A.F.R.

**HIGH COURT OF ORISSA: CUTTACK.**

**M.A.C.A.NO.35 OF 2004**

From a judgment dated 16.05.2003 passed by the Court of the 3rd Motor Accident Claims Tribunal, Puri in M.A.C. No.256/427 of 93/88.

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The Oriental Insurance Co. Ltd.,
being represented through its
Divisional Manager, Bhubaneswar ... Appellant

-versus-

Sanjukta Das and four others ... Respondents

For Appellant : M/s. P.Ray, S.Ray, A.A.Khan, A.Ghose & S.K.Mishra

For Respondents : M/s. P.N.Mishra, B.N.Mishra & S.Bahadur
(For R-1 to R-3)

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P R E S E N T:

**THE HONOURABLE MR.JUSTICE B.N.MAHAPATRA**

Date of Judgment : 10.05.2013

***B.N.MAHAPATRA,J.*** This is an appeal under Section 173 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'the Act') filed by the appellant-Insurance Company against the judgment dated 16.05.2003 passed by the 3rd Motor Accident Claims Tribunal, Puri (hereinafter referred to as "the Tribunal") in M.A.C. No.256/427 of 93/88 .

2. The case of the claimant-petitioners before the learned Tribunal was that on 09.05.1988 at about 8.30 AM while the deceased,

Prasanna Kumar Das, was proceeding near Dahuka river culvert at Balugaon on Nayagarh-Khandapara road from Nayagarh towards Balugaon side in his Scooter bearing registration No.ORX-8823 slowly and cautiously on the left side of the road as the road condition was not good, the offending Matador bearing registration No.ORG-9696 came from the opposite direction, i.e., from Balugaon side in a high speed and after moving towards right proceeded eighty feet in an uncontrollable manner and dashed against the Scooter of the deceased. As a result of such accident, the deceased was thrown out of the Scooter and sustained several injuries on his person. His Scooter was badly damaged. Immediately thereafter, the deceased was taken to Nayagarh Hospital from where he was referred to S.C.B. Medical College and Hospital, Cuttack, but on the way, the deceased succumbed to the injuries at Itamati. The post mortem examination of the deceased was done at Nayagarh and Nayagarh PS Case No.71/88 was registered against the driver of the offending Matador.

Further case of the claimants was that the driver of the offending vehicle had a valid driving licence and the offending vehicle was insured with opposite party No.2-Insurance Company at the time of accident. The offending vehicle being a private vehicle the statutory liability of the insurer was claimed to be unlimited. The deceased was about 32 years and was maintaining a sound health. At the time of accident, he was an Advocate of Nayagarh Bar and having reputation was attached as Public Prosecutor in the Court of the Sub-ordinate Judge-

cum-J.M.F.C., Nayagarh. From legal profession, he was earning Rs.1,500/- per month. Besides, the deceased purchased a Tractor incurring loan from A.D. Bank/SBI, Nayagarh and engaged the same in agricultural operation and transportation of different construction materials. From that source the deceased was earning Rs.500/- per month. In total, income of the deceased was claimed to be Rs.2,000/- per month out of which he was contributing Rs.1,500/- per month to the claimants for their maintenance. For untimely death of the deceased, the petitioners were deprived of getting the said amount of monthly contribution of the deceased, the consortium as well as love and affection of the deceased. They also spent for funeral of the deceased and got the Scooter repaired. Thus, the claimants who are widow and minor children and old parents of the deceased, as legal heirs, with the above pleadings claimed compensation of Rs.4,00,000/-.

3. Before the Tribunal, opposite party No.1 did not contest the case. Opposite Party No.2-Insurance Company, on the other hand, filed written statement denying the accident as alleged and the fact that the offending Matador was insured with it covering the date of accident. It was further contended that the claim of compensation was high and excessive. Accordingly, it prayed for dismissal of the claim petition.

4. On the basis of the pleadings of the parties, learned Tribunal framed the following issues:-

"(1) Is the claim application maintainable?

(2) Did the death of deceased Prasanta Kumar Das occur on account of motor vehicle accident involving vehicle No.ORG-9696, Matador (private vehicle?
(3) Was the driver of the offending vehicle rash and negligent in causing the accident?
(4) Are the petitioners entitled to get the compensation, if so, to what extent and from which O.P.?
(5) To what relief?"

5. In order to substantiate the claim, petitioners have examined four witnesses including petitioner No.1 as PW-1 and also relied upon documents, marked as Exts. 1 to 14. No evidence was led on behalf of the opposite party No.2-Insurance Company.

