

**(1970) 09 OHC CK 0004**  
**In the Orissa High Court**  
**Case No : Misc. Appeal No. 184 of 1964**

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|---------------------------------------|----|------------|
| Orissa Co-operative Ins. Society Ltd. | Vs | APPELLANT  |
| Bhagaban Sahu and Others              |    | RESPONDENT |

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**Date of Decision :** 17-09-1970

**Acts Referred:**

Motor Vehicles Act, 1939 — Section 105, 110, 110A, 110B, 110C

**Citation :** (1970) 09 OHC CK 0004

**Hon'ble Judges :** B.K. Patra, J

**Bench :** Single Bench

**Advocate :** G.B. Mohanty, for the Appellant; R.C. Patnaik and R.K. Patra, for the Respondent

**Final Decision :** Dismissed

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## Judgement

B.K. Patra, J.—On 28.8 1961, while one Arakhita Sahu with his two grandsons was going from Bhubaneswar Railway Station towards Bhubaneswar old town on a rickshaw, the truck ORP. 851 which stands registered in the name of one Hansaraj Nurala (Respondent No. 3 ) and was being driven by one Sujan Singh and which was coming from New Capital and proceeding towards Cuttack dashed against the rickshaw at the turning near Kalpana Talkies as a result of which the two children were thrown out from the rickshaw and received some injuries and Arakhit Sahu fell down and was run over by the truck. The right front wheel of the truck ran over the head of Arakhita Sahu completely crushing the skull resulting in his instantaneous death. The truck was insured with the Orissa Cooperative Insurance Society, Ltd, Cuttack (Appellant). Bhagaban Sahu, the son of the deceased representing joint family filed an application u/s 110-A of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act) before the Motor Accidents Claims Tribunal, Puri claiming Rs. 40,000/- as compensation. Besides the Insurance Company and Hansraj Nurala, he also added one Mahendra Singh as an opposite party as the latter was alleged to have purchased the truck from Hansraj.

2. All the three opposite parties contested his claims. Mahendra Singh denied having purchased the truck and contended that he is not a necessary party to the proceedings. He also alleged that the accident took place not due to the rashness or negligence of the driver of the truck but it was due to the negligence of the riskshawpuller. Hansaraj contended that he had sold the truck to Mahendra Singh on 1.12.1960, and that therefore he was not liable to pay any compensation. The Insurance Company admitted that Hansaraj had got the truck insured with the Company on 15.8.1961 for a period of one year but contended that as the insurance was obtained by suppression of material facts, the insurance was not valid and the Company was not liable to pay any compensation. It was also alleged that the accident was caused due to rash and negligent driving of the truck by the driver, that the compensation claimed was excessive and that the petition was not maintainable as all the legal representatives of the deceased had not joined in the petition.

3. The deceased admittedly left behind him his widow, two sons including the Petitioner and a daughter. The Tribunal held that the Petitioner as Karta of the family could not file the application on behalf of and for the benefit of the entire joint family and that in the event of the Petitioner substantiating the claim, he would be entitled only to recover his share of the compensation. On the question of ownership of the truck, the Tribunal held that it had not been proved that Hansaraj had sold the truck to Mahendra Singh and that as the registration certificate still stood in the name of Hansaraj, the latter alone must in the eye of law be deemed to be the owner thereof. That being so, there was no breach of any of the conditions of the insurance policy so as to invalidate it and consequently the Insurance Company was also liable to pay damages. He further held that the accident was caused as a result of the negligence of the driver of the truck. The Petitioner was working as a Malaria Inspector getting a salary of Rs. 200/- per month by the time his father died. The Tribunal accepted his case that he had to leave the job to enable him to look after the landed property which his father had left. On the assumption that the deceased who was 53 years old would have lived up to his sixtieth year the Tribunal held that during these seven years, the Petitioner would have earned Rs. 16,800/- towards his salary and the loss of this amount was directly attributable to the death of his father. But as the Petitioner claimed Rs. 40,000/- towards damages and his share therein is only Rs. 10,000/- the Tribunal restricted the amount of compensation awarded to the Petitioner to Rs. 10,000/- only and directed that he do recover the same from Hansaraj and the Insurance Company and exonerated Mahendra Singh from all liability. Being aggrieved by this decision the Insurance Company filed an appeal (M.A. 184/64), Hansaraj filed a separate appeal (M.A. 120/64) questioning his liability to pay any compensation to the Plaintiff. Both the appeals have been heard together. The expression "Appellant" wherever used in this judgment will have reference only to the Insurance Company which is Appellant in M.A. 184 of 1964.)

