

(2002) 07 OHC CK 0018

In the Orissa High Court

Case No : Miscellaneous Appeal No's. 99, 319 and 323 of 1997

The New India Assurance Co. Ltd.

APPELLANT

Vs

Mamina Behera and Others
 Mahina Behera and
Another Vs Smt. Sova Nayak and Others
 Laxmidhar
Jena Vs The New India Assurance Co. LTd.

RESPONDENT

Date of Decision : 26-07-2002

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2002) 07 OHC CK 0018

Hon'ble Judges : A.S. Naidu, J

Bench : Single Bench

Advocate : G.P. Dutta, in M.A. 99, 101 and 102 of 1997 and S.N. Kar, in 319, 321 and 323, for the Appellant; S.N. Kar, for Respondents No. 1 in M.A. 101 of 1997, Respondent Nos. 1 and 2 in M.A. 99 of 1997 and Respondents 1 to 5 in M.A. 102 of 1997 and B. Brahmachari, in M.A. 99 of 1997 and Respondent 2 in M.A. 319 and 323 of 1997, B.H. Mohanty and G.P. Dutta, in M.A. 319, 321 and 323, for the Respondent

Judgement

A.S. Naidu, J.—All these appeal arise out of the claim application filed u/s 166 of the Motor Vehicles Act, 1988 with regard to one and the same accident. As the cases involve the same set of facts and points of law. the appeals were heard analogously and are disposed of by this common judgment.

2. For appreciation of the facts, a little background of the cases is necessary.

It is alleged that on January 9, 1992, deceased Iswar Behera and Baban Sethi as well as the injured Laxmidhar Jena were travelling in a truck bearing registration number ORC 7225 with their goods. Near Pratap Nagari at about 4. P.M. the offending bus bearing registration number of OSF 289 came in a high speed from the opposite direction and dashed against the truck. Due to the accident both Iswar Behera and Baban Sethi died and Laxmidhar Jena who was the Petitioner in Misc. Case No. 553/92 before the Court below, sustained multiple injuries, it is further alleged that the deceased persons and the injured were dealing in

bamboo business jointly and each of them were earning a sum of Rs. 3,500.00 per month. The legal heirs of Iswar Behera being the widow and a minor daughter filed Misc. Case No. 176 of 1992 before the Court below claiming compensation of Rs. 2,50,000.00. The legal heirs of Baban Sethi, being the widow, a minor son two minor daughters and old mother filed Misc. Case No. 177/92 also claiming Rs. 2,50,000.00 as compensation.

The injured Laxmidhar Jena filed Misc. Case No. 553/92 claiming Rs. 85,000.00 as compensation

3. The owners of the truck and the offending bus were impleaded as opposite parties 1 and 2 respectively in the court below in all the Misc. Cases in spite of due service of notice, they did not appear and were set *ex parte*.

4. The Oriental Insurance Company, insurer of the truck and impleaded as opposite party No. 3 in all the Misc. Cases, filed written statement vaguely denying the accident, death, injuries, income and also stated that the offending vehicle was not duly insured. In an additional written statement it was alleged that as the deceased persons were travelling in goods truck, the insurer was not liable for any compensation.

The New India Assurance Company, the insurer of the offending bus was impleaded as opposite party No. 4 in all the Misc. Cases. The Said Opposite party also vaguely denied all the averments made in the claim petitions and prayed to put the claimants to strict proof of the allegations.

5. The claimants, to substantiate the averments made, adduced both oral and documentary evidence. The Tribunal relying upon the oral evidence of P.Ws 1 and 2, the legal heirs of the deceased persons as well as P.W. 3, the injured claimant who was also travelling in the same bus and was an occurrence witness, as well as the documents marked Exts. 1 to 6 being the FIR, chargesheet and other documents seized by police, came to a categorical finding that due to negligence of the driver of the bus the accident took place causing death of two passengers and injuries to the other. The learned Tribunal though noticed the contention of the Insurance Companies to the effect that the drivers of both the vehicles were responsible for the accident, declined to accept the said plea as neither the investigating officer was examined, nor the M.V.I's report was produced before him by either of the Insurance Companies.

