

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

MISC. APPEAL (C) NO. 892 OF 2008

Ramnivas Gupta, S/o Late Bhagirathi Gupta, aged 35 years, occupation- Agriculture, R/o Village Durgapara, Tah. Bagicha, District Jashpur (C.G.)

... Appellant

versus

1. Sitaram, S/o Shri Samrath Ram, Caste- Uraon, aged about 51 years, occupation- Agriculture

2. Smt. Dilaso Bai, W/o Shri Sitaram, Caste-Uraon, aged about 45 years

No.1 and 2 both R/o Village- Durgapara, Tahsil- Bagicha, District Jashpur (C.G.).

At present- Village Gholeng, Tahsil and District Jashpur (C.G.)

3. Dilprasad, S/o Nansai, Caste-Kanwar, occupation-Driver, R/o Village Boda, Post Batauli, P.S. & Tahsil Batauli, District Sarguja (C.G.)

4. The New India Insurance Company Limited, Local Branch Office Raigarh (C.G.)

... Respondents

For Appellant : Mr. A.K. Prasad, Advocate.

For Respondent No.4 : Mr. Deepak Gupta, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

25/10/2017

1. The present is an owner's appeal under Section 173 of the Motor Vehicles Act challenging the award dated 5.4.2008 passed by the Motor Accident Claims Tribunal, Jashpur, in Motor Accident Claim Case No. 31/2007.

2. Vide the impugned award, the learned Tribunal, in a death case, under Section 166 of the Motor Vehicles Act, has awarded a compensation of Rs.3,74,500/- in favour of respondents no. 1 and 2/claimants with interest thereon at the rate of 6% per annum from the date of presentation of the claim application. While passing the award, the learned Tribunal has exonerated the respondent no.4-insurance company of its liability for payment of compensation and fastened the same upon the appellant-owner and respondent no.3-driver of the tractor involved in the accident.

While passing the award, the learned Tribunal has also held that it shall be the responsibility of respondent no.4-insurance company to pay the compensation first and to get the amount recovered subsequently from the owner and driver of the vehicle, applying the principle of 'pay and recover'.

3. The insurance company has not challenged the impugned award of pay and recovery passed by the learned Tribunal.

4. The present is an appeal by the owner challenging the exoneration of the insurance company and the order of pay and recovery passed by the learned Tribunal.

5. Brief facts of the case are that the appellant is the owner of the tractor bearing registration no. MP26-E-1956. On 21.11.2005, the said tractor which was being driven by respondent no.3-Dilprasad met with an accident when it turned turtle near a culvert, as a result of which an occupant on the said tractor, namely, Dabluram, son of respondents no.1 and 2/claimants, received grievous injuries and who later succumbed to the said injuries.

6. The legal representatives of deceased-Dabluram, i.e., the respondents-claimants, moved a claim application under Section 166 of the Motor Vehicles Act before the learned Tribunal and the impugned award has been passed on the said claim application.

7. The ground of challenge by the appellant-owner is that the deceased was travelling on the tractor without the knowledge of the appellant and that said tractor was duly insured with respondent no.4-insurance company with a package policy and as such the insurance company ought to have been held liable jointly and severally indemnifying the appellant-owner. Learned counsel for the appellant-owner referred to the claim application filed under Section 166 of the Motor Vehicles Act by the claimants wherein it was pleaded by them that the deceased was taken from his residence by

the driver-Dilprasad, which by itself establishes the fact that the owner was not aware of the fact that the deceased was being taken by the driver. It was further contended that the FIR (Exhibit P-2) was lodged by the appellant-owner himself and whereby it was at that point of time itself stated by the appellant that the deceased who was travelling in the tractor was an unknown person and that the driver who was driving the tractor had fled from the scene leaving the tractor at the place of accident itself. According to the learned counsel for the appellant-owner, this is sufficient proof of the fact that he was not aware of the driver permitting the deceased to travel in the tractor. Further contention raised is that there has been no evidence led by the insurance company to show that there was a specific breach of policy condition and unless there is a pleading and evidence to support the pleading by the insurance company it cannot be presumed that there was a breach of policy condition on the part of the appellant-owner and for these reasons the finding of pay and recovery ordered by the learned Tribunal deserves to be set aside.

8. Opposing the appeal learned counsel for respondent no.4-insurance company submits that the deceased was travelling on the tractor sitting beside the driver, itself shows the breach of policy inasmuch as the tractor has a sitting capacity of only the driver and if the deceased was travelling along with the driver it was in contravention to the conditions of the insurance policy. He further contended that the deceased in the instant case would not come within the ambit of third party with which the insurance company could have been held liable for payment of compensation indemnifying the owner and driver. Further contention raised is that the impugned award also does not warrant interference for the reason that the owner has not proved its case by leading any evidence of discharging his burden to prove that he was unaware of the deceased

travelling in the tractor and for all these reasons the appeal deserves to be rejected.

9. Having heard the contentions put forth on either side and on perusal of the records, what is undisputed in the instant case is, the accident that took place on 21.11.2005; the vehicle involved in the accident being a tractor bearing registration no. MP26-E-1956; one person having died in the accident namely Dabluram who was an unmarried person aged around 20 years; the tractor involved in the accident being duly insured with a package policy by respondent no.4-insurance company and the accident having occurred during the validity of the insurance policy.

10. In addition to the aforesaid factual matrix of the case, what has also come up before the Tribunal is that apart from the witnesses examined on behalf of the claimants, none of the parties have led any evidence in respect of their respective contentions which they had raised before the Tribunal. In the absence of any evidence led by the parties except for the claimants before the Tribunal, all that the Tribunal could have done was to peruse the evidence available and reach to a conclusion. The FIR lodged in respect of the accident was marked as Exhibit P-2 by the claimants before the Tribunal wherein it reveals that it is the owner who had lodged the report in respect of the accident first and in the FIR itself he had expressed his ignorance so far as the details of the deceased is concerned. It also reveals that the owner had not instructed the driver to take the deceased along with him when the accident had occurred. There is no evidence in rebuttal produced by the insurance company to the said document. Neither is there any evidence to disprove or doubt the contents of the said FIR.

11. At this juncture, it would be relevant to refer to the decision of the Hon'ble Supreme Court in the case of **Oriental Insurance Co. Ltd. v. Rajni Devi, 2008 (5) SCC 736**, where in paragraph 7 it was held as under:

“7. It is now a well settled principle of law that in a case where third party is involved, the liability of the Insurance Company would be unlimited. Where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the Insurance Company would depend upon the terms thereof. The Tribunal, in our opinion, therefore, was no correct in taking the view that while determining the amount of compensation, the only factor which would be relevant would be merely the use of the motor vehicle.”

12. It is further worth referring to the judgment of the Hon'ble Supreme Court in the case of **Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan & Ors., AIR 1987 SC 1184**, wherein the Hon'ble Supreme Court in paragraph 14 referring to the expression 'breach' has held as under:

“14. The expression 'breach' is of great significance. The dictionary meaning of 'breach' is 'infringement of violation of a promise or obligation' (See Collins English Dictionary). It is, therefore, abundantly clear that the insurer will have to establish that the insured is guilty of an infringement or violation of a promise that a person who is not (sic) duly licensed will have to be in charge of the vehicle. The very concept of infringement or violation of the promise that the expression 'breach' carries within itself induces an inference that the violation or infringement on the part of the promisor must be a willful infringement or violation. If the insured is not at all at fault and has not done anything he should not have done or is not amiss in any respect how can it be conscientiously posited that he has committed a breach?...It must be established by the Insurance Company that the breach was on the part of the insured and that it was the insured who was guilty of violating the promise or infringement of the contract. Unless the insured is at fault and is guilty of a breach the insurer cannot escape from the obligation to indemnify the insured and successfully contend that he is exonerated having regard to the fact that the promisor (the insured) committed a breach of his promise...”

13. The Hon'ble Supreme Court in **Skandia Insurance Co. Ltd. (supra)** had also held, *that when the insured had handed over vehicle to be driven by licensed driver and even if the licensed driver on his own and because*

of his negligence had allowed an unlicensed cleaner to driver the vehicle it could not be said that there was any breach committed by the insured, so as to attract the exclusion clause in favour of the Insurance Company as contemplated under Section 96(2)(b) of the Motor Vehicles Act, 1939.

14. In the light of the aforesaid decisions of the Hon'ble Supreme Court when we compare the facts of the present case, it stands established that the burden was upon the insurance company to have proved and established before the Tribunal that there was an infringement and infringement was deliberate and intentional and with the knowledge and consent of the insured, in the absence of which it cannot be inferred attributing the breach upon the owner/insured. In the instant case, the insurance company has not led any evidence though true it is that the owner also has not led any evidence. But, there is a document i.e. FIR (Exhibit P-2) which was lodged immediately after the accident and which has been produced and duly proved before the Tribunal though by the claimants, the contents of which show that the owner was not aware of who the deceased was and that he had not instructed for taking the deceased along with the driver on the tractor. This fact goes in favour of the appellant-owner.

15. In view of above, this Court is of the opinion that the finding of the learned Tribunal in exonerating the insurance company of its liability is not proper, legal and justified and the same deserves to be and is accordingly set aside.

16. It is, therefore, held that the liability of payment of compensation shall be jointly and severally upon the owner, driver and insurance company. Since the policy issued in the instant case was a package policy which would also cover the risk of an occupant on the tractor, the

responsibility of payment of compensation is ordered to be upon the respondent no.4-insurance company.

17. In case of any compensation deposited by the appellant-owner the same shall be refunded to him by the respondent no.4-insurance company and the balance amount of compensation if any shall be deposited by the respondent no.4-insurance company.

18. The appeal stands allowed accordingly.

19. Registry of this Court is directed to forward a copy of this judgment to the Secretary, District Legal Services Authority of the concerned District from where the claimants hail, with a direction for ensuring that the copy of this judgment is served upon the claimants at the earliest.

Sd/-
(P. Sam Koshy)
Judge