4. One of the points formulated by the Tribunal for consideration was whether

the Petitioner Bhagaban Sahu had to allege and prove rashness or negligence on the part of the driver of the truck to sustain his claim for compensation. It appears to have been contended before him by the Petitioner that under the provisions of the Motor Vehicles Act, the scope of enquiry is limited only to determine the quantum of damages and not to go further into the question whether the death of the deceased was caused by rashness or negligence, on the part of the driver. The learned Tribunal accepted this position and did not allow the Petitioner to lead evidence regarding rashness and negligence. None the less relying on certain undisputed facts and other circumstances of the case, he came to the conclusion that the driver of the truck was guilty of rashness and negligence. True it is that Section 110B of the Act does not specifically lay down that it is only when negligence on the part of the vehicle concerned is established that compensation can be awarded. But it has to be borne in mind that Sections 110 to 110F of the Act which include Section 110-B merely deal with the subject of substitution of Motor Accidents Claims Tribunal in place of the Civil Courts for the purpose of adjudicating on claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles. In order therefore, to discover the criterion or the test for fixing liability one has to turn to the Law of Torts according to which negligence in causing the accident in question is generally speaking essential to hold the negligent person liable for damages. In fact, it is conceded by Mr. R.C. Patnaik, learned Advocate appearing for the Petitioner-Respondent that the Petitioner has to allege and prove rashness and negligence on the part of the driver of the vehicle to succeed in his claim for recovery of compensation against the owner of the vehicle. The Petitioner had indicated in his petition that at the time of accident, the truck was being driven rashly and negligently. But although being under a mistaken impression regarding the scope of the enquiry, the learned Tribunal in paragraph 6 of his order says that the Petitioner was not allowed to adduce any evidence regarding rashness and negligence witnesses examined on the Petitioner's side while describing how this accident occurred did state facts from which it is possible to draw an inference that the truck was being driven rashly at that time. The learned Tribunal in fact has given a finding that the driver was guilty of rashness and negligence. The Insurance Company which is the sole Appellant in this case, had admitted in paragraph 13 of its written statement that the accident was caused due to the rashness and negligence in driving on the part of the driver. That being the definite stand taken by the Appellant in the pleadings, it is not now open to it to challenge the correctness of the finding recorded by the learned Tribunal on this point, even assuming that the finding is defective. I would therefore, proceed to dispose of the appeal on the footing that the death of the deceased Arakhita Sahu was caused as a result of rash and negligent driving of the truck by the driver.

5. It is next contended on behalf of the Petitioner-Respondent that the Insurance Company is not entitled to take any defence which is not provided in Sub-section (2) of Section 96 of the Act and these grounds are enumerated in Clauses (a),

(b) and (c) of Sub-section (2) of Section 96 of the Act which may be extracted:

96. Duty of insurers to satisfy judgments against persons insured in respect of third party risks.

(1) \*\*\*\*\*

(2) No sum shall be payable by an insurer under Sub-section (1) in respect of any judgment unless before or after the commencement of the proceedings in which the judgment is given the insurer had notice through the Court of the bringing of the proceedings, or in respect of any judgment so long as execution is stayed thereon pending an appeal ; and an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds namely:

(a) that the policy was cancelled by mutual consent or by virtue of any provision contained therein before the accident giving rise to the liability and that either the certificate of insurance was surrendered to the insurer or that the person to whom the certificate was issued has made an affidavit stating that the certificate has been lost or destroyed, or that either before or not later than fourteen days after the happening of the accident the insurer has commenced proceedings for cancellation of the certificate after compliance with the provisions of Section 105 ; or

(b) that there has been a breach of a special condition of the policy, being one of the following conditions, namely:

(i) a condition excluding the use of the vehicle:

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by the permit to ply for hire or reward, or

(b) for organised racing and speed testing, or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle, or

(d) without side-car being attached, where the vehicle is a motor cycle ; or

(ii) a condition excluding driving by a named person or person or by any person who is not duly licensed, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification ; or

(iii) a condition excluding liability for injury caused or contributed to by conditions of war, civil war, riot or civil commotion ; or

(c) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact which was false in some material particular.

