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**(2011) 06 GAU CK 0078**  
**In the Gauhati High Court**  
**Case No : MAC Appeal No. 12 (K) of 2008**

Oriental Insurance Company Ltd.

APPELLANT

Vs

Smti. Shalini Devi Sethi and Others

RESPONDENT

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**Date of Decision :** 03-06-2011

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 140, 147, 165, 166, 170  
Penal Code, 1860 (IPC) — Section 302

**Citation :** (2011) 06 GAU CK 0078

**Hon'ble Judges :** P.K. Musahary, J

**Bench :** Single Bench

**Advocate :** B. Debnath, for the Appellant; B.N. Sarmah, for the Respondent

**Final Decision :** Allowed

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## Judgement

P.K. Musahary, J.—The Insurer, who was Opposite Party No. 2 in the claim petition, has filed this appeal u/s 173 of the Motor Vehicles Act, 1988 ( hereinafter referred to as the " MV ACT") against the judgment and award dated 17.12.07 passed by the learned Member, Motor Accident Claims Tribunal, Dimapur, Nagaland (hereinafter referred to as the ("Tribunal") in MAC Case No. 54/ 2001 wherein and whereby the Appellant was directed to pay an amount of Rs. 19,636,840/- only along with interest at the rate of Rs. 6% per annum from the date of filing of the claim i.e. from 11.5.2001 within a period of 30 days from the date of order with further direction to deposit the said amount in the form of cheque or bank draft into the Tribunal for verification and disbursement to the claimant.

2. The brief facts of the case are that on 23.4.97, while the deceased Sailesh Kumar Sethi was coming out from the office of the Directorate of Supplies, Dimapur, Nagaland, along with one of his inmates in a Maruti Car bearing Registration No. 05- 0341 driven by himself, arrived at the main gate of the office, an un-identified miscreant stopped him and asked the key of the vehicle for going somewhere. While the deceased and his fellow occupant refused to

handover the key of the vehicle to the miscreant and in the process of snatching, stealing of the vehicle, the miscreant pumped several bullets through fire arm on the deceased and the inmate who was sitting inside the vehicle along with the deceased. Due to bullet shots the deceased died on the spot while the fellow occupant sustained bullets injuries on his hands and was admitted in the hospital. The deceased's wife Smti Shalini Devi Sethi and her 2 minor daughters filed the claim petition under Sections 140/166 of the MV Act before the learned Tribunal which was registered as MAC Case No. 54 /2001 claiming compensation of Rs. 32,10,880/-. The owner of the aforesaid vehicle Miss Sarshika Sethi and the Divisional Manager, Oriental Insurance Co, Ltd., Dimapur, Nagaland were impleaded as O.P. Nos. 1 and 2 respectively. The O.P. No. 1, minor daughter of the deceased, is the registered owner of the accident vehicle.

3. The Appellant-O.P. No. 1 filed written statements admitting that she is the registered owner of the accident vehicle and she is a minor. It was also admitted that her deceased father was using the vehicle for welfare of the family as a natural guardian who used to driver the vehicle. In the written statements she stated that being a minor daughter she had No. idea about the age, income and tax liabilities of her deceased father.

4. The O.P. No. 2 (present Appellant) contested the claim case stating inter-alia that the claim petition is not maintainable and No. cause of action arose to claim the compensation as it was a murder simpliciter which cannot be termed as accidental death or accidental murder and No. liability could be saddled upon the Insurer inasmuch as the deceased might have purchased the vehicle benami in the name of his minor daughter and in all practical purposes he was the owner of the vehicle and being an owner of the vehicle, it is not liable for payment of compensation in respect of the death of an owner of the vehicle. The insurer as O.P. No. 2 denied the age, income and avocation of the deceased and stated that the claim amount is highly excessive and arbitrary.

5. The learned Tribunal framed as many as 8 issues to decide the claim petition.

6. The claimant examined herself as P.W-1. The person who was present at the time of alleged accident, as an eye witness was also examined as P.W-2. The insurer-O.P. adduced No. evidence. The learned Tribunal on the basis of oral and documentary evidence on record and also upon hearing the learned Counsel for the parties, passed the impugned judgment awarding compensation as indicated above.

7. Mr. Debnath, learned Counsel for the Appellant- Insurer submits that there was No. accidental murder within the meaning of the Act. It was a murder simpliciter by the extremists without involving any accident. Even assuming, but not admitting that it was an accidental murder, No. liability can be fixed with the Appellant- Insurer inasmuch as the deceased was a benamdar of the vehicle and he was driving the vehicle himself and in such case, he cannot be treated as a "third party" for the purpose of claiming compensation for accidental murder.

The alleged incident took place when he was driving the vehicle and not while travelling in the vehicle as a third party. For claiming compensation by the owner driver, there must be paid extra premium to cover the accident risk and in such case No. claim petition is required to be filed and whatever compensation is due, is to be paid as per the terms and conditions specified in the policy itself. For want of such proof of payment of extra premium to cover the accident of the owner driver, the insurer would not be liable to pay any compensation to the claimant as legal heirs of the deceased. In this regard, reference has been made to a decision in National Insurance Co. Ltd. Vs. Cholleti Bharatamma and Others, wherein it has been observed that "injury to any persons " would mean a third party and not a passenger travelling on a goods carriage whether gratuitous or otherwise". The learned Counsel for the Appellant, would advance his argument further that a person who drives a vehicle as its owner falls under the same category and he would not be a third party. In order to explain the meaning of third party he refers to New India Assurance Company Ltd. Vs. Sadanand Mukhi and Others,

8. At the outset an objection has been raised by the learned Counsel for the Respondents that this appeal is not maintainable inasmuch as the Appellant's application u/s 170 of the M.V. Act before the learned Tribunal for contesting the claim on all grounds was rejected on two occasions - once on 28.8.2003 and next on 7.10.2005. Any order passed by the Tribunal on the application u/s 170 of the M.V. Act is appealable and in the present case No. appeal has been filed by the insurer/Appellant and as such the insurer cannot file the present appeal against the impugned judgment and award and the same is liable to be dismissed as not maintainable. Moreover, the insurer Appellant as opposite party adduced No. rebuttal evidence before the learned Tribunal. It remained satisfied with filing of written statements. By filing this appeal the insurer is trying to fill up its lacuna and improve the case to avoid the liabilities for compensation. The Appellant has taken new pleas in this appeal which is not permissible under the law. Besides, there is No. prayer for allowing the Appellant for adducing additional evidence. The Appellant according to the claimant/Respondent, cannot take the plea that additional premium is necessary for covering risk of the owner driver without submitting the policy particulars along with the written statements. It is further argued that by taking ground No. vi and vii in the Memo of Appeal the Appellant has pleaded new ground which was not taken in the written statement inasmuch as it has been stated therein that the vehicle was purchased benami in the name of minor daughter of the deceased and the deceased was the owner of the incidental vehicle for which the insurer has incurred No. liability to the 3rd party in terms of Section 147 of the M.V. Act. and also stating therein that the insurance policy of the vehicle involved in the accident case has No. extremist coverage. The ground No. viii and x taken in the Memo of Appeal to the effect that the deceased was not a paid driver of the vehicle and as such the death of the deceased father of the minor registered owner is not covered by the existing policy of the insurance is also not tenable under the law. In regard to

maintainability of claim for compensation in the case of death caused by firing by the extremist, Mr. Sarma relies on Bipal Bashi Das v. Oriental Insurance Company Ltd. and Ors. reported in 2007 (2) TAC 181 (Gau(DB) and Ajay Jaiswal Vs. Mahadev Debnath and Others,

9. Mr. B.N. Sarma, learned Counsel for the Respondent-claimant submits that the present case is clearly covered by the Supreme Court's decision in Smti Rita Devi and Ors. v. New India Assurance Company Ltd. and Anr. reported in AIR 2000 SC 1930. In respect of payment of compensation due to death in accidental murder or in felonious act for stealing the motor vehicle, in the said case it has been observed that if the dominant intention of the act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder could be termed as accidental murder. The learned Counsel for the Respondent strenuously argued that the miscreant stopped the vehicle driven by the deceased and asked for the key of the vehicle and when the deceased refused to handover it, he was shot at. The act of stopping the vehicle indicates that the dominant intention of the miscreant was to get hold or steal away the vehicle but the miscreant had resorted to extreme act of pumping bullets on the deceased while he refused to handover the key of the vehicle. That means the prime intention of the miscreant was not to kill the deceased but to take possession of the vehicle from the deceased. In other words, according to him, the act of shooting and killing took place in the course of stealing the vehicle and so it comes within the meaning of accidental murder and such accidental murder is covered under the motor accident and the legal heirs are entitled to get the compensation under the M.V. Act.

