GAHC010195712017

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

Case No. : MACApp./204/2017

THE ORIENTAL INSURANCE CO. LTD
A COMPANY REGISTERED UNDER THE COMPANIES ACT 1856,
REPRESENTED BY ITS CHIEF REGIONAL MANAGER, ULUBARI,
GUWAHATI-7, DIST. KAMRUP, ASSAM.

VERSUS

SRI UDAY CHANDRA DAS and 2 ORS
S/O LATE GIRINDRA DAS, R/O VILL. KUSHLAIGURI, P.S. MANIKPUR, DIST. BONGAIGAON, ASSAM.

3:SWARUP MOHAN DAS

S/O LATE NAMALESWAR DAS
VILL. PATILADOHA
P.S. MANIKPUR
DIST. BONGAIGAON
ASSAM

Advocate for the Petitioner : MR.R KATHKATIA

Advocate for the Respondent :

Linked Case : MACApp./207/2017

THE ORIENTAL INSURANCE CO LTD
A COMPANY REGISTERED UNDER THE COMPANIES ACT
1956

REP. BY ITS CHIEF REGIONAL MANAGER
ULUBARI
GUWAHATI- 7
DIST. KAMRUP
ASSAM

VERSUS

SMTI MALATI BARMAN and 4 ORS
W/O LT. KLHOKA BARMAN

2:MISS. SWAPNA BARMAN

3:SRI ISWAR BARMAN
NO. 1 IS THE WIFE AND NO. 2 AND 3 ARE MINOR DAUGHTER AND SON OF LT. KHOKA BARMAN
SINCE SON AND DAUGHTER ARE MINORS SO THEY ARE REP. BY THER MOTHER. ALL ARE RESIDENT AT VIL- 2 NO. DAILANGJHAR
P.S. BIJNI
DIST. CHIRANG BTAD
ASSAM
5:SRI SWARUP MOHAN DAS
S/O LT. NAMALESWAR DAS VILL- PATILADOHA
P.S. MANIKPUR
DIST. BONGAIGAON
ASSAM

Advocate for : MR.N BARMAN
Advocate for : appearing for SMTI MALATI BARMAN and 4 ORS

Linked Case : MACApp./208/2017

THE ORIENTAL INSURANCE CO. LTD
A COMPANY REGISTERED UNDER THE COMPANIES ACT 1956
REP. BY ITS REGIONAL MANAGER
ULUBARI
GUWAHATI-7
DIST. KAMRUP
ASSAM

VERSUS

SMT REENA DAS and 4 ORS

W/O LT. SANKAR DAS

2:SRI SOUMEN DAS
S/OLT. SANKAR DAS RESPONDENT NO. 2 BEING MINOR
REP. BY NATURAL GUARDIAN MOTHER RESPONDENT NO. 1
3:SMTI. MURATI BALA DAS
MOTHER OF LT. SANKAR DAS ALL ARE RESPONDENT OF VILL-
KUSHLAIGURI P.S. MANIKPUR DIST. BONGAIGAON
ASSAM
5:SRI SWARUP MOHAN DAS
S/O LT. NAMALESWAR DAS VILL- PATILADOHA
P.S. MANIKPUR
DIST. BONGAIGAON
ASSAM

Advocate for : MR.N BARMAN
Advocate for : MR. K R PATGIRI appearing for SMT REENA DAS and 4 ORS

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the appellant : Mr. S. K. Goswami, Advocate.

For the Respondents : Mr. K. Bhattacharjee, Advocate.

Date of Hearing : 15.12.2022

Date of Judgement : 20.04.2023.

JUDGMENT & ORDER (CAV)

1. Heard Mr. S. K. Goswami, learned counsel for the appellant. Also heard Mr. K. Bhattacharjee, learned counsel for the claimant respondent No. 1. None appears for the respondent Nos. 2 and 3, i.e. the owner and driver respectively of the offending vehicle.

2. These three appeals being MACApp./204/2017, MACApp./207/2017 and MACApp./.208/2017 are taken up together for final disposal as agreed to by the

learned counsel for the parties and also for the reason that the aforesaid three appeals arise out of the same accident and the evidences and the stands of the appellant Insurance Company in their written statements are also similar.

