

GAHC020001712021



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

Case No. : MACApp./7/2021

THE NATIONAL INSURANCE CO. LTD.
REPRESENTED BY THE SENIOR DIVISIONAL MANAGER, DIMAPUR
DIVISIONAL OFFICE,
DHOBINULLAH, P.O DIMAPUR 797112

VERSUS

MRS. SANGITA SONOWAL AND 4 ORS
PERMANENT R/O VILLAGE
KAKURI DIGHALI (DHOLPETA), KEKURI, DIST. LAKHIMPUR,
P.O KEKURI , ASSAM

2:MR. GAURAB GOGOI
S/O LATE MOHENDRA GOGOI

3:SHRI BHUBAN GOGOI
S/O LATE DIMBESWAR GOGOI

4:MRS. KHIRESHWARI GOGOI
W/O LATE BHUBAN GOGOI

R/NO. 2 TO 4 REPRESENTED BY THE R/NO.1

5:SHRI KAMAL SAIKIA
S/O RANGPUR SAIKIA
OWNER OF TRACTOR REGD. NO. AS 22C 3247
VILLAGE NA ALI BHAJU GAON
DIST DHEMAJU
P.O JIYADHAI CHARIALI
ASSAM

:: BEFORE ::

HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the Appellant : Mr. Imti Imsong, Advocate

For the Respondents : Mr. B. N. Sarmah, Advocate
(For Respondents No. 1,2,3 & 4)

: Mr. Z. Kulnu, Advocate
(Respondent No. 5)

Date of Hearing : 09.05.2023

Date of Judgment : 18.05.2023

JUDGMENT & ORDER (CAV)

(Mridul Kumar Kalita, J)

Heard Mr. Imti Imsong, learned counsel for the appellant. Also heard Mr. B. N. Sarmah, learned counsel for the respondent Nos. 1, 2, 3 & 4 and Mr. Z. Kulnu, learned counsel for the respondent No. 5.

2. This Motor Accident Claims Appeal has been preferred by the appellant, namely, National Insurance Company Limited, under Section 173 of the Motor Vehicles Act, 1988 against the judgment and award dated 20.12.2019 passed by the learned Member, Motor Accident Claims Tribunal, Kohima in MAC Case No. 1/2017, whereby the present appellant was directed to pay compensation amounting to Rs.21,36,000/- (Rupees Twenty One Lakh Thirty Six Thousand) to the claimants, along with interest @ 9% per annum, from the date of filing of the claim petition i.e. 01.03.2017 until realization.

3. The facts relevant for adjudication for this appeal, in brief, are as follows:-

(i) The appellant is a body corporate and registered under Companies Act, 1956 having its registered Office at 3 Middleton Street, Post Box- 9229, Kolkata- 71 and it carries various insurance businesses all over the India under the various Regional Office including the North East Regional Office situated at G.S. Road, Guwahati and one of its Divisional Office at Dhobinullah, Dimapur.

(ii) One Mohendra Gogoi (since deceased), of whom the present respondents are the legal representatives, was a driver by profession and on 25.10.2015, at about 8:30 p.m., at Dhulpata Gaon under the jurisdiction of Sonari Chapori outpost in the district of Lakhimpur, Assam, met with an accident while he was driving a tractor bearing registration No. AS-22-C-3247. It is also stated that the said accident occurred due to mechanical failure in the tractor, as a result of which Mohendra Gogoi sustained grievous injuries and ultimately succumbed to his injuries on the way to hospital.

(iii) The present respondent No. 1, being wife of the late Mohendra Gogoi, respondent No. 2 being son of late Mohendra Gogoi and respondent Nos. 3 and 4 being parents of late Mohendra Gogoi filed a Motor Accident Claims case under Section 166 read with Section 140 of the Motor Vehicles Act, 1988 claiming compensation for the death of late Mohendra Gogoi in the aforementioned vehicular accident. The said case was registered as MAC Case No. 1/2017 before the Motor Accident Claims Tribunal, Kohima.

