

GAHC010238492017



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./352/2017

NEW INDIA ASSURANCE CO. LTD
HAVING ITS REGISTERED OFFICE AND HEAD OFFICE AT 87 M.G. ROAD
FORT, MUMBAI AND ITS REGIONAL OFFICE AT G.S. ROAD,
BHANGAGARH, GUWAHATI.

VERSUS

MRS GURIA SAHANI @ BHUMIKA SINGH and 5 ORS
W/O LATE PROMUD KR. SINGH

2:MRS. HEM PRAVA SINGH
W/O LATE RAM AJUDHYA SINGH

BOTH R/O LACHIT NAGAR
P.O. HAIBORGAON
NAGAON
P.S. SADAR
DISTRICT NAGAON
ASSAM. PIN-782002 (CLAIMANTS)

3:SRI MALAY KUMAR DEB
S/O LATE MOTILAL DEB

C/O SRI BIRESWAR DAS BARKAPARA
R/O BASISTHA CHARIALI
H/No. 3
GUWAHATI - 781029
DISTRICT KAMRUP(M)
ASSAM (OWNER OF VEHICLE No. AS01T-6214 (INDICA DLS))

4:UNITED INDIA INSURANCE CO. LTD.
NAGAON BRANCH (INSURER OF VEHICLE No. AS01T-6214 (INDICA DLS))

5:MD. ABDUL KADIR
S/O MD. HAZRAT ALI
R/O VILL- GUNABARI
P.O. RUPAHIHAT
P.S. RUPAHIHAT
DISTRICT- NAGAON
ASSAM
PIN-782125.
(DRIVER OF VEHICLE No. AS01T-6214 (INDICA DLS))

7:SRI BABUL DAS
S/O LATE SANSAI DAS

R/O VILLAGE AMOLAPATTY
P.O. NAGAON
P.S. SADAR
DISTRICT NAGAON
ASSAM (DRIVER OF VEHICLE No. AS02L-3625 (MOTOR CYCLE))

Advocates for the appellants : Mr. R. Goswami

Advocates for the respondents : Mr. J. Kalita, for R- 1 & 2
Ms. M. Choudhury, R- 4

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 11.05.2023
Date of Judgment & Order : 26.06.2023

JUDGMENT & ORDER (CAV)

Heard Mr. R. Goswami, learned counsel for the appellant. Also heard Mr. J. Kalita, learned counsel for the respondent Nos. 1 & 2 and Ms. M. Choudhury, learned counsel for the respondent No. 4.

2. This is an application under Section 173 of the Motor Vehicle Act, 1988, against the judgment and award dated 21.03.2017, passed by the learned Member, MACT, Nagaon, in MAC Case No. 499/2014, under Section 166 of the Motor Vehicles Act, 1988.

3. The brief facts of the case is that the appellant/New India Assurance Company Ltd., a Government. of India Undertaking with its Registered & Head Office at Middleton Street, Kolkata, and its Regional Office at G.S. Road, Bhangagarh, Guwahati, was impleaded as Opposite Party No. 5 in MAC Case No. 499/2014 by the respondent Nos. 1 & 2/claimants claiming compensation for the death of the husband of the respondent No. 1 in a motor vehicle accident on 31.03.2014, at around 8.20 P.M., at Pachim Senchowa Agriculture Tiniali under Nagaon Police Station in the Nagaon District of Assam. The husband of the respondent No. 1/claimant died, as a result of motor vehicle accident on 31.03.2014, while the deceased was proceeding from Raha towards his house by riding his motorcycle, bearing Registration No. AS-02/L-3625, as a pillion rider. The accident occurred when he reached near Pachim Senchowa Agriculture Tiniali when suddenly a vehicle, being Registration No. AS-01/T-6214 (Indica DLS), which was coming from Nagaon side, knocked at front side of the motorcycle. As a result of the said accident, the husband of the respondent sustained grievous injuries on his person and finally succumbed to his injuries.

4. The learned Member, MACT, Nagaon, however, disregarded the materials placed before him and was pleased to pass the judgment and award on 21.03.2017 for total amount of Rs. 9,81,694/- by directing the present appellant to pay 50% of the award amount.

