
(1991) 05 OHC CK 0041
In the Orissa High Court

Udayanath Pani

APPELLANT

Vs

Basanti Dalai and Others

RESPONDENT

Date of Decision : 17-05-1991

Acts Referred:

Motor Vehicles Act, 1988 — Section 147, 148, 149, 168

Citation : (1992) 1 ACC 578

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Judgement

A. Pasayat, J.—The owner of a vehicle which was involved in an accident has called in question the legality of the direction given by the Second Motor Accidents Claims Tribunal, Cuttack (in short the "Tribunal"). Fastening a part of the compensation awarded on him. The award was made on the basis of a Claim petition filed by the dependents (hereinafter referred to as the "claimants") of one Jayakrushna Dalai alias Jayaram Dalai who lost his life on 20.2.1984 in an accident wherein a bus bearing registration No. ORU 7248 belonging to the appellant was involved.

2. The background facts and the grounds of challenge as described by the claimants are as follows:

On the fateful date at about noon while the deceased was standing by the side of Jagatsinghpur-Cuttack road at Kaijanga bus stop, the offending vehicle dashed against him, knocked him down and ran over him resulting in his instantaneous death. The vehicle was being driven in a rash and negligent manner, the deceased at the time of death was 42 years old and was serving as a truck driver and getting Rs. 1200/- per month, out of which his contribution to the family was Rs. 800/- per month. A total Claim of Rs. 99,500/- was made by the widow of the deceased, seven minor children and dependant parents. The Tribunal accepted the factum of accident as alleged, and that the vehicle was being driven in a rash and negligent manner. On consideration of the evidence placed on behalf of the claimants; it did not accept the income and contribution as Claimed

and quantified the compensation at Rs. 56,000/-. The liability of the insurance company i.e. the New India Assurance Company (hereinafter referred to as the "insurer") was held to be Rs. 50,000

3. According to the appellant, the entire compensation awarded should have been made payable by the insurer. It is pleaded that the insurer did not take a definite defence that its liability was not beyond Rs. 56,000/- or that its liability was not unlimited, and in any event. It having not enclosed a copy of the policy along with its defence should be liable to pay the entire amount. In support of the plea, strong reliance is placed on a decision of the Supreme Court reported in 1988 A.C.J. 270; National Insurance Company Limited v. Jugal Kishore and Ors. and an unreported decision of this Court in Misc. Appeal No. 254 of 1984 Akhaya Kumar Sahoo v. Kumari Chhabirani Sethi and Anr. disposed of on 6.4.1990. According to the appellant, the latter decision is also an authority for the proposition that the entire policy having not been produced by the insurer before the Tribunal, a presumption arises that the liability of the insurer is unlimited.

4. Since, similar pleas are advanced in many cases, I feel that an elaborate discussion on the acceptability of the pleas is desirable.

5. Before advertng to the acceptability of the pleas, it may be noted here that the insurer had filed a copy of the policy and prayed for its acceptance as additional evidence. After hearing the parties, the prayer was accepted. This was done because the certificate of insurance and an incomplete duplicate copy of policy was filed on behalf of the insured before the Tribunal.

6. A person who suffers injuries or the dependants of a deceased losing his life in an accident are entitled to compensation. The liability is initially that of the person who is responsible for the accident. Therefore, primarily the responsibility for damages is that of the driver. But law is settled that master is vicariously liable for the acts of his servant acting in the course of his employment. Unless the act is done in the course of employment the servant's act does not make the master Laible. In other words, for the master's liability to arise the act must be a wrongful act authorised by the master or a wrongful and unauthorised mode of doing some act authorised by the master See. Sitaram Motilal Kalal Vs. Santanuprasad Jaishankar Bhatt, . Therefore, by application of the "principles relating to vicarious liability, the owner of the vehicle becomes liable. To get indemnification of any compensation which may become payable the owner who is also described as the insured enters into an agreement with any insurance company like the insurer in the instant case, which for a premium undertakes to indemnify any liability that may be fastened on an insured. The insurance policy is the basic document from which the intention of the insured and the insurer can be fathomed. It shows the extent of the liability of the insurer. The Motor Vehicles Act, 1939 (hereinafter referred to as the "Act") and the Motor Vehicles Act, 1988 (hereinafter referred to as the "new Act") provide the necessity for insurance, the requirements of policies, die limits of liability and the duty of the insurer to satisfy judgments against persons insured in respect of third party

risks. Sections 94,95 and 96 of the Act and Sections 147, 148 and 149 of the new Act are relevant for the purpose.

