

(1996) 01 OHC CK 0019
In the Orissa High Court
Case No : Misc. Appeal No. 632 of 1991

The Branch Manager, National Insurance Co. Ltd. APPELLANT
Vs
Kahas Beherani and Others RESPONDENT

Date of Decision : 18-01-1996

Acts Referred:

Motor Vehicles Act, 1939 — Section 95(2)

Citation : (1998) ACJ 59 : AIR 1997 Ori 19

Hon'ble Judges : P.C. Naik, J

Bench : Single Bench

Advocate : P. Roy, L. Dash and S. Roy, for the Appellant; B. Brahmachari and S.K. Roy, for the Respondent

Final Decision : Partly Allowed

Judgement

P.C. Naik, J.—In this appeal, the Insurer challenges the award of the Second Motor Accident Claims Tribunal, Barhampur whereby the liability of Rs. 1,45,200/- has been saddled on it.

2. Respondent No. 1 is the mother, respondent No. 2 is wife and respondent Nos. 3 and 4 are minor children of deceased Sarat Behera, who was killed in a motor accident on 14-5-85. The Tribunal held that the accident was due to rashness and negligence of the driver of a passenger bus bearing registration number OSG 7792 owned by respondent No. 5 and insured with the appellant at the relevant time. In spite of notice, as the owner (respondent No. 5) did not enter appearance, he was set ex parte. The appellant/insurer denied its liability. Its alternative plea in para 11 of the written statement was that assuming that it was liable, its liability was limited to the extent laid down in Section 95(2)(b)(i) of the Motor Vehicles Act, 1939.

3. In this appeal a number of contentions are raised by the learned counsel for the appellant but in view of the limitations imposed by Section 96(2) of the Act and the ratio laid down in the case of National Insurance Co. Vs. Magikhaia Das

(After him) Mst. Laxmi Dibya and Others, , the contentions sought to be advanced on merits of the case cannot be entertained. Moreover, there is nothing on record to indicate that the insurer had obtained an order in writing from the Tribunal in terms of Section 110-2A(c) permitting it to contest the claim on merits. As permission was not granted by the Tribunal, it is not open to the insurer to challenge the award on merits. Had such a permission been granted, the insurer may have been justified in assailing the award on merits also.

4. The insurer, however, submits that the award needs to be modified by limiting its liability to the sum specified in Section 95(2)(b)(i) of the Motor Vehicles Act, 1939 which is Rs. 50,000/- per accident. It is further submitted that to that effect there was a specific averment in para 11 of the written statement and there is nothing on record to indicate that any contract to the contrary i.e. for higher liability, was entered into between the insurer and the insured, whereby the insurer had undertaken to cover additional or unlimited liability. It is accordingly prayed that the award be modified by limiting its liability to Rs. 50,000/- only.

5. In reply, the learned counsel for the claimants/respondents contended that as the insurer failed to file a copy of the insurance policy, the Tribunal was justified in drawing an adverse inference against the insurer holding that its liability under the policy was unlimited. In support of its submission, reference was made to National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, ; Prasanna Kumar Mitra Vs. Pravati Khatei and Others, and National Insurance Co. Ltd. Vs. Krushna Chandra Das and Others, . The learned counsel for the claimants accordingly submitted that non-filing of the policies by the insurer would lead to a presumption that there was in existence a contract to the contrary whereby unlimited risk was covered by the policy.

6. Having considered the contentions, and on facts and circumstances of the case, the contention raised by the learned counsel for the appellant needs to be accepted and the contention raised by the learned counsel for the claimant/respondents has to be overruled.

7. The owner of the vehicle was in possession of the original policy and if so desired, he could have entered appearance and placed the policy on record. He could have also pleaded that on payment of an additional premium the insurer had undertaken to cover unlimited liability. But for reasons best known to him, the owner did not choose to appear nor did he consider it proper to file a copy of the policy. Even after receiving notice of appeal he has not cared to appear. The memo of appeal clearly indicate that the question of limited liability was being agitated by the insurer. If in spite of this, the owner did not think it proper to appear he has to thank himself. There was nothing to prevent the owner from appearing and filing a copy of the policy in this Court, for it is now a settled position that Order 41, Rule 27, C. P. C. can be invoked in an appeal under the Motor Vehicles Act.

