles Act (59 of 1988), Section 149-Third party risk-liability of insurance company where driver of offending vehicle was not having valid license--Burden lies on owner to prove who was driving vehicle and whether person who was driving vehicle was having a valid driving licence or not--Owner has not entered into the witness box, Court can draw adverse inference against owner and held that owner cannot be absolved from his liability--Insurance Company will pay compensation and will have liberty to recover same from owner of vehicle.

(B) Motor Vehicles Act (59 of 1988), Section 168--Compensation--Death of 9 years old boy--Second schedule appended to Section 163A provides guidelines to determine reasonable compensation--Deceased boy was a non-earning person--Looking to future prospects of a young boy, who was a student of class three and other facts and circumstances of case, multiplier method and principle of notional income can be applied.

7. Admittedly, no evidence was led by the owner of the offending Truck in respect of proof of the factum of having a driving license in the name of Badal Bhowmick, on the relevant point of time. Minus such proof, the inference would be that on the relevant point of time i.e. at the time of accident, the driver of the truck did not have a valid driving license.

8. Having considered these matters as placed before this Court for consideration, this Court is of the opinion that the finding of the learned Tribunal that Badal Bhowmick, the driver had a valid license cannot be accepted and in that situation, the insurance company, the appellant cannot, however, be burdened with liability.

9. There is no dispute as to the accident that occurred on the relevant day and also in respect of damage of the Maruti Car. The learned Tribunal on the basis of some documents proved by the claimant, respondent No. 1 herein estimated the cost of repairing at Rs. 85,618/-. According to Mr. Jindal, this amount has been awarded by the learned Tribunal after deducting 20% of the claim made by the claimant on the basis of the job estimate, proved and marked as Ext. 1. On careful scrutiny of the entire evidence on record, it is nowhere found that the claimant in order to substantiate his claim proved any other document, which could have been legally entertained. According to Mr. Jindal, the calculation so made by the learned Tribunal is based on conjecture and surmise. A job estimate is generally furnished by the owner/proprietor of a Garage for the purpose of repairing of a vehicle but for the purpose of arriving at a decision in respect of the actual expenditure, some other documents are also required to be proved. The damaged Maruti Car was admittedly repaired in a Garage by the claimant but no document supporting the actual expenditure is proved by the claimant, respondent No. 1. Therefore, on the basis of the job estimate, it is argued by Mr. Jindal, compensation cannot be assessed. The learned Tribunal ought to have asked for some other documents in support of the claim of the claimant. Minus proof of such documents it would be unfair on the part of the learned Tribunal to

assess the claim at Rs. 85,618.00.

10. We have also found from the record that after the accident, the damaged Maruti vehicle was examined by one Shri A. Benarjee, a Surveyor of M/s. Oriental Insurance Company, the appellant and after survey, he filed an estimate of estimated cost of repairing amounting to Rs. 46,150/-, which is proved and marked Ext. E before the learned Tribunal. This Surveyor before the learned Tribunal was examined as O.P.W. No. 2. He in his evidence clearly stated that the probable expenditure for repairing of the damaged Maruti Car would be at Rs. 46,150.00 but the evidence of the surveyor was rejected by the learned Tribunal on the ground that he is not a qualified Mechanical Engineer and does not have any requisite knowledge in the survey of a damaged vehicle. From the document Ext. E, it is found that he is a Civil Engineer having a valid license. So, finding of the learned Tribunal that his O.P. W. No. 2 does not have requisite engineering knowledge for this purpose is not acceptable.

11. Since the claimant failed to prove his case by adducing cogent sufficient and acceptable evidence in respect of the amount expended in respect of repairing of his vehicle, this Court does not find any cogent ground to accept the finding of the learned Tribunal that the claimant had actually expended Rs. 85,618/- in repairing his vehicle. On the other hand, Ext. E, which has been proved by O.P.W. No. 2, could have been acted upon and accepted in view of the fact that he has engineering knowledge and more so a surveyor of the Insurance Company. The probable expenditure, which has been proved by O.P.W. No. 2 could, without any hesitation, have been accepted in view of the failure on the part of the claimant.

12. Learned Counsel for the claimant respondents while arguing his case fails to render any assistance in the context of finding of the learned Tribunal. He has without any hesitation admitted that the claimant failed to discharge his burden in the context of actual expenditure expended for the purpose of repairing the vehicle.

13. In view of the facts and circumstances of the case and the evidence available on record, this Court is of the view that the learned Tribunal calculated the award on surmise and conjecture. An award is required to be calculated/assessed basing on evidence both oral and documentary. Here in our case, we have found that no document has been proved in respect of the expenditure. When the surveyor of the appellant company estimated the probable cost of the repairing of vehicle at Rs. 46,150/-this Court does not find any impediment in accepting his evidence and awarding the cost of repairing at such amount.

14. Learned Tribunal also awarded Rs. 25,000/- towards the loss of income from the vehicle. It is an admitted fact that the damaged Maruti Car is a private car not a taxi. There is no evidence on record to show that, the car had been used as Taxi or it yield income from other source. A private car is usually not allowed to operate as a Taxi. The vehicle was under repairing in Garage for about seven months. The claimant might have suffered some loss for non-use of the vehicle

during that period. Since the damaged Maruti Car is not a Taxi, the Tribunal ought not to have assessed loss of income. The finding of the learned Tribunal that the claimant had suffered a loss of Rs. 25,000/- for non-use of the vehicle, is not accepted.

15. Having considered the matters in its entirety, this Court is of the view that the compensation awarded by the learned Tribunal requires modification. The award is accordingly modified to the extent of Rs. 46,150/- with interest @ 7.5% p.a. Interest shall be calculated on the modified amount on and from the date of passing of the judgment by the learned Tribunal.

16. It is made clear that the Insurance Company shall pay the award with interest to the claimant after adjustment of the amount already deposited with the Registry within one month from the date of receipt of the certified copy of this judgment and order and thereafter shall recover the same from the owner of the offending Truck bearing registration No. TR-01-A-1592. This appeal is partly allowed.