7. So far as the State of Orissa is concerned, the driver is not a necessary party in a Claim petition. Section 110-B of the Act and Section 168 of the New Act lay down that the Tribunal shall specify the amount which would be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be. Even though u/s 110-B of the Act (Section 168 of the new Act) the driver of the vehicle involved in the accident may be made liable for compensation, under Rule 6 of the Orissa Motor Vehicles (Accidents Claims Tribunals) Rules, 1960 (hereinafter referred to as the "Rules") notice of the application for damages has to be sent only to the owner of the vehicle involved in the accident and its insurer and not to the driver. Columns 15 and 16 of the prescribed form for the application under the Rules are meant for naming the owner of the vehicle and its insurer. There is no column for naming the driver. The driver, therefore, cannot be held liable in an inquiry prescribed under the Act. This is the view expressed by this Court in *Prafulla Kumar Misra and Anr. v. Balaram Sahu and Ors.* 1975 A.C.J. 29. Since the liability is originally that of the insured it has to be placed before the adjudicating Tribunal to show what is the quantum of indemnification undertaken by the insurer. In *National Insurance Company's case* (supra), the Supreme Court was dealing with a case where policy was not produced either before the Tribunal or before the High Court and only while the Civil Appeal was being heard, a Xerox copy of the policy was placed before the Court. The attitude adopted by the insurance company is not filing a copy of the policy before the Tribunal or the High Court was seriously viewed. The claimants are not expected to possess the policy or a copy thereof and the owners for the reasons best known to them do not choose to produce them. The Supreme Court emphasised on the desirability of production of a document, which is in possession of a party for an effective adjudication. In that background, it was held that the insurance company concerned should file a copy of the insurance policy along with its defence where it wants to take a defence in a Claim petition that its liability is not in excess of the statutory liability. Nevertheless considering the xerox copy of policy that was filed, the Supreme Court held that the insurer's liability could not be in excess of Rs. 20,000/-. It was, nowhere, laid down in the said decision as an absolute proposition that wherever the copy of the policy is not filed with the defence the liability of the insurer become unlimited. In fact had it been so the Supreme Court would not have accepted the xerox copy of the policy filed by the insurer to restrict the liability to Rs. 20,000/- when compensation of Rs. 1,00,000/- was awarded. The Court emphasised on the desirability of filing the copy of policy, because insurance company is an instrumentality of the State, which is expected to act fairly and avoid litigation. Order 8 Rule 1 of the Code of Civil Procedure, 1908 (in short the "Code") permits a defendant to present a written statement of his defence at or before the first hearing or within such time as the Court may permit. Rule 5 of the said Order provides that every allegation of fact in the plaint,

if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted except as against a person under disability. Rule 8-A also provides that where a defendant bases his defence upon a document in his possession or power, he shall produce it in Court when the written statement is presented by him and shall, at the same time, deliver the document or a copy thereof, to be filed with the written statement. Applying the analogy, where there is a positive assertion that the liability of an insurer is unlimited or Claims to that effect are made, then only the question of the insurer taking a defence that its liability is not unlimited arises. Unless such a positive assertion is made in the Claim petition and/or in the objection filed by the insured, the question of the insurer taking a defence that its liability is not unlimited does not arise. Thus it cannot be laid down as a general principle that in all cases the insurer is required to file a copy of the policy to show that its liability is not unlimited. Such a situation will only arise when there is a positive assertion in that regard. It need not be emphasised that the casual approach of the insured in not effectively participating in the proceeding, and not even producing the policy which is a document over which he has the primary custody is to be discouraged. The Tribunals should insist on the insured filing the policy, and require it to indicate the reason why it does not do so, and in appropriate cases draw adverse inferences. That would curb the tendency of the owners in not effectively participating in the proceedings, and resultantly fastening unintended liability on the insurer. The conduct of the insurers is not always appreciable. More often than not, they show a very casual approach. Routine objections are filed and the participation in the adjudicator process is ineffective. It is high time that they take a stock of the whole situation.

8. The residual question is whether in the unreported decision of this Court in the case of Akhaya Kumar Sahoo (*supra*) the Court laid down as a principle that wherever the complete policy is not produced before the Court adverse inference can be drawn and the insurer can be asked to indemnify the entire liability. According to me, the documents should be complete in the sense that all relevant particulars which shows the extent of liability undertaken for indemnification are clearly brought for consideration. In the last mentioned case, the Division Bench found that the relevant particulars were not produced. This is apparent from paragraph 12 itself on which much stress has been laid by the insured. The Court found that though the policy in question indicated that the same was subject to clause M.V.C. and endorsement Nos. 23, 26, 21, 16, 13 and 57(H), these endorsements were not filed. Therefore, adverse inference was drawn, and it was held that the insurer was to pay the entire awarded amount. Where, however all the relevant details are before the Tribunal from which actual quantum of liability undertaken to be indemnified, can be ascertained the question of fastening the unlimited liability on the insurer would not arise.

9. The pleas of the appellant that the insurer's liability is unlimited do not get any countenance from the two decisions on which reliance was placed. It is needless to repeat the oft-quoted truism of Lord Halsbury See *Quinn v. Leathern*:

1901. A.C 495 that a case is an authority for what may it actually decides and not for what may seem to follow logically from it. There is always peril in treating the words of a speech or a judgment as though they were words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case Per. Lord Morris of Borth-y-Gest in *Merrington v. British Rvs. Board* (1972) 2 W.L.R. 537. A decision is only an authority for what it actually decides. What is of essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it See *State of Orissa v. Sudhansu Sekhar Misra and Ors.* AIR 1968 S.C. 547 and *Amar Nath Om Prakash and Others Vs. State of Punjab and Others*, .

10. Adverting to the present case, I find that an incomplete copy of the policy was filed by the insured before the Tribunal. The insurer has filed a copy of the policy for consideration as additional evidence. It would be appropriate that this document should be considered by the Tribunal afresh. The insurer shall be permitted to file a copy of the policy before the Tribunal and the insured and the claimants shall be permitted to lead evidence as regards the liability of the insurer.

11. So far as the quantum of liability is concerned, the amount of Rs. 50,000/- fastened by the Tribunal on the insurer remains unaltered subject to final decision by the Tribunal on the question whether liability is unlimited or not. The quantum of compensation awarded is also affirmed, as I do not find any infirmity in the process of reasoning indicated by the Tribunal. To avoid unnecessary delay, I direct the parties to appear before the Tribunal on 26th of June 1991 when the Tribunal shall fix up a date for adjudication. The insurer shall file a copy of the policy on that date. No further notice shall be issued to the parties. The Tribunal shall accept the copy to be filed by the insurer and shall act on it for the purpose of adjudication,, giving opportunity to the Parties as afore directed.

The Miscellaneous appeal is disposed off. No costs.