5. The Tribunal, on the basis of the categorical finding that the driver of the truck was not responsible for the accident, held that neither the owner nor the insurer of the truck could be held responsible. It further held, relying upon Ext. 4/1, that the offending bus was duly insured with opposite party No. 4, the New India Assurance Co. and that the policy was valid till January 17, 1992 covering the date of the accident. It was also held that the driver of the bus possessed a valid driving licence. The Tribunal, however, did not accept the statement that the two persons who died in the accident were earning Rs. 3,500.00 per month. In the absence of any cogent evidence, the Tribunal held that the income of the

deceased persons could only be assessed at Rs. 25.00 per day

In Misc. Case No. 176/92. taking the age of deceased Iswar Behera to be thirty-two years and calculating his income at the rate of Rs. 25.00 per day and also adding other awardable amounts like consortium for the loss of his company by the family, the Tribunal held that the claimants in the said case were entitled to a compensation of Rs. 95,000.00 from opposite party No. 4 Insurance Company.

in Misc. Case No. 177/92, the Tribunal, on the basis of the post-mortem examination report, held the age of Deceased Baban Sethi to be thirty years and assuming his daily income to be Rs. 25.00. also awarded the same compensation of Rs. 95,000.00 in favour of the Claimants, i.e. the widow and three minor children and awarded a sum of Rs. 10,000.00 as compensation to the old mother of the deceased.

It is pertinent to mention that award of Rs. 10,000.00 made in favour of the old mother of deceased Baban Sethi is not challenged and has attained finality.

In Misc. Case No. 553/92 on the basis of the injury report Ext; 6. prepared on police requisition, the Tribunal found that the claimant sustained a fracture injury QJI his left side fibula and some abrasions which were simple in nature and that barring the aforesaid injuries there was no proof with regard to any other injury, nor any evidence regarding any disability suffered by the said claimant, it was also held that there was no evidence with regard to the loss of earning capacity of the claimant. Taking a cumulative assessment of the entire evidence, the Tribunal awarded a compensation of Rs. 10,000.00 in favour of the injured claimant and directed that the said amount should also be paid by the opposite party No. 4 Insurance Company.

7. The New India Assurance Company has filed M.A. No. 99. 101 and 102 of 1997 inter alia challenging the findings arrived at by the Tribunal in all the three claim cases. Similarly, the legal representatives of the two deceased persons filed M.A. Nos. 319 and 321 of 1997: whereas the injured-claimant has filed M.A. No. 323/97 inter alia praying for enhancement of the compensation amount awarded in their favour respectively.

8. Mr. Dutta learned Counsel for the New India Assurance Company, the Appellant in M.A. Nos. 99, 101 and 102 of 1997, strenuously tried to convince me that the finding of the Tribunal that the accident occurred due to the rash and negligence of the driver of the bus alone is not just and proper. He invited my attention to the chargesheet and other documents seized by police, more particularly the report of the investigating officer, which according to Mr. Dutta reveal that the drivers of both the vehicles were responsible for the accident. It was further submitted by him that the Tribunal acted illegally and with material irregularity in discarding the said evidence only on the ground that the investigating officer was not examined in the cases. He also contends that if both the vehicles are held to be jointly responsible for the accident, the negligence shall be contributing and the compensation awarded should be shared half and

half between the two Insurance Companies, i.e. New India Assurance Company and the Oriental Insurance Company. Mr. Dutta also forcefully submitted that the finding that the offending bus was possessing a valid driving licence is also not correct, and the award passed by the Tribunal thus suffers from non-consideration of relevant materials. It is apt to mention that though notice was duly served on Respondent No. 4. Oriental Insurance Company, it chose not to appear before this Court.

