
(1992) 01 OHC CK 0014
In the Orissa High Court
Case No : Misc Appeal No. 59 of 1991

United India Insurance Co. Ltd.

APPELLANT

Vs

Ullash Chandra Jena and Another

RESPONDENT

Date of Decision : 07-01-1992

Acts Referred:

Motor Vehicles Act, 1939 — Section 100B, 95

Citation : (1993) 1 ACC 473 : (1992) ACJ 1041 : AIR 1992 Ori 193

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : M. Sinha and S. Sen, for the Appellant; R.N. Mohanty, B.N. Rath, A.K. Pati and A. Dash, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—This is an appeal by the insurer u/s 110-D of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act) read with Section 173 of Motor Vehicles Act, 1988.

2. On 10-11-1986 in the morning at about 6.45 A.M. while claimant was moving in his cycle from Khapuria (Government Press side) towards the bus-stand side at Badmabari, ORP 82 a truck came from behind and dashed against him as a result of which he sustained injuries. On 10-2-87, he filed application u/ Section 110-A of the Act claiming compensation of Rs. 1,50,000/-claim petition was amended on 2-7-1988 reducing it to Rs. 1,45,000/- on which day the claim was agreed to be settled at Rs. 1,45,000/- on compromise in the ensuing Lok Adalat as a reconciliation attempt. Three days after on 6-7-88 insurer filed an application to avoid the agreement. Prayer was allowed and case was posted for hearing. During continuance of hearing, claimant filed an application on 10-8-90 for amendment of claim amount enhancing the same to two lakhs Rupees. The same was allowed.

3. Owner remained ex parte originally. Insurer filed a written statement denying

its liability and called upon the claimant to prove that there was accident in which he sustained injuries and there was valid insurance of the vehicle. After amendment of claim petition, it filed additional written statement on 20-8-90 stating that accident said to have occurred at 6.45 A.M. was much before the proposal was given for insurance at 9 P.M. in which wrongly it was stated by proposer that vehicle was in perfect condition. Proposer gave an undertaking that facts are true, thus, deliberately suppressed the fact of accident. On that basis covernote was issued.

4. Tribunal has held that there was negligent driving of the vehicle on account of which claimant sustained injuries and he is entitled to Rs. 1,45,000/- as compensation which the insurer is liable to pay. This is grievance of the insurer.

5. Owner not having appeared to contest, insurer has the right to challenge fact of accident, negligence quantum as well as its liability. Mr. M. Sinha, learned counsel for the insurer-appellant assailed the order on the following grounds:--

(i) On account of negligence of the claimant accident occurred which could have been avoided if the claimant would have been careful.

(ii) There is no clear evidence of negligent driving of the vehicle by the driver.

(iii) Insurance is not valid as the proposal was made at about 9 P.M. and the covernote was issued at that time whereas about 15 hours before, the accident had taken place which fact was not brought to the notice of the insurer.

(iv) Determination of compensation is not just.

6. On the material available, Tribunal has come to the conclusion that accident took place at 6.45 A.M. Mr. Sinha is not able to place his hand on any material which has not been considered by Tribunal to disturb this finding. Thus, it can safely be concluded that the truck caused the accident as a result of which claimant sustained injuries. Accident was on the road between Khapuria (Government Press) and Badambadi near Palaman-dap which road is popularly known as Link Bond in Cuttack Town. It is true that P.W. 1 claimed to be coming behind the claimant in the same direction and he had gone to the side of the road on hearing propelling sound of the vehicle. He does not say that claimant had moved to the side. There is no evidence that claimant was hard of hearing. However, from the evidence, it is clear that enough space was left for the vehicle to pass smoothly avoiding dash against the claimant. Accordingly, merely because claimant was moving on the road having 10 ft. to his left on the early morning hour, it cannot be said that driver of the vehicle is not required to be careful. Driver of a heavy vehicle like the truck is required to be very careful while moving on the road even if it is vacant at the time of his driving the vehicle. It cannot be said that claimant has contributing negligence as suggested by Mr. Sinha I am satisfied, on the material available, that claimant is not responsible for the accident and driver of the vehicle on account of his negligent driving caused and accident. Thus, owner of the vehicle has vicarious liability.

7. Vicarious liability of owner is undertaken to be discharged by insurer as per terms of the policy. It is not disputed that by issue of a valid covernote insurer covers the risk. Issue of covernote by the insurer is not disputed. Objection of Mr. Sinha is that cover note was issued 15 hours after the accident when the fact of accident was not disclosed by the owner at the time of proposal. According to Mr. Sinha risk of the vehicle was not covered by the insurer retrospectively to relate to the time of accident. Besides, cover note is void on account of non-disclosure of material facts.

