

(2022) 11 GAU CK 0030
Gauhati High Court
Case No: MACApp. No. 89 Of 2015

United India
Insurance Company
Ltd

APPELLANT

Vs

Md Aksed Ali And 4
Ors

RESPONDENT

Date of Decision: Nov. 16, 2022

Acts Referred:

- Motor Vehicle Act, 1988 - Section 95(2), 128, 147, 163A, 166, 173, 194C
- Indian Penal Code, 1860 - Section 279, 338, 427
- Insurance Act, 1938 - Section 46

Hon'ble Judges: Mitali Thakuria, J

Bench: Single Bench

Advocate: H. Buragohain, S. S. Sharma, K. Bhattacharjee, A. Dutta

Final Decision: Disposed Of

Judgement

1. Heard Mr. H. Buragohain, learned counsel appearing on behalf of Mr. S. S. Sharma, learned Senior Counsel for the appellant. Also heard Mr. K.

Bhattacharjee, learned counsel for the respondent No. 1 and Mr. A. Dutta, learned counsel for the respondent No. 5.

2. This is an appeal, under Section 173 of the Motor Vehicle Act, 1988, against the judgment and award dated 28.11.2014, passed by the learned

Member, Motor Accidents Claims Tribunal, Bongaigaon, in MAC Case No. 129/2012, directing the appellant/insurer to pay a sum of Rs. 62,750/-, i.e.

the 50% of total awarded amount of Rs. 1,25,499/-, along with the interest @ 6% per annum from the date of evidence till realization.

3. The brief facts, leading to filing of the present appeal, is that on 04.05.2012, while the respondent No. 1/injured- Aksed Ali was going towards his office from his residence by riding his elder brother's motorcycle, bearing Registration No. AS-19B-5632, and while he reached on the National Highway 31(B), Jogighopa, in front of Kiron Weigh Bridge, the driver of the offending vehicle, bearing Registration No. AS-25-0359 (Truck), coming from the opposite direction in a rash and negligent manner, collided with the motorcycle. As a result of which, the respondent No. 1 sustained grievous injuries on his head, legs and other parts of the body. Thereafter, he was brought to Cholontapara Mini PHC, but due to his serious condition, he was shifted to Solace Hospital, Goalpara. Thereafter, he was referred to Hayat Hospital, Guwahati, where he was admitted on 05.05.2012 and subsequently was discharged from the hospital on 22.05.2012. At the time of accident, he was 22 years of age and was working as a Manager of Anil & Shonti Transport Company Ltd. and his monthly income was Rs. 6,000/- per month. But, after the accident, he became permanently disabled and unable to do his normal work. He incurred huge expenditure on his treatment. Thereafter, a case was registered, vide Jogighopa P.S. Case No. 95/2012, under Sections 279/338/427 of the Indian Penal Code, against the driver of the offending vehicle (Truck). It is further stated that at the time of accident, both the vehicles were covered under valid insurance policy and accordingly, vide the claim petition, the respondent No. 1 claimed for Rs. 7,35,000/- towards compensation.

4. The respondent No. 5, i.e. the Oriental Insurance Company Ltd., the insurer of the offending vehicle- AS-25-0359 (Truck), submitted their Written Statement and took a plea that the driver of the vehicle did not drive the vehicle in rash and negligent manner and it is the claimant/injured who was driving the vehicle in rash and negligent manner. The appellant herein, i.e. the United India Insurance Company Ltd., the insurer of the vehicle bearing Registration No. AS-19B-5632 (motorcycle), also contested the case by filing the Written Statement and also denied the case of the claimant. The respondent No. 2, i.e. the owner of the motorcycle, also submitted his Written Statement, wherein, it is stated that his brother/injured took his

motorcycle on the relevant day of accident to attend his office at Kawaitary and he did not feel any hesitation to give his motorcycle as his brother/claimant had the valid driving license.

5. The respondent No. 1/claimant adduced his evidence as P.W.-1 in support of his case and the learned Member, Motor Accident Claims Tribunal,

Bongaigaon, after hearing the argument from both sides and also considering the materials on the record, passed the impugned judgment & order and

awarded an amount of Rs. 1,25,499/-, along with 6% interest from the date of filing of the evidence till realization, with a further direction to pay 50%

of the awarded amount to the present appellant/insurer of the motorcycle and the respondent No. 5, i.e. the Oriental Insurance Company Ltd., was

directed to pay the other 50% of the total awarded amount.