9. Mr. Kar, learned Counsel for the claimants, on the other hand forcefully repudiated the submissions of the learned Counsel for the insurer. He submitted that it was incumbent upon the insurer to prove joint negligence by adducing cogent evidence, but it has failed to do so. So far as the driving licence is concerned. Mr. Kar submitted that as would be evident from the documents seized, specially Ext. 4. the driver of the bus was possessing a valid driving licence. There is no iota of evidence produced by the Appellant-Insurance Company in support of its bald allegation that the driver of the bus was not possessing a valid driving licence, and such submissions, at this related stage, should not be accepted. On the basis of the aforesaid submissions. Mr. Kar, learned Counsel for the claimants, contended that the three appeal filed by the Insurance Company, i.e. M.A. Nos. 99 101 and 102 of 1997, should be dismissed in limine. Mr. Kar alia drew my attention to the fact that the accident occurred in the year 1992 and the widow and minor children of the claimants are subject to unsurmountable hardship due to stringent financial difficulties and only on that ground the appeal filed by the Insurance Company should be dismissed.

10. So far as the three appeals filed by the claimants, i.e. MA. 319. 321 and 323 of 1997 are concerned. Mr. Kar submitted that two young men aged thirty two and thirty five years, who were in the prime of their earning, lost their lives leaving behind young widows and minor children. It is further submitted that the legal heirs were subjected to great hardship and became destitute and are moving from pillar to post since 1992. According to Mr. Kar the Tribunal committed a gross error in holding that the deceased persons were earning only Rs. 25.00 per day. This finding, according to Mr. Kar is based on mere surmises and conjectures and is devoid of any cogent evidence. Accordingly to him the Tribunal should have accepted the oral evidence which unambiguously revealed that the monthly income of the deceased persons was Rs. 3,500.00 each. On the basis of the aforesaid submission, Mr. Kar prayed for enhancement of the compensation amount awarded by the Tribunal and to award the amount claimed in the claim petitions.

11. Mr. Dutta, learned Counsel for the New India Assurance, on the other hand supported the finding arrived at by the Tribunal and stated that in the absence of any cogent documentary evidence with regard to the earning capacity Of the deceased persons, the Tribunal rightly assumed that the deceased persons were earning Rs. 25.00 per day and rightly also awarded compensation of Rs. 95,000.00 in each case and there is absolutely no justification to enhance the

same.

12. After hearing the learned Counsel for the parties and pursuing the evidence, both oral and documentary, I feel that the presumption arrived at by the Tribunal that the deceased persons were earning only at the rate of Rs. 25.00 per day was not justified and was not based on any materials. Even if the finding of the Tribunal that the deceased persons were working as coolies is accepted, their wages per day, according to the Minimum Wages Act prevalent at the relevant time would have been at the rate of Rs. 40.00. as submitted by Mr. Kar and thus the finding of the Tribunal on this aspect cannot be sustained. But then, the occurrence took place in the year 1992 and any attempt now made to reassess the earning capacity of the two deceased persons by remanding the matter would not be in the interest of any of the parties. Therefore, taking a cumulative assessment of all the factors. I am persuaded to enhance the compensation awarded in respect of the two deceased persons in MA. 319/97 arising out of Misc. Case No. 176/92 and M.A. 321/97 arising out of Misc. Case No. 177/92 to Rs. 1,25,000.00 each in a spirit of LOK Adalat.

It appears from order dated April 29, 2002 passed in M.A. 321/97 that in the meanwhile Susama Sethi, claimant-Appellant No. 1 has expired and her name has been directed to be deleted. By the said order, claimant-Appellant Nos. 2, 3 and 4 who are minors, were permitted to be represented by their grandmother Puchi Sethi.