6. After taking into consideration the oral as well as documentary evidence, the Tribunal came to the conclusion that the death of the deceased occurred due to rash and negligent driving of the driver of the offending Matador which hit the Scooter of the deceased with violent force. The Tribunal has assessed the monthly income of the deceased at Rs.2,000/- and his contribution to the family at Rs.1,500/- per month. The learned Tribunal also applied 15 multiplier taking into consideration the age of the deceased to be 36 years. For loss of consortium, the Tribunal awarded Rs.10,000/-; Rs.3,000/- was also awarded towards funeral expenses besides another Rs.3,000/- towards damage of the Scooter. Thus the total amount of compensation was determined at Rs.2,86,000/-(Rs.2,70,000/- + Rs.10,000/- + Rs.3,000/- + Rs.3,000/-).

The learned Tribunal further held that the offending vehicle was duly insured with opposite party No.2-Insurance Company during the relevant time having validity from 22.02.1988 to 21.02.1989, which covers

the date of accident. Therefore, the Tribunal held that opposite party No.2-Insurance Company is liable to pay the entire compensation amount to the claimant petitioners. Interest was awarded from the date of accident, i.e., 25.06.1988 at the rate of 9% per annum. The Tribunal has also directed that the award of Rs.15,000/- with interest at the rate of 12% per annum on principle of no fault claim in MAC No.52/428 of 90/88 if disbursed, the same is liable to be adjusted from the aforesaid payment. Further the Tribunal directed to keep a portion of the awarded amount in fixed deposit in the name of the claimants.

7. Mr. Ray, learned counsel for the appellant-Insurance Company submitted that the liability of the insurer is limited to Rs.50,000/- as the accident took place on 09.05.1988 and the policy was valid from 22.02.1988 to 21.02.1989 which directly covers under Section 95(2) of the M.V. Act, 1939. Placing reliance upon the judgment of this Court in the case of *New India Assurance Co. Ltd. vs. Suresh Chandra Patra and others,* 1994 ACJ 1245, Mr. Ray, submitted that both the insurer and the claimant did not raise the plea of unlimited liability. Moreover, under Order 8 of CPC, when a fact of allegation on a party is not admitted by another party, the said fact must be specifically denied in the written statement. In the present case the payment of additional premium for covering the higher risk was neither pleaded by the insurer nor by the claimant. Therefore, question of raising a plea in the written statement by the insurer does not arise. Placing reliance upon the judgment of this Court in the case of *New India Assurance Co. Ltd. vs. Ramani Bewa and*

*others,* 1992 (2) T.A.C. 576, it was submitted that it was the duty of the owner of the vehicle to supply the materials in support of his plea of insurance of his vehicle with a particular Insurance Company. Without furnishing necessary particulars, to require an Insurance Company to say whether the vehicle is insured would tantamount to asking it to locate a needle in a mountain. Lakhs of policies are issued by the Insurance Companies. Mere mention that a vehicle is insured with an Insurance Company without particulars of the policy would be insufficient to prove that the vehicle is really insured.

8. Mr. Ray, relying upon the decision of this Court in the case of *The Divisional Manager, representing United India Insurance Co. Ltd. vs. Gokula Moharana and another,* 2003 (1) OLR 413 submitted that when a policy in this case was issued while the M.V. Act, 1939 was in force, it has to be consistent with the provisions of the Act unless there is a special contract between the owner and insurance company to cover any liability beyond the limit prescribed under Section 95(2) of the Act, 1939. Mr. Ray also relied upon the decision of this Court in the case of *Branch Manager, National Insurance Co. Ltd. vs. Kahas Beherani and others,* 1998 ACJ 59 in support of his contention. Concluding his argument, Mr. Ray, prayed to allow the appeal.

9. Mr. Ray submitted that the claimants did not mention the Policy Number in the claim petition and also did not raise the plea of payment of additional premium. The owner-insured, who is in custody of original policy, did not appear and also did not file any written statement

raising the plea of payment of additional premium of higher risk. The insurer appeared and filed its written statement saying that as the policy number was not mentioned in the claim petition, the said fact was denied. At the time of hearing, referring to the cover note issued in respect of the policy (Ext.12) filed by the claimants as well as Insurance Company it was submitted that under heading Form-B (India), it has been mentioned that under the "Motor Vehicles Act, 1939. Section 95(2)(1) provides the limited liability of Rs.50,000/-. In Ext. 12 under heading Additional Risk of any special condition nothing has been mentioned and is completely blank. Though the Tribunal relied upon Ext.12, it has lost sight of the terms and conditions of Ext.12. There is absolutely no basis for the finding of the Tribunal directing the appellant to pay the entire compensation. This amounts to non-application of mind of the Tribunal. It is submitted that when the policy was issued, the M.V. Act, 1939 was in force and therefore, it had to be consistent with the provisions of the Act, 1939 and the liability of the Insurance Company cannot be extended beyond the limit prescribed under the provisions of Section 95(2) of the M.V. Act, 1939. Further, placing reliance upon the judgment of the Hon'ble Supreme Court in the case of *New India Assurance Co. Ltd. vs. C.M. Jaya and others,* AIR 2002 SC 651, it is submitted that the liability of the insurer is limited, but it is open to the insured to make payment of additional higher premium and get a higher risk covered in respect of third party also. But in absence of any such additional contract or clause in the Insurance Policy, the liability of the insurer cannot be unlimited in respect of a third party and it is

