
(1990) 03 OHC CK 0026

In the Orissa High Court

Case No : M.A. No's. 40 to 43 and 67 to 69 of 1985

United India Insurance Co. Ltd. and Another

APPELLANT

Vs

Sankranti Swain and Others

RESPONDENT

Date of Decision : 16-03-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Motor Vehicles Act, 1988 — Section 95, 96

Citation : (1991) ACJ 132

Hon'ble Judges : R.C. Patnaik, J

Bench : Single Bench

Advocate : R.C. Samantaray and A.K. Mohanty, for the Appellant; Pradip Mohanty, B.P. Ray, S.C. Routray, D.K. Mohapatra and Manoj Misra, for the Respondent

Final Decision : Dismissed

Judgement

R.C. Patnaik, J.—In a collision between a contract carriage passenger vehicle bearing registration No. WMH 4355 and a goods truck bearing registration No. ORS 6759 on the National Highway No. 5 at 3 p.m. on 18.5.1981 near Gangapada in between Khurda and Bhubaneswar, five occupants of the bus died and some others were injured. Four claim cases (Miscellaneous Case Nos. 144 to 147 of 1981) were filed by the legal representatives of the deceased passengers. The insurers of the vehicles and the owners contested the proceedings. On a consideration of the evidence, the Tribunal awarded in Misc. Case No. 144 of 1981 compensation of Rs. 65,000/- to the parents against their claim of Rs. 75,000/- for the death of their son; in Misc. Case No. 145 of 1981, a sum of Rs. 66,500/- was awarded against the claim of Rs. 1,20,000/- made by the parents for the death of a son and a daughter; in Misc. Case No. 146 of 1981, Rs. 85,000/- was awarded against Rs. 85,000/- claimed by the parents, widow and minor child and in Misc. Case No. 147 of 1981 a sum of Rs. 89,000/- was awarded against the claim of Rs. 1,30,000/- claimed by the widow, parents and minor child of the deceased. Drivers of both the vehicles were held to have been

responsible for the accident. The Tribunal hence directed that the owners and insurers of both the vehicles be jointly and severally liable and directed that each of the insurers should bear the liability of compensation in equal proportion. Being aggrieved by the decision of the Tribunal, the United India Insurance Co. Ltd. has filed Miscellaneous Appeal Nos. 40 to 43 of 1985 on the ground that the Tribunal was in error in holding that the driver of the truck was negligent and the quantum was excessive. The National Insurance Company Ltd., the insurer of the bus, has filed Misc. Appeal Nos. 67 to 69 of 1985 against the decision of the Tribunal in Misc. Case Nos. 144 to 146 of 1981. It had filed Misc. Appeal No. 66 of 1985 against the decision of the Tribunal in Misc. Case No. 147 of 1981; but the same was dismissed before admission for non-compliance of order pertaining to removal of defect. An application for restoration (M.J.C. No. 103 of 1985) was dismissed on 9.9.1985. The insurer nevertheless filed Misc. Appeal No. 89 of 1986 but the same was dismissed as not maintainable in view of the dismissal of Misc. Appeal No. 66 of 1985 earlier and the prayer for condonation of delay was held to be misconceived. The insurer, however, undaunted by the aforesaid course of event, preferred a cross-objection under Order 41, Rule 22 of the CPC in Misc. Appeal No. 41 of 1985 filed by the United India Insurance Co. Ltd. The ground of challenge in its Appeal Nos. 66 to 69 of 1985 and the cross-objection filed in Misc. Appeal No. 41 of 1985 is that the direction of the Tribunal apportioning the liability equally between the two insurers was contrary to Section 95 (2) (b) (ii) (4) of the Motor Vehicles Act, 1939, its maximum statutory liability being Rs. 5,000/- per passenger. It has, therefore, contended in its appeals and in the cross-objection that its liability in each of the Misc. Case Nos. 144, 146 and 147 of 1981 should have been fixed at Rs. 5,000/- and at Rs. 10,000/- in Misc. Case No. 145 of 1981 inasmuch as the claim was for the death of two persons, a son and a daughter of the claimants.

2. I have indicated earlier that the insurers of both the vehicles as well as the owners contested the proceedings. The owners had filed written statement and had engaged counsel and had participated. There is no allegation of any collusion or fraud. Hence, the grounds which were not available to the insurer to urge before the Tribunal cannot be taken as grounds in this appeal. Since none of the grounds raised by the United India Insurance Co. Ltd., the insurer of the truck, comes within the purview of Section 96 (2) of the Motor Vehicles Act, the appeals filed by it are not maintainable. This is the settled position of law, vide decision of the Full Bench of this court in *National Insurance Co. Vs. Magikhaia Das (After him) Mst. Laxmi Dibya and Others*,). The plea raised by the National Insurance Co. Ltd. is one covered by Section 96 (2). It has been submitted by Mr. Samantaray, the learned counsel for the insurer, that having regard to the statutory provisions, the insurer of the bus could not have been saddled with any amount in excess of Rs. 5,000/- per passenger who died in the accident. It is, however, submitted by Mr. D.K. Mohapatra and Mr. B.P. Ray, counsel for the owner and the claimants respectively, that the contention of the insurer is without substance having regard to the enhanced liability accepted by it under

the policy. They have drawn my attention to the endorsement slip 13 (A), wherein the following stipulation has been made:

In consideration of an additional premium of Rs. 300/- and notwithstanding anything to the contrary contained in Section II-I (c) but subject otherwise to the terms, exceptions, conditions and limitations of this policy the company will indemnify the insured against liability at law for compensation (including law costs of any claimant) for death of or bodily injury to any person other than a person excluded u/s II-I (b) being carried in or upon or entering or mounting or alighting from the motor vehicle but such indemnity is limited to the sum of Rs. 50,000/- in respect of any one person and subject to the aforesaid limit in respect of any one person to Rs. 50,000/- in respect of any number of claims in connection with the motor vehicle arising out of one cause.

Mr. Samantaray for the insurer contended that the figures were mistakes committed by the person who filled up the same.

3. The endorsement slip is a part of the policy. Hence is a term of condition of the policy which would govern the contractual relation between the two, the insurer and the insured. A facile statement that the person who filled up the form had no idea as to what he was writing, is difficult to accept. Since the document was produced before the Tribunal, the parties should be deemed to have been aware of the contents. That was the proper stage where, if at all, an enquiry to the facts alleged by Mr. Samantaray could be contemplated but not at the stage of hearing of the appeal. In view of the said entries where the limited liability in respect of each passenger upto Rs. 50,000/- has been accepted, the plea of the insurer of the bus that the Tribunal had saddled it with liability in excess of that prescribed by the statute has no force because it is always open to the insurer to accept extended or higher liability than that fixed by the statute, the latter being the minimum that an insurer must undertake to satisfy.

4. A similar view has also been taken by a learned Judge of this court in Misc. Appeal No. 243 of 1984; decided on August 7, 1989.

5. After hearing was concluded, applications under Order 41, Rule 27 read with Section 151 of the CPC were filed by the National Insurance Co. Ltd., the appellant in Misc. Appeal Nos. 67, 68 and 69 of 1985 and the cross-objector in Misc. Appeal No. 41 of 1985 for reception of a true copy of the policy of insurance and certified copy of Exh. A as additional evidence. No such application was filed in course of the hearing. It has been alleged therein that a duplicate copy of the policy was proved as Exh. A and there have been manipulations in the entries in the endorsement slip. Copy of the policy was proved and marked as an exhibit in presence of parties. Hence, there is no substance in the assertion that the policy was exhibited without notice to the advocate for the insurer. A certified copy of the policy and another document stated to be a true copy of the policy were passed on for consideration of the court without taking any step for tendering additional evidence and satisfying the court that there was justification

for reception of additional evidence. I refused to look to them unless the insurer satisfied that the provisions contained under Order 41, Rule 27, CPC were satisfied. Those documents are not even now appended to the applications. Had those documents even been filed, I would not have entertained the applications filed at such belated stage after closure of the hearing. The documents were in possession of the parties but those were not filed before the Tribunal, or before the hearing of the appeals in this court or even during the hearing.

6. In view of the findings on merit, it is unnecessary for me to decide the competence of the cross-objection filed by the National Insurance Co. Ltd. in Misc. Appeal No. 41 of 1985 because assuming that the same was maintainable and competent, there is no merit therein having regard to the conclusion that I have readied in regard to Misc. Appeal Nos. 67 to 69 of 1985. However, I must notice the contention raised by Mr. Mohapatra relying on Union of India v. Central Coal Fields Limited 45 CLT 219. In that case, five suits had been disposed of by a common judgment. One of the appeals was dismissed being barred by limitation. Dismissal of the appeal was construed as affirmation of the judgment of the trial court and the bar of res judicata was applied to the other four appeals. Mr. Ray has contended that by reason of the dismissal of Misc. Appeal No. 66 of 1985 as well as Misc. Appeal No. 89 of 1986, neither is the cross-objection maintainable nor is any of the appeals filed by National Insurance Co. Ltd. He has urged that the case of the insurer is much worse having regard to the dismissal of Misc. Appeal No. 66 of 1985 on the ground of maintainability. In view of my conclusion on merits, I accept the contentions raised by Mr. Mohapatra and Mr. Ray and hold that not only was the cross-objection but also the appeals filed by the insurer were barred by res judicata by reason of the dismissal of Misc. Appeal No. 66 of 1985 as well as Misc. Appeal No. 89 of 1986.

7. In the result, the appeals and the cross-objection are dismissed with costs. Hearing fee is assessed at Rs. 100/- in each of the appeals.