10. From the argument advanced by the learned Counsel for the parties it could be understood that the crux of the matter is whether there was a motor vehicle accident within the meaning of Section 165 of the MV Act and more preciously, whether the death of the deceased is an accidental death/murder caused by felonious act with dominant intention to steal the vehicle to be covered within the meaning of judicial pronouncement in Rita Devi's case (supra) so as to award compensation to the claimants. The other questions or issues are dependent on the answer to be found and as such I would first deal with the aforesaid main issue.

11. The facts of the much relied case of Rita Devi are that some unknown persons hired an Auto Rickshaw from a Auto Rickshaw stand. The said auto rickshaw was reported to be stolen and the dead body of the auto rickshaw driver was recovered by police on the next day. But the auto rickshaw was never recovered. The claim of the owner that the auto rickshaw was lost was accepted by the Respondent-insurance company and a sum of Rs. 47,220/- as compensation was settled by the Insurance Company towards the loss suffered by the owner. In the said case it was held that the stealing of the auto rickshaw

was the dominant object of felony and the murder caused in the said process of stealing the auto rickshaw was only incidental to the act of stealing of the auto rickshaw and therefore it has to be said that the death of deceased of auto driver was caused accidentally in the process of committing theft of the auto rickshaw. Posing a question whether a "murder" can be regarded as an accident in any given case, the Apex Court explained the position in paragraph 10 of the judgment in Rita Devi's case, which are as under:

10... There is No. doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simplicitor, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

12. In the light of the above explanation, whether in the present case a particular act of felony has been committed with dominant intention to kill the deceased, an analysis is called for to come to a conclusion. Facts in Rita Devi's case and in the present case may be compared first. In the Rita Devi's case the perpetrators in the guise of passengers hired the auto rickshaw with intention at the beginning or in a pre-planned manner, to steal the auto rickshaw and with that intention they have hired and disappeared with the said auto rickshaw and in the process they eliminated its driver. It was a clear case of theft of the auto rickshaw and committing theft was the dominant intention of the perpetrator. It was not their dominant intention to kill the driver of the auto rickshaw. So it is well covered within the meaning of incidental murder for which compensation may be claimed under the MV Act.

13. In the case at hand the perpetrators stopped the vehicle while the deceased was coming out driving the vehicle with one Inspector of Food and Civil Supply who was sitting on front seat, was asked for the key of the vehicle. As per evidence on record the perpetrator shot several rounds of bullets at the deceased when he refused to handover the key of the vehicle. The inmate accompanying the deceased was also shot and received bullet injury. The perpetrator was in a position to take over possession of the vehicle and drive away but he did not do so. If the dominant intention of the perpetrator was to steal the vehicle driven by the deceased, he would have quietly stolen and driven away the said vehicle but he did not do so. Had the perpetrator disappeared with the vehicle, it would have been a clear case of theft and the said murder would have been said to have been committed in the process of committing theft. Nothing of the sort had happened. There is No. evidence adduced by the claimants that the perpetrator

tried to disappear with the vehicle. There is also No. evidence to the effect that due to interference by some bystanders around the place of occurrence he could not disappear. In absence of such evidence it cannot be inferred that the perpetrator aimed at stealing the vehicle and for the said purpose he resorted to extreme felonious act like killing the deceased. In my considered view, it cannot be safely said that the perpetrator had dominant intention to steal the vehicle and committed the murder in the process of stealing the vehicle.

14. From the records placed it has been found that a crime being Dimapur P.S. Case No. 70 of 1997 was registered u/s 302 Indian Penal Code, 1860 and the matter was investigated but No. steps were taken by the claimants to summon and examine the I.O. of the case or any concerned police official to know about the result of the investigation or to know as to whether the deceased was killed with motive behind or out of some grudge or he was killed in the process of stealing the vehicle. It has remained a secret as to whether the perpetrator belongs to any extremist group or whether there was a demand for ransom from the deceased by any extremist elements which was not unlikely in the prevailing situation. It has also remained a secret why the PW 2, Inspector of Food and Civil Supplies, Sri Zumomo Lotha was moving out with the deceased during office hour at the relevant point of time. There is nothing on record whether chargesheet was submitted in the aforesaid police case or returned in FR for want of sufficient proof and materials.