5. Being highly aggrieved and dissatisfied with the impugned judgment and award, dated 21.03.2017, passed by the learned Member, MACT, Nagaon, in MAC Case No. 499/2014, the appellant has preferred the present appeal on the following grounds, amongst others:

- (i) That the impugned judgment and award dated 21.03.2017, passed in MAC Case No. 499/2014 is bad in law and facts and is liable to be set aside and quashed.
- (ii) That the learned Member, MACT, Nagaon, ought to have rejected the claim petition filed by the respondent No. 1 as not maintainable insofar as the appellant is concerned.
- (iii) That the judgment and award dated 21.03.2017, passed in MAC Case No. 499/2014, is bad in law inasmuch as the same is against the settled position of law that the insured/owner of the vehicle is not a third party insofar as the vehicle is concerned. The deceased being the owner of the vehicle, insured by the appellant, was not a third party and therefore, the appellant ought not to have been held liable for compensation by the learned Member, MACT, Nagaon. The learned Member, MACT, Nagaon, failed to appreciate the settled position of law that the owner of the vehicle is not a third party within the meaning of the provision of the Motor Vehicles Act, 1988, and as such, the owner of the vehicle is not entitled to claim any benefit or compensation as a third party before the learned Member,

MACT, Nagaon.

- (iv) That the findings of the learned Member, MACT, Nagaon, that the owner of the vehicle is entitled to compensation under a policy of insurance as a third party is totally perverse and is against the intention of the statute and various time-honoured interpretations of definition of third party. As per Section 147 (b) of the M.V. Act, the policy of insurance is required to be indemnify the insured against any liability incurred by him against bodily injury of any third party. This provision of Act, therefore, clearly spells out that the insured/owner of the vehicle cannot be a beneficiary under this provision of Act.

Accordingly, the judgment and award passed by the learned Member, MACT, Nagaon, is bad in law and, therefore, the same is liable to be quashed and set aside in respect of 50% liability of the present appellant.

6. The learned counsel for the appellant, Mr. R. Goswami, has submitted that the appellant, as the insurer of the motorcycle, which was ridden by the deceased at the time of accident, is not liable to pay 50% of the awarded amount as directed by the learned Member, MACT, Nagaon. As per Section 147 (b) of the M.V. Act, 1988, as amended, a policy of the insurance is required to be indemnify the insured against any liability incurred by him against bodily injured or any third party. But, in the present case, the deceased, who was driving the vehicle, was the owner of the vehicle and is not a third party so far

the vehicle is concerned and the deceased being the owner of the vehicle, insured by the appellant, was not a third party and therefore, the appellant is not at all liable to pay 50% of the awarded amount as directed by the learned Member, MACT, Nagaon. More so, there is no evidence recorded by the learned Member, MACT, Nagaon, that there was contributory negligence on the part of the motorcycle, though the learned Member, MACT, Nagaon, arrived at a decision that there is a contributory negligence and hence, the Insurance Company of the motorcycle is equally liable to pay the 50% of the compensation.

7. The learned counsel for the appellant further relied on the following decisions in support of his submissions:

- (i) **Dhanraj Vs. New India Assurance Co. Ltd. & Anr.**, reported in **(2004) 8 SCC 553**.
- (ii) **Oriental Insurance Co. Ltd. Vs. Jhuma Saha & Ors.**, reported in **(2007) 9 SCC 263**.
- (iii) **Oriental Insurance Co. Ltd. Vs. Rajni Devi & Ors.**, reported in **(2008) 5 SCC 736**.
- (iv) **New India Assurance Company Limited Vs. Prabha Devi & Ors.**, reported in **(2013) 14 SCC 719**.
- (v) **National Insurance Co. Ltd. Vs. Nirada Devi & Anr.**, reported in **2021 (5) GLT 599**.

8. In all these above cited decisions, it has been held by the Hon'ble Apex

Court that if the additional premium was not paid in respect of the entire risk of death or bodily injury of the owner of the vehicle - Section 147(b) of the Act which covers a risk of a third party only would be attracted in the present case – The question of the insurer being liable to indemnify insured does not arise.

9. In the case of **Dhanraj (supra)**, the Hon'ble Supreme Court has held in paragraph Nos. 8 & 9 as under:

"8. Thus, an insurance policy covers the liability incurred by the insured in respect of death of or bodily injury to any person (including an owner of the goods or his authorized representative) carried in the vehicle or damage to any property of a third party caused by or arising out the use of the vehicle. Section 147 does not require an insurance company to assume risk for death or bodily injury to the owner of the vehicle.

9. In the case of Oriental Insurance Co. Ltd. v. Sunita Rathi it has been held that the liability of an insurance company is only for the purpose of indemnifying the insured against liability incurred towards a third person or in respect of damages to property. Thus, where the insured i.e. an owner of the vehicle has no liability to a third party the insurance company has no liability also."

10. Further, in the case of **Oriental Insurance Company Ltd. Vs. Utpalesh Chakraborty**, reported in **(2013) 2 GLR 145**, this Court has held that "Comprehensive policy - accident occurred due to negligence of the owner of the vehicle - Owner drove the vehicle causing the accident - Insurance company not liable to make payment of the compensation - Even comprehensive policy does not arrest the insurer to shoulder the liability of payment of the damages that the owner of the vehicle suffered in the accident."

