

(1972) 02 OHC CK 0004
In the Orissa High Court
Case No : Misc. Appeal No. 22 of 1968

The Oriental Fire and General Insurance Co. Ltd.	APPELLANT
Vs	
Vanita Kalyani and Others	RESPONDENT

Date of Decision : 15-02-1972

Acts Referred:

Motor Vehicles Act, 1988 — Section 110A, 110D, 96, 96(2)

Citation : (1972) ACJ 261

Hon'ble Judges : S.K. Ray, J; S. Acharya, J

Bench : Division Bench

Advocate : R.C. Patnaik, for the Appellant; R.C. Parija and M.M. Sahu, for the Respondent

Judgement

S. Acharya, J.—This is an appeal u/s 110-D of the Motor Vehicles Act against the order passed by the Motor Vehicles Claims Tribunal, Cuttack in Misc. Case No. 51/66 dated 23-10-1967 awarding compensation of Rs. 22,500/- to the claimants Respondents 1 to 4 herein.

2. The claimants filed an application for compensation arising out of an accident which took place on 10-2-1966 at about 9 A.M. in which one Hasmukrai Kalyani, aged 30 years, while going on a cycle at Purighat, was run over by the goods public carrier motor truck bearing registration No. ORP 1170, and died on the spot. Birendra Kumar Patnaik, Respondent No. 5 herein, was the owner of the vehicle at the time of the accident and the Appellant Oriental Fire & General Insurance Company Ltd, was the insurer of the vehicle. The claimants in this case are:

- (1) the widow of the deceased Vanita Kalyani (R. 1)
- (2) Bharat Kumar Kalyani (R. 2) son of the deceased.
- (3) Sailesh Kumar Kalyani (R. 3) son of the deceased.
- (4) Urvasi, the daughter of the deceased (R. 4).

The claim at first was lodged before the above named owner and insurer of the vehicle, but as the said claim could not be finalised at that level, the petition u/s 110-A of the Motor Vehicles Act was filed in the Court of the Claims Tribunal,. The claimants based their claim on the fact that the deceased Hasmukrai was aged only 30 years and was an employee in the Kalpataru Cycle Stores, Cuttack, on a monthly pay of Rs. 125/- and the claimants were entirely dependent on the deceased.

3. The owner of the truck (Respondent No. 5 herein) in his written statement contested the claim of the Petitioners mainly on the grounds that the petition was not maintainable in law; that the monthly income of the deceased as stated in the claim petition is incorrect and exaggerated; that the greater part of the responsibility for the accident was that of the victim; that the relationship of the claimants with the deceased is not within his knowledge; that the amount claimed is exaggerated and arbitrary ; that the accident did not take place due to the rash and negligent driving of the vehicle and that it was a pure case of accident arising out of the contributory negligence of the deceased, and in the circumstances the claim is not maintainable.

4. The insurer-company, the Appellant herein, filed a separate written statement alleging therein identically the same above-mentioned grounds as taken by the owner of the truck.

5. On the above pleadings the following issues were framed:

- (1) Is the claim maintainable?
- (2) Are the Petitioners entitled to get compensation, and if so, to what extent?
- (3) To what reliefs are the Petitioners entitled?

6. On Issue No. 1, the Claims Tribunal, on a consideration of the law and the facts, had held that the aforesaid petition by the claimants is maintainable. This finding on maintainability has not been questioned before us.

7. Issues Nos. 2 and 3 were considered together. On an elaborate consideration of the evidence on record, the Court below has arrived at the following findings relevant to the above-noted 2nd issue.

(i) The truck in question was proceeding from Purighat side towards Khannagar with speed and deceased Hasmukrai was coming from the other direction on a cycle and he was to his extreme left, and the truck which was on the middle of the road suddenly went to the right extreme of the road and hit the deceased and ran over him causing his instantaneous death.

(ii) The locality in question being a fairly busy one, the driver, driving the vehicle with speed, certainly acted with rashness. It was also a case of negligent driving as the hand brakes of the vehicle were not in order.

