

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

M.A.C. APPEAL NO. 39/2010

NATIONAL INSURANCE CO. LTD.

... Appellant

-Versus-

MUST. HASINA BEGUM AND ORS.

... Respondents

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

Advocates for the Petitioners:	Ms. S. Roy.
Advocates for the Respondents No.1 to 4:	Mr. G. Jalan,
Advocates for the Respondent No.8:	Mrs. M. Choudhury.
Date of hearing and order:	01.12.2017.

JUDGMENT AND ORDER (ORAL)

Heard Ms. S. Roy, learned counsel for the appellant as well as Mr. G. Jalan, learned counsel appearing for the respondents No. 1 to 4 (i.e. claimants) and Ms. M. Choudhury, learned counsel appearing for the respondent No. 8. None appears on call for the other respondents, although notice was duly served. As the appeal is heard ex-parte against them.

2) This appeal under Section 173 of the Motor Vehicles Act, 1988 is preferred against the judgment and award dated 05.11.2009, passed by the

learned Member, Motor Accident Claims Tribunal, Kamrup (M), Guwahati in MAC Case No. 928/2005.

3) The Respondent No.1/ claimant is the wife of Late Sahbuddin Ahmed, the deceased victim of the motor vehicle accident. The claim case in brief is that on 21.04.2005, while the deceased was riding his motorcycle bearing registration No. AS-12/B-6693 along with his wife i.e. the claimant and his minor daughter, the offending motorcycle bearing registration No. AS-12/C-4255, which was coming from the other side in a rash and negligent manner, hit their motorcycle and consequently the victim sustained grievous injury and died. The appellant, who was arrayed as Opposite Party No. 3 in the claim petition, filed their written statement as well as additional written statement. Apart from usual stereo-type defence, the appellant took a plea that the deceased, who was the owner of the motorcycle bearing registration No. AS-12/B-6693, was riding his motorcycle along with his wife and minor daughter as pillion riders and, as such, the deceased was carrying excess persons in his motorcycle in violation of the carrying capacity of the motorcycle. It was stated that due to imbalance as well as rash and negligent driving, the deceased had hit one cyclist, namely, Gobin Karmakar and as a result, the deceased along with his wife and daughter fell on the road and sustained injuries. After hitting the cyclist in the accident, it is projected that the deceased had slipped away from his own motorcycle and thereafter, the offending motorcycle, which was coming on the road from opposite direction had hit only the motorcycle of the deceased and in the process, the offending vehicle did not cause any injury to the deceased and therefore, the appellant insurer was not liable for paying any compensation in respect of the death of the victim. The respondent No. 8, i.e. The Regional Manager, New India Assurance Co. Ltd., who was arrayed as Opposite Party No. 5 in the claim petition had also filed their written statement and denied the claim. On the basis of the pleading, the learned Tribunal framed the following issues for adjudication:

- (1) *Whether the victim (claimant's husband) Sahbuddin Ahmed died out of the accident which occurred on 21.04.2005 involving vehicle No. AS-12/B-6693(M/Cycle) & AS-12/C-4255 (M/Cycle)?*
- (2) *Whether the aforesaid accident occurred due to rash and negligent riding by the rider (Opposite Party No.) of the vehicle No. AS-12/C-4255 (M/Cycle)?*
- (3) *Whether any relief/compensation is available to the claimant for the death caused to her husband in the above vehicular accident involving vehicle No. AS-12/C-4255 (M/Cycle) & AS-12/B-6693(M/Cycle) insured with M/s. National Ins. Co. Ltd. & M/s. New India Assurance Co. Ltd., respectively, if so, what amount and from whom?*

4) It is required to be clarified that in the impugned judgment, the seriatim of the three issues framed by the learned Tribunal was inadvertently typed out as (1), (2) and (2). Therefore, the second issue No.(2) is renumbered and referred to as Sl. No.(3) herein for the sake of convenience and clarity.

5) In support of the claim petition, while the claimant had examined herself as PW-1, the present appellant had examined two witnesses, namely, Sri Bimal Chandra Nath, the owner of the motorcycle bearing registration No. AS-12/C-4255 as well as Sri Babul Chandra Nath, the pillion rider of the same motorcycle. The present respondent No. 8 had also examined one witness.

6) On appreciating the pleadings and the evidence on record, in respect of issues No. 1 and 2, the learned Tribunal held that had the rider of vehicle No. AS-12/C-4255 taken proper care, perhaps the collusion could have been avoided. It was further held that had similarly, had the deceased not contributed to the accident by falling down on the road after hitting by the bicyclist, there was less chance of the other vehicle hitting the vehicle of the deceased. Hence in the totality of the evidence, it was held that both the vehicles were equally

responsible for the accident causing to the death of the deceased and, as such, it was held that the responsibility of vehicle No. AS-12/C-4255 in the accident causing death of the deceased cannot be held to be more than 50%. In respect of issue No. 3, the learned Tribunal arrived at a finding that the deceased was 40 years of age at the time of death as per the statement of the claimant and as per the Ext. 4, which is the HSLC pass certificate, the age of the deceased was 41 years at the time of the death and, as such, the applicable multiplier was taken to be 14. It was held on the basis of the salary certificate (Ext.3) that the deceased was a teacher and earning salary of Rs.6,528/- per month. Therefore, taking the same to be income of the deceased, one-third of such income was deducted on account of personal expenses, and the annual loss of dependency was calculated at Rs.48,800/- and on applying the multiplier of 14, total compensation on account of loss of dependency was assessed as Rs.6,83,200/-. Moreover, compensation on account of funeral expenses, loss of consortium and loss of estate was assessed at Rs.5000/- each and the total compensation was assessed at Rs.6,98,200/-. On account of contributory negligence of the deceased, liability of 50% was imposed only on the present appellant. Accordingly, an award of Rs.3,49,000/- was passed against the present appellant, and it was held that the appellant would be liable to pay interest at the rate of 6% per annum from the date of filing of the claim petition i.e. 01.06.2005 till payment.