limited to the statutory liability. In the case of *Oriental Insurance Co. Ltd. vs. Cheruvakkara Nafeessu and others,* 2001 ACJ 1, the Hon'ble Supreme Court has held that the Insurance Company is liable to pay the entire amount awarded, with a right to recover from the insured, the excess amount over and above the liability statutorily covered and limited under the policy.

10. Mr. P.N. Mishra, learned counsel for the claimant-respondents submitted that the Insurance Company for the first time is raising a point in the appeal that its liability is limited to Rs.50,000/- as provided under Section 95(2) of the Act, 1939. In the written statement filed by the insurance company, they have not taken such a stand. They have also not produced any policy before the Tribunal to prove that they have limited liability as provided under Section 95(2) of the Act, 1939. In respect of his contention, he relied upon the decision of the Delhi High Court in the case of *Om Wati and others vs. Mohd. Din and others,* 2001(2) T.A.C. 665 (Del.), and the judgment of the Madras High Court in the case of *New India Assurance Co. Ltd., Salem vs. Shyamala and others,* 1997 (1) T.A.C. 565 (Mad) and the judgment of the Gauhati High Court in the case of *New India Assurance Co. Ltd. vs. Birendra Mohan De and Others,* 1996 (1) T.A.C. 771 (Gau.). It was further submitted that the Tribunal while granting compensation has not taken into consideration the future prospects of the deceased.

11. Mr. Mishra further submitted that Ext.12 is not the policy, it is a cover note. The policy was not filed either before the Tribunal or before

this Court. Misc. Case No.96 of 2013 has been filed under Order 41, Rule 27, CPC for acceptance of the policy as additional evidence, but in fact, the said Misc. Case was accompanied by the cover note which has been marked as Ext.12 in the Tribunal.

12. On the rival contentions advanced by the parties, the only question that falls for consideration by this Court is as to whether in the facts and circumstances of the case, the liability of the Insurance Company is limited to Rs.50,000/- in terms of Section 95(2)(b) of the M.V. Act, 1939 under which the policy was issued.

13. In the written statement in paragraph-1, the Insurance Company has stated as follows:

> "That on 9.05.1988 at about 8.30 A.M. the deceased while proceeding from Nayagarh towards Balugaon side in his scooter bearing registration No. ORX-8823 dashed against the Matador as a result of which the deceased was thrown out of the scooter and sustained severe injuries on his persons. Due to sudden mechanical failure of the offending vehicle (matador) the accident took place.

14. In the instant case, owner of the vehicle did not contest the case. The claimants filed the cover note (Ext.12), which has not been disputed by the Insurance Company. Despite the same, the Insurance Company has not produced the corresponding Insurance Policy either before the Tribunal or before this Court. It is not expected from the claimant(s) that in each and every case of injury or death, they would collect and furnish the Insurance Policy Certificate before the Tribunal. Undisputedly, in the instant case, the cover note of the Insurance policy

has been produced by the claimants and marked as Ext.12 without any objection. It is not understood why the Insurance company is not coming forward with the corresponding insurance policy to establish that the vehicle is not covered by any additional risk in respect of third party other than what is provided under Section 95(2)(1) of the M.V. Act, 1939. Therefore, the decision of this Court in the case of *Ramani Bewa (supra)* is of no help to the present appellant.

15. In *Ramani Bewa case (supra)*, this Court has held that it was the duty of the owner of the vehicle to place material in support of his plea of insurance with a particular Insurance Company; without furnishing necessary particulars, to require an Insurance Company to say whether the vehicle is insured would tantamount to asking it to locate a needle in a mountain; lakhs of policies are issued by the Insurance Companies; mere mention that a vehicle is insured with an Insurance Company without particulars of the policy would be insufficient to prove that the vehicle is really insured; that is why insistence is on the giving of particulars of Insurance policy; that facilitates in finding out whether as a matter of fact, a vehicle is insured or not.

In that case this Court has never said that the policy number and certificate has to be furnished by the claimants to enable the Insurance Company to locate as to whether the offending vehicle was insured with a valid insurance policy. In the instant case, the claimants have produced the cover note by which the offending vehicle was covered and the same is not disputed by the Insurance Company. Therefore, the

Insurance Company cannot take advantage of their own laches and inaction.

