

(1993) 11 OHC CK 0009
In the Orissa High Court
Case No : M.A. No. 217 of 1989

United India Insurance Co. Ltd.

APPELLANT

Vs

Kanduri Nayak and Another

RESPONDENT

Date of Decision : 04-11-1993

Acts Referred:

Insurance Act, 1938 — Section 45
Motor Vehicles Act, 1988 — Section 173
Representation of the People Act, 1950 — Section 23

Citation : (1994) 1 ACC 380 : (1994) ACJ 1125

Hon'ble Judges : A. Pasayat, J

Bench : Single Bench

Advocate : D.M. Misra, for the Appellant; Pradip Mohanty, B.P. Ray, J.K. Panda, R.C. Rath, S.K. Panda and S. Acharya, for the Respondent

Final Decision : Allowed

Judgement

A. Pasayat, J.—In this appeal u/s 173 of the Motor Vehicles Act, 1988 (in short, "the Act"), United India Insurance Co. Ltd. (hereinafter referred to as "the insurer") calls in question legality of award made by the Second Motor Accidents Claims Tribunal, Southern Division, Berhampur (hereinafter referred to as "the Tribunal") holding that Kanduri Nayak (hereinafter referred to as "the claimant") is entitled to a compensation of Rs. 20,000/- in respect of an accident wherein the vehicle bearing registration No. OSG 1155 belonging to Atanu Kumar Behera (hereinafter referred to as "the owner") was involved. The stipulation of a higher rate of interest in case of default by non-payment is also challenged.

2. The fact situation as presented by the claimant is as follows:

On 27.4.1987 one Abhimanyu Nayak (hereinafter referred to as "the deceased") aged about 12 was going to Bhanjanagar to attend his school. He was proceeding on the left side of Berhampur-Bhanjanagar Road. Suddenly passenger bus bearing registration No. OSG 1155 belonging to the owner came from Berhampur side at a high speed, dashed against the deceased causing his instantaneous

death. The vehicle was being driven in rash and negligent manner. The deceased, a brilliant student, was studying in class VI. A compensation of Rs. 50,000/- was claimed. The owner filed a written statement admitting the accident, but denied the allegation that the vehicle was being driven in a rash and negligent manner. It was also stated that the vehicle was validly insured on the date of accident and in case any liability is fixed the same is to be indemnified by the insurer. The stand of the insurer was that it was not liable to pay any compensation.

3. Two witnesses were examined to buttress the claimant's plea. The Tribunal came to hold that the accident had occurred on account of rash and negligent driving. The insurer's stand regarding non-liability was based on the footing that at the point of time when the accident took place there was no insurance. A reference was made to the cover note No. 207635 which indicated that the same was issued on 27.4.1987 at 8 p.m. According to the insurer, the accident having occurred at 8.30 a.m. there was no valid insurance at the time of accident. This plea did not find acceptance by the Tribunal which held that the effect of commencement of insurance being 27.4.1987 the same is operative from the midnight of the previous day, i.e., 26.4.1987 and, therefore, the policy was operative on the date the accident took place.

4. In support of the appeal Mr. D.M. Misra has strenuously urged that u/s 64-VB of the Insurance Act, 1938, and Section 95 of the Motor Vehicles Act, 1939 (in short, "the old Act") the policy is operative from the time it is issued and did not cover risk of anything that happened prior to it, though it relates to the same date. Additionally it is submitted that there is non-disclosure of material facts. It was the bounden duty of the person who submitted proposal for insurance to disclose about the accident, if any. That having not been done, there was suppression of material facts and, therefore, the insurer is not liable to pay. The learned counsel for the claimant, on the other hand, contended that not only the certificate of insurance indicates the date, but also the cover note speaks of the date of commencement of the insurance. Mere mention about the time of issue is not very material. The certificate of insurance is marked as Exh. A while the cover note is marked as Exh. A-1 in this case. In both the documents the date of commencement of insurance is 27.4.1987, but in the cover note the time of issue is indicated to be 8 p.m. Strong reliance is placed on a decision of the Apex Court in *New India Assurance Co. Ltd. Vs. Ram Dayal and Others*, wherein it was observed that even if the accident took place prior to the time the insurance policy was taken, as the date commenced immediately after the midnight of the previous day ended, the policy covered the risk, notwithstanding the fact that the accident had occurred earlier.

