

(2009) 08 CAL CK 0078

In the Calcutta High Court

Case No : F.M.A. No. 118 of 2008 and C.A. N. 4684 of 2008

The Oriental Insurance Co. Ltd.

APPELLANT

Vs

Smt. Tanushri @ Tanushree Banerjee and Others

RESPONDENT

Date of Decision : 19-08-2009

Acts Referred:

Evidence Act, 1872 — Section 114
Motor Vehicles Act, 1988 — Section 166, 170

Citation : (2009) 08 CAL CK 0078

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Sanjoy Paul, for the Appellant; Amit Ranjan Roy, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of the Insurance Company in a proceeding u/s 166 of the Motor Vehicles Act and is directed against an award dated 30th June, 2007 passed by the Motor Accident Claims Tribunal and Fast Track, 1st Court, Asansol, in M.A.C. Case No. 88 of 2006 thereby awarding a sum of Rs. 10,80,163/- in favour of the claimants. The Insurance Company was directed to make payment of the said amount within two months from the date of passing of award with a stipulation that in default of making such payment within the said period, the awarded sum would carry interest at the rate of 9% per annum till realization of the amount.

2. Being dissatisfied, the Insurance Company has come up with the present appeal.

3. According to the claimants, on 18th June, 2005 while their predecessor in-interest was proceeding towards his house at New Konda from Asansol by riding his motorcycle bearing No. WB-40G/8012, a truck bearing No. WMH-6064 hit the said motorcycle from behind. As a result, the victim sustained fatal injury and died on the spot. The victim was taken to S.D. Hospital where he was declared

"brought dead". The victim was the sole bread-earner being a reputed contractor and businessman and had been earning a sum of Rs. 18,000/- a month. According to the claimants, the offending vehicle was insured with the Oriental Insurance Company having valid policy. The claimants, the widow with two minor children prayed for compensation of Rs. 20,00,000/-

4. None appeared on behalf of the owner of the offending vehicle but the Insurance Company contested the case by filing written statement denying the material allegations made in the application for compensation thereby contending, inter alia, that the application was not maintainable as there was no cause of action to bring the proceedings against the Insurance Company. According to the Insurance Company, the deceased while traveling in his motorcycle died due to his own fault and the truck insured by the Insurance Company was not involved in the accident.

5. The learned Trial Judge on consideration of the evidence of record came to the conclusion that the offending truck was responsible for the accident and the death occurred due to rash and negligent driving on the part of the driver of the offending vehicles as it appeared from the materials on record.

6. The learned Trial Judge found that the victim was aged about 50+ and was a contractor earning Rs. 18,000/- per month approximately. The learned Trial Judge relied upon the income tax returns submitted by the deceased for the financial year 1999-2000, 2000-2001, 2001-2002, 2002-2003, 2004-2005 and it appeared that the average annual income of the deceased after deduction of tax was Rs. 1,46,000/-. The learned Trial Judge after deducting one-third from the said amount for his personal expenditure and by using the multiplier of 11 arrived at the figure of Rs. 10,70,663/- and in addition to the said amount, granted Rs. 9,500/- towards loss of consortium, loss of estate and funeral expenses.

7. Being dissatisfied, the Insurance Company has come up with the present appeal.

8. Mr. Paul, learned advocate appearing on behalf of the Insurance Company, at the very outset, has attacked the award by contending that the learned Tribunal below erred in law in misreading the evidence on record while arriving at the conclusion that the truck was the offending vehicle in the alleged accident. According to Mr. Paul, it would appear from the evidence on record that the victim himself was responsible for the death as he was driving his own motorcycle and due to negligent driving on his part, the same struck with the divider of the road, as a result, he died. Mr. Paul points out that OPW No. 3 in this case is the maker of F.I.R., but by writing a letter to the Insurance Company, he has admitted that no truck was involved in the accident and it was the victim who himself was responsible for the death. Mr. Paul points out that the said author of F.I.R supported the case of Insurance Company in deposition but the learned Tribunal below erroneously disbelieved his evidence. Mr. Paul further

contends that in this case, there was collusion between the owner of the truck and the claimants, as a result, the owner did not contest the proceeding. Mr. Paul further draws our attention to the fact that the first investigating officer on the basis of F.I.R. lodged by OPW No. 3 arrived at the conclusion that there was no material to suggest the involvement of the truck concern but subsequently, on a re-investigation by another officer on the application of the defacto complainant, the criminal case was registered and charge sheet was submitted. He, therefore, prays for dismissal of the claim application with the finding that the claimants failed to prove that any other vehicle was involved in the accident.

