

(2019) 09 GAU CK 0012

In the Gauhati High Court

Case No : Motor Accident Appeal No. 271 Of 2016

United India Insurance Co. Ltd

APPELLANT

Vs

Bijanti Bala Roy And Anr

RESPONDENT

Date of Decision : 05-09-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166A

Citation : (2019) 09 GAU CK 0012

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : A Talukdar, A Hussainr

Final Decision : Disposed Off

Judgement

Heard Mr. K.K Bhatta, learned counsel for the appellant. Also heard Mr. A. A Dewan, for the respondent No. 1. No one appears for the respondent No. 2, who is the owner of the motorcycle bearing Registration No. AS-19/A-7564.

1. The facts of the case in brief is that the wife of Late Kailash Chandra Roy filed a claim under Section 166 A of the M.V Act, 1988 due to the death of her husband, who was riding on a Scooter bearing Registration No. AS-19-1937, which was involved in a head on collision with a motorcycle bearing Registration No. AS-19-A/7564 on 28.01.2005.

2. The learned MACT, Bongaigaon, thereafter, vide Judgment & Order dated 16.05.2016 passed in MAC Case No. 126/2016, awarded compensation amounting to Rs. 29,05,295/-along with interest at the rate of 6% per annum from the date of restoration of the claim petition i.e., on 23.04.2015 till realization. It also directed that Rs. 5 lakhs should be deposited in the name of the children of the deceased, for a term of 3 (three) years in any nationalized Bank.

3. The appellant/Insurance Company has challenged the Judgment & Order dated 16.05.2016 passed in MAC Case No. 126/2016, on the ground that the learned

MACT had overlooked the fact that the accident occurred due to the contributory negligence of the deceased and hence, the liability of the appellant/insurer to pay compensation should have been limited only to 50% of the compensation amount awarded.

4. The learned counsel for the respondent No. 1, on the other hand, submits that the learned Tribunal has rightly come to a finding that there was rash and negligent act on the part of the driver of the motorcycle and accordingly, there was no infirmity with the learned Tribunal fastening the liability of paying the entire compensation amount upon the appellant.

5. I have heard the learned counsels for the parties.

6. The claimant's husband was riding his Scooter and the same met with a head-on collision with a motorcycle, which was coming from the opposite direction. The motorcycle was insured with the appellant. The question to be decided is whether there was contributory negligence on the part of the deceased, given the fact that there was a head-on collision between 2 (two) two-wheelers.

7. The evidence recorded by the learned Tribunal shows that there was only one eye-witness to the accident, i.e., one Chandra Mohan Barman (PW-2). He deposed that while he and his friend Gautam Ray were taking tea in a tea-stall, he saw the claimant's husband coming on a Scooter and the same was knocked down by the motorcycle. As a result, the deceased fell on the PWD road and sustained injury, due to which the deceased was taken to a hospital. The cross-examination of PW-2 is to the effect that the accident took place at Majgaon and the road at Majgaon where the accident took place was in a broken condition.

8. The evidence of the claimant/respondent No. 1 is to the effect that the accident was reported to the police and G.D.E No. 920 dated 28.12.2005 and GDE No. 925 dated 28.12.2005 had been recorded in the Bongaigaon Police Station. However, the police did not make any final report holding the motor cyclist to have acted in a rash and negligent manner while driving the motorcycle. No doubt the knocking down of the scooter suggests that the motorcyclist was in the wrong.

9. The evidence on record shows that the road at Majgaon was in a broken condition. There is no evidence adduced by PW-2 that the motor cyclist or the deceased were driving their two wheelers in a rash or negligent manner. The finding of the learned Tribunal is to the following effect:-

".....From the above evidence of PWs, both oral and documentary, it appears to me that there was rash and negligence on the part of the driver of the offending motorcycle. The opposite party did not adduce any rebuttal evidence regarding causing the accident by the offending vehicle concerned."