5. The question as to whether the word "date" could also be understood as having reference to time, having due regard to the context in which it is used, assumes importance. The nature of the consequence which has relevance to the date and time is determinative factor. In this context, it is necessary to refer to the decision of the Apex Court in *Narendra Madivalapa Kheni Vs. Manikrao Patil*

and Others, . In that case the question was whether the inclusion of names of fifteen persons in the voters' list for election to the Legislative Council of the State of Karna-taka from local authorities constituencies to the State Legislative Council after 3 p.m. on the last date fixed for filing the nomination which was 17.4.1974 could be regarded as valid. In that case Section 23 of the Representation of the People Act, 1950, was referred to which prescribes that the inclusion of names in the electoral roll can be carried out till the last date for making nominations for an election in the concerned constituency. A question was raised, what then was the last date? and when did the last date cease to be? The court observed that the purpose of the provisions was to illumine its sense and a sense of rationality has to be used. It was observed that the expression "last date for making nominations" must mean that the last hour of the last date during which presentation of nomination paper is permitted u/s 23 of the Representation of the People Act, 1950. An insurance policy is meant to cover liability incurred by the owner of a vehicle or property as a result of accident taking place in future and not in respect of an accident which had already taken place, unless materials are placed to show that the insurer also undertook to indemnify liability already incurred. In this context, Section 64-VB of the Insurance Act, 1938 assumes importance. The provisions of the Act should not be interpreted in a manner which would result in encouraging practice of fraud on the insurance company by unscrupulous owners of vehicles by suppression or non-disclosure of a material fact or by a representation of fact which was false in some material particular. Section 96(2)(c) stipulates that the insurer has the right to defend the action on the ground that the policy is void as it was obtained by non-disclosure of a material fact or by a representation of fact which was false in some material particular.

It cannot be said in all cases that even knowing that there was accident the insurer agreed to indemnify the owner for the accident which might have taken place on that date prior to taking of the insurance policy. Section 64-VB of the Insurance Act, 1938, has to be construed in that sense. No insurance policy issued by an insurance company on any day expressly specifying the date and time of issue on the cover note or the policy covers the risk in respect of the accident caused by the vehicle earlier on the same day, in respect of which such policy is issued if the premium was paid and the insurance policy was taken/ issued after the accident.

The insurance policy is issued in continuation of the cover note which is issued after receipt of premium. The cover note and the policy are to be read together and not in isolation. Otherwise, it becomes incongruous. It cannot be said that cover note operates from a point of time subsequent to the time of receipt of premium while policy operates by preponement of time to midnight of previous day. The explanation to Section 64-VB(2) of the Insurance Act has been pressed into service in many cases to show that insurer may assume liability from the date on which cheque was posted. But that does not take away the right of the insurer to make enquiry whether the vehicle was involved in any accident before

issuing the policy. It can enquire about both time and date of accident. It can by no stretch of imagination be said that insurer is bound to issue policy and/or indemnify notwithstanding knowledge about accident at a time antecedent to time of posting of the cheque. Since policy is the result of a contract, the intention of the parties is the determinative factor.

6. Additionally, I find that all questions in a proposal form are material. Any statement which is to the knowledge of the proposer not correct would attract the mischief of Section 45 since insurance is a contract of utmost good faith (*uberrimae fidei*). However, all the three requirements for application of second part of Section 45 of the Insurance Act must be satisfied. The three conditions are as follows:

(a) the statement must be on a material matter or must suppress facts which it was required to disclose;

(b) the suppression must be fraudulently made by the policyholder; and

(c) the policyholder must have known at the time of making the statement that it was false or that it suppressed facts which it was obligated to disclose. [See *Mithoolal Nayak Vs. Life Insurance Corporation of India*, .

Sub-section (5) of Section 96 of the old Act lays down that the expressions "material fact" and "material particular" mean, respectively, a fact or particular of such a nature as to influence the judgment of a prudent insurer in determining whether it will take the risk and, if so, at what premium and on what conditions.

7. So far as the decision of the Apex Court in *New India Assurance Co. Ltd. Vs. Ram Dayal and Others*, is concerned, no time was specified on the cover note or in the insurance policy in that case. Therefore, the observations of the Apex Court are to be limited to the facts of that case and cannot have universal application.