3. Background facts for the each of the MAC Appeals:-

A. **MAC appeal No. 204/2017**this appeal arises out of MAC Case No. 1628/2012, wherein, the learned Tribunal below under its Judgment dated 24.10.2016, had awarded compensation of Rs. 10,000/- (Rupees ten thousand) only with interest @ 7.5% (seven point five) per annum for the injuries sustained in the accident.

B. **MAC Appeal No. 207/2017:** The respondent No. 1, along with her minor daughter and minor son in this appeal were the claimants in MAC Case No. 1626/2012, wherein the learned Tribunal below under its Judgement dated 24.10.2016, had granted compensation of Rs. 8,34,000/- (Rupees eight lakh thirty four thousand) only with interest @ 7.5% (seven point five) per annum on account of death of their husband/father in the accident.

C. **MAC Appeal No.208/2017**: The respondent No. 1, along with her minor daughter and minor son in MAC Appeal No. 208/2017 were the claimants in MAC Case No. 1627/2012, wherein the learned Tribunal below under its Judgement dated 24.10.2016, had awarded compensation of Rs. 12,18,000/- (Rupees twelve lakh eighteen thousand) only with interest @ 7.5% (seven point five) on account of death of their husband/father in the accident.

D. The common pleaded case of the claimants in a nutshell is that on 18.03.2012, Uday Chandra Das, claimant in MAC Case No. 1628/2012 along with Sankar Das, the husband of claimant No. 1 and father of the claimant No. 2 & 3 in MAC Case No. 1627/2012 and one Khoka Barman, the husband of the claimant No. 1 and father of claimant No. 2 & 3 in MAC Case No.

1626/2012, were proceeding from Patiladaha towards Guwahati in a 407 Mini truck bearing registration No. AS-01-CC-6964 (herein after referred as offending vehicle) as owner of the goods.The vehicle being driven in a very rash and negligent manner overturned on the road at Puthimari at about 05.00 am. As a result of the accident, the husband/father of the claimants in MAC Case No. 1626/2012 sustained injuries on his person and died on the spot and the husband/father of the claimants in MAC Case No. 1627/2012 died during his treatment at Gauhati Medical College and Hospital, Guwahati and the claimant in MAC Case No. 1628/2012 got seriously injured.

E. Accordingly, the aforesaid three claim petitions were filed. The Insurance Company filed its separate written statements in each case before the learned Tribunal and amongst other took a common stand that the vehicle was driven in violation of the provisions of the Motor Vehicles Act, 1988 and it was within the knowledge of the owner. It also took a stand that as the policy was not yet verified, the Insurance Company reserves its right to present the policy at a later date before the learned Tribunal below. The Insurance Company took yet another stand that if there is any violation of policy condition, the Insurance Company will not be liable for payment of any compensation. The Insurance Company had taken another stand that they be allowed to adduce evidence and / or cross-examine the witnesses of the claimant irrespective of statement made in the written statement.

F. Thereafter, the claimants laid evidence of two witnesses each i.e. PW-1 and PW-2. The Insurance also adduced evidence of DW-1. Both the parties exhibited certain documents including the Accident Information Report, Post Mortem report, FIR, Insurance Policy, Registration documents of the vehicle etc.

G. After conclusion of the trial, the learned Tribunal below after consideration

of material available on record came to a conclusion that the claimants are entitled to receive compensation and the insurer is liable to pay such compensation. Accordingly, the awards as discussed hereinabove were passed.

4. Mr. S. K. Goswami, learned counsel for the appellant has confined his argument to the following points:-

I. That the three persons were gratuitous passengers in the vehicle and they were not at all third parties inasmuch as the learned Tribunal below proceeded to grant compensation to the claimants on the premises that these three persons were third parties.

II. The passengers in a goods vehicle cannot be treated as third parties. Therefore, the learned Tribunal below ought not to have awarded the compensation.

III. Though these three persons claim to be the owner of the goods for which the vehicle was hired, however, they had not led any evidence to show that they were the owner of the goods and in absence of such proof, the learned Tribunal below ought not to have accepted such contention of the claimants and ought not to have awarded the compensation.

IV. Even if for the sake of argument, it is admitted that they are the owner of the goods, however, the insurance policy itself permits three persons to travel in the cabin of the vehicle including the driver and the claimants in the present cases are three in number. Therefore, there is clear violation of the policy condition and

accordingly, the learned Tribunal below ought not to have fastened the liability on the Insurance Company.

V. To contend that excess passengers beyond carrying capacity cannot be granted compensation, Mr. Goswami, learned counsel relies on the decision of the Hon'ble Apex Court in the Case of ***National Insurance Co. Ltd –Vs- Anjana Shyam and Others*** reported in ***(2007) 7 SCC 445***

VI. Even if the claimants are entitled for compensation in MAC Case No.1626/2012 (MAC Appeal no.208/2017), the claimants had claimed the age of the deceased to be 48 years, however, as per Post Mortem Report the age of the deceased was declared by the Doctor as 65 years. Therefore, the multiplier ought to have been 5 and even if the proof of age adduced by the claimant i.e. the voter list, then as the voter list relates to the year 2006, so the age of the deceased on the date of accident should be 54 years and the corresponding multiplier shall be 11 and therefore, the learned Tribunal below has committed serious error in giving the multiplier 13.

VII. In the case of MAC Case No. 1627/2012, the future prospect in terms of the judgment of National Insurance Company Limited vs ***Pranay Sethi and Others*** reported in (2017)16SCC680 ought to have been 40%, whereas the future prospect has been considered to be 50%, and in MAC Case No. 1626/2012, the future prospect should also be treated as 25% instead of 30% in terms of the judgment of the ***Pranay Sethi and Others*** (supra). Accordingly, even if, this Court holds that they are entitled for compensation, same should be treated in terms of aforesaid pronouncement.

VIII. The learned Tribunal below has committed wrong in awarding exorbitant amount so far it relates to conventional head and since the appeal is a continuation of the proceeding of the claim, they should be awarded compensation against conventional head as determined by the Hon'ble Apex Court in the case of ***Pranay Sethi and Others*** (Supra).

5. Per contra, Mr. K. Bhattacharjee, learned counsel for the claimants/respondents contends that the claimants by leading evidence had proved that they were the owner of the goods and they travelled in the cabin of the vehicle and such evidence has not been shaken by the Insurance Company in their cross-examination. Therefore, in terms of Section 147(1)(b) of the MV Act,1988 the claimants are entitled for compensation even if such owners exceed beyond the carrying capacity of the vehicle in terms of the Insurance policy and if any violation is there on the part of the owner of the vehicle, such benefit cannot be denied to the claimants. In support of such contention, Mr. Bhattacharjee, learned counsel relies on a judgment of this Court in the case of ***Putu Hazarika –Vs- National Insurance Company Ltd. and another*** reported in ***2013 1 GLR 52*** and the judgment of the Hon'ble Calcutta High Court in the case of ***The New India Assurance Company Ltd –Vs- Shibani Mondal & Others*** reported in ***2012 ACJ 1641***. Mr. Bhattacharjee, learned counsel also relies on a judgment of the Hon'ble Andhra Pradesh High Court in the case of ***New India Assurance Company –Vs- Medisetty Venkatalakshmi and Other*** reported in ***2022 (3) T.A.C. 114 (A.P).***

6. It is also contended by the learned Counsel that such violation cannot be treated as a fundamental breach of policy condition to

disentitle the claimants from the statutory benefit. In support of such submission Mr. Bhattacharjee places reliance on the judgment of the Hon'ble Apex Court in ***Skandia Insurance Co.Ltd Vs. Kokilaben Chandravadan***, reported in ***1987 2 SCC 654***.

7. This Court has given anxious consideration to the submissions made by the learned counsels for the parties, and also perused the materials available on record.

8. Chapter 11 of the MV Act,1988 consisting of Section 145 to Section 146(D) deals with Insurance of Motor vehicle against third party risk.

9. Section 147 of MV Act deals with requirement of policies and limits of liabilities.

10. Section 147 of MV Act, 1988, gives a protection to the insured against any liability which is incurred by him in respect of death or bodily injury to a third party which includes the owner of the goods or his representative carried in the vehicle .

11. In the present case in hand, there is no dispute that the vehicle involved in the accident is a goods carriage vehicle. An exception is carved out under Section 147 of MV Act, 1988, where the owner or his representative accompanying the goods carriage vehicle gets a statutory insurance cover against the damage.

12. In the case in hand, the claimant has established that it was a goods carriage vehicle and they were accompanying the goods being the owner of the goods carried by the offending vehicle which was a goods carriage vehicle. Such evidence has remained unshaken and insurance company

has failed to rebut such evidence. Therefore this court unhesitantly holds that the claimants are entitled for protection u/s 147 MV Act.

