IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.168 of 2012

==

BRANCH MANAGER, NATIONAL INSURANCE CO. LTD. RAJENDRA NAGAR NAWADA, REPRESENTED THROUGH SRI ANJANI KUMAR WORKING AS A.O.AND DULY CERTIFIED ATTORNEY OF NATIONAL INSURANCE CO. LTD, HAVING ITS REGIONAL OFFICE AT 4TH FLOOR, SONE BHAWAN, BEER CHAND PATEL PATH, P.S.SACHIVALAYA, DISTT-PATNA.

... ... Appellant.

Versus

1. SUSHILA DEVI, W/O LATE SURENDRA PASWAN @ SURENDRA PRASAD R/O VILL-DHARHARI, P.O. DHARHARA, P.S.DHAMAUL, DISTT-NAWADA
2. AMIT KUMAR GAURAV S/O LATE SURENDRA PASWAN @ SURENDRA PRASAD MINOR SON OF LATE SURENDRA PASWAN ARE UNDER THE GUARDIANSHIP OF THEIR MOTHER SUSHILA DEVI, R/O VILL-DHARHARI, P.O. DHARHARA, P.S.DHAMAUL, DISTT-NAWADA
3. NITISH KUMAR S/O LATE SURENDRA PASWAN @ SURENDRA PRASAD MINOR SON OF LATE SURENDRA PASWAN ARE UNDER THE GUARDIANSHIP OF THEIR MOTHER SUSHILA DEVI, R/O VILL-DHARHARI, P.O. DHARHARA, P.S.DHAMAUL, DISTT-NAWADA
4. PRINCE KUMAR S/O LATE SURENDRA PASWAN @ SURENDRA PRASAD MINOR SON OF LATE SURENDRA PASWAN ARE UNDER THE GUARDIANSHIP OF THEIR MOTHER SUSHILA DEVI, R/O VILL-DHARHARI, P.O. DHARHARA, P.S.DHAMAUL, DISTT-NAWADA
5. AARTI KUMARI D/O LATE SURENDRA PASWAN @ SURENDRA PRASAD MINOR DAUGHTER OF LATE SURENDRA PASWAN ARE UNDER THE GUARDIANSHIP OF THEIR MOTHER SUSHILA DEVI, R/O VILL-DHARHARI, P.O. DHARHARA, P.S.DHAMAUL, DISTT-NAWADA
6. PRATAP RANJAN S/O AMBIKA SINGH R/O GANGTA, P.S.AKBARPUR, DISTT-NAWADA
7. BHOLA BHUSHAN SHARMA S/O VIDYA BHUSHAN SHARMA R/O MAHANANDPUR, P.S.AKBARPUR, DISTT-NAWADA
8. CHANDRA BHUSHAN SHARMA S/O SIDHESHWAR SINGH R/O KALAUNDA, P.S.AKBARPUR, DISTT-NAWADA (DRIVER OF BOLERO NO.BR27-2141).

... ... Respondents.

==

Appearance :

For the Appellant	:	Mr. Shailendra Kumar, Advocate.
For the Respondents	:	Mr. Sanjay Parasmani, Advocate.
		Mr. Manish Kumar, Advocate.

WEB COPY

CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL
ORAL JUDGMENT
Date : 22-11-2018

Heard learned counsel for the appellant and learned counsel for the respondents on this miscellaneous appeal.

2. This miscellaneous appeal has been preferred against the judgment dated 11.01.2012 and award dated 09.04.2015 passed by the Additional District Judge-III-cum-Motor Vehicle Accident Claim Tribunal, Nawada (hereinafter in short referred to as the 'Tribunal') in M.V. Claim Case No.38 of 2009/26 of 2010, whereby the learned Tribunal allowing the claim case directed the opposite party no.1-National Insurance Company Limited to pay compensation to the tune of Rs.8,71,550/- along with interest at the rate or 9% per annum from the date of the order till its realization.

3. The factual matrix of the case is that claimants filed M.V. Claim Case No.38 of 2009/26 of 2010 under Section 166 of the Motor Vehicles Act for awarding compensation to the tune of Rs.6,00,000/- on account of death of one Surendra Paswan alias Surendra Prasad in a motor vehicle accident with the case in succinct that on 08.02.2009 at 7 PM Surendra Paswan along with his friends was travelling by Bolero, bearing registration no. BR 27 2141, from Patna to Nawada and when the aforesaid vehicle arrived near the Dharampur bridge, due to rash and negligent

WEB COPY

driving by the driver of the vehicle, the said vehicle plunged into the drain resultantly the said Surendra Paswan sustained grievous injury and he was rushed to the PMCH, Patna for better treatment where he succumbed his injuries. The deceased was assistant post-master and his gross salary was Rs. 4,174/- per month. The aforesaid accident took place due to rash and negligent driving of the offending vehicle by its driver at the relevant time of accident. The aforesaid vehicle was insured by opposite party no. 1-National Insurance Company Limited. Hence, the National Insurance Company is liable to pay the aforesaid amount of compensation to the claimants.