(iii) In the absence of any evidence on the part of the contestants as to how the

accident took place, their plea that the deceased was guilty of contributory negligence cannot be accepted.

(iv) The established facts, that the area is a busy one and the truck dashed against the cyclist on the right side and that too on the extreme right side of the road are prima facie evidence of negligence.

(v) In this case there is no evidence by the Respondents that the driver had taken all reasonable care to avoid the accident.

(vi) There can be no doubt that the accident in this case was caused due to rashness and negligence of the driver, and as such the employer, i. e. Respondent No. 5 herein, is liable for payment of damages to the legal representatives of the deceased. So also the insurer, i. e, the Appellant herein, is liable to the extent provided in the Motor Vehicles Act.

(vii) The above-mentioned claimants are the wife and children of the deceased as stated above and are entitled to claim damages from both the contestants.

8. The above findings could not be assailed on any convincing ground. P. w. 2, an Advocate of the Cuttack Bar, is an eyewitness to the said accident, and he immediately informed the police about the same. He has given a vivid account as to how the accident took place. His evidence is that at about 8-30 A. M. he was proceeding on the Kathjori embankment road and the truck No. O. R. P. 1170 was proceeding ahead of him loaded with sand and a cyclist was coming from the opposite direction and suddenly the truck went from the middle of the road to its right and dashed against the cyclist who fell down and the truck ran over him causing his instantaneous death. He has further stated that the truck was moving at a very high speed, that is about 45 to 50 miles per hour and the cyclist was on the extreme left of the road and the truck went to its extreme right and hit him. His evidence to the above effect has not at all been shaken in cross-examination. Nothing has been suggested, much less elicited from him, as to why this witness, a respectable member of the Bar, would perjure in the witness box. The Court below has considered his evidence in the correct perspective, and on cogent and convincing grounds has placed reliance on his testimony.

His evidence about the speed of the truck at the time of the accident gets corroboration from the expert evidence of p. w. 5, an Inspector of Motor Vehicles. P. w. 5, on examination of the defects and marks on the vehicle, its situation on the road, the manner in which it was standing and the topography of the place of occurrence, opined that the speed of the vehicle when it dashed against the deceased could not have been less than 30 miles per hour. P. W. 3, a senior police officer of the Lalbag, P. S. on the date of the; accident, arrived at the spot immediately after the accident on receiving a phone message to the effect. He had testified to the fact that the deadbody was lying on the river embankment on the right side of the road in front of the Rajabagicha High school while going from Purighat to Khannagar side. The truck was facing towards

Khannagar side. The right wheel of the truck was on a heap of chips just on the foot-path to the right side of the road. When he went to the spot the deceased was found at a distance of about 22 feet behind the truck and a cycle in between two. The dead-body was on the right edge of the road. We got it from the evidence of P. W. 5 that both the wheels on the right side of truck (front and back) were on the foot-path of the road to its right side. Nothing has been elicited from them on which it can be said that their evidence is not reliable or that they are not trustworthy witnesses, Mr. Patnaik could not show as to why the evidence of the above mentioned witness should not be accepted. On a perusal of the evidence on record we are convinced that the above findings of fact arrived at by the Court below are well founded, thoroughly justified and perfectly correct.

9. After arriving at the findings mentioned above the Court below has taken up the question relating to the compensation to be paid to the claimants on account of the said accident forming the subject matter of the third issue. On a consideration of the monthly income of the deceased, his expectancy of life and various other factors as laid down on authoritative pronouncement regarding assessment and fixation of compensation in a matter like this the Court below has fixed the compensation at Rs. 22,500/-, and has ordered that the insurer, Appellant herein, will pay Rs. 20,000/-, and the owner i. e. Respondent No. 5 herein, will pay the balance of Rs. 2,500/-. The Appellant and Respondent No. 5 have also to pay the corresponding costs of case with pleader's fee etc. Nothing could be urged on behalf of the Appellant to modify in any manner the quantum of the compensation fixed or the amounts apportioned to be paid by the Appellant and Respondent No. 5 herein. The cross-appeal preferred by the claimants for the enhancement of the quantum of compensation was not pressed. Accordingly the compensation amount as fixed above by the Court below stands. But on the basis of the principles and reasonings stated in paragraph 12 of the decision of this Court reported in *Oriental Fire and General Insurance Co. Ltd. Vs. Mrs. Kamal Kamini Das and Others*, , the claimants are entitled to get interest at the rate of 6 percent per annum on the compensation amount from the date of the award till the same is paid to the claimants.