7) The learned counsel for the appellant has submitted that in the present case in hand, the evidence of DW-1 and DW-2 had established that the deceased had hit a cyclist causing his motorcycle to fall. This had also caused the deceased, the claimant and their minor daughter to fall down on the road. The said evidence had also proved that while the deceased was lying falling down on the road, the offending motorcycle had hit only the motorcycle of the deceased. At that time, as the deceased was not riding his motorcycle, no case was made out for fixing any liability upon the appellant, which was the insurer of the alleged offending vehicle. Great stress as well as reliance was placed by the

learned counsel for the appellant on the final report dated 31.07.2005, submitted by the police in course of their investigation of the accident. It is also submitted that the claim petition was filed under Section 166 of Motor Vehicles Act, 1988 and, as such, it was the burden of the claimant to prove rash and negligent driving of the offending vehicle, which was a pre-condition for award being passed under Section 166 of the M.V. Act. It is further submitted that the deceased was driving his motorcycle in violation of the traffic rules as the seating capacity of a motorcycle cannot exceed two persons.

8) Per-contra, the learned counsel for the respondent No. 1 to 4 (i.e. claimants) has submitted that the owner of the offending vehicle, namely, Sri Bimal Chandra Nath (DW-2) was arrayed as Opposite Party No.2 in the claim petition. He had not contested the claim petition as no written statement was filed by him. Therefore, the evidence of Bimal Chandra Nath as DW.2 was liable to be ignored on the ground that he had given his evidence without his pleading on record. It is further submitted that the claimant No.1 as PW-1 had proved her plea that the owner of the offending motorcycle had been driving his vehicle in a rash and negligent manner at the time of the accident and that the statements made in her evidence-in- chief could not be dislodged during her cross-examination. Therefore, when the defence plea that the deceased was not riding his vehicle at the time of the accident could not be proved. It is submitted that the present claim has arisen out of motor vehicle accident under the Motor Vehicles Act, 1988 and, as such, it was only required for the claimants to merely establish the existence of probability. In support of his argument, the learned counsel for the appellant has relied on the case of *Bimla Devi and Ors. Himachal Road Transport Corpn. and Ors., (2009) 13 SCC 530*. The relevant paragraph No. 15 thereof is quoted below:

"15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be possible to be done by

the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said reason, the High Court should have taken into consideration the respective stories set forth by both the parties."

9) It is also submitted by the learned counsel for the respondents No.1 to 4 that in the accident in this case, the deceased had lost his life and had left behind his wife and three minor children. Yet, the the amount of compensation apportioned on the appellant was only a meagrely sum of Rs.3,49,000/- and therefore, on hyper-technical appreciation of the evidence, the claimants may not be deprived of even the said insufficient compensation awarded in their favour.

10) The learned Counsel for the respondent No.8 has submitted that the respondent No.8 was the insurer of the motorcycle of the deceased and they had been exonerated from paying any sum to the claimants. Therefore, as the claimants had not preferred any appeal against the exoneration of the respondent No.8, they are appearing at the hearing only as a formal party so as to protect their interest.

11) On the basis of the plea taken by the appellant, the only point of determination which arises for consideration of this court in the present appeal is - *Whether the motorcycle bearing registration No. AS-12/C-4255 had contributed to cause the accident and whether the appellant had been successful to prove the stand taken at the trial?*

12) In her evidence, the PW-1 had proved the following exhibits, viz., Police Report (Ext.1), Certificate showing date of appointment as Assistant Teacher at Bhasha Swahid L.P. School (Ext.2), Pay slip of the deceased, Sahabuddin Ahmed, showing that his monthly salary was Rs.6,528/- (Ext.3), HSLC examination pass certificate of the deceased, showing his date of birth as

15.08.1964 (Ext.4), Certified copy of post mortem report (Ext.5) and certified copy of the FIR (Ext.6).

13) It is seen that in the evidence of the claimant as PW-1, the said witness had stated that the accident had occurred due to sole negligence on part of the rider of motorcycle bearing registration No. AS-12/C-4255, who due to his high speed driving could not keep control over his motorcycle and as a result dashed into motorcycle of the deceased. In her cross-examination by O.P. No. 3 i.e. the appellant herein, PW-1 had denied that on the date her husband had knocked down cyclist, Govin Karmakar and as a result he was killed. The said witness had also denied that the accident took place due to her husband.

14) The appellant did not examine its own officers as any of the witnesses and instead, they had examined one Babul Chandra Nath as DW-1. The said DW-1 was the pillion rider of motorcycle No. AS-12/C-4255 and he had stated that the deceased after hitting a bicyclist and then slipