(1985) 12 MP CK 0019

Madhya Pradesh High Court

Case No: Miscellaneous Appeal No. 195 of 1980

National Insurance Co. Ltd.		APPELLANT
	Vs	
Purshotamdas Maheshwari and Others		RESPONDENT

Date of Decision: Dec. 5, 1985

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 22, Order 41 Rule 33
- Motor Vehicles Act, 1939 - Section 103A, 110D, 95(2), 96

Citation: (1987) ACJ 209

Hon'ble Judges: B.C. Verma, J

Bench: Single Bench

Advocate: K.L. Issrani, for the Appellant; V.S. Shronti, for the Respondent

Final Decision: Allowed

Judgement

B.C. Varma, J.

This is an appeal u/s 110-D of the Motor Vehicles Act, 1939, against the award of Rs. 5,000/- as compensation in favour of the Respondent No. 1 and against the Appellant only on account of the death of a three years old son of the Respondent No. 1 who was crushed under a motor truck No. MPI 3346 which at the relevant time, i.e., on 4.8.1978 was being driven by Respondent No. 41 mratlal and owned by Respondent No. 2 Rameshwar Prasad Agarwal.

2. Truck MPI 3346 was being driven by Imratlal on 4.8.1978 when it ran over an infant Shyam, son of Respondent No. 1. The accident resulted in instantaneous death of the child. This truck originally belonged to Respondent Mohanlal Agarwal who on 20/21.7.1978 had transferred it to Respondent Rameshwar Prasad Agarwal. Prior to this transfer it was insured by Mohanlal Agarwal with the Appellant insurance company. Purshotamdas, therefore, claimed compensation for the death of his child against other three Respondents and sought to make liable the

Appellant also being the insurer of the vehicle. All the Respondents denied their liability and the special plea raised by the Appellant was that the truck was transferred prior to the accident by its owner Mohanlal Agarwal without any permission or notice to the Appellant. It was, therefore, pleaded that the contract of insurance had come to an end and that there was breach of insurance policy exonerating the Appellant from any liability to indemnify. Before the Claims Tribunal specific issue was raised on this plea.

3. The Accidents Claims Tribunal after due trial found that driver Imratlal drove the truck rashly and negligently resulting in the accident causing death of Shyam. However, it held the Appellant alone liable for compensation. Assessing the damages at Rs. 5,000/- the Claims Tribunal held the Respondent No. 1 entitled to that amount. The other Respondents have not appealed. The claimant Purshotamdas Maheshwari did not file any appeal but has preferred a cross-objection under Order 41, Rule 22 of the CPC for enhancement of compensation but no relief even in that cross-objection is claimed against the other Respondents who were completely exonerated of all liabilities.

4. In this appeal, Respondent Nos. 2, 3 and 4 not represented. This court, therefore, by order dated 28.10.1985 issued special notices to them of the date of hearing. In spite of it, they have not cared to appear nor has anyone else appeared on their behalf to represent them in this Court. Hearing, therefore, was completed in their absence.

5. In this appeal, thus the principal question to be decided is whether in terms of the insurance policy (Exh. R-6) and in view of the provisions contained in Sections 95 (2)(a) and 103-A of Motor Vehicles Act, 1939, the award given against the Appellant is legal and proper. The Appellant''s contention is that since the accident has taken place subsequent to the transfer of the vehicle by Respondent No. 3 in favour of the Respondent No. 2 and since no notice of this transfer was given to the Appellant by Respondent No. 3 who got the vehicle insured and in whose favour alone the policy was issued, the Appellant cannot be asked to indemnify the owner of the vehicle for the amount awarded. Now, there is no dispute that it is the Respondent No. 3 Mohanlal Agarwal who intially owned that truck and got it insured with the Appellant. It is clear from Exh. R-6 that the policy has been issued in favour of Mohanlal Agarwal and it is he who got the vehicle insured. A letter dated 31.7.1978 signed by Mohanlal Agarwal was issued to the Appellant. The contents of this letter are that the truck has been transferred by Mohanlal to Respondent Rameshwar Prasad. It contains a request that the insurance policy may continue in favour of the transferee, Rameshwar Prasad Agarwal. This is claimed to have been sent under certificate of posting. Subsequently, the policy was renewed in favour of Rameshwar Prasad Agarwal on 14.8.1978. These facts can well be taken to have been established in the case.