10. Apart from the above consideration on the factual aspect of the matter, Mr. Sahu, the learned Counsel for the claimants, urged that the grounds on which the insurer contested the claim for compensation in the Court below were not valid and tenable in law. The insurer, as stated above, contested the claim on identically the same grounds as taken by the owner of the truck, which have been mentioned above in paragraph 3. Mostly and mainly on the said grounds both the contestants alleged that the claim against them was not maintainable. It is urged that none of the aforesaid grounds is available to the insurer to contest this claim and so that appeal by the insurer is, ipso facto, without any merit.

11. Their Lordships of the Supreme Court in *British India General Insurance Co.*

Ltd. Vs. Captain Itbar Singh and Others, , have laid down the law on this aspect of the matter as follows:

(5) To start with it is necessary to remember that apart from the statute an insurer has no right to be made a party to the action by the injured person against the insured causing the injury. Sub-section (2) of Section 96 however gives him the right to be made a party to the suit and to defend it. The right therefore is created by statute and its content necessarily depends on the provisions of the statute. The question then really is, what are the defences that Sub-section (2) makes available to an insurer? That clearly is a question of interpretation of the Sub-section.

(6) Now the language of Sub-section (2) seems to us to be perfectly plain and to admit of no doubt or confusion. It is that an insurer to whom the requisite notice of the action has been given "shall be entitled to be made a party thereto and to defend the action on any of the following grounds, namely", after which comes an enumeration of the grounds. It would follow that an insurer is entitled to defend on any of the grounds enumerated and no others. If it were not so, then of course no grounds need have been enumerated. When the grounds of defence have been specified, they cannot be added to. To do that would be adding words to the statute.

(7) Sub-section (6) also indicates clearly how Sub-section (2) should be read. It says that no insurer to whom the notice of the action has been given shall be entitled to avoid his liability under Sub-section (1) otherwise than in the manner provided for in Sub-section (2)". Now the only manner of avoiding liability provided for in Sub-section (2) is by successfully raising any of the defence therein mentioned. It comes then to this that the insurer cannot avoid his liability except by establishing such defences. Therefore Sub-section (6) clearly contemplates that he cannot take any defence not mentioned in Sub-section (2). If he could, then he would have been in a position to avoid his liability in a manner other than that provided for in Sub-section (2). That is prohibited by Sub-section (6).

(8) We therefore think that Sub-section (2) clearly provides that an insurer made a Defendant to the action is not entitled to take any defence which is not specified in it.

That being the law on the subject, and none of the grounds on which the insurer contested the claim is, as is obvious therefrom, within the scope and purview of the grounds enumerated in Sub-section (2) of Section 96 of the Motor Vehicles Act, the defences put up by the insurer were not legally available to him. As the insurer has not put up any legal defence in the case available to him, he is not entitled under the law to avoid his liability arising out of the said accident, and on this consideration alone the appeal has to fail.

11. The cross-appeal filed by the claimants, Respondents 1 to 4 in this appeal, was not pressed as already indicated in our order dated 24-1-1972.

12. In the result, therefore, the appeal filed by the insurer and the cross-appeal filed by the claimants both fail, and are dismissed; but since, as already stated in paragraph 9 above, by reason of the decision in Oriental Fire General Insurance Company Limited v. Mrs. Kamal Kamini Das and Ors. the claimants are entitled to interest, we hereby order that the compensation fixed by the Court below is to be paid with interest at 6 per cent per annum with effect from the date of the award, i.e. from 23-10-1967. This order be suitably embodied in the award of the Court below. In the circumstances of this case parties are to bear their own costs of this appeal.

S.K. Ray, J.

13. I agree.