11. For ready reference, paragraph No. 14 of the aforesaid judgment reads as

under:

"14. This view is taken in view of the decision as rendered in National Insurance Company Ltd. V. Jugal Kishore, 1988 ACJ 270 (SC), where it has been categorically laid down by the Apex Court that a comprehensive policy means it covers that third party risk and it cannot cover unlimited or higher than the statutory liability fixed under sub-section (2) of Section 95 of the Motor Vehicles Act. There has been no accommodation how in section 147 (corresponding to old section 95 of the Motor Vehicles Act) for coger of risk of the owner who had driver the vehicle causing the accident. The risk of the owner can be made covered only by a special arrangement with the insurer paying the premium as per the terms and even in that case also non-payment of the damage would not make the claim filed under sections 166 and 163A of the Motor Vehicles Act sustainable in law. The remedy in that event has to be availed through the forum as set up under the consumers Protection Act."

12. Accordingly, the learned counsel for the appellant has submitted that considering the view of the Hon'ble Apex Court in the case laws referred to hereinabove, it can be held that the present appellant, Insurance Company of the motorcycle, which was riding by the husband of the respondent No. 1, is not liable to indemnify the claim of the claimant. Thus, the present appellant is not at all liable to pay the compensation @ 50% of the total awarded amount as per the judgment passed by the learned Member, MACT, Nagaon.

13. During the course of argument, the learned counsel for the respondent Nos. 1 & 2/claimants, Mr. J. Kalita, submitted that there is no contributory negligence on the part of the motorcycle and hence, the other Insurance Company, i.e. the respondent No. 4- United Indian Insurance Co. Ltd., is liable to pay the entire awarded amount. He further submitted that from the discussion made by the learned Member, MACT, Nagaon, it reveals that the other vehicle, i.e. the Tata Indica, is the offending vehicle and the accident took

place only due to the rash and negligent driving of the other vehicle and there is no contributory negligence on the part of the motorcycle and hence, the respondent No. 4, i.e. the United India Insurance Co. Ltd., is liable to pay the entire compensation amount as awarded by the learned Member, MACT, Nagaon.

14. It is further submitted by the learned counsel for the claimants/respondents that the respondent/claimants cannot be debarred from challenging the award only for the reason that they have not filed any separate appeal independently in regards to the compensation awarded by the learned Member, MACT. In this context, the learned counsel for the respondents/claimants also relied on a decision of Hon'ble Supreme Court in **Ranjana Prakash & Ors. Vs. Divisional Manager & Anr**, reported in **(2011) 14 SCC 639**, wherein, it has been held that "Appeal by owner/insurer – Defending defective award of Tribunal on other grounds in absence of cross-appeal or cross-objections by claimants – Permissibility – High Court ignoring error in award of Tribunal pointed out by claimants but only taking note of error pointed out by insurer and reducing compensation by 30% - Held, in appeal filed by owner/insurer, if High Court proposes to reduce compensation awarded by Tribunal, claimants can certainly defend quantum of compensation awarded by Tribunal, by pointing out other errors or omissions in award, which would show that there was no need to reduce amount awarded as compensation – Fact that claimants did not independently challenge award of Tribunal will not therefore come in the way of their defending compensation awarded on other grounds." Paragraph Nos. 7 & 8 of the said judgment reads as under:

"7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure

which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seeks compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation."

15. In this context, the learned counsel, Ms. M. Choudhury, appearing on behalf of the respondent No. 4/United Indian Insurance Co. Ltd., has submitted that without challenging the judgment, how the respondents/claimants can challenge the order or can claim 100% compensation from the other respondent. It is the appellant, who filed the present appeal against the respondents, i.e. the claimants as well as the respondent No. 4/United India Insurance Co. Ltd., and without challenging the judgment and award passed by the learned Member, MACT, Nagaon, the respondents/claimants cannot raise this issue at this appellate stage and cannot claim any relief against the other respondent. Being one of the respondent, the respondent/claimant cannot claim any relief against the other respondent and he had the option to file appeal

against the judgment and order of the learned Member, MACT, Nagaon, if the respondents/claimants are aggrieved in any manner in the judgment and order passed by the learned Member, MACT, Nagaon.

16. In this context, the learned counsel for the respondent No. 4/United India Insurance Co. Ltd. has relied on a decision of the Hon'ble Apex Court reported in **1967 0 Supreme(SC) 410 (State of Assam & Anr. Vs. Raghava Rajgopalachari)** and further emphasized on paragraph No. 13 of the said judgment, which reads as under:

“13. the learned counsel for the State sought to argue before us The Writ was brought to challenge this order. No such petition, even if it be competent, was filed by the State itself. The respondent to a Writ Petition cannot be allowed to attack its own order as a respondent.”