6. On being highly aggrieved and dissatisfied with the impugned judgment and award, dated 28.11.2014, passed by the learned Member, Motor

Accident Claims Tribunal, Bongaigaon, in M.A.C. Case No. 129/2012, awarding a sum of Rs. 67,750/-, i.e. 50% of total awarded amount of Rs.

1,25,499/- along with 6% interest from the date of filing of the evidence till realization of the entire amount, the opposite party/appellant preferred this

appeal on the following grounds:

(i) that the impugned award is untenable in law and it is liable to be set aside and reversed;

(ii) that the learned Member, Motor Accident Claims Tribunal, Bongaigaon, ought to have considered the evidence on record, which clearly prove that

the claimant/injured after flying the motorcycle of his brother met with an accident by colliding with a truck and thereby suffered bodily injury. He

thereby stepped into the shoes of the owner/insured and therefore, he cannot be regarded as a third party and consequently, the appellant, as insurer

of the vehicle, is not liable to pay any compensation to the respondent No. 1, i.e. the claimant, and hence, the impugned judgment and award is liable to

be set aside as to the extent of liability fastened against the present appellant;

(iii) that the learned Member, MACT, decided the issue Nos. 1, 2 & 3 in favour of the appellant and categorically held that the driver of the offending

truck, i.e. respondent No. 3, was guilty of rash and negligent driving, but in spite of such clear finding, the learned Tribunal proceeded to hold the

appellant liable to pay 50% of the awarded amount, simply because of head on collision had occurred between 2 (two) vehicles. Such a finding was

not just and proper and if any award was to be passed, the same should have passed against the owner of the motorcycle or against the insurer or

insured of the offending truck and not against the present appellant; and

(iv) that the learned Member, MACT, failed to consider the fact that on completion of the investigation, police filed the Charge-Sheet against the

driver of the truck, finding that the accident occurred due to rash and negligent driving of the driver of the truck.

Accordingly, it is prayed by the appellant/insurer that the impugned award is required to be set aside and reversed as per as the appellant is concerned

and the same be made payable by the owner-insured of the motorcycle or by the insurer or insured of the offending truck.

7. Mr. H. Buragohain, learned counsel appearing on behalf of the appellant, submitted that the owner of the motorcycle cannot claim for compensation

for his own negligence. Moreover, as per the judgment of the learned Member, MACT, the driver of the offending truck was responsible for the

accident, though the judgment was passed considering it to be contributory negligence on the part of the motorcycle. The present appellant/insurer is

not at all liable to pay any compensation or to the extent of 50% as awarded by the learned Member, MACT.

8. In this context, the learned counsel for the appellant also relied on a decision of this Court in Oriental Insurance Company Ltd. Vs. Utpalesh

Chakraborty, reported in (2013) 2 GLR 145, wherein, it is 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.”

9. 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.â€

10. Further, in Paragraph No. 21 of the above referred judgment of Utpalesh Chakraborty (supra) it has been held as under:

â€œ21. In our considered opinion, the ratio of the decision in Oriental Insurance Co. Ltd., (2008) 5 SCC 736 is clearly applicable to the facts of the

present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner.

The deceased cannot be held to be an employee of the owner of the motorbike although he was authorized to drive the said vehicle by its owner and,

therefore, he would step into the shoes of the owner of the motorbike. We have already extracted section 163 of the MVA hereinbefore. A bare

perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of

the vehicle.â€

11. Further, the Honâ€™ble Apex Court in the case of Nigammaand & Anr. Vs. United India Insurance Company Ltd., reported in (2009) 13 SCC

710, has held as under:

â€œ20. In our considered opinion, the ratio of the decision in Oriental Insurance Co. Ltd., (2008) 5 SCC 736 that section 163A of the MVA cannot be

said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the

question is no longer res integra. The liability under section 163A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant

as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of section 163A of the

MVA.â€

12. Citing the aforesaid decision, it is submitted by the learned counsel for the appellant that here in the instant case also, the brother of the owner,

who was riding the motorcycle, met with an accident and hence, he stepped into the shoes of the owner/insured and therefore, he cannot be treated as

a third party to claim any compensation.

13. Further it is submitted by the learned counsel for the appellant that from the judgment itself, it reveals that the learned Member, Motor Accident

Claims Tribunal, Bongaigaon, considered the other vehicle, i.e. the truck, as the offending vehicle and it also reveals that the F.I.R. was lodged against

the driver of the offending vehicle, i.e. the truck, and the Charge-Sheet is also filed against the driver of the offending truck. Moreover, the learned

Member, Motor Accident Claims Tribunal, Bongaigaon, made observation that the accident took place due to rash and negligent driving of the driver

of the vehicle bearing Registration AS-25-0359 (truck), and due to the said accident, the claimant/respondent sustained grievous injury on his person.