8. There is no averment in the claim petition that the insurer and the insured had entered into a contract whereby the insurer had agreed to cover higher or unlimited liability. On the contrary, there is a specific averment in para 11 of the written statement of the insurer that its liability is limited to the amount mentioned in Section 95(2)(b)(i) of the Act. The witnesses examined on behalf of the claimants also do not state that the insurer had covered unlimited liability. All these facts seem to have been overlooked by the Tribunal.

9. Section 95 of the M. V. Act, 1939 relates to requirements of policy and limits of liabilities. Relevant extracts whereof, i.e. Section 95(2)(b)(i) read thus:

"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 one lakh and fifty thousand rupees in all, including the liabilities, if any, arising under the Workmen's Compensation Act, 1923 (8 of 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;

(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;

xxxx xxxx xxxx"

Thus, it is mandatory that a policy of insurance must cover the risk up to the limits specified in Section 95(2)(b)(i) of the Act.

10. Learned counsel for the claimants/ respondents urged that the provisions contained in Section 95 do not bar the owner and the insurer from entering into a contract covering higher liability. There can be no dispute to such a proposition but it is to be seen whether or not such a contract was in fact entered into between the owner and the insurer. Admittedly, the owner has not entered appearance. Hence there is nothing on record from the side of the owner to indicate that there was an agreement between him and the insurer covering liability over and above the limits specified in Section 95(2)(b)(i) of the Act. In the absence of any pleading and proof on this point and, in view of the specific plea of the insurer that its liability is limited to the sum specified in Section 95(2)(b)(i) of the Act, the finding that there was in existence a contract to the contrary covering higher liability between the owner and the insurer was not warranted. Even otherwise, higher or unlimited liability can be covered by the insurer only on payment of higher/additional premium. The owner is the best person to appear and plead this fact which he has failed to do. There seems no reason why an adverse inference ought not to be drawn against the owner for his failure to appear and place the original insurance policy on record.

11. Relying on the decision rendered in *National Insurance Co. Ltd. Vs. Krushna Chandra Das and Others*, , the learned counsel for the claimants/ respondents further submitted that a pedestrian is not a person in respect of whom liability has been limited u/s 95(2)(b)(i) of the Act. With great respect to the view expressed by the learned Judge in *Krushna Chandra's* case (supra), his observation in the said case proceeds on a misreading of the provision contained in Section 95(2)(b)(i) of the Act. A bare perusal of the said provision would show that it relates to an accident involving a passenger bus. The said provision provides for limits in respect of "persons other than passengers carried for hire or reward" and "in respect of passengers"". The term "passengers" would naturally mean persons" being carried in the vehicle. The term "persons other than passengers" would cover all except those being carried in the vehicle. Such a person may be a pedestrian, a cyclist, a motorist or a person who is an occupant of another vehicle and is killed or injured by a passenger bus. Thus, Section 95(2)(b)(i) covers the limits of liability in respect of-- persons other than passengers carried for hire or reward, which would mean any one on the road other than an occupant of the offending bus, and passengers who are travelling in the bus in question. Non-mention of the word "pedestrian" in Section 95(2)(b)(i) would not mean that his risk is not covered. On the contrary, such non-mention of the word "pedestrian" in Section 95(2)(b)(i) would, if the contention of the learned counsel is accepted, mean that his risk is not required to be covered by the section as statutory liability is to be covered in terms of Section 95 of the Act. The decision in *Krushna Chandra's* case (supra), therefore, is of no assistance to the respondents/claimants.

12. The case of *Prasanna Kumar Mitra Vs. Pravati Khatei and Others*, on which reliance was placed by the learned counsel for the claimants is also of no assistance to the claimants. In that case, after extracting a paragraph from the judgment of the Apex Court in *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, , it was held (at p. 314 of AIR):

"In view of the aforesaid authoritative pronouncements of the different courts including that of the Supreme Court there is no escape from the conclusion that the insurer would be held liable to pay the entire compensation money on a conclusion that it had accepted a higher liability than that provided in the statute. It may be mentioned at this stage that even in this Court, the insurer had not taken any steps to produce the original policy to indicate that it had not taken any higher liability."