15. Bipal Bashi's case (supra) is a classic case where the extremists in the State of Agartala on the Amarpur-Teliamura Road spread bullets on a Jeep injuring passengers and killing one of them, travelling in the said vehicle. It was held therein that the Tribunal, in an appropriate case, is required to determine the dominant intention for causing injury to, or death to a passenger in a vehicle. On consideration of the facts and circumstances of the case it was held by this Court that dominant intention in the said case was not to kill any of the passenger or any particular passenger but to attack the vehicle. Further it was held that when the dominant intention was not to cause death to any particular individual, but was an attack on the use of the vehicle, the death arising of such occurrence would be treated as an accident death. On the said consideration it was held that the death of the claimant's husband was caused on account of use of vehicle in question and thus it was the accidental death due to extremists action. In fact the area to which Amarpur-Teliamura Road passes through, is known as infested by extremists and possibilities of extremists attack on public vehicle passing through the said road in the said area was very high and some passengers asked the driver to take a different road, although it was a longer one, but the driver did not pay heed to such request of the passengers and drove the vehicle through the said area. The act of the driver of the said vehicle was considered to be driving of the vehicle in a rash and negligent manner without bothering the safety of the passengers. The death arising out of such occurrence has been treated as an accidental death hastened by the extremists act. In such case, claim for compensation is maintainable inasmuch as dominant intention of

extremists was to attack the vehicle and the claimant's husband died in such attack. The present case is distinguishable from the aforesaid case. There is No. evidence on record that the perpetrator belonged to any extremist group and he attacked on the use of the vehicle by the deceased who was driving the vehicle himself and No. rash and negligent driving was attributed.

16. The claim petition, admittedly was filed u/s 166 of the M.V. Act. Under this Section No. liability for payment of compensation can be ordered until it is proved that accident arose out of use of motor vehicle. From the above discussion it has been found that the deceased was not killed by motor vehicle accident. The question of payment of compensation would have arisen if the claimant could have proved that the dominant intention of the perpetrator was to steal or take away the vehicle and in course of accomplishment of the said act, the perpetrators opened firing on the deceased causing death to him. I am afraid that the ratio applied to the case of Rita Devi and Bipal Bashi (supra) could cover the claimant's case at hand.

17. In my considered view, having come to a conclusion that the death of the deceased was not caused due to or out of motor vehicle accident within the meaning of M.V. Act and the aforesaid judicial pronouncements, this Court is not called upon to answer the question of liability and payment of compensation by the Appellant/insurer for the death of the deceased. It may be noted that the Appellant insurer, in paragraph-6 of its written statement, pleaded clearly that it was a murder simplicitor and never an accidental death and the insurer is not liable to pay any compensation. In view of the above, it cannot be said that the Appellant insurer did not take this plea and No. objection can be made to the effect that the Appellant/insurer took a new plea in this regard. The said plea having been taken in the written statement, the Appellant cannot be debarred from agitating the aforesaid issue in appeal. It has No. connection with the rejection of the Appellant's petitions u/s 170 of the M.V. Act so far as it relates to the issue of death of the deceased due to felonious act of the perpetrator whose dominant intention has not been proved to be committing theft of the vehicle. The objection raised by the Respondent-claimant is not sustainable under the law. Having taken into consideration the entire facts and circumstances of the case and evidence on record and also having come to a conclusion that the deceased was not killed in a motor vehicle accident within the meaning of the MV Act, I dissuade myself from upholding and affirming the impugned judgment dated 17.12.2007 passed in MAC Case No. 54 of 2001 by the learned Member Motor Accident Claims Tribunal, Dimapur, awarding compensation fixing liability on the Appellant-insurer and directing it to make payment of the awarded compensation amount to the Respondent-claimant. Consequently, I quash and set aside the impugned judgment and award. Appeal stands allowed. No. costs.

18. Sent down the LCRs forthwith.