6. From the narration of above facts it is clear that the truck was transferred in favour of Respondent No. 2 by Respondent No. 3 without prior permission or even information to the Appellant. This transfer was, therefore, in contravention of the terms of the policy which clearly prescribes that the policy is not transferable to any person or persons unless company''s written consent has been obtained. The effect of such a transfer without the consent and prior permission of the insurer and before the accident was considered by the Full Bench of the High Court of Gujarat in Shantilal Mohanlal and Another Vs. Aher Bawanji Malde and Others, and it was held that under such circumstances the contract of insurance does not subsist on the date of accident and the insurance company would, therefore, be not liable to indemnify the transferee and the claimants are not entitled to recover any compensation from the insurance company. The Full Bench in coming to this conclusion has considered decisions of various High Courts on the question. I may refer to the decision of Punjab and Haryana High Court in Oriental Fire and General Insurance Co. Ltd. Vs. Sant Ram and Others, In this case also no application was made of the proposed transfer by the owner of the vehicle to the insurance company and the transfer was effected without any such intimation to or permission from the insurer. The accident took place subsequent to the transfer. It was held that under the circumstances Section 103-A of the Motor Vehicles Act was not helpful to the claimant for, fixing liability against the insurance company. It was further held and in my opinion quite rightly that liability of the assured has to be-first established before the amount of compensation awarded could be recovered through the insurer as the owner of the truck and if the transferee was not insured for the truck on the date of accident with the insurance company, the same could not be held liable to indemnify u/s 96 of the Motor Vehicles Act. In view of the aforesaid decisions it has to be held that the contract of insurance between the Appellant-insurer and the Respondent No. 3 came to an end when the vehicle was transferred without the consent or prior permission of the Appellant/insurer and therefore, the Appellant cannot be held liable to indemnify.

7. Learned Counsel for the Respondents, however, argued that since there was an intimation of transfer of the vehicle to the Appellant on 31.7.1978 and the policy was ultimately renewed in favour of the transferee, viz., the Respondent No. 2, on 14.8.1978, it must be held that the Appellant/insurance company impliedly consented to the transfer which should relate back to the date of information, i.e. 31.7.1978 and therefore, on the date of accident, i.e. 4.8.1978, the contract of insurance must be deemed to be subsisting between the Appellant-insurance company and the transferee, Respondent No. 2. In my opinion, the contention is not correct. There is no evidence on record that the Appellant has consented to the transfer or has agreed to accept the transferee as the insured. Instead, what appears is that the vehicle was transferred prior to 31.7.1978 and then by letter of that date Respondent No. 3 Mohanlal intimated the fact of this transfer to the insurance company. The insurance company does not seem to have accepted this

transfer or consented to it. Instead it seems to have issued a new policy bearing No. 642/6300951/78 for a period between 14.8.1978 to 13.8.1979 in favour of the transferee Rameshwar Prasad Agarwal, Respondent No. 2. Section 103-A of the Motor Vehicles Act is, therefore, clearly not attracted and does not assist the Respondent at all. According to that section, the proposed transfer of ownership of motor vehicle in respect of which insurance policy was taken together with the policy of insurance relating thereto is to be intimated and permission of the insurer for such transfer of the certificate of insurance and policy should be obtained. It is only when within a period of 15 days of such information the insurer fails to intimate the refusal to transfer the certificate and the policy to the other person, the certificate of insurance and the policy described in the certificate shall be deemed to have been transferred in favour of the person to whom the motor vehicle is transferred with effect from the date of his transfer. The words ''proposes to transfer'' used in Section 103-A of the Motor Vehicles Act clearly go to show that an application must precede the transfer. In the present case, the transfer was effected without any such application as is clear from the letter issued by Respondent No. 3 to the insurance company and therefore, Section 103-A of the Motor Vehicles Act is clearly not attracted. In Calcutta Insurance, Madras, now known as National Insurance Co. Ltd. (Formerly known as Calcutta Insurance, Madras) Vs. Thirumalai Ammal and Others, it was held that the insurance policy lapses upon the transfer of ownership of the motor vehicle unless the insurance company agrees to accept transferee as the insured in relation to the vehicle. In that case the widow of the owner of the car sold it without making an application as required by Section 103-A of the Motor Vehicles Act and the accident took place only a week after that transfer of the ownership of the car. It was held that even if the application for transfer had been made, the deeming provision containing Section 103-A of the Motor Vehicles Act could not be invoked against the insurance company as it had time to consider the question of transfer. This decision fully applies to the present case as here also even if the information sent on 30.7.1978 by the Respondent No. 3 could be taken to be an application u/s 103-A there was time enough to consider the question of transfer as the accident took place only on 4.8.1978. i.e. before the expiry of fifteen days where after alone the deeming provision containing Section 103-A of the Motor Vehicles Act could become operative. Reference may also be made to the decision in P.K. Panda Vs. Smt. Premalata Choudhury and Others, where it has been clearly laid down that when transfer of ownership was not notified to the company and accepted by it before the accident, the policy of insurance being a contract of personal indemnity, the insurance company cannot be compelled to indemnify a third party. Learned Counsel for the Respondent No. 1 relied upon Gyarsilal Jagannath Prasad v. Pandit Sitacharan Dubey 1958 ACJ 352 (MP). In that case the insurance policy also did not prohibit any transfer of the policy and that feature distinguishes that case from the present one.

