

(2012) 09 GAU CK 0098
In the Gauhati High Court
Case No : MAC Appeal No. 57 of 2007

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Saharban Begum

RESPONDENT

Date of Decision : 28-09-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 173
Penal Code, 1860 (IPC) — Section 279, 337, 338, 427

Citation : (2013) 2 GLT 792

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : S.K. Goswami, for the Appellant; K. Bhattacharjee, for the Respondent

Final Decision : Dismissed

Judgement

Subhasis Talapatra, J.—Heard Mr. S.K. Goswami, learned counsel appearing for the appellant as well as Mr. K. Bhattacharjee, learned counsel appearing for the respondents. This is an appeal u/s 173 of the Motor Vehicles Act, 1988 by the Oriental Insurance Co. Ltd. against the judgment and award dated 18.08.2006 passed by the Motor Accident Claims Tribunal, Kamrup in MACT Case No. 266 of 2004.

2. The findings as returned by the Tribunal as regards the accident that occurred on 18.07.2003 involving the vehicles bearing registration Nos. AS-01/L-8268 (Bus) and AS-21/1357 (Bus), death of Abul Ali, the driver of the vehicle bearing registration No. AS-01/L-8268 (Bus) in the said accident and the insurance coverage of the vehicle bearing registration No. AS-21/1357 (Bus) by the appellant, the Oriental Insurance Co. Ltd. are not in dispute by either of the parties or in the appeal. As such, those findings stand affirmed requiring no further appraisal whatsoever.

3. The questions those have been projected in the appeal are related to (1) when there was a head-on collision, the Tribunal by not directing any part of the

awarded sum to be paid by the owner of the vehicle bearing registration No. AS-01/L-8268 (Bus) has committed serious illegality and (2) in absence of any evidence, the Tribunal by considering the age of the deceased at 38 years has departed from the settled state of law.

4. Mr. Goswami, learned counsel for the appellant seriously questioned the finding of the Tribunal that

From the materials on record it is clearly established that due to fault and rash and negligent driving of the vehicle no. AS-21-1357 (Bus) owned by OP No. 2 and the driver was OP No. 3 who has authorized driving licence and the vehicle was also duly insured with OP No. 1, Oriental Insurance Co. Ltd. There is also no dispute about the insurance coverage of the vehicle. So, I am constrained to hold that the insurance Co. is to indemnify the owner. The issue is answered accordingly in favour of the claimants.

He further questioned the finding that:

There is also no proof of age of the deceased. But Ex-2, Death certificate and Ex-3, PM Report which reveals the age of the deceased was 38 years. As such "15" is the appropriate multiplier to be used in this case.

According to Mr. Goswami, learned counsel for the appellant those are not the documents for proving the age of the deceased and as such the finding cannot be sustained in law. In support of his contention, Mr. Goswami, learned counsel relied on a decision of the apex Court in *Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others*, where it has been held that:

12. Adverting to the next contention of the claimants, no doubt the High Court has not dealt with the point in issue. However, we have noticed the reasoning and finding of MACT recorded under Issue 2. It is the evidence of Rajesh Kumar Gupta PW 2 who was travelling in the Maruti car along with the deceased Raj Kumar Dugar on the day of the accident that he also suffered some injuries in the said accident. He stated that while coming from Digboi, the Maruti car being driven by the deceased met with an accident at a place near Kharjan Pol. Before the accident, Raj Kumar Dugar noticed a passenger bus coming from the opposite direction and the movement of the bus was not normal as it was coming in a zigzag manner. The Maruti car being driven by the deceased Raj Kumar Dugar and the offending bus had a head-on collision. MACT has not accepted the evidence of PW 2 to prove that the driver of the offending bus was driving the vehicle at abnormal speed. If the bus was being driven by the driver abnormally in a zigzag manner, as PW 2 wanted the Court to believe, it was but natural, as a prudent man, for the deceased to have taken due care and precaution to avoid head-on collision when he had already seen the bus coming from the opposite direction from a long distance. It was head-on collision in which both the vehicles were damaged and, unfortunately, Raj Kumar Dugar died on the spot. MACT, in our view, has rightly observed that had the knocking been on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the

driver of the bus, but when the vehicles had a head-on collision. the drivers of both the vehicles should be held responsible to have contributed equally to the accident. The finding on this issue is a finding of fact and we do not find any cogent and convincing reason to disagree with the well-reasoned order of MACT on this point. MACT has awarded interest at the rate of 10% per annum on the amount of compensation from the date of filing of the claim application till the date of payment. It is a discretionary relief granted by MACT and, in our view, the discretion exercised by MACT cannot be said to be inadequate and inappropriate.