That an insurer can defend an action for compensation only on the grounds

enumerated above is made clear by Sub-section (6) of Section 96 of the Act which runs thus-

No insurer to whom the notice referred to in Sub-section (2) or Sub-section (2-A) has been given shall be entitled to avoid his liability to any person entitled to the benefit of any such judgment as is referred to in Sub-section (1) or Sub-section (2-A) otherwise than in the manner provided for in Sub-section (2) or otherwise than in the manner provided for in Sub-section (2-A) in the corresponding law of the State of Jammu and Kashmir or of the reciprocating country, as the case may be.

The only manner of avoiding liability provided for under Sub-section (2) is by successfully raising any of the defences therein mentioned. It, therefore, follows that the insurer cannot avoid his liability except by establishing such defences. If, therefore, it is found in this case that the policy of Insurance effected in respect of the vehicle ORP 851 was in force by the time the accident took place, it would not be open to the Insurance Company to defend the action for damages on any ground not enumerated in Sub-section (2) of Section 96.

6. Mr. G.B. Mohanty, learned Advocate appearing for the Appellant Company, however, seeks to avoid the liability on the two following grounds:

(1) Hansaraj admitted in his written statement that he sold the vehicle to Mahendra Singh on 1.12.1960 and that since then it is the latter who is the owner of the vehicle. But when the vehicle was insured by Hansaraj with the Insurance Company on 15.8.1961 this material fact was not disclosed and consequently the policy has become void and this is a plea which is open to be taken by the Company by reason of Clause (c) of Sub-section (2) of Section 96 ; and

(2) as by the terms of the Insurance Policy Ext (B) (vide para 5 under the heading Liability to third parties), the Company has reserved the right to undertake the defence in a proceeding in any Court of law in respect of any act or alleged offence causing or relating to any event which may be the subject of indemnity under the policy, the Company is not restricted in its defence to the grounds mentioned in Sub-section (2) of Section 96, but it can advance any ground which the insured himself could have advanced.

7. So far as ground No. 1 is concerned, there is no dispute that the truck still stands registered in the name of Hansaraj. He stated in paragraph No. 4 of his written statement that he had sold the truck on 1.12.1960 to Mahendra Singh. Mahendra Singh does not admit that he is the owner. Neither Hansaraj nor Mahendra Singh has been examined as witness in this case. O.P.W. 4 Bhagirathi Satpathy, who is the Law Assistant of the Insurance Company, however, produced in Court what purports to be an agreement for sale in respect of the truck, alleged to have been executed by Hansaraj and Mahendra Singh. Excepting the proof of signatures of these two persons, the agreement has not been properly proved. There is thus no legal evidence to prove the alleged sale.

It is therefore not necessary for me to consider the further submission made by the learned advocate for Hansaraj that it is only a hire-purchase-agreement under which right is reserved by Hansaraj to take back the truck in case of default in payment of any of the prescribed installments and that therefore, the transaction cannot be treated as a sale. That apart, u/s 22 of the Act, it is compulsory for every owner of a motor vehicle to get it registered with a registering authority. Section 31 deals with transfer of ownership of the motor vehicle and provides that in a case of such transfer, the transferer shall within fourteen days of the transfer report the transfer to the registering authority concerned, and that the transferee in his turn, shall within thirty days of the transfer, report the transfer to the registering authority and shall forward the certificate of registration to him together with the prescribed fee requesting the registering authority to note the particulars of the transfer of ownership in the certificate of Registration. A perusal of the relevant provisions of the Act shows that it is only the ostensible owner whose name is entered as such in the registration Book who is to be considered as the owner of the motor vehicle irrespective of the fact that the ownership may be with some body else. Undoubtedly it is Hansaraj who is still shown in the registration certificate as the owner of the vehicle. In any case, as I have already indicated, it has not been proved in this case that the truck had been transferred to Mahendra Singh. Hansaraj who is the registered owner of the truck had got it insured with the Insurance Company in August, 1961.

8. Assuming for a moment that on 1st December, 1960, he had entered into an agreement with Mahendra Singh to sell the truck to him on hire purchase basis, the question for consideration is whether he had brought this to the notice of the Insurance Company in August, 1961 when the Insurance of the vehicle was effected. Before insurance is effected, the insured submits a proposal in which the necessary particulars are furnished. This proposal has not been produced by the Company to establish its plea that no mention had been made therein about the alleged agreement of 1st December, 1960. The Law Assistant of the Insurance Company examined as O.P.W. 4 has no personal knowledge about the issue of the policy in question. There is therefore absolutely no material on record to establish the contention advanced on behalf of the Insurance Company that the policy was obtained by non-disclosure of material facts so as to render the policy void. The defence referred to in Clause (c) of Sub-section (2) of Section 96 of the Act is therefore not available to the Company.