But, subsequently, it is held by the learned Member, Motor Accident Claims Tribunal, Bongaigaon, that there was a head on collision between the 2

(two) vehicles and hence, the 50% of awarded amount was to be borne by the insurer of the motorcycle, i.e. the United India Insurance Company

Ltd., the present appellant.

14. In this context, the learned counsel for the respondent No. 1/claimant submitted that he was not the owner of the vehicle and is the brother of the

owner of the said motorcycle, which met with an accident due to rash and negligent driving of the driver of the offending truck. He had valid driving

license at the time of the accident and it is the admitted position that the accident occurred only due to rash and negligent driving of the driver of the

offending truck and hence, the Insurance Company of the offending truck is liable to pay the entire awarded compensation.

15. After hearing the submissions of learned counsels for both sides, I have carefully perused the case record and it is the admitted fact that the driver

of the motorcycle, i.e. the claimant of the case, is not the actual owner of the vehicle. But, as discussed above, by riding the motorcycle, he stepped into the shoes of the owner and he also cannot be treated as a third party to claim any compensation.

16. Moreso, the Hon^{ble} Supreme Court in the case of National Insurance company Ltd. Vs. Jugal Kishore, reported in (1988) ACJ 270 (SC),

categorically laid down that the comprehensive policy means it covers the 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. It was observed that "special agreement has to be arrived at between

the Insurance Company and the insured and separate premium has to be paid on account of liability undertaken by the Insurance Company in this

behalf."

17. Though the learned counsel for the respondent submitted that it was under comprehensive policy, yet, as discussed above, there is no evidence to

show that the separate premium was paid for the purpose of covering of the risk of the owner himself.

18. The Hon^{ble} Apex Court in the case of Dhanraj Vs. New India assurance Co. Ltd. & Anr., reported in (2004) 8 SCC 553, has held that

"Motor Vehicles Act, 1988 S. 147 Statutory liability if extends to owner of the vehicle Insurance policy under S. 147 which complies

with the requirements of this Chapter [Ch. XI of the 1988 Act] Scope of Held, such an insurance policy does not require an

insurance company to assume risk of death or bodily injury to the owner of the vehicle Such an insurance policy is only to indemnify the insured

against liabilities incurred towards a third person or in respect of damages to property An owner of a vehicle can only claim a payout in respect of

bodily injury to himself provided he is specifically covered by the policy in question On facts, it was not shown that the particular policy covered

any risk of injury to the owner himself Heading "Own damage" in insurance policy on facts Import of held, did not cover liability

towards personal injury to the insured, but in light of the words "premium on vehicle and non-electrical accessories" appearing under the heading

“Own damage”, covered damage to the vehicle “ Insurance Act, 1938 ” S.46.

19. Paragraph Nos. 8 & 10 of the above referred judgment, Dhanraj (supra), reads 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 a owner of the goods or his authorised representative) carried in the vehicle or damage to any property of a third party caused by or arising out of 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.

10. In this Case, it has not been shown that the policy covered any risk for injury to the owner himself. We are unable to accept the contention that the premium of Rs. 4,989 paid under the heading “Own damage” is for covering liability towards personal injury. Under the heading “Own damage”, the words “premium on vehicle and non-electrical accessories” appear. It is thus clear that this premium is towards damage to the vehicle and not for injury to the person of the owner. An owner of a vehicle can only claim provided a personal accident insurance has been taken out.

In this case there is no such insurance.”

20. So, from the entire discussion made above and also 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 respondent No. 1/injured at the time of

accident, is not liable to indemnify the claim of the claimant, who had already stepped into the shoes of the owner even though he borrowed the

motorcycle from his brother. The comprehensive insurance policy also does not cover his own damage and did not cover the liability towards personal

injury to the insured. Accordingly, it is seen that the present appellant is not liable to pay compensation to the tune of Rs. 62,750/-, i.e. 50% of the total

awarded amount as per the judgment passed by the learned Member, Motor Accident Claims Tribunal, Bongaigaon.

21. Coming to the point of contributory negligence on the part of the vehicle, i.e. the motorcycle, which was riding by the injured at the time of

incident, the learned Member, Motor Accident Claims Tribunal, Bongaigaon, has held that as there was head on collision between the 2 (two) vehicles

and hence 50% of the award will be borne by the insurer of the motorcycle, i.e. the United India Insurance Company Limited/the present appellant.

22. It is the admitted fact that the accident occurred due to head on collision between the 2 (two) vehicles, but there is no evidence as such nor there

is any opinion held by the learned Member, Motor Accident Claims Tribunal, Bongaigaon, that the accident occurred due to contributory negligence on

the part of the motorcycle as well as the offending truck.

23. From the entire evidence on record as well as from the judgment and award passed by the learned Member, Motor Accident Claims Tribunal,

Bongaigaon, it is seen that the F.I.R. was lodged against the driver of the truck and Charge-Sheet was also filed against him. In the entire evidence on

record as well as in the judgment, it is held that the accident occurred only due to rash and negligent driving by the driver of the offending vehicle

(truck). The learned Member, Motor Accident Claims Tribunal, Bongaigaon, held that there was contributory negligence on considering the fact that

there was head on collision between the 2 (two) vehicles and accordingly, the present appellant/United India Insurance Company Limited is made

liable to pay 50% of the awarded amount. But, only for the head on collision, there cannot be an automatic inference that both the vehicles involved in

the accident were equally responsible or there was contributory negligence from both the vehicles for which the accident occurred.

24. Here in the instant case, it is evident from the evidence recorded by the learned Member, Motor Accident Claims Tribunal, Bongaigaon, as well

as from the judgment itself that the accident occurred due to rash and negligent driving on the part of the driver of the offending vehicle (truck). 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 and there was contributory negligence which caused the accident. From the judgment and award passed by the learned Member, Motor

Accident Claims Tribunal, Bongaigaon, it reveals that there is no reasoning or explanation as to why the motorcycle was made liable for contributory

negligence except the fact that there was head on collision between the 2 (two) vehicles. For attributing contributory negligence on the victim, definite proof to establish contributory negligence is required [Oriental Insurance Co. Vs. Sahaban Begum, (2013) 1 GLR 133].

25. The Honâ€™ble Apex Court in the case of Khenyei Vs. New India Assurance Company Ltd & Ors., reported in (2015) 9 SCC 273, has held that

â€œthere 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.â€

26. In another case of Mohammed Siddique & Anr. Vs. National Insurance Company Ltd. & Ors., reported in (2020) 3 SCC 57, the Honâ€™ble

Supreme Court has held that â€œMotor Vehicles Act, 1988 â€" Ss. 166, 168 and 128 & 194-C â€" Compensation â€" Contributory negligence of

victim â€"Requirements for invocation of principle of â€" Explained â€" Deceased pillion rider riding on a motorcycle with two others (â€œtriplingâ€)

when hit by a car from behind, such pillion riding above the permissible limit not having casual connection with injury or accident â€" Held, fact that

deceased was riding pillion on a motorcycle along with driver and another beyond the permissible limit, may not, by itself, without anything more, make

him guilty of contributory negligence, unless it is established that it contributed either to accident or to impact of accident upon victim.â€

27. More so, in the case of Khenyei (supra), the Honâ€™ble Supreme Court held that â€œthere is difference between the contributory and composite

negligence. In the case of contributory negligence, a person who has himself contributed to the accident cannot claim compensation for the injuries

sustained by him in the accident to the extent of his own negligence. Extent of his negligence is required to be determined as damaged recoverable by

him in respect of the injuries have to be reduced in proportion to his contributory negligence. However, in the case of composite negligence, a person

who has suffered has not contributed to the accident but due to the outcome of combination of negligence of two or more other persons. In such case,

the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is

joint and several.â€

28. Here in the instant case, it is seen that there is no material to show that the deceased had contributed to the accident and there is clear evidence from the side of the claimant that the accident occurred solely due to rash and negligent driving of the driver of the offending truck which was insured with the Oriental Insurance Company Limited Bongaigaon/the respondent No. 5. Therefore, in my considered opinion, the offending vehicle (truck) insured with the Oriental Insurance Company Limited, Bongaigaon/respondent No. 5 was solely responsible for the accident in the facts and circumstances of the case and hence, no liability can be attributed to the victim nor the present appellant/United India Insurance Company Limited where the motorcycle was insured with. The award passed by the learned Member, Motor Accidents Claims Tribunal, Bongaigaon, in MAC Case No. 129/2012, is, accordingly, modified to the effect that the entire awarded amount of Rs. 1,25,499/- shall be satisfied by the respondent No. 5/the Oriental Insurance Company Limited, the insurer of the vehicle No. AS 25 0359 (truck). Accordingly, the statutory deposited amount of Rs. 25,000/-, made by the appellant before the Registry, shall be returned to the appellant forthwith.

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