
(2020) 02 GAU CK 0006

In the Gauhati High Court

Case No : Motor Accident Appeal No. 195 Of 2012

Md Mufty Ashadullah

APPELLANT

Vs

Suresh Kr Dhanuka And Ors

RESPONDENT

Date of Decision : 06-02-2020

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2020) 02 GAU CK 0006

Hon'ble Judges : S. Hukato Swu, J

Bench : Single Bench

Advocate : A Ganguly, M Choudhury

Final Decision : Dismissed

Judgement

1. Heard Mr. A. Ganguly, learned counsel for the appellant and Ms. M. Choudhury, learned counsel for the respondent No. 3 as well as Mr. R.

Goswami, learned counsel for respondent No. 4.

2. This is an appeal under Section 173 of the Motor Vehicles Act, 1988 (M.V. Act) challenging the order dated 31.03.2012, passed by the Motor

Accident Claims Tribunal, Sonitpur, Tezpur.

Facts of the case is that one Mufti Ashadullah (the claimant) filed for compensation for damage of his vehicle bearing Registration No. AS-25-A/8626

(Maruti Van) in road traffic accident on 03.05.2003. The vehicle, while proceeding towards Guwahati, on reaching Garigaon under Jalukbari Police

Station, pick-up van bearing registration No. AS-0-IN/7168 driven by its driver, Dilip Koch, who is impleaded as opposite party No. 4 collided with the

Maruti Van. In the said accident, the occupants alongwith the driver were killed. It is in connection to this accident that the claimant, who is the owner

of the Maruti Van, has filed petition for indemnifying his damage claiming an amount of Rs. 2,80,000/-. The learned Tribunal, on adjudication of the claim petition found that the 2 (two) vehicles involved in the accident were both driven in a rash and negligent manner which caused the accident and apportioned the compensation on 50:50 basis to both the vehicles. The Maruti car being insured with the National Insurance Company Ltd. and the pick-up truck being insured with the Oriental Insurance Company Ltd., was awarded a sum of Rs. 1,46,930/- which was directed to be borne on 50:50 basis by the 2 (two) companies. The claimant, being dissatisfied with the judgment and order has brought this appeal on the ground that the basis on which the learned Tribunal came to the conclusion that both the vehicles were liable 50:50 is not based on the evidences that is brought before the learned Tribunal for adjudication. The learned Tribunal heavily relied upon the FIR and came to the conclusion that it was a case of contributory negligence by both the vehicles.

3. The learned counsel, Mr. Ganguly has relied upon the case of Usha Rajkhowa and others vs. M/S Paramount Industries and others, reported in (2009) 14 SCC 74, wherein the Apex Court has laid down the ratio that in a case of contributory negligence it is the burden of the insurance company to prove such negligence. The insurance company, the Oriental Insurance Company in the instant case has not discharged the burden of proof cast upon them and as such, the award is liable to be set aside and necessary assessment has to be made in passing the award of apportionment in accordance with the evidence. He has also pleaded that where issue of contributory negligence is involved, issue should be framed and a decision thereof should be arrived at in accordance with the evidence that is brought before the learned Tribunal. In the instant case, no issue as such was framed and hence, the learned Tribunal came to a wrong conclusion. It has been further stated that the burden of proof being cast upon the insurer, the insurance company was not debarred from calling the surviving driver who could have testified on the issue of the contributory negligence. This was not done by the respondents. Hence, they failed in their duty to discharge their burden of proving that there was contributory negligence to come to a just finding.

4. Ms. M. Choudhury, learned counsel appearing for the respondent No. 3,

Oriental Insurance Company has argued that the case referred by the learned counsel, Mr. A. Ganguly, in the case of Usha Rajkhowa (supra) is not in para materia with the case in hand. The facts in the referred case was that, inspite of evidences where there was total negligence on the part of the offending truck, the learned Tribunal came to the conclusion that there was 50:50 negligence. Under this situation the said judgment has been passed directing that the insurance company has to prove the contributory negligence. She has submitted that the case is not relevant for the purpose of our instant case. Ms. M. Choudhury, learned counsel has also submitted that the respondent No. 4 has admitted in their written statement at para 6 that both the vehicles are liable. It is also in the evidence of P.W.-1 that both the drivers of the vehicles were made an accused in the charge-sheet. Furthermore, FIR clearly indicates that it was a head on collision and both the vehicles contributed to the accident and there is no error in the finding of the learned Tribunal. Charge-sheet was submitted after 5 (five) long years and the I.O. was not examined nor was the charge-sheet exhibited, thus, opportunity was not given to the respondents for cross-examination. The precious opportunity for cross-examining vital documents which would have otherwise proved that there was contributory negligence was not privileged to the respondents. FIR and the charge-sheet are both the documents of the claimants, which in reality should not be proved by the respondents. When all those documents are agitating against the claimants and showing that there was contributory negligence, there was no further necessity to prove that there was contributory negligence.