9. Regarding ground No. 2, it is contended on behalf of the Appellant that as by the terms of the Insurance Policy (vide Clause (5) under the heading "Liability to third parties" appearing in the Insurance Policy Ext. (B), the company has reserved to itself the right to defend any action against the assured for recovery of damages, all the pleas which are available to the assured are also available to the Company. Clause (5) of the policy referred to above, so far as is relevant runs thus:

The Company has reserved the right to undertake the defence of proceeding in any Court of law in respect of any act or alleged offence causing or relating to any event which may be subject of indemnity under this policy

10. In view of the increase in running down accidents, the Legislature has made insurance against third party's risk compulsory with a view to afford protection to persons other than the assured, who are injured by such accidents. Obviously, the primary object of the Insurance Company is to indemnify the assured and not the third party who is a victim of the running down accident. Such a victim does not in law or by fiction of law become a party or privy to the insurance contract. The remedy of the victim of the accident is only to enforce it against the assured who is directly or vicariously responsible for the injury. The third person cannot be held to be an assured person simply because the insurer had undertaken under the contract of insurance to indemnify the assured. The injured person has a right to proceed against the assured for damages and in such a suit the insurer could not intervene nor could the Plaintiff implead the insurer as Defendant on the ground that he was ultimately liable to pay the compensation fixed between the injured and the assured person by virtue of the contract between them. Thus the insurer could not safeguard his interest by intervening in the suit filed by the injured against the assured. This legal position caused hardship both to the insurer and the injured person. To mitigate this hardship the Legislature Prescribed a procedure by which the claim for compensation made by the injured person or in the case of death, by the heirs of the deceased against the assured and the contractual claim of the assured against the insurers for indemnification could be decided in a single suit. While providing for this expeditious remedy, the Legislature did not choose to change the legal relationship between the parties concerned. Before enactment of Section 96 of the Act, the insurer could not intervene in the litigation between the injured person and the assured. Now u/s 96(2) of the Act it is open to the insurer to challenge his liability on certain grounds, specified therein. If those grounds are established, the injured person cannot hold the insurer liable as judgment-debtor even if the assured is held liable to pay compensation because, by proof of any of those grounds, the insurer can escape liability. If those grounds are not established then the insurer cannot avoid his liability to pay compensation decreed against the assured. While making the insurer liable as judgment-debtor the Legislature has permitted him to defend the suit although on certain limited grounds mentioned in Section 96. If the insurer desires to avoid liability on grounds other than those specified in Section 96, then he may have to take other proceedings in accordance with law against the assured but his liability to pay the injured party remains intact.

11. A Division Bench of the Bombay High Court in *Royal Insurance Co. Ltd. Vs. Abdul Mahomed Meheralli*, , however, held that where in a case the assured either does not defend the action or is not in a position to do so, the Insurance Company can come to Court and apply that he should be permitted to defend the suit in the name of the assured and if permission is given, all the defences

available to the assured would also be available to the Insurance Company. It was held in that case that the object of providing for a notice to the Insurance Company is really two-fold. One is to enable it to defend the action in its own right and in its own name if it is challenging the claim on any of the grounds mentioned in Section 96 (2) of the Act. But the other purpose and object of the notice, which is equally important, is to give intimation to the Insurance Company to see that the action is properly defended and that the decree does not go against the Defendant by default or that a decree is not passed collusively against the Defendant. Therefore, when a notice is served on the Insurance Company and it finds that the assured is not likely to defend the action, it is open to the Insurance Company to apply to the Court that it should be permitted to defend the suit in the name of the Defendant. The Supreme Court in *British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others*, after laying down that Sub-section (2) of Section 96 of the Act clearly provides that an insurer, made a Defendant to the action, is not entitled to take any defence which is not specified in it, repelled the arguments advanced on behalf of the insurer that such a construction of Sub-section (2) of Section 96 would create hardship. Their Lordships observed:

We are furthermore not convinced that the statute causes any hardship. First, the insurer has the right, provided he has reserved it by the policy to defend the action in the name of the assured and if he does so all defences open to the assured can then be urged by him and there is no other defence that he claims to be entitled to urge. He can thus avoid all hardship if any, by providing for a right to defend the action in the name of the assured and this he has full liberty to do.

12. It is true no doubt that in this case, the Insurance Company had reserved to itself the right to defend any such action on behalf of the assured. But to avail itself of this right the Company had to make an application to the Court for permission to defend the action on behalf of the assured. No such application appears to have been made in this case. It is, therefore, not open to the Insurance Company to defend the action on pleas which are available to the assured but which under Sub-section (2) of Section 96 of the Act are not available to the Insurance Company.

13. Assuming for a moment that the Insurance Company in this case can defend the action on any of the pleas available to the assured, those pleas are (1) that the accident was not caused due to the rash and negligent driving on the part of the driver ; (2) that the Petitioner is not entitled to claim the compensation ; and (3) that the compensation claimed is excessive.

14. So far as the first plea is concerned, I have already indicated that in view of the admission made by the Appellant in para. 13 of the written statement filed by it, it is not now open to it to challenge the correctness of the finding of the Tribunal that the death of the deceased was due to rash and negligent driving on the part of the driver.

15. The Petitioner's competency to claim compensation is opposed on the ground that other heirs of the deceased have not joined the Petitioner in this proceeding. The petition filed by the Petitioner in this case shows that he preferred the claim as the Karta of the joint family. The claim u/s 110-A of the Act has a representative character and is essentially one on behalf of the representatives of the deceased (See *Suman v. The General Manager, Madhya Pradesh State Road Transport and Ors.* 1970 A.C.J. 280). The Petitioner, as the Karta of the joint family, is therefore, entitled to claim the entire compensation.

16. There is no quantitative scale of computing compensation for damages resulting from death and Courts of law must, in the circumstances of each case, exercise their discretion to arrive at a reasonable and fair figure. The task of the Court is to estimate as best as it can the capital sum which will represent a fair compensation for the loss of the actual pecuniary benefits which the Petitioner might reasonably have expected to enjoy if the deceased had not been killed. I have already indicated the basis on which the learned Tribunal has calculated the same. Having found that the total loss, sustained by the Petitioner, is about Rs. 16,800/- he limited the claim only to Rs. 10,000/- on the ground that in the amount of Rs. 40,000/- which he claimed as compensation, his share was only Rs. 10,000/- he being only one of the four heirs left by the deceased. In view of my finding that the claim made by him is in his representative character, there was no justification for the learned Tribunal to hold that the Petitioner could not in this proceeding claim more than his share. But since no appeal has been filed by the Petitioner, there is no scope to enhance the amount of compensation granted to him.

17. The amount awarded as compensation to the Petitioner is within the limits of liability undertaken by the insurer under the Insurance policy, Ext. B, the relevant portion of which runs thus:

#### Liability To Third Parties

1. Subject to the Limit of Liability the Company will indemnify the Insured in the event of accident caused by or arising out of the use of the Motor Vehicle in a public place against all sums including claimant's costs and expenses which the Insured shall become legally liable to pay in respect of death of or bodily injury to any person.

The limit of liability as indicated above, is the amount necessary to meet the requirements of the Act. As the liability is not restricted to any particular amount, the entire amount of Rs. 10,000/- awarded in this case to the Petitioner is payable by the Insurance Company. In the result, therefore, I find no merit in Appeal No. 184 of 1964.

18. I would now take up Appeal No. 120 of 1964 filed by Hansaraj. The grounds on which he has filed the appeal are, (I) that before the accident he had sold the truck to Mahendra Singh and as such he is not liable to pay any compensation; (2) that in the absence of other heirs of the deceased, the claim made by the

Petitioner alone is not maintainable; (3) that the award made by the Tribunal is contrary to the mandatory provisions of Section 110B of the Act inasmuch as he has not specified the amount which shall be paid by the insurer; and (4) that the compensation, if any, should have been awarded against the insurer alone who is liable u/s 96 of the Act to satisfy judgments against the assured in respect of third party risks.

19. Points 1 and 2 have already been dealt with in M.A. 184 of 1964. In view of what I have stated there, the contentions now raised by Hansaraj on these points must be rejected. Regarding the other two points, since the liability of the Insurance Company is not restricted to any particular amount, the entire amount of compensation of Rs. 10,000/- payable in this case to the Petitioner has to be paid by the Insurance Company only and hence no part of the compensation is payable by Hansaraj. The appeal filed by him (M.A. No. 120/64) must therefore be allowed.

20. In the result, M.A. 184 of 1964 is dismissed with costs payable to Respondent No. 1 only. Misc. Appeal No. 120 of 1964 is allowed without costs. The order passed by the learned Tribunal is modified to the extent that the amount of Rs. 10,000/- awarded by it as compensation to the Petitioner Bhagaban Sahu shall be payable by opposite party No. 3, the Insurance Company only.