8. From the copy of the cover note produced, it is seen that the same was granted at 9 P.M. by the Development Officer of the insurer on the basis of the proposal (Ext. A). There is no reason to disbelieve the time when the covernote was issued, Short question is, whether, proposal after the accident and issue of covernote on the basis would make the insurer liable in respect of accident which was earlier to the proposal. This might have caused some difficulty in case in the decision reported in Saheli, A Women's Resources center, Through Ms Nalini Bhanot and Others Vs. Commissioner of Police Delhi Police Headquarters and Others, , Supreme Court would not have held otherwise, In the said decision it was observed :--

"When a policy is taken on a particular date, its effectiveness is from the commencement of the date".

Therefore, cover note, though, issued at 9 P.M. on 10-11-1986 commenced from the mid night when 10-11-1986 started.

9. Mr. Sinha submitted that in view of Section 64 VB of the Insurance Act, 1938 insurer is prohibited to assume risk unless premium is received in advance. This section reads as follows:

"64. VB-- No risk to be assumed unless premium is received in advance:--

(1) No insurer shall assume any risk in India in respect of any insurance business on which premium is not ordinarily payable outside India unless and until the premium payable is received by him or is guaranteed to be paid by such person in such manner and within such time as may be prescribed or unless and until deposit of such amount as may be prescribed is made in advance in the prescribed manner.

(2) For the purposes of this section, in the case of risks for which premium can be ascertained in advance, the risk may be assumed not earlier than the date on which the premium has been paid in cash or by cheque to the insurer.

Explanation-- Where the premium is tendered by postal money order or cheque sent by post, the risk may be assumed on the date on which the money order is hooked or the cheque is posted, as the case may be.

(3) Any refund of premium which may become due to an insured on account of the cancellation of a policy or alternation in its terms and conditions or otherwise

shall be paid by the insurer directly to the insured by a crossed or order cheque or by postal money order and a proper receipt shall be obtained by the insurer from the insured and such refund shall in no case be credited to the account of the agent.

(4) Where an insurance agent collects a premium on a policy of insurance on behalf of an insurer, he shall deposit with, or despatch by post to, the insurer, the premium so collected in full without deduction of his commission within twenty-four hours of the collection excluding bank and postal holidays.

(5) The Central Government may, by rules, relax the requirement of Sub-section (1) in respect of particular categories of insurance policies."

According to Mr. Sinha premium having been received at 9 P.M. risk cannot be covered for a period before that. This submission of Mr. Sinha has no force. Sub-section (2) is the direct answer to Mr. Sinha's submission, Premium in this case can be ascertained from the Tarrif rate in advance, Risk, therefore, can be assumed on the day premium is paid. "Day" commences from midnight as has been held by Supreme Court. Therefore, the time of receipt of premium is not material. The date of such receipt gains importance, Decision of Karnatak High Court reported in Smt. Asma Begum and others Vs. Nisar Ahmed and others, is of no avail to Mr. Sinha. On the facts of this case by issue of cover note risk for accident on any part of the day earlier to payment of premium is covered. When such cases arise cover note should clearly indicate that it could cover risk from the next day. In that case question might be different. I find in this case what the proposal has not been complete in all respects. It is also stated that proposal has not been signed by the owner but by his brother. Anxiety to receive such proposals bring many suspicions. These are matters for the insurance company to take note for administrative purpose and for recovering of the amount paid from the owner in respect of which I express no opinion.

10. Coming to question of quantum, Mr. Mohanti learned counsel for the claimant submitted that the same is settled and there is no scope for backing out from the same. I may indicate that agreement at conciliation is on different considerations. Claimant has also not accepted the same and amended the claim by enhancing the compensation claimed to two lakh rupees. Insurer has also not been able to contest the quantum. However, no case compensation for the nature of injury of the claimant would be less than Rs. 25,000/-. Accordingly, I set aside the award in respect of quantum only directing the Tribunal to make further enquiry and determine the just compensation after giving both parties opportunity to adduce materials in support of determination of such compensation. Claimant shall be entitled to the amount of Rs. 25,000/- deposited in this Court which shall be adjusted to the compensation that would be determined by Tribunal.

11. Claimant would be harassed to face a prolonged litigation because of the order of the remand specially when insurer has backed out from the agreement,

In such circumstances, T direct that insurer shall pay a cost of Rs. 5,000/- to the Claimant before the Tribunal. On deposit of the amount by the insurer the enquiry shall proceed. Insurer shall deposit the amount within two months from today.

12. In the result, the appeal is allowed. Award is set aside. Tribunal is directed to make fresh enquiry for determination of just compensation after deposit of Rs. 5,000/- by the insurer within two months from today. Parties are directed to appear before the Tribunal on 9th March, 1992 on which day further proceeding shall continue to be disposed of by end of November, 1992. There shall be no order as to costs.