5. Mr. R. Goswami, learned counsel appearing on behalf of respondent No. 4/ National Insurance Company, the insurer of the Maruti Van has submitted that whatever has been reflected in the written statement should not affect the parties involved and the merits of their evidences should be considered independently of his written statement.

6. On considering the arguments forwarded by the learned counsels for the contesting parties, I find that the best evidence that has been put on record are the FIR and the charge-sheet alongwith the deposition of P.W.-1. This is the limited evidence that has been laid before the learned Tribunal for determination of the merits of the case. On scrutiny of the evidences that is put on records for the learned Tribunal to examine, there can be no other

finding than to conclude that it is a case of head on collision and apportionment of liability should go on 50:50 basis. It is an admitted fact that no eye witness has been examined, therefore, the Tribunal must rely on the best evidence produced before him.

I find force in the argument forwarded by the learned counsel for the respondents and I do not consider it as a case deserving the interference of this Court.

7. The learned Tribunal has to rely on the best evidence to come to a decision. Thus, from the three pieces of evidences available, the inference

drawn by the learned Tribunal cannot be questioned. There is an attempt to suggest that the First Information Report (FIR) is the only document

which indicates that there was a head on collision but it has no value since the charge-sheet does not indicate a head on collision. It is the accepted

view that FIR is unadulterated document recorded immediately after any incidence of an offence or accident. Hence, the suggestion that the FIR

loses its value when the charge-sheet, which is a subsequent document contains different facts is not well placed. The fact is that under such

circumstances, there is more doubt cast upon the charge-sheet, which is a document liable to be prepared with afterthought propositions. Hence, the

FIR, when there is no convincing evidence against the contents must be treated as a primary evidence. We must also keep in mind that it is the

document of the claimants.

8. I am also not in agreement with the suggestion made by the learned counsel for the respondent No. 4 that their pleadings must not be read into the

case of the claimant. Respondent No. 4 is indeed the integral part of the main issue, being the insurer of the Maruti Van, AS-25-A/8626. Pleadings of

respondent No. 4 cannot be segregated as they are an intricate part of the issue representing the other car involved in the accident. Hence, it is

appropriate for the learned Tribunal to consider the plea that the Maruti Van was also contributory to the cause of the accident as filed by the

respondent No. 4 in the written statement. Thus, what a party to the enquiry admit or deny will have a bearing on the outcome of the enquiry.

9. The argument that the issue of contributory negligence has not been framed is also not in consonance with the records. In fact it has been framed

as issue No. 1 which reads as follows :-

â??(1) whether the accident took place due to the rash and negligent driving by the driver of the offending vehicle?â??

In fact, while discussing the issue, the main issue to dispose the claim petition has been answered encompassing the issue of contributory negligence.

In the textual words of the learned Tribunal, it reads as follows :-

â??8. From the claim petition and from the documents submitted by the claimant as Ext.1, it is found that the accident was occurred in head

and collusion of both the vehicles i.e. the Maruti Van and Pick up Van and the FIR was lodged against the driver of both the vehicles.

Along with the Addl evidence, the claimant has submitted the copy of the charge sheet in which the driver of the Pick up Van Dilip Koch is

shown as an accused, but, in the said charge sheet the IO has mentioned that the accident occurred in head and collusion of both the

vehicles and the driver of the Maruti Van died in the said accident. Therefore, from the oral and documentary evidence adduced by the

claimant it can be held that the accident took place due to the rash and negligent driving of the driver of both the vehicles.

This issue is decided accordingly.â??

From the above discussions of the learned Tribunal it is sufficiently clear that the issue of contributory negligence was clearly covered.

10. With respect to the interest that is directed to be given to the claimant, I do not agree to the view taken by the learned Tribunal that the interest

will be stopped for the reason the claimants have caused the delay in examination of the witnesses and they are disentitled to any interest for the

obvious reason that the claimants had delayed the trial by bringing the witness after a lapse of 5 (five) long years. The learned Tribunal has in his

arsenal the option of imposing cost upon the claimant and also adopting other various methods for speedy disposal of the matter. To penalize the

claimant alone would, therefore, be unreasonable. Hence, the interest must be paid to the claimant from the date of filing of the claim petition till

realization @ 6% per annum.

11. With the above discussions, it is apparent that there was sufficient evidence to ascertain and conclude that it was a case of contributory

negligence, and there was no requirement for the proof of the same, it was clear on records and was also admitted by the claimants and by respondent

No. 4.

12. With the above limited modification, the appeal is dismissed.

13. Let the records be sent back.