

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.887 of 2011

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The New India Assurance Company Ltd through the Deputy Manager (Legal Deptt.) at Regional Office, BSFC Building, Fraser Road, Patna (For the New India Assurance Company Ltd) Chandra Lok Complex, Ghantaghar, Bhagalpur. (O.P. No.2)/ Appellant/s

Versus

1. Suchita Devi wife of Ramotar Sharma, R/O Village-Balia PS. Rupauli, Distt-Purnea. At present, Station Road, PS. Naugachia, Distt-Bhagalpur.
2. Subenandan Shekhar Singh son of R.P. Singh, R/O, Khanjarpur, near DIG Office, Bhagalpur (Owner of the vehicle).

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Mukteshwar Prasad Singh, Advocate
For the Respondent/s : Mr. Randhir Kumar Singh, Advocate
Mr. Sanjay Kumar Pandey, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV ORDER

20 12-04-2016 Appellant/Insurer/OP No.2, the New India Assurance Company Ltd through the Deputy Manager has raised propriety of the judgment dated 22.06.2011 and award dated 19.09.2011 passed by 3rd Additional District Judge-cum- Additional Motor Vehicle Accident Claims Tribunal, Naugachia, Bhagalpur in Claim Case No. 174/2006 whereby and whereunder insurer has been directed to pay the amount appertaining to Rs. 4 Lacs as compensation wherefrom Rs. 50,000/- paid in lieu of Section 140 of the Motor Vehicle Act (for brevity 'the Act') was to be deducted along with interest @ of 6% per annum.

2. On account of death of Ramotar Sharma, a carpenter aged about 28 years on 14.08.2004 in a motor vehicle



accident caused by a bus bearing Registration No.JH-4A 9394 at Durgapur More, PS. Puraini, Distt-Madhepura and for which, Puraini PS Case No. 21/2004 was registered, and further, having vehicle insured under the appellant/OP. No.2, the claimant, wife of deceased, namely, Suchita Devi filed claim case asking for compensation disclosing the monthly income of deceased appertaining to Rs. 4000/- per month.

3. Insured as well as insurer were only made parties. From the lower court record, it is evident that on account of non-appearance of owner, vide order dated 16.10.2008, the case was fixed for ex parte hearing against the owner. It is also evident that vide order dated 06.02.2009, the prayer made on behalf of appellant in terms of Section 170 of the Act, has been allowed. After going through the judgment impugned in consonance with the relevant order-sheets, it is evident that after appearance of appellant on 08.03.2007, as the appellant failed to file WS within reasonable time, on account thereof, vide order dated 02.12.2008, appellant was debarred from filing WS. That means to say, once the appellant/OP has been debarred from filing WS and further no prayer has been made on behalf of appellant/OP to recall that order, in the aforesaid facts and circumstances of the case, the pleading whatever made subsequently thereof, had gone out of



consideration and that happens to be the reason behind that in spite of having the objection raised on behalf of appellant by way of WS so filed on 08.12.2008 is not taken note of. The aforesaid extraordinary situation having arisen on account of having been debarred raised ticklish question for consideration, i.e. (a) statutory right in terms of Section 149(2) of the Act could be allowed to be availed by the appellant, (b) when prayer made on behalf of appellant, though subsequently, has been allowed in terms of Section 170 of the Act, then in that event, the status of the parties as well as scope of the appeal.

4. Although, the learned counsel for the respective parties did not thoroughly explain nor could be able to cite any decision on that score. On the other hand, learned counsel for the appellant submitted that it happens to be a case of contributory negligence in the background of the fact that though during course of evidence, the claimant had unsuccessfully tried to place the deceased inside the bus but, from the FIR having been recorded on the Fard-e-beyan of relative of deceased who was accompanying the deceased at the relevant time that they both were sitting over roof of the bus and during course thereof deceased fell down. Furthermore, it has also been submitted that in the aforesaid eventuality, the amount so directed by the learned Tribunal to be



paid by the appellant, would not have been assessed as, to the fault having been at the end of deceased, there should have been appropriate deduction. It has also been submitted that when FIR has been made part and parcel of the petition, then in that event, the contents thereof, should be accepted. To substantiate such plea, learned counsel relied upon *National Insurance Co. Ltd v. Rattani & Ors* as reported in *2009 ACJ 925*.

5. On the other hand, learned counsel for the respondents controverted the plea and submitted that mere sitting over the roof of the bus could not be held to be a case of contributory negligence. It has also been submitted that though in absence of owner, the appellant had substituted the owner and on account thereof, would have pleaded and in likewise manner cross-examined the witnesses, examined the witnesses to show as well as to bring on record that allowing the passenger to sit over the roof was contrary to consent of owner and on account thereof, would have challenged the assertion of the claimant. That being so, appellant is not entitled to raise any kind of objection over quantum of compensation.

6. As disclosed above, two points are to be answered before proceeding ahead. Certainly, on account of having been debarred to file WS, though no specific provision has been



prescribed under the M.V. Act, however, under CPC, it could be seen under Order VIII Rule 10 which empowers the Court to deliver judgment in case, there happens to be failure on the part of the defendant to file WS within stipulated time. That means to say, on account of failure on the part of the defendant to file WS within the stipulated time requiring the judgment to be followed, gives an indication that defendant should not be allowed to participate. However, by certain judicial pronouncement, there happens to be some sort of relaxation whereunder defendant has been allowed to cross-examine the witnesses but without advancing their own plea. In the aforesaid background, whatever grounds happen to be available to the appellant/O.P. in terms of Section 149(2) of the Act, that cannot be.

7. Furthermore, as discussed above, the appellant/O.P. was allowed to substitute the owner in terms of Section 170(b) of the Act, though later on, even then failed to substantiate itself as owner as no pleading in said form has been tendered. The aforesaid incidence further exposes a piquant situation as, in terms of owner, the defence available to the Insurance Company relates to justifying the driving license, due care and caution during course of driving, vehicle being validly driven, contributory negligence, driver allowed to sit over roof without consent of

owner, hence driver was sole responsible as well as non pleading the driver makes the petition non maintainable, which never been raised before the Tribunal

8. Therefore, after discussing and analyzing the prevailing situation, it is apparent that appellant/O.P., insurer would not be entitled to avail the grounds so enumerated under Section 149(2) of the Act and that being so, the instant appeal would not be seen as well as adjudicated upon in terms thereof.

9. Now getting the ray after thorough discussion as made hereinabove, appellant is found entitled for assailing the judgment and award impugned in terms of Section 170(b) of the Act and that being so, the only point now so perceived relates to event of contributory negligence.

10. To substantiate such plea, though during course of cross-examination, AW-1, claimant, Suchita Devi has not been cross-examined while AW-2, Subodh Kumar Jaiswal was suggested on that very score. FIR has been made an exhibit of the record as Ext-1 and on account thereof, can be looked into. The aforesaid view is further found fortified by judicial pronouncement as referred on behalf of appellant in *National Insurance Co. Ltd v. Rattani & Ors* (supra) wherein at para-7, it has been held as follows:-

“We are not oblivious of the fact that ordinarily an allegation made in the first information report would not be admissible in evidence *per se* but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that Tribunal and consequently the appellate courts would be entitled to look into the same.

11. Section 123 of the Act reads as follows:-

“123. Riding on running board, etc.— (1) No person driving or in charge of a motor vehicle shall carry any person or permit any person to be carried on the running board or otherwise than within the body of the vehicle.

(2) No person shall travel on the running board or on the top or on the bonnet of a motor vehicle.”

12. From bare perusal of the aforesaid Section, it is evident that in terms of Sub-Section(2) of 123 Act, no person is to be allowed over top, bonnet, as well as would be permitted to board in running condition. There was every option available to the driver to resist as well as to desist from plying the vehicle on account of having presence of passenger over the top. There happens to be no evidence on that very score. Apart from this, putting his legs into the shoe of owner, the appellant/O.P. rightly withdrew itself from raising such plea and in likewise manner, kept mum. After all, the driver was an employee and was driving the vehicle during course of employment as per wish of the

employer. Furthermore, the owner/employer is found vicarious liable for the mistake committed by the employee during course of employment and on account thereof, comes within the ambit of *tortfeasor*. Once, the insurer transposed itself as owner, then in that event, unless and until, there happens to be specific pleading identifying individual act of driver, an employee against his direction, then and then only, there would be independent classification which, in the facts and circumstances of the case, is completely lacking. So far quantum of compensation is concerned, that is found reasonable one.

13. That being so, the instant appeal is found devoid of merit and is, accordingly, rejected. However, in the facts and circumstances of the case, parties will bear their own cost.

Patna High Court
12th day of April 2016.
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(Aditya Kumar Trivedi, J)

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