9. Mr. Roy, the learned advocated appearing on behalf of the claimants/respondents, on the other hand, has opposed the aforesaid contention of Mr. Paul and contended that the owner of the vehicle in spite of being added as party having failed to contest the proceedings and the Insurance Company having taken leave u/s 170 of the Act, it was the duty of the Insurance Company to summon the owner of the vehicle as he was the best witness to prove that his vehicle was not involved in the accident. Mr. Roy submits that unless his client got opportunity of cross-examining the owner of the vehicle or the driver thereof, no adverse inference of collusion can be made against them. Mr. Roy submits that in the facts and circumstances of the present case it was the onus of the Insurance Company to bring the owner of the vehicle to the witness box as the Insurance Company was the insurer of the said owner. Mr. Roy, therefore, prays for dismissal of the appeal.

10. Therefore, the sole question that arises for determination in this appeal is whether the plea of non-involvement of the insured vehicle in the accident taken by the insurance company has been established from the evidence on record.

11. As pointed out earlier, according to the Insurance Company, the truck in question was not at all involved in the accident and the victim himself was responsible for the death due to his contributory negligence by colliding with the divider of the road.

12. In this case, the learned Tribunal below on consideration of the evidence on record has accepted the version of the claimants that the truck was the offending vehicle which was admittedly insured by the appellant at the relevant point of time. Although the owner of the vehicle was made a party to this proceeding, he did not contest the proceeding to deny the allegation that his vehicle was involved in the accident. In view of such fact, the Insurance Company took leave u/s 170 of the Act and contested the proceedings by leading evidence. The person who lodged the F.I.R became a witness of the Insurance Company and proved a letter subsequently written by him to the Insurance Company stating that due to the negligence of the victim, the accident occurred. The learned Tribunal below, however, disbelieved such witness and came to the conclusion that the truck was very much involved and due to the rash and negligent driving on the part of the driver of the said vehicle, the accident occurred, resulting in the death of the victim. In this case, on the application of the said witness of the

Insurance Company who was the defacto complainant of the accident, the learned Judicial Magistrate ordered fresh investigation and on fresh investigation, charge sheet was submitted against the driver of the offending vehicle although in the earlier investigation, it was found that the truck was not involved. The said witness admitted his signature on the application for reinvestigation and he admitted in his evidence that he was not an eyewitness to the accident. We, thus, find no reason to give any importance to the contents of the Ext- B, the said letter when he admitted that he did not witness the accident. It is needless to mention that for the purpose of lodging an FIR it is not necessary that the maker thereof must be an eyewitness to the accident. The learned Tribunal below believed the version of PW-2 who was an eyewitness to the accident and discarded the evidence given by DW-4, another alleged eyewitness claimed by the Insurance Company who himself admitted in his cross- examination that he came to the spot 5-7 minutes after the accident. It was further admitted by him that the place of occurrence was situated at the distance of 60/70 feet from his hotel where he used to handle the cash.

13. In our opinion, the said finding of the learned Tribunal was quite justified in the facts of the present case and we do not find any reason to interfere with such finding for an additional reason set forth below:

14. In this case, the claim petition has been filed against the owner of the truck and the said truck being insured by the appellant, it was also made party to the proceedings for compensation.

15. The owner of the truck against whom compensation has been basically claimed was the best person to prove non-involvement of the truck by producing the garage register or movement register of the vehicle indicating the movement of the car at the relevant point of time or by producing other convincing evidence specially within his knowledge, from which it could be well established whether the vehicle was plying in a different place. Similarly, if the vehicle was really involved but his driver was innocent, such fact could also be proved by producing his driver at the witness box. In spite of being made party, if the owner decides not to defend and to controvert the allegation, according to the law of the land, adverse presumption should be drawn against such party. At this stage, we may aptly refer to the following observations of the Apex Court in the case of Gopal Krishnaji Ketkar Vs. Mahomed Haji Latif and Others, where the said Court pointed out the duty of the party to a suit to appear as witness when he was the best witness to the disputed issue even if the burden of proof was on the other side:

...Mr. Gokhale, however, argued that it was no part of the appellant's duty to produce the accounts unless he was called upon to do so and the onus was upon the respondents to prove the case and to show that the Dargah was the owner of plot No. 134. We are unable to accept this argument as correct. Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on

the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof. In AIR 1917 6 (Privy Council) Lord Shaw observed as follows :

A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof, and failing, accordingly, to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough -they have no responsibility for the conduct of the suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition." This passage was cited with approval by this Court in a recent decision - Biltu Ram v. Jainandan Prasad Civil Appeal No. 941 of 1965, D/- 15-4-1968 (SC). In that case, reliance was placed on behalf of the defendants upon the following passage from the decision of the Judicial Committee in *Mt. Bilas Kunwar v. Desraj Ranjit Singh* 42 Ind App 202 at p. 206 : AIR 1915 PC 96 at p. 98:

But it is open to a litigant to refrain from producing any documents that he considers irrelevant; if the other litigant is dissatisfied it is for him to apply for an affidavit of documents and he can obtain inspection and production of all that appears to him in such affidavit to be relevant and proper. If he fails so to do, neither he nor the Court at his suggestion is entitled to draw any inference as to the contents of any such documents". But Shah, J., speaking for the Court, stated :

The observations of the Judicial Committee do not support the proposition that unless a party is called upon expressly to make an affidavit of documents and inspection and production of documents is demanded, the Court cannot raise an adverse inference against a party withholding evidence in his possession. Such a rule is inconsistent with illustration (g) of Section 114 of the Evidence Act, and also an impressive body of authority.

16. Even in the subsequent case of the Supreme Court in the case of *Vidhyadhar Vs. Manikrao and Another*, , the Apex Court took the action of a party deciding not to appear as a witness and to offer himself for cross-examination, in the following way:

Where a party to the suit does not appear into the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct as has been held in a series of decisions passed by various High Courts and the Privy Council beginning from the decision in AIR 1927 230 (Privy Council) . This was followed by the Lahore High Court in *Kirpa Singh v. Ajaipal Singh* AIR 1930 Lah 1

and the Bombay High Court in *Martand Pandharinath Chaudhari Vs. Radhabai Krishnarao Deshmukh*, . The Madhya Pradesh High Court in *Gulla Kharagjit Carpenter Vs. Nar Singh Nandkishore Rawat*, , also followed the Privy Council decision in AIR 1927 230 (Privy Council) . The Allahabad High Court in *Arjun Singh Vs. Virendra Nath and Another*, held that if a party abstains from entering the witness box, it would give rise to an inference adverse against him. Similarly, a Division Bench of the Punjab and Haryana High Court in *Bhagwan Dass Vs. Bhishan Chand and Others*, , drew a presumption u/s 114 of the Evidence Act against a party who did not enter into the witness box.

17. The aforesaid principle applies with greater force when a party even does not dispute the statement made in the pleading of the other side and decides to remain *ex parte*. We are quite conscious that in the proceedings for compensation under the Motor Vehicles Act, when the offending vehicle is insured, the owner of the vehicle may not be interested to appear at the witness box in spite of the fact that he is a party to the proceedings. For that reason, the legislature has incorporated the provision contained in Section 170 of the Act permitting the Insurance Company to contest the proceedings on all points. Once such leave is granted, it is the duty of the Insurance Company to summon the owner of the vehicle to appear as a witness for disputing the allegation of the owner. If the Insurance Company after taking leave of the Tribunal u/s 170 of the Act, decides not to lead any evidence by summoning the relevant witnesses including the party whose liability it has undertaken, its position in law will be just like the party who is afraid of appearing in the witness box to face the cross-examination of the claimants. It is preposterous to suggest that the Court will hold against the claimants notwithstanding the fact that in spite of the allegation of rashness or negligence against the driver, the driver or the owner of the vehicle is deliberately avoiding the Court and the claimants are unable to cross-examine the owner against whom the compensation is claimed or the errant driver whose identity has been disclosed in a civil proceeding.

18. Therefore, the Insurance Company in spite of taking leave u/s 170 of the Act having failed to summon the owner or the driver of the vehicle to disprove the allegation of the claimants of the involvement of the vehicle concerned or the rash and negligent driving, the Court is left with no other alternative but to accept the allegation of the claimants unless there is either admission of the claimants or their witness about non-involvement of the vehicle or about the contributory negligence of the victim in the accident or there exists other evidence of unimpeachable nature given by uninterested witness showing falsity of the allegation of the claimants. In this case, there is no such admission or evidence of that nature. In this case, the driver has been charge sheeted and thus, there is no reason why the Insurance Company in spite of taking leave u/s 170 of the Act should not summon the said driver to give evidence for disclosing the truth. We are unable to presume collusion between the driver and the claimants when the driver has been indicted in the criminal proceedings. It will be a travesty of justice in the facts of the present case to disbelieve the

eyewitness of the claimants when the owner and the driver are neither appearing nor are they even summoned by the Insurance Company even after taking leave u/s 170 of the Act to face cross-examination at the instance of the claimants.

19. We, thus, find that the involvement of the truck insured by the appellant in the accident and the negligent driving of such vehicle have been proved and we find no reason to interfere with the finding of the learned Trial Judge on the grounds set forth above apart from the reasons shown by the Tribunal. Regarding the amount of compensation, the same is quite in conformity with the income of the victim appearing from the income tax return and his proved age.

20. The appeal is, thus, devoid of any substance and is dismissed.

21. In the facts and circumstances, there will be, however, no order as to costs.

22. I agree.