16. In the written statement, the Insurance Company has stated that it will file additional written statement or amend the original written statement if necessary after knowing about the cover note of the policy, Ext.12.

17. It reveals from the impugned judgment of the Tribunal that the claimants have taken a specific stand that the statutory liability of the Insurance Company is unlimited. Despite such a stand taken by the claimants and producing the cover note relating to the policy which was not disputed by the Insurance Company, the Insurance Company has not produced the policy issued with reference to the cover note to prove that the policy does not cover any additional risk of the 3rd party.

18. It is not correct to say that the liability of the insurance company on the policy issued under M.V. Act, 1939 is limited to Rs.50,000/- in view of Section 95 of the M.V. Act, 1939 in all events and circumstances. It would be true only if the insurer has not charged any higher premium for the third party risk. In the instant case, in spite of the stand taken by the claimants that the liability of the insurer is unlimited, the insurer has failed to produce any record/policy or legal evidence to prove that it has not charged any additional premium and its liability is limited to Rs.50,000/-.

19. The Delhi High Court in the case of ***Om Wati and others vs. Mohd. Din and others,*** 2001(2) T.A.C. 665 (Del.), has held as under:

> "7. Learned counsel for the Insuracne Company Mr. Suri wanted us to ignore and overlook the exercise undertaken by First Appellate Court and to go by a D.B. judgment of this Court in LPA 56/1990 titled "A.C. Gupta v. New India Assurance Co." decided on 1st September, 2000 : 87 (2000) DLT 779 (DB), which according to him cover the point in issue in favour of the insurer requiring us to hold that Insurance Company's liability was limited to Rs.50,000/-. We have gone through this judgment and we find it wholly distinguishable. It appears to us that Mr. Suri had misread it to believe that Section 95 of Motor Vehicles Act envisages a limited liability of the insurer in all events and circumstances. This judgment on the contrary held the company's liability limited in the facts and circumstances of the case and on finding that insurer had not charged any higher premium for third party risk. In the present case, however, insurer had failed to produce any record or legal evidence to prove that it had not charged any additional premium and that its liability was limited to Rs.50,000/-. It seems to have mistakenly believed that its Branch Manager's testimony would be the last word on the subject and would do the trick to reduce its liability.
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> 8. We accordingly affirm the finding of First Appellate Court and hold in the circumstances of the case that appellant Company's liability was unlimited and not limited to Rs.50,000/- as claimed by it."

20. In the case of ***New India Assurance Co. Ltd., Salem vs. Shyamala and others,*** 1997 (1) T.A.C. 565 (Mad), the Madras High Court has held as under:

> "5. The Motor Accidents Claims Tribunal held an enquiry on the above pleadings and gave a finding that the accident was due to the rash and negligent driving of the car and awarded a compensation of Rs.1 lakh payable by the respondents 3 and 4 jointly and severally.

21. The decision of this Court in the case of ***Suresh Chandra Patra and others*** *(supra)* is of no help to the appellant Insurance

Company. In that case, a copy of the insurance policy was filed by the appellant insurance company before the Tribunal. It was also not in dispute that right from the beginning the appellant has been raising the contention that as an insurer of the mini bus its liability is limited only to Rs.50,000/-as provided in Section 95(2) of the Act.

In the present case, the Insurance Company has not taken any specific stand before the Tribunal that its liability is limited only to Rs.50,000/- as provided in Section 95(2) of the Act. Therefore, Suresh Chandra Patra's case (supra) has no application to the present case.

22. There is no dispute over the legal propositions settled by the Hon'ble Supreme Court as well as this Court in various cases relied upon by Mr. Ray, learned counsel for the appellant-Insurance Company, but those cases are of no help to the appellant for the reasons stated in preceding paragraphs.

23. In view of the above, this Court does not find any illegality or infirmity in the impugned judgment passed by the Tribunal warranting interference of this Court. The Appellant-Insurance Company is therefore, directed to deposit the amount of compensation along with interest before the Tribunal within a period of eight weeks from the date of filing of claim petition till the date of payment as awarded by the Tribunal, adjusting any payment if paid earlier. On deposit of the said amount of compensation along with interest, the learned Tribunal shall disburse the same to the claimants in the manner it has directed in its judgment.

24. On production of the receipt showing payment of the amount of compensation along with interest as directed above, the Registrar (Judl.) shall refund the statutory deposit along with interest accrued thereon to the Insurance Company.

25. In the result, the appeal is dismissed.

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***B.N.Mahapatra,J.***

*Orissa High Court, Cuttack,*
*The 10th May, 2013/ss.*