4. All the opposite parties put their appearance in the case and filed seperate written statement. Opposite party no. 1 National Insurance Company Limited had taken the case, *inter alia,* that the vehicle in question was insured as a private vehicle and not as a commercial vehicle and the deceased was travelling by the said vehicle as a passenger vehicle by hiring it. Hence, the Insurance Company is not liable to pay any compensation as it has not taken any premium for the passenger. Claimants adduced ocular as well documentary evidence in buttress of their case.

WEB COPY

5. After hearing the parties and perusing the record, the learned Tribunal passed the impugned judgment and award as detailed in the earlier paragraph.

6. Being aggrieved and dissatisfied with the impugned judgment and award, the opposite party no.1-National Insurance Company Limited has preferred this appeal.

7. It is submitted by the learned counsel for the appellant that the aforesaid appeal has been filed only on the ground that the vehicle in question was insured by the insurance company as a private vehicle but the same was used as a commercial vehicle at the relevant time of the accident and as the deceased was travelling by the said vehicle as a passenger by hiring it and the Insurance Company has not taken any premium of the aforesaid passenger hence, it is not liable to pay any compensation to the claimants indemnifying the owner of the vehicle rather the owner is squarely liable to pay the same but the learned Tribunal wrongly and illegally ignoring the aforesaid plea of the appellant has allowed the claim case.

8. On the other hand, it is submitted by the learned counsel for the respondents-claimants that the vehicle was a private vehicle and was being used as private vehicle and the deceased was travelling by the said vehicle not as a passenger by

WEB COPY

hiring it rather as a friend of the owner of the vehicle. Though AW-2 Amit Kumar Gaurav has stated that the deceased was travelling on the said vehicle by hiring it as a passenger but he is a hearsay witness and the burden lies upon the Insurance Company to prove the aforesaid fact but it has utterly and miserably failed to discharge its burden. Learned counsel for the respondents relying upon the judgment rendered in ***New India Assurance Company, Shimla vs. Kamla and others*** reported in ***2001(3) PLJR 74 (SC)*** has submitted that when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to third parties, whether or not there has been any breach/violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

9. From perusal of the record, it appears that the appellants by filing written statement has taken specific case that the vehicle in question was insured by it as a private vehicle but the said vehicle was being used as a passenger vehicle at the relevant time of the accident and the deceased was travelling by the said vehicle by hiring it. The appellant has not taken any premium of the passenger of the vehicle hence, it is not liable to

WEB COPY

pay any compensation to the claimants indemnifying the owner of the vehicle in the case of the death of the deceased in the accident. From perusal of the evidence of the claimants, it appears that AW-2 Amit Kumar Gaurav, who happens to be son of the deceased, has stated in para-6 of his cross-examination that the offending vehicle was hired one and other persons who were friend of the deceased were also travelling on the said hired vehicle. All the commuters were of different villages. The said witness happens to be none else than the son of the deceased and his testimony is nothing else than the evidence of the claimants themselves. Hence, the claimants cannot escape from it. As per the aforesaid evidence of the claimant itself the vehicle in question was being plied as a passenger vehicle and the deceased and his friends were travelling in the said vehicle by hiring it and admittedly the vehicle was insured as a private vehicle and not as a passenger vehicle and no premium of passenger was given by the insured to the Insurance Company, hence, in my considered opinion, the appellant Insurance Company is not liable to pay any compensation to the claimants indemnifying the owner of the vehicle rather the owner is squarely liable to pay the same.

10. A co-ordinate Bench of this Court in the case of **Branch Manager, Oriental Insurance Company Limited Vs.**

WEB COPY

Md. Yunus and Others and in the case of **Oriental Insurance Company Limited Vs. Leelawati Devi and Others** has observed that if the insurance company is not at all liable to pay any compensation to the claimant, it cannot be compelled to pay the said compensation to the claimants first and then recover it from the owner of the vehicle. The Hon'ble Apex Court in the case of **National Insurance Company Limited Vs. Parvathneni reported in 2010 (1) PLJR (SC) 76** has been pleased to observe that if Insurance Company proves that it has no liability to pay compensation to the claimants, the Insurance Company cannot be compelled by order of court to make payment and later on recover it from the owner of vehicle.

11. The aforesaid case law N***ew India Assurance Company, Shimla vs. Kamla and others*** as relied upon by the learned counsel for the respondents in buttress of their case is not applicable in the case under hand. As in the said case person driving the vehicle was having sham driving licence and the validity of the driving licnece in the said case was in issue and not the use of the private vehicle as a passenger vehicle without paying the premium of the passenger to the Insurance Company.

12. In aforesaid facts and circumstances of the case, the appellant National Insurance Company Limited is exempted from

WEB COPY

payment of the awarded amount of compensation to the claimants indemnifying the owner of the vehicle holding owner of the vehicle squarely liable to pay the aforesaid amount of compensation and interest thereon to the claimants. Accordingly, the appeal is allowed and the aforesaid judgment and award passed by the learned Tribunal is modified to the extent as indicated above. Let the statutory amount deposited by the appellant National Insurance Company Limited be returned to it through cheque.

(Prakash Chandra Jaiswal, J)

Trivedi/-

AFR/NAFR	**AFR**
CAV DATE	**NA**
Uploading Date	27.11.2018
Transmission Date	27.11.2018

WEB COPY