17. Further it is submitted by the learned counsel for the respondent No. 4/United India Insurance Co. Ltd. that the learned Member, MACT, Nagaon, in paragraph No. 9 of the judgment, has held that both the vehicles were involved in the alleged accident and there was a contributory negligence of both the vehicles and accordingly, the learned Member, MACT, Nagaon, and, accordingly, passed the order directing both the Insurance Company of the vehicles to pay 50% of the awarded compensation. Hence, the respondent No. 4/United India Insurance Co. Ltd. is not at all liable to pay the 100% awarded compensation amount as claimed by the respondent Nos. 1 & 2.

18. After hearing the learned counsels appearing on behalf of the parties, I have perused the case record and the judgment passed by the learned Member, MACT, Nagaon, in MAC Case No. 499/2014.

19. From the discussions made in the judgment passed by the learned Member, MACT, Nagaon, it is seen that the issue No. 2 was framed, which reads as follows:

“Whether the accident occurred due to rash and negligent driving of the drivers of vehicle nos. AS-02L-3625 and AS-01/T-6214 (Indica DLS)?”

20. The learned Member, MACT, Nagaon, while discussing this issue, arrived at a conclusion that both the vehicles were involved in the accident and both are responsible for the accident and thus, it was held that there was contributory negligence on the part of both the vehicles. It is also seen that the learned counsel for the claimants had submitted that there was no contributory negligence on the part of the deceased and as such, the whole responsibility should be fixed upon the driver of the offending vehicle (Indica DLS). However, after discussing the issue, the learned Member, MACT, arrived at a conclusion that both the vehicles were equally responsible for the said accident and accordingly, passed the order directing both the Insurance Company to pay 50% each of the compensation award amounting to Rs. 4,90,847/-. But the claimants/ respondents did not challenged the order passed by the learned Member, MACT, Nagaon, wherein, it was held that both the vehicles are involved in the alleged accident and there was contributory negligence on the part of both the vehicles for the alleged accident. There cannot be any automatic inference of contributory negligence by the deceased, only because the accident took place because of head on collision, in absence of any evidence to that effect [**Khenyei Vs. New India Assurance Company Ltd. & Ors., (2015) 9**

SCC 273].

21. From the discussion made by the learned Member, MACT, Nagaon, it is seen that though at the initial stage of judgment there was no evidence or statement that the motorcycle is equally involved in the alleged accident, but while discussing the issue No. 2, there is a clear observation from the learned Member, MACT, Nagaon, that both the vehicles are involved in the alleged accident, whereas, it is seen that though it is observed by the learned Member, MACT, Nagaon, that the Nagaon P.S. Case No. 498/2014, under Sections 279/338/304 (A)/427 of the Indian Penal Code, was registered against both the vehicles, bearing Registration Nos. AS-02/L-3625 and AS-01/T-6214, and from the Charge-Sheet which is available in the LCR, it is seen that the case was registered and Charge-Sheet was filed only against the driver of the other vehicle, i.e. Indica DLS, and not against the driver or owner of the motorcycle. More so, there is no evidence to that effect that there was any contributory negligence on the part of the motorcycle though make responsible for the alleged accident.

22. There is no evidence on record that there was contributory negligence on the part of the motorcycle to take any inference that both the vehicles are responsible for the accident. From the judgment and award passed by the learned Member, MACT, Nagaon, it reveals that there is no reasonable explanation as to why the motorcycle was also made liable for contributory negligence. There should be definite evidence to established for attributing negligence, definite proof of contributory negligence is required [**Oriental Insurance Co. Vs. Sahaban Begum, (2013) 1 GLR 133**].

23. It is a fact that the respondents/claimants did not preferred any appeal against the said observation made by the learned Member, MACT, Nagaon, regarding the contributory negligence. But, in the same time, it cannot be denied that being the layman, the claimants may not be aware about the provision of law or there may not be any proper guidance from the engaged counsel to prefer any appeal against the said judgment and order.

24. In view of the discussions made above, I find that in absence of any proof of contributory negligence, the Insurance Company of the motorcycle cannot be made responsible to pay 50% of the awarded amount as per judgment and order passed by the learned Member, MACT, Nagaon, and accordingly, the award passed by the learned Member, MACT, Nagaon, in MAC Case No. 499/2014, under Section 166 of the Motor Vehicles Act, 1988, is hereby modified to the extend that the entire awarded amount of Rs. 9,81,694/- shall be satisfied by the respondent No. 4- United India Insurance Co. Ltd, the insurer of the vehicle Registration No. AS-01/T-6214 (Indica DLS). Consequently, the statutory deposited amount of Rs. 2,45,423/- (Rupees Two Lakh Forty Five Thousand Four Hundred Twenty Three) only, made by the appellant before the Registry, shall be returned to the appellant forthwith.

25. To the extent of above observation, the appeal stands allowed and disposed of accordingly.

JUDGE

Comparing Assistant