13. Mr. Kar for the claimant-Appellant in M.A. 323/97 arising out of Misc. Case No. 553/97 strenuously reiterated that in view of the multiple injuries sustained by the claimant in the said case, the Tribunal acted illegally and with material irregularity in awarding a paltry sum of Rs. 10,000.00 as compensation. The said submission is countenanced by Mr. Dutta appearing for the New India Assurance Company. To appreciate the inter se submissions. I perused the injury report and other documents. It appears that apart from one fracture injury, the claimant sustained only some abrasions of simple nature. There is also no evidence with regard to any disability or loss of earning capacity of the claimant due to the accident. After perusal of the documents. I am not persuaded to accept the submissions of Mr. Kar and have no hesitation to confirm the findings and compensation awarded by the Tribunal Accordingly. Misc. Appeal No. 323/97 is dismissed.

14. So far as the submission with regard to non-existence of a valid driving licence is concerned. Mr. Dutta submitted that on enquiry it was learnt that the driving licence produced in Court vide Ext. 4 was a fake one. This fact came to the knowledge of The Insurance Company in course of enquiry. However, due to certain discrepancy as well as mis-noting of the date to which the cases were posted before the Tribunal, the documents in support of the said submission could not be produced before the Tribunal. It is submitted by Mr. Dutta that as the driver was not possessing a valid driving licence, there was a breach of the contractual obligations between the owner and the Insurance Company and

therefore the Insurance Company is not liable to pay the compensation. Be that as it may, in view of existence of a valid Insurance policy, the Insurance Company is liable to pay the compensation to the claimants, but then if there was any violation of any of the terms of the insurance policy, it is open to the Insurance Company to realise the amount paid by it from the owner. In the aforesaid scenario, for an effectual adjudication as to whether the driver of the offending vehicle was possessing a valid driving licence or not and as to whether the accident took place due to contributory negligence of both the vehicles. I feel that the matter should be remanded to the Tribunal. I therefore, remand the cases to the Tribunal with direction to the Tribunal to issue notice to both the owners of the vehicles and decide as to whether the accident took place due to contributory negligence of both the vehicles and whether the drivers of the vehicles possessed valid driving licences.

It is further directed that if after remand it is held that the driver (s) of the offending vehicles (s) did not possess valid driving licences (s) the Tribunal would direct realisation of the amount (s) of compensation paid by the Insurance Company from the respective owners. It would be open to the Appellant Insurance Company to realise the proportionate compensation from the Oriental Insurance Company.

it is made clear that no notice need be issued to any of the claimants and the adjudication after remand shall be confined only to the two Insurance Companies and the owners of the vehicles involved in the accident.

15. In view of the discussions made above. Misc. Appeal Nos. 99/97 and 102/97 arising out of Misc. Case Nos. 176/92 and 177/92 are allowed to the extent indicated above. The cases are remitted back to the Tribunal for fresh adjudication only for the limited purposes as indicated above. This view is taken by me in the light of the decision in the case of *New India Assurance Co. Shimla v. Kamala and Ors.* reported in 2001 (2) TAC 243 (SC).

M.A. No. 321/97 arising out of Misc. Case No. 177/92 and M.A. No. 319/97 arising out of Misc. Case No. 176/92 are also allowed in part and it is directed that instead of compensation of Rs. 95,000.00 in each case, the claimants will be entitled to compensation of Rs. 1,25,000.00 in each case together with interest at the rate of 9% per annum from the date of the claim, i.e. 9-3-1992 till realisation.

16. The entire amounts shall be deposited by the New India Assurance Company before the Second M.A.C.T., Cuttack within two months hence, failing which interest at the rate of 12% (twelve per cent) will be payable on the entire compensation amounts. The amounts so deposited shall be disbursed to the respective claimants in accordance with the ratio of the decision in *Susama Thomas* case as well as the directions issued by the Tribunal in his judgment.

17. After the amounts of compensation are deposited before the Tribunal as directed above, the amounts deposited in this Court along with interest accrued

thereon be refunded to the insurance Company by A/c. payee cheques on proper application.