5. Mr. Goswami, learned counsel for the appellant giving sufficient stress on the said finding submitted that when the vehicle had a head-on collision, the drivers of both the vehicles should have been held responsible to have contributed equally to the accident. He also relied on a decision of this Court in National Insurance Co. Ltd. Vs. Bikram Kumar Das and Another, to support his contention that evidence in a criminal proceeding cannot be relied without doing necessary inquiry into the fact that has been pleaded by the parties. In para-7 of the judgment, this Court held that:

7. The Criminal court by the judgment dated 6.4.2005, copy of which has been produced before this Court, has decided the criminal liability of the owner of the vehicle and has acquitted the accused from the charges u/s 279/338 of I.P.C. on the ground that the prosecution has failed to prove the charges beyond all reasonable doubts. The standard of proof in a criminal case and in a claim case under the provisions of Motor Vehicles Act, are different. In a criminal Case, the prosecution has to bring home the charges beyond all reasonable doubt but, in a Civil case it is preponderance of probabilities. Therefore, the submission of the learned counsel for the writ petitioner that, since the owner of the vehicle who drove the same on the fateful date was acquitted from the criminal charges, no award can be passed by the learned Tribunal, cannot be accepted and hence, rejected.

6. On the other hand, Mr. Bhattacharjee, learned counsel for the respondent Nos. 1 to 5 submitted that Bikram Kumar Das (supra) cannot be read isolatedly alienating facts related to that particular case whether there had been contributory negligence on the part of both the vehicles or not has to be established by way of evidence. In absence of the evidence to provide necessary basis for presumption it cannot be held that a head-on collision always is the outcome of contributory negligence. There cannot be any such universal rule. Learned counsel for the respondent Nos. 1 to 5 further submitted that the finding of the Tribunal as regards the age of the deceased which is based on the PM Report and the Death Certificate cannot be faulted with. Even there was scope of adducing the better evidence but for the purpose of inquiry and in absence of other evidence the Tribunal always can rely on such document.

7. This Court before discussing the rival contentions as advanced by the learned counsel for the parties made a scrutiny of the records. It appears from the

Accident Information Report that the police registered a case being Noagaon PS Case No. 557 of 2002 under Sections 279/337/338/427 of the IPC against the driver of the vehicle, namely, Lakhbindar Pal Gill of the vehicle bearing registration No. AS-21-1357 (Bus). There is no other evidence. Similarly, after investigation the charge sheet was filed, not against the driver of the other vehicle bearing registration No. AS-01/L-8268(Bus), namely, Md. Abul Ali. The police submitted the charge-sheet against the driver of the vehicle having registration No. AS-21-1357 (Bus) namely, Lakhbindar Pal Gill who later on pleaded guilty and was accordingly sentenced to suffer one month's simple imprisonment for the offence under Sections 279/337/427 of the IPC. Thus the case was finally disposed of. Apart that, one claimant, namely, Saharban Begum examined herself in support of the claim as the PW-2 and brought the relevant documents including the cost of treatment etc. on evidence but the respondents did not examine any witness or produce any document to support their contention that both the vehicles were negligent and responsible for the said accident.

8. While deposing in the tribunal, the PW-1 categorically stated that for rash and negligent driving of the driver, namely, Lakhbindar Pal Gill of the vehicle No. AS-21-1357 (Bus), the said accident occurred but there was no cross-examination on that point. In the Examination-in-Chief however she admitted that she did not sight the accident. Except the judicial order dated 15.10.2004 (Exbt.8) no other document speaks of the negligent driving.