8. My conclusion, therefore, is that this transfer of insurance policy without notice of that transfer to the Appellant was clearly in contravention of the terms of the policy (Exh. R-6) and thus, brought the contract of insurance to an end. On 4.8.1978 when the accident took place, the Respondent No. 2 was the owner of the vehicle. There was no contract of insurance between him and the Appellant and therefore, the Appellant cannot be held liable for any compensation to which the Respondent No. 1 may be held entitled, on account of the death of his son.

9. The aforesaid finding would ordinarily result in dismissal of the entire claim of the Respondent No. 1. However, in my opinion, the Respondent No. 2, i.e. the owner of the vehicle at the time of the accident, must be made liable to compensate. The court would be entitled to do even in the absence of cross-objection in that behalf by force of Order 41, Rule 33 of the CPC which provides:

The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require and this power may be exercised by the court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the Respondents or parties, although such Respondents or parties may not have filed any appeal or objection.

Learned Counsel for the parties did not dispute that this provision is applicable to proceedings u/s 110-A of the Motor Vehicles Act.

10. It cannot be doubted that primarily the driver of the vehicle is liable for damages resulting from any injury or death caused due to the negligent or rash driving of the vehicle. It also cannot be doubted that it is the owner of the vehicle who is vicariously liable if the vehicle was driven by person under his employment. It is not clear from the impugned award as to why the owner and driver of the vehicle who were parties to the proceedings before the Tribunal were exonerated. Once the finding is that the vehicle was driven negligently and rashly and that the child died as a consequence of such rash and negligent driving of the vehicle, Respondent Nos. 2 and 4 who at the relevant time were the owner and driver of the vehicle respectively have to be held liable for damages. This position was not seriously disputed before me by the counsel appearing for the parties. I would, therefore, hold the Respondent Nos. 2 and 4 liable for damages.

11. The cross-objection filed by Respondent No. 1 relates only for enhancement of the amount awarded. In determining compensation as Rs. 5,000/- the Claims Tribunal has relied upon certain decisions including one of this Court in Madhya Pradesh State Road Transport Corporation Vs. Yasin and Others, These decided cases do furnish sufficient data for determining the amount of compensation to be awarded. In Smt. Gulab Devi Sohaney Vs. Govt. of Madhya Pradesh and Another, , it was held that the Tribunal has to award such compensation as may be just. Just would mean fair, adequate, reasonable and probable. The word "just" would take its

colour from the main purpose of an object and enactment. In the instant case, the claimant has examined only two witnesses to prove the negligence. No material worth the name has been placed on record to determine the status of the claimant. All that we find is that apart from this deceased child, the claimant has two more daughters. Under these circumstances the Tribunal cannot be said to be unjust in awarding Rs. 5,000/- as damages.

12. Learned Counsel for the Respondent No. 1 relied upon the decision in M.A. Rahim and Another Vs. Sayani Bai, and submitted that at least Rs. 25,000/- should be awarded as damages. Even there it was observed in para 8 that the determination of compensation would turn upon the particular facts of each case and the family environment, the members of the family, the health, the age of the victim, his outlook in life, the interest which his parents were taking in the boy and the totality of circumstances tending to show whether the victim would have a predominantly happy life or a life of misery or a life of despondence or an insipid life have all to be taken into account while determining compensation. Element of speculation cannot be ruled out. The pecuniary loss sustained by the person to claim compensation as a result of the accident is also one of the factors to be taken into account. For this, the age of the boy at the time of death, the age of parents and the prospects of the boy contributing his earnings to the parents will have to be taken note of. The child died in that case was aged about 12 years and enough material was placed on record. On the basis of which an award of Rs. 25,000/- was made and the Madras High Court in appeal did not consider the award as unjust under the circumstances of that case. It was, however, observed that the jurisdiction of the Tribunal under the Motor Vehicles Act to award just compensation is very wide and comprehensive. I am of the opinion that under the circumstances of the present case where the claimant has failed to place any material on record to assess damages, the Tribunal cannot be said to be unjust in awarding Rs. 5,000/- as compensation. The cross-objection, therefore, has to be dismissed.

13. The result is that the appeal succeeds and is allowed. The award made against the Appellant is hereby set aside and the claim against it is dismissed. The claim of the Respondent No. 1 is, however, allowed against Respondent No. 2 and Respondent No. 4 who shall pay the amount of compensation awarded under the impugned award to the claimant, Respondent No. 1. The cross-objection is dismissed. The parties shall bear their own costs.