GAHC010115872015

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MACApp./89/2015

UNITED INDIA INSURANCE COMPANY LTD
HAVING ITS REGISTERED OFFICE AT 24 WHITES ROAD, CHENNAI 600014
AND A BRANCH OFFICE AT GOLAGHAT, ASSAM AND REPRESENTED BY
ITS REGIONAL OFFICE, G.S. ROAD, GUWAHATI-5

VERSUS

MD AKSED ALI and 4 ORS
S/O MD. ABED ALI, R/O VILL. BARAIKUNDI PART VIII, P.O. KAWAITARY,
P.S. JOGIGHOPA, DIST. BONGAIGAON, ASSAM.

2:MD. BASER ALI

S/O MD. ABED ALI
R/O VILL. BARAIKUNDI
PART VIII
P.O. KAWAITARY
P.S. JOGIGHOPA
DIST. BONGAIGAON
ASSAM.

3:MRS. NAZMA BEGUM

W/O MD. JAHAN UDDIN
R/O VILL. KAWATARY PART-V
P.O. KAWAITARY
P.S. JOGIGHOPA
DIST. BONGAIGAON
ASSAM.

4:SANJIT RABHA

S/O HARANSUDRA RABHA
R/O VILL. GORAIMARI DARIDUBI
P.S. and DIST. GOALPARA
ASSAM.

5:ORIENTAL INSURANCE CO. LTD.

DIVISIONAL MANAGER
BONGAIGAON DIVISION
P.O. and DIST. BONGAIGAON
ASSAM

Advocates for the appellant : Mr. H. Buragohain
Mr. S. S. Sharma

Advocates for the respondents : Mr. K. Bhattacharjee, for R1
Mr. A. Dutta, for R5

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of Hearing : 22.09.2022
Date of Judgment & Order : 16.11.2022

JUDGMENT & ORDER (CAV)

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.*"

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

> *"21. 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."*

11. Further, the Hon'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:

> *"20. 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."*

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 "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 where 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, Bongaigaion, 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 Hon'ble Apex Court in the case of **Khenyei Vs. New India Assurance Company Ltd & Ors.**, reported in **(2015) 9 SCC 273**, has held that "there 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."

26. In another case of **Mohammed Siddique & Anr. Vs. National Insurance Compaly Ltd. & Ors.**, reported in **(2020) 3 SCC 57**, the Hon'ble Supreme Court has held that "Motor Vehicles Act, 1988 – Ss. 166, 168 and 128 & 194-C – Compensation – Contributory negligence of victim –Requirements for invocation of principle of – Explained – Deceased pillion rider riding on a motorcycle with two others ("tripling") when hit by a car from behind, such pillion riding above the permissible limit not having casual connection with injury or accident – 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."

27. More so, in the case of **Khenyei (supra)**, the Hon'ble Supreme Court held that "there 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."

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.

JUDGE

Comparing Assistant