9. On the face of such records, the probable inference that might be drawn is that the vehicle bearing No. AS-21-1357 (Bus) entirely responsible for the said accident particularly so in absence of any materials to indicate the negligence of the other vehicle.

10. Regarding the presumption of the contributory negligence for head-on collision Bijoy Kumar Dugar (*supra*) has been distinguished by the apex Court in *Usha Rajkhowa and Others Vs. Paramount Industries and Others*, . In *Usha Rajkhowa* (*supra*) it has been held that

12. The High Court firstly endorsed the finding of the Tribunal that Oriental Insurance Co. Ltd. was not liable to pay any compensation, since the policy was an Act policy. The High court then went into the exercise of appreciation of evidence and observed that the Tribunal had held that the accident took place due to contributory negligence of the drivers of the truck and the Maruti car. Considering the evidence of PW 3, it referred to the stray sentence, which we have quoted earlier, to the effect that the witness was not able to say clearly as to which vehicle was at fault. On this very basis, the High Court endorsed the so-called finding of the Tribunal that it was an act of contributory negligence. The High Court, therefore, held both the vehicles equally responsible for the accident and proceeded to dismiss the appeal. It is this judgment, which has fallen for consideration before us.

14. In spite of our minute scrutiny of the award, we have not been able to even find a mention of the words "contributory negligence" in the award passed by the Tribunal. There is, in fact, no finding given by the Tribunal as regards the contributory negligence. The subject is discussed in paragraphs 10 and 11, where we do not find any specific finding to the effect that the Maruti Car was guilty of the contributory negligence. It is only because the amount of compensation is restricted to 50% of the assessed amount that we have to infer that the Tribunal had given a finding of contributory negligence. Even at the cost of repetition, we may say that the words "contributory negligence" nowhere appear in the award passed by the Tribunal. There is only one stray statement in the award, concerning the evidence of PW-3 Madhuriya Rajkhowa to the effect that he failed to state which of the vehicles was actually at fault.

20. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in *Pramodkumar Rasikbhai Jhaveri Vs. Karmasey Kunvargi Tak and Others*, . That was also a case of collision in between a Car and a truck. It was observed in SCC p.458, Para 8:

8.....The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence". Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence", it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong."

21. This Court further relied on an observation of the High Court of Australia in *Astley v. Austrust Ltd.* (1999) 73 ALJR 403 to the following effect:

A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases, the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.

11. In this case also there is no evidence that the other vehicle indulged in such act which materially contributed to the damage caused and the said act was of such nature that it may properly be described as negligence.

12. Since it has been held in *Pramodkumar Rasikbhai Jhaveri* (supra) that unless his found that there had been no use of reasonable care for the safety of either himself or for the property, so that he becomes blameworthy in part as an author of his own wrong. The other vehicle therefore cannot be stated to have contributory negligence. In *Astley* (supra) the High Court of Australia has succinctly underlined the requirement for proving the contributory negligence. The duties and responsibilities of the defendant are several in determining whether contributory negligence existed and if so nature of the duty owed from a claim of contributory negligence and in another case the nature of the duty may reduce the plaintiffs share for the damage suffered. Therefore, all what required is the definite proof to establish the contributory negligence, which is conspicuously absent in the case in hand. Keeping these principles in mind, this Court finds that there was absolutely no evidence to suggest that there was any failure on the part of the other vehicle to take any particular care or that he had breached any duty in any manner. As such, the claim of the contributory negligence does not have any substance and the same is discarded. This Court is in agreement with the submission as made for the claimant-respondents that in absence of the other better evidence the Tribunal may consider the medical records such as the PM Report, Death Certificate etc. for determining the age of the victim. As such, this appeal is devoid of merit. Accordingly, the same is dismissed. However, there shall not be any order as to costs. The appellant is directed to pay the entire awarded sum in terms of the impugned judgment and award dated 18.08.2006 as passed by the Motor Accident Claims Tribunal, Kamrup in MACT Case No. 266 of 2004 within two months from today in the Tribunal on deducting the sum if any paid by this time. The appellant be returned with the statutory deposit for the purpose of making the final payment in the Tribunal.

Send down the LCRs forthwith.