(iv) The present appellant, being the insurer of the tractor bearing Registration No. AS-22C-3247, which was involved in the accident, was also impleaded as one of the respondents in the Motor Accident Claims case filed by the present respondents No. 1 to 4 (*as claimants*). Though, the present appellant engaged its counsel in the MAC Case No. 1/2017 however, it failed to file written statement in the said claim case and learned Member, Motor Accident Claims Tribunal, Kohima proceeded with the case without the written statement of the present appellant. After completion of the inquiry, learned Member, Motor Accident Claims Tribunal, Kohima awarded a compensation amount of Rs.21,36,000/- (Rupees Twenty One Lakh Thirty Six Thousand) to the claimants (*present respondents No. 1 to 4*) and the present appellant was directed to pay the said amount along with an interest of 9% per annum from the date of filing of the claim petition i.e. from 01.03.2017 till realization. The said judgment and award dated 20.12.2019 has been impugned in the present MAC Appeal.

4. Mr. Imti Imsong, learned counsel for the appellant has submitted that the main ground on which the appellant has preferred this instant appeal is that in the instant case a claim under Section 166 of the Motor Vehicles Act, 1988 is not maintainable in as much as the deceased was the driver of the vehicle which was involved in the accident and as such he may not be treated as a third party and on that ground only the impugned judgment and award is liable to be set aside. Learned counsel

for the appellant has also submitted that the claimants have failed to prove any negligence of the part of the owner of the vehicle involved in the accident and on that count also the impugned judgment and award is liable to be set aside.

5. On the other hand, Mr. B. N. Sarmah, learned counsel appearing for the respondents No. 1, 2, 3 and 4 has submitted that in the instant case, the evidence on record shows that the accident involved in this case occurred due to mechanical failure/break failure of the tractor which was involved in the accident and there is evidence on record to show that there was a lack of proper maintenance of the said tractor as well as negligence on the part of the owner of the vehicle and hence, the accident occurred due to the negligence of the owner of the vehicle i.e. tractor bearing Registration No. AS-22-C-3247 and there was no negligence on the part of the deceased, namely, Late Mohendra Gogoi.

6. Mr. Sarmah, learned counsel for the respondents No. 1, 2, 3 and 4 has further submitted that though the deceased was the driver of the vehicle which was involved in the accident, however, he was not the owner of the same and under the circumstances of this case as he may also be regarded as third party *viz-a-viz* the contract of insurance which was between the owner of the vehicle as well as the Insurance Company. In support of the submissions made by him, Mr. Sarmah, learned counsel appearing for the respondents No. 1, 2, 3 and 4 has cited the ruling of Hon'ble Rajasthan High Court in "**National Insurance Company Limited -Vs- Nirmala Bai**" reported in "**1999 (2) TAC 1 (Raj)**" wherein it was observed as follows:-

"7. The expression 'third party' has not been defined. Then,

what is the meaning of expression 'third party'. Normally and ordinarily, a contract of insurance has two parties to it, the insurer and the insured. Therefore, any party other than the contracting party of the contract of insurance becomes and can be called as third party. The use of the words and expression 'third party' clearly indicates that it refers to a party who is neither the first party nor the second party to a contract of insurance. Therefore, the expression 'third party' includes everyone be it a person travelling in vehicle itself or any other vehicle or one walking on the road. Section 147(1)(b)(i) of the new Motor Vehicles Act, 1988, directs that the insurance policy must insure the insured "against any liability which may be incurred by him in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place". The term 'any person' used in the above provision would include every person who incurs death caused by or arising out of the use of the vehicle and the passenger in the vehicle is covered by the third party risk. In the case of Amrit Lal Sood v. Kaushalya Devi Thapar, 1998 ACJ 531 (SC), Hon'ble Supreme Court has observed that "the expression 'any person' would undoubtedly include an occupant of the car who is gratuitously travelling in the car". Hon'ble Supreme Court has further held that "once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy". Thus, the proposition that the policy does not cover the liability in respect of a passenger, including a gratuitous person, passenger travelling in the car in question itself, cannot be accepted because the statutory requirement of a policy under section 147 is that the policy should insure against any liability

which may be incurred by the owner in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle in a public place”.

7. Mr. B. N. Sarmah, learned counsel for the respondents No. 1 to 4 has also cited another ruling of Hon’ble Allahabad High Court in “***Ram Kumar Awasthi -Vs- Vimlarani Chaurasiya***” reported in “***2013 (4) TAC 408***” wherein it was observed as follows:-

“21. This clearly goes to so that every Insurance Policy covers the risk of third party irrespective of the fact that the vehicle was being plied against the Insurance Policy or not, hence, the liability to pay Compensation in Claim Petition is squarely upon the Insurance Company without right to recovery because they are bound to indemnify the liability of the owner”.