10. The finding of the learned Tribunal, as quoted above is not supported by any evidence. The closest evidence that allegedly shows that there was rash and negligent act on the part of the Motorcyclist is that he had knocked down the

Scooterist.

The evidence shows that the accident occurred where the road was in a bad condition. It also shows that the two wheelers came from opposite directions, which implies that the two wheelers' drivers would have seen each other.

11. In the case of Bijoy Kumar Dugar vs. Bidya Dhar Dutta and Others, reported in 2006 3 SCC 242, the Apex Court has held at para 12 as follows:-

"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 the MACT recorded under Issue No.2. It is the evidence of Rajesh Kumar Gupta-P.W.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. The MACT has not accepted the evidence of P.W. 2 to prove that the driver of the offending bus was driving the vehicle in abnormal speed. If the bus was being driven by the driver abnormally in a zigzag manner, as P.W. 2 wanted to believe the Court, 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 from a long distance coming from the opposite direction. It was head-on collision in which both the vehicles were damaged and unfortunately, Raj Kumar Dugar died on the spot. The MACT, in our view, has rightly observed that had it been the knocking 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 the MACT on this point. The 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 the MACT and, in our view, the discretion exercised by the MACT cannot be said to be inadequate and inappropriate."

The Judgment of the Apex Court, as quoted above, wherein it upholds the finding of the Tribunal, is to the effect that when there is a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident, unless there was a finding that one of the vehicles had been knocked on its side, whereby negligence or rashness should have been wholly fastened or made attributable to the driver of the other vehicle. In the present case, though there is nothing to show that there has been any contributory negligence due to some action or omission on the part of scooterist, equally there is nothing to

show that the motor cyclist had driven the motorcycle in a rash and negligent manner, except to the accident that it had knocked down the scooter.

12. In the case of *Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak*, reported in 2002 6 SCC 455, the Apex Court has held at para 8 & 9 as follows:-

"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."

9. Subject to non-requirement of the existence of duty, the question of contributory negligence is to be decided on the same principle on which the question of defendant's negligence is decided. The standard of reasonable man is as relevant in the case of plaintiff's contributory negligence as in the case of defendant's negligence. But the degree of want of care which will constitute contributory negligence, varies with the circumstances and the factual situation of the case. The following observation of the High Court of Australia in *Astley Vs. Austrust Ltd.* (1999) 73 ALJR 403 is worthy of quoting:

"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."

In the case of *Jiju Kuruvila & Ors. vs. Kunjamma Mohan & Ors.*, reported in 2013 9 SCC 166, the Apex Court has held at para 20.5 as follows:-

"20.5. The mere position of the vehicles after accident, as shown in a Scene Mahazar, cannot give a substantial proof as to the rash and negligent driving on the part of one or the other. When two vehicles coming from opposite directions collide, the position of the vehicles and its direction etc., depends on number of

factors like speed of vehicles, intensity of collision, reason for collision, place at which one vehicle hit the other, etc. From the scene of the accident, one may suggest or presume the manner in which the accident caused, but in absence of any direct or corroborative evidence, no conclusion can be drawn as to whether there was negligence on the part of the driver. In absence of such direct or corroborative evidence, the Court cannot give any specific finding about negligence on the part of any individual."

13. In the present case, there is nothing to show whether the head-on collision took place, in the middle of the road or on the left/right side of the road. Further, the road was purportedly in a bad condition at the time of the accident.

14. In the present case, though General Diary entries (GDE) were allegedly registered with the Police, no police case was registered by the police against the motor cyclist. The evidence of the wife of the deceased (PW-1) is to the effect that one Gautam Roy and one Mafiz Uddin were present at the time of the accident. However, they were not examined as witnesses in the learned Tribunal nor were they examined by the police, as no police case had been registered, though GD entries had been made in respect of the accident.