In the said case, the owner did not appear nor did he produce the insurance policy and was set ex parte. Compensation of Rs. 1,00,000/- was awarded to the claimant. Out of this amount, a sum of Rs. 50,000/- was directed to be paid by the insurer and the balance of Rs. 50,000/- was required to be paid by the owner. Aggrieved with the award, the owner had filed an appeal contending that the insurer not having produced the policy in question and the claimants having made a claim against both the answer and the insurer, it must be held that the

insurer had accepted a larger liability and therefore, must be bound to pay the entire compensation. The learned counsel for the claimants submits that the principles laid down in that case should be applied to the facts of this case and the appeal of the insurer should be dismissed.

13, At the very outset, it may be stated that Section 95(2) of the Act specifically lays down the requirements of policy and limits of liabilities required to be covered under the Act. Therefore, in absence of any evidence to the contrary, the only presumption that may be drawn and which I feel is permissible is that insurance policy covers- liability specified in Section 95(2) of the Act. In absence of any evidence to the contrary, the mere fact that an additional or unlimited liability was covered cannot be presumed. In *Prasanna Kumar Mitra Vs. Pravati Khatei and Others*, , the learned Judge seems to have drawn such a presumption since he has held that the insurer is liable to pay the entire compensation on a conclusion that it had accepted higher liability than that is provided for under the statute in the absence of any plea or averment of the Owner in that regard. In that case it has been presumed that there was in existence a contract between owner and the insurer whereby unlimited liability was undertaken. In other words, the existence of such a contract has been presumed. A presumption is an assumption of fact that the law requires to be made from another fact or proof of facts found or otherwise established in the action. A presumption is an inference as to the existence of a fact not actually known arising from its connection with another which is known. It is a probable consequence drawn from facts either certain, or proof by direct testimony as to truth of a fact alleged but of Which there is no direct proof. Thus, it is a legal device which operates in the absence of other proof to require that certain inferences are drawn from the available evidence.

14. The Bench decision of Allahabad High Court in the case of *National Insurance Co. Ltd. Vs. Narendra Kumar and Others*, , relying on which the decision in *Prasanna Kumar Mitra Vs. Pravati Khatei and Others*, has been rendered, is distinguishable because a mere perusal of para 5 of the judgment at page 400 would show that in that case the insurer had not taken the plea that its liability is limited. The case of *Satya Wati Pathak Vs. Hari Ram and Others*, .is also distinguishable as in that case the entire liability was fastened on the insurer on a finding that the contract of insurance had not been proved (see para 32). But, if a contract of insurance was not proved, how could the insurer be made liable? This fact seems to have been over-looked in *Prasanna Kumar's* case (supra).

15. Reference may now be made to the case of *National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others*, , which has been referred to in *Prasanna Kumar Mitra Vs. Pravati Khatei and Others*, . A portion therefrom, which is relevant for the purpose, is extracted hereunder (at pp. 721 and 722 of AIR):

"..... Even though it is not permissible to use a vehicle unless it is covered at least under an "act only" policy it is not obligatory for the owner of a vehicle to get it comprehensively insured. In case, however, it is got comprehensively

insured a higher premium than for an "act only" policy is payable depending on the estimated value of the vehicle. Such insurance entitles the owner to claim reimbursement of the entire amount of loss or damage suffered up to the estimated value of the vehicle calculated according to the rules and regulations framed in this behalf. Comprehensive insurance of the vehicle and payment of higher premium on this score, however, do not mean that the limit of the liability with regard to third party risk becomes unlimited or higher than the statutory liability fixed under Sub-section (2) of Section 95 of the Act. For this purpose a specific agreement has to be arrived at between the owner and the insurance Company and separate premium has to be paid on the amount of liability undertaken by the insurance Company in this behalf. Likewise, if risk of any other nature for instance, with regard to the driver or passengers etc., in excess of statutory liability, if any, is sought to be covered it has to be clearly specified in the policy and separate premium paid therefor. This is the requirement of the tariff regulations framed for the purpose....."

It is thus clear that the policy covering higher risk can be obtained by the owner for which specific agreement has to be arrived at between the owner and the insurance Company and separate premium has to be paid on the amount of liability undertaken by the insurance Company in this behalf,

16. In the case at hand, the insurer has specifically alleged that its liability is limited to the limits specified in Section 95(2)(b)(i) of the M. V. Act, 1939, This averment has not been rebutted as the owner has not thought it proper to contest the proceeding. In such a situation, how could a presumption be drawn by the Tribunal that there existed a contract to the contrary whereby the insurer had agreed to cover unlimited liability? In other words, the learned Tribunal has assumed something which was not pleaded. It is true that in para 10 of its judgment, the Apex Court has emphasised that in all cases where the insurance Company takes a defence that its liability is not in excess of the statutory liability, it should file a copy of the insurance policy along with its defence. But, this does not mean that an adverse inference will always be drawn against the insurer in every case in which a policy has not been filed whatever the facts and circumstances involved in the case may be.

17. The original policy is always with the owner of the vehicle and it is also his duty to place it before the Court or the Tribunal for arriving at a fair decision on the question of liability. If the owner does not choose to appear and produce the policy before the Court, a presumption can be drawn that there does not exist a contract to the contrary covering unlimited liability and that the liability undertaken is limited to the statutory limits. How can a presumption be drawn against the insurer that it has covered unlimited liability when the owner who has obtained the insurance policy does not enter appearance to raise such a plea? It is quite possible that the owner has purposefully avoided appearance so that an adverse inference can be drawn against the insurer. The question of liability should not be decided on presumptions and assumptions but should be on the

basis of the pleading and material on record. It is the duty of a party to assist the court or the Tribunal in arriving at a just and proper conclusion. When a party remains away from Court, it is a direct indication that he has no intention to assist the Court. May be, the owner has not appeared because of his collusion with the claimants. This becomes apparent from the fact that a xerox copy of the certificate of insurance has been filed by the claimants. Naturally, the claimants would not be in possession of the certificate of insurance and must have obtained it from the owner. This indicates that the claimants were in touch with the owner who had given them the xerox copy of the certificate of insurance but not the policy. Had unlimited risk been really covered, there seems no reasons why the owner would keep back the original policy from the Tribunal as filing of the said policy would be to his benefit. If an adverse presumption is to be drawn, it should not be with respect to any particular party. If an adverse presumption is permissible, it should be against all the parties to the litigation and should be drawn having regard to the facts and circumstances of a particular case. In claim cases, if an adverse inference is to be drawn against the insurer, it may indicate the bias against it which would in turn mean prejudging the issue of liability. In National Insurance Co. Ltd., New Delhi Vs. Jugal Kishore and Others, , it has been observed that filing of the policy not only cut short avoidable litigation; but also helps the Court in doing justice between the parties. The observations in para 10 of the judgment cannot be interpreted to mean that non-filing of the policy would result in an adverse inference against the insurer.

18. Goodloss to say a contract is brought about where an offer is made by one and accepted by another. So unless there is proof that any offer for covering higher liability or unlimited risk was made by the owner on payment of additional premium, and the offer was accepted by the insurer it cannot be presumed and held that such a contract is in existence. As in the case at hand there is neither any pleading nor any evidence to indicate that there was a contract covering higher liability, the Tribunal erred in presuming that the insurer had covered higher/unlimited liability. The award, therefore, needs to be modified by limiting the liability of the insurer up to the limits specified in Section 95(2)(b)(i) of the Act.

19. For the reasons aforesaid, the appeal is partly allowed. The award is modified and it is held that the insurer is liable to pay a sum of Rs. 50,000/- only to the claimants/respondents. However, as is clear from the order sheets of this appeal, the insurer has already deposited/paid a sum of Rs. 50,000/- to the claimants/respondents. Therefore, it is now liable to pay only the interest on the said amount at the rate awarded by the Tribunal from the date of filing of the claim petition till the dates of payment. The balance amount of compensation i.e. Rs. 1,45,200/- minus Rs. 50,000/- which comes to Rs. 95,000/- in other words, the award in excess of Rs. 50,000/- together with interest at the rate awarded by the tribunal will be satisfied by the owner Krushna Chandra Panda, respondent, No. 5, to the claimants/ respondent. On the said amount being realised from the owner, the appropriate Tribunal shall pass necessary orders regarding payment/

deposit thereof.

The shall be no order as to costs.