13. Next question which is seriously been urged by Mr.S. K.Goswami, learned counsel for the appellant is that the insurance policy permits three persons to travel in the cabin of the vehicle including the driver and however, the claimant in the present case are three in number and therefore even after they are protected u/s 147 of the MV Act,1988 the Insurance company cannot be fastened with the liability as the vehicle was carrying more than three persons in the cabin violating the Insurance policy.

14. The Hon'ble Apex Court in the case of ***Skandia Insurance (supra)*** held as follows:-

"*… When the option is between opting for a view which will relieve the distress and misery of the victims of accidents or their dependents on the one hand and the equally plausible view which will reduce the profitability of the insurer in regard to the occupational hazard undertaken by him by way of business activity, there is hardly any choice. The Court cannot but opt for the former view. Even if one were to make a strictly doctrinaire approach, the very same conclusion would emerge in obeisance to the doctrine of 'reading down' the exclusion clause in the light of the 'main purpose' of the provision . The effort must be to harmonize the two instead of allowing the exclusion clause to snipe successfully at the main purpose."*

15. Similar view was also expressed by the Hon'ble Apex Court in the case of ***B. V. Nagaraju –Vs- Oriental Insurance Co. Ltd*** reported in ***1996 4 SCC 647***. In case of ***B. V. Nagaraju*** (Supra), the following question was framed:-

"*Whether the alleged breach of carrying humans in a goods' vehicle more than the number permitted in terms of the insurance policy, is so fundamental a breach so as*

to afford ground to the insurer to eschew liability altogether?"

16. While dealing with the issue, the Court came to the following conclusion:-

"*Merely by lifting a person or two, or even three, by the driver or the cleaner of the vehicle, without the knowledge of owner, cannot be said to be such a fundamental breach that the owner should, in all events, be denied indemnification. The misuse of the vehicle was somewhat irregular though, but not so fundamental in nature so as to put an end to the contract, unless some factors existed which, by themselves, had gone to contribute to the causing of the accident.*"

17. Law is by now well settled that when there is a fundamental breach of a condition which affected the main purpose of the act ,then only the insurance company can avoid its liability. Law is also equally well settled that allowing gratuitous passenger in a good vehicle is a fundamental breach. It is also equally well settled that Section 147 of the MV Act, 1988 provides that the policy should be a policy which insures the person or classes of person specified in sub-section 2 of Section 147 of the MV Act, 1988 against any liability which may be incurred due to death of or bodily injury to any persons including owner of the goods or his authorized representative carried in the vehicle or damage to any property of a third party caused by or arising out of the use of vehicle in a public place. Thus, the owner of goods in a good carrying vehicle is statutorily insured.

18. From the Insurance policy in question relating to the present case, the insured vehicle was entitled to carry in the cabin three persons including the driver and there were three claimants and thus admittedly the vehicle was carrying four persons in the cabin, though it was

permitted to carry three persons in the cabin. As held in ***B. V. Nagaraju*** (Supra), until and unless, it is established that carrying four persons in the cabin have contributed to the causing of the accident, such breach cannot be held to be a fundamental breach. This court is of the considered opinion that ratio laid down in the case of ***B. V. Nagaraju*** (Supra), and the facts thereof, squarely covers the present case. Furthermore, the insurance company has not laid any evidence to establish that such breach of carrying persons in the cabin more than permitted limit is the cause of the incident or that such breach has been committed with the knowledge of the owner.

19. In view of the aforesaid reason and discussions, it is held that there was no fundamental breach in carrying the three persons who were the owner of the goods and their presence in excess of permitted capacity has not been proved by the insurance company in contributing to the accident.

20. The judgment relied on by Mr. Goswami, learned counsel for the appellant i.e. ***Anjana Shyam and Others***,(Supra) in case of overloading passengers is not applicable to the given facts of the present case inasmuch as the vehicle in that case was permitted to carry 42 passengers and 42 passengers were insured, however, 90 passengers were carried. Therefore, it was held to be fundamental breach inasmuch as in the said case liability was limited to the claim of 42 passengers. In the considered opinion of this Court, ***Anjana Shyam*** (supra), was a case of gratuitous passengers and not a case of owner of the goods and therefore, is not applicable in the present case.

21. Coming to the argument relating to the determination of age in case

of the deceased in MAC Case No. 1626/2017, there is no dispute that in the claim petition, the age of the deceased has been claimed as 48 years. In the post mortem report the age of the deceased was declared by doctor as 65 years and the voter list exhibited by the claimant shows the age of the deceased to be 54 years on the date of accident. There was no other evidence to prove the age of the deceased.

22. It is by now well settled that age determined by doctors during post mortem may be appropriate but cannot be said to be accurate and therefore, when there is no evidence on record like birth certificate, passport, ration card, voter ID etc., the age prescribed in the post mortem certificate are considered. It is also well settled that when material evidence is available like identity card issued by the Government on the basis of self declared age and age declared in post mortem certificate, in the considered opinion of this Court, the self declared age accepted by the Government, shall be relied compared to the age given in post mortem certificate. Therefore, the learned tribunal below has committed error in relying on the self declared age in the claim petition by ignoring the self declared age in the voter list. Accordingly, it is held that the age of the deceased should be determined as 54 years and the corresponding multiplier shall be 11 and not 13 as determined by the learned Tribunal below.

23. Regarding the argument advanced touching the issue of future prospect, in Pranay Sethi (Supra), it was held that in case the deceased was self-employed, or on a fixed salary, an addition of 40% of the established income should be the warrant where the deceased was below the age of 40 years and the addition should be 25% where the deceased

was between the age of 40 to 50 years and 10% where the deceased was between the age of 50 to 60 years.

In the case of the deceased in MAC Case No.1626/2017, it is established that the deceased was self-employed and his age was 54 at the time of death and therefore, the future prospect would be addition of 25%.

In case of the deceased in MAC Case No.1627/2017, it is established that the deceased was self-employed and his age was 25 at the time of death and therefore, the future prospect would be 40%.

24. Coming to the other argument of Mr. Goswami, learned counsel for the appellant regarding payment of excess amount in respect of conventional head, this Court is of the view that the principle laid down in the case of ***Pranay Sethi*** (supra) shall also be applicable as the Hon'ble Apex Court determined and laid down certain formula for determination of award against conventional head.

25. Regarding the future prospect, the principle laid down in the case of ***Pranay Sethi*** (supra) is also required to be applied.

26. In view of the foregoing reasons and decisions, the MAC Appeal No.204/2017 is dismissed and the MAC Appeal No.207/2017 and MAC Appeal No.208/2017 are partly allowed by modifying the Awards to the following extent:

Award in MAC Appeal No.207/2017

(Arising out of MAC Case No. 1626/2012)

SL	Head	Amount

No.		
1.	A. Annual Income	Rs.4500X12=54,000/-
	B. Future Prospect @ 25% of income.	Rs. 13,500/-
	C. Less 1/3rd	Rs. 45,000/-
	D. Add Multiplier	Rs. 45,000/- X 11= Rs.4,95,000/-
	Total compensation Rs. 4,95,000/-	
2.	Loss of Estate	Rs. 16500/-
3	A. Consortium for wife and two children	Rs. 44,000X3=Rs.1,32,000/-
	B. Funeral expenses	Rs. 16500/-
	Total = Rs. 6,60,000/-	

Award in MAC Appeal No.208/2018

(Arising out of MAC Case No. 1627/2012)

SL No.	Head	Amount
1.	A. Annual Income	Rs.4500 X 12= Rs.54,000/-
	B. Future Prospect @ 40% of income.	Rs.21,600/-
	C. Less 1/3rd	Rs.50,400/-
	D. Add Multiplier	Rs. 50,400/- X 18= Rs. 9,07,200/-
	Total compensation Rs. 9,07,200/-	
2.	Loss of Estate	Rs. 16500/-
3	C. Consortium for	Rs. 44,000X3=1,32,000/-

	wife and two children	
	D. Travelling Expenses for treatment	Rs. 74,796/-
	E. Travelling expenses	Rs.9,000/-
	F. Funeral expenses	Rs. 16,500/-
	Total	**= Rs. 11,55,996/-**

27. The rate of interest awarded @7.5 percent from the date of filing of the claim are not interfered with.

28. The statutory deposit be returned back to the insurance company. The awards be satisfied within a period of three months from today.

JUDGE

Comparing Assistant