8. Mr. Sarmah, learned counsel for the respondents No. 1 to 4 has further submitted that when the owner of the vehicle was examined as DW- 1 on behalf of the opposite party No. 1, in Motor Accident Claims Case No. 1/2017, he had deposed that, on 25.10.2015, when his permanent driver, namely, Mohendra Gogoi was returning on the tractor after completion of his day long work, before reaching his residence, the tractor rolled down to the road side due to sudden break failure and resultantly the driver sustained grievous injuries and succumbed to his injuries. During cross-examination, DW- 1 has stated that before the day of the accident, the break system of the vehicle was not effectively working as such, mechanic of the garage advised him to change the break pad immediately. However, due to distance of North Lakhimpur town from his place, he could not change the break pad immediately, though it was advised. He has further stated that unfortunately he forgot to inform the

deceased driver about the defective break system of the tractor.

9. Mr. B. N. Sarmah, learned counsel for the respondents No. 1 to 4 has submitted that the testimony of DW-1 (owner of the tractor) shows that the accident on 25.10.2015 occurred only because of the poor maintenance of the tractor by the owner and his negligence to inform the deceased, namely, Mohendra Gogoi about defectives breaks of the tractor and under the facts and circumstances of the case it may not be incorrect to state that the accident occurred due to the negligence of the owner and as such the claimants who are the wife, son and parents of the deceased driver are entitled to get compensation on account of the negligence of the owner.

10. The main issue to be decided in this appeal is whether the deceased who was the driver of the ill-fated tractor which was involved in the accident may be regarded as a third party or not. Though, there are judgments of this Court to the effect that the owner-cum-driver may not be regarded as a third party so as to make an insurer liable to indemnify such an owner when he himself was driving the vehicle which was involved in the accident. This position of law may not be disputed as apparently the owner may not be regarded as a third party *viz-a-viz* the contract of insurance, if there was such a contract between him and the Insurance Company even if he was the driver himself and sustained injuries or had succumbed in the vehicular accident involving the vehicle in respect of which a contract of insurance was there between the Insurance Company and the owner-cum-driver. However, the position may not be the same when the driver is not the owner of the vehicle involved in the accident. In such a case, he has to be regarded as a third party *viz-*

a-viz the contract of insurance between the owner and the Insurance Company. Such driver, who is not the owner of the vehicle involved in the accident, would be included within the expression "*any person*" used in section 147(1)(b)(i) of the Motor Vehicles Act, 1988 and the Insurance Company shall be liable to indemnify the owner for liability incurred by him for the death or bodily injury of such a driver.

11. As regards, the fact as to whether there was negligence on the part of owner of the vehicle in the instant case, the submissions made by Mr. B. N. Sarmah, learned counsel for the respondents No. 1 to 4 appears to be based on materials available on record. In MAC Case No. 1/2017, the testimony of DW-1, who was the owner of the ill-fated vehicle, shows that he was negligent in not informing the driver of the ill-fated vehicle, namely, Mohendra Gogoi (*since deceased*) about the defective condition of the breaks of the said vehicle, neither he did anything to rectify or repair those breaks, even after knowing about its defective condition, before allowing the said vehicle to be used by deceased Mohendra Gogoi. The finding of learned Member, Motor Accident Claims Tribunal, Kohima, regarding negligence on the part of the owner of the ill-fated vehicle, appears to be based on materials available on record which does not justify any interference by this Appellate Court.

12. In view of the reasons cited above and discussions made, this Court is constrained to hold that the instant appeal is devoid of any merit and accordingly dismissed.

13. It appears from the record that the appellant has deposited an amount of Rs.25,000/- as statutory deposit in the Registry of this Court at the time of filing of this appeal and has also deposited 50% of the

awarded amount in the Registry of this Court as per Court's direction. The said amount may be withdrawn by the respondent Nos. 1 to 4 from the Registry after proper verification by the Registry, if not already withdrawn. The appellant is directed to pay the remaining amount of the award after adjusting the amount which has already been deposited in the Registry, to the Motor Accident Claims Tribunal, Kohima within a period of 2(two) months from today. Same shall be disbursed by the Member, Motor Accident Claims Tribunal, Kohima to the present respondent Nos. 1 to 4 after proper verification.

14. Send back the LCR along with a copy of this judgment to the Motor Accident Claims Tribunal, Kohima.

Sd/-
JUDGE

Comparing Assistant