15. In the case of Meera Devi & Anr. Vs. Himachal Road Transport Corporation & Ors., reported in 2014 4 SCC 511, the Apex Court has held that to prove contributory negligence there must be cogent evidence. In the absence of any cogent evidence to prove the plea of contributory negligence, the said doctrine of contributory negligence cannot be applied. On perusing the written statement submitted by the appellant before the learned Tribunal, it is seen that though they did not take up the plea of contributory negligence, they had denied that the motor cyclist had driven the motorcycle in a rash and negligent manner. As has been quoted above, the Apex Court, in the case of Meera Devi & Anr. Vs. Himachal Road Transport Corporation & Ors (supra), had held that there must be cogent evidence to prove contributory negligence. Using the same yardstick, this Court is also of the view that there must be some evidence to prove the finding of the learned Tribunal that the motorcycle had been driven in a rash and negligent manner. As stated earlier, there is nothing in the evidence recorded, as to whether the head-on collision took place in the middle of the road or on the left/right side of the road, i.e., the side of the road where the scooter was travelling or the side on which the motor cyclist was travelling. There is nothing to show that the motor cyclist was speeding or driving in a zig-zag manner. Further, the evidence is to the effect that the road was in a bad condition. If the deceased had seen the on-coming motorcycle being driven in a rash and negligent manner, the deceased, as a prudent man could have tried to avoid the on-coming motorcycle by stopping the scooter or going to the side of the road etc. However, as stated earlier, the evidence is silent on this aspect. In such a scenario, it will be difficult to come to a finding as to whether the motor cyclist was rash and negligent. However, the ground taken by the learned Tribunal for holding the motor cyclist to have acted in a rash and negligent manner seems to

be the fact that the motorcycle had knocked the scooter. The knocking of the scooter shows that the motor cyclist was in the wrong. However as the accident was a head-on collision, the scooter would also have knocked the motorcycle. Accordingly, this Court is of the view that there was contributory negligence on the part of the deceased scooterist also. Further, though a death had occurred due to the accident, the police have not registered any case against the motor cyclist, though GD entries had apparently been made. It may also be stated here that the claimant did not submit any copy of the GD entries before the learned Tribunal. No Police report under Form 54 of the M.V Act, 1988 has been made or submitted in the learned Tribunal with regard to the accident.

16. This Court is of the view that though the learned Tribunal had committed no error in coming to a finding that the motor cyclist acted in a rash and negligent manner, because the motorcycle had knocked the scooter, it has failed to record any finding with regard to the role of the deceased scooterist. Though the learned Tribunal is not expected to search for proof or evidence beyond reasonable doubt and can come to a finding on the basis of preponderance of probability. The only conclusion that can be arrived at from the evidence adduced is that there was some contributory negligence from both the parties due to the head-on collision. However, as the exact extent of contributory negligence of the scooterist cannot be ascertained, this Court holds, keeping in view the judgment of the Apex Court in *Bijoy Kumar Dugar vs. Bidya Dhar Dutta and Others.* (supra) and the fact that there is no Police Report under Form No. 54, the extent of contributory negligence by the deceased scooterist is fixed at 25%.

17. In that view of the matter, this Court holds that the appellant is liable to pay to the claimant/respondent No. 1 only 75% of the compensation awarded. Accordingly, as the appellant has deposited 50% of the awarded amount in terms of the Order passed in I.A(C) No. 1709/2016 and 50% of the deposited amount has been released to the respondent No. 1, the remaining portion, which has been kept in a fixed deposit shall also be released to the respondent No. 1. The remaining 25% of the compensation amount awarded by the learned Tribunal along with interest @ 6% from the date of restoration of the claim petition till final payment, shall be deposited by the appellant in the MACT, Bongaigaon, within four weeks from the date of receipt of a copy of this order. However, out of the amount to be received by the respondent No. 1, Rs. 2 lakhs each shall be put in a fixed deposit in the name of the children of the deceased, i.e., Hemen Ch. Ray. Hitesh Ch. Ray and Priya Ray, for 3 (three) years in any nationalized Bank.

18. The impugned Judgment & Order dated 16.05.2016 passed by the MACT Bongaigaon in MAC Case No. 126/2006 is accordingly modified to the extent indicated above. Send back the LCR.