8. After clearing the deck so far as legal position is concerned, it is necessary to grapple with the fact situation of the case at hand. It is unfortunate that though the time of accident was clearly mentioned by the claimant, in the written statement filed by the insurer before the Tribunal there was no averment that material fact and/or material particulars were suppressed. Even there was no assertion that the cover note having been issued after the accident, it had no liability to indemnify. The explanation has been offered for this omission. It is urged by the learned counsel for the insurer that the plea relates to a question of law and the same can be agitated for the first time in the appellate court. There can be no two opinions about the acceptability of a plea relating to law, even though not pleaded and urged before lower Forum, at the appellate Forum. But the question whether the insurer issued the policy making it effective from 27.4.1987 being aware of the accident is a question of fact. It is not the case of the insurer that at the time the written statement was filed, the time of issue indicated in the cover note was not known to it. Therefore, the absence of any

specific pleading on the aspect of time and/or about alleged practice of fraud by suppression of material fact or material particulars cannot be considered at this stage, in the absence of any explanation for the omission in the written statement. Additionally, the proposal form was neither produced before the Tribunal nor before me to show what the proposer had indicated in the form. Supposing the fact of accident is indicated in the proposal form and the insurer with eyes open issued the cover note and policy making it effective from any particular date without mention of time the position becomes different.

9. In order to curb the practice of unscrupulous owners taking insurance policy after the accident occurs, the insurer should take some precautionary measures. It is desirable that the insurance company should make production and inspection of the vehicle compulsory before issuing a fresh policy or a renewal policy. If the renewal is sought for after the previous policy had expired, cover note or policy should be issued after making sure that the vehicle was not involved in any accident on that day. It should specifically incorporate the time of commencement of the policy in all the connected documents, such as, receipt acknowledging receipt of premium, cover note and the insurance policy. That could be done in accordance with the requirements of Section 64-VB of the Insurance Act. It is the duty of the insurance company in every case where the owner of the vehicle seeks an insurance policy in respect of any motor vehicle for the first time with the insurance company concerned or for renewal of an earlier policy after the expiry of the earlier policy, to require the owner of the vehicle to produce the vehicle to ensure that no accident had taken place earlier to the date on which, or the time at which the person concerned is seeking an insurance policy. It is only by this method the insurance company can safeguard itself against unscrupulous persons who want indemnification after the accident had taken place by suppressing the fact of accident.

10. Since u/s 96(2), an insurer is absolved of the liability if it proves that a policy is void on account of non-disclosure of material fact and/or false representation of fact in some material particular, the onus is initially heavy on the insurer to prove it. Where such a plea is not taken in the written statement without any acceptable reason, adverse inference is available to be drawn.

11. A cross-appeal has been filed seeking enhancement of the award. It becomes extremely difficult to assess compensation when the deceased is a person who is non-earning. No hard and fast rule can be laid down about mode of assessment. But one relevant factor is the age of the claimants. An illuminating judgment of the Andhra Pradesh High Court in *Andhra Pradesh State Road Trans. Corporation v. G. Ramanaiah* 1988 ACJ 223 has elaborately dealt with question of quantification of compensation in the case of death of non-earning persons. As observed by Lord Halsbury, LC in *The Mediana* (1900) AC 113 the whole region of inquiry into damages is one of extreme difficulty; but nevertheless the law recognised that as a topic upon which damages can be given. Award of damages for death always raises complex questions.

12. In Andhra Pradesh State Road Transport Corporation v. G. Ramanaiah 1988 ACJ 223 the multiplier was indicated to be 12.79 in case parents' age is 40 years. Taking annual contribution to be Rs. 1,200/-the loss of dependency will be as follows:

Contribution x multiplier = Rs. 1,200/- x 12.79 = Rs. 15,348/- Add : Loss due to pain, suffering and loss of amenities and loss of expectation of life Rs. 7,500/- Rs. 22,848/- or Rs. 23,000/- (in round figures) The addition due to loss has been made because the contribution has been made in case of a non-earning person. The cross-appeal is allowed to the extent of Rs. 3,000. The amount awarded has to be indemnified by the insurer.

13. So far as the insurer's right to proceed against the owner for fraud, if any, is concerned, I do not express any opinion. It is open to the insurer to get the aspect adjudicated in an appropriate Forum. My dismissal of insurer's appeal shall not be construed to be expression of any opinion about that aspect.

14. So far as stipulation of higher rate of interest in case of default of payment within stipulated time is concerned, the same is unsustainable. [See Oriental Fire and General Ins. Co. Ltd. Vs. Buli Dei and Others,]. In my considered opinion, 9 per cent interest per annum from date of application, i.e., 15.5.1987 would meet the ends of justice.

The appeal and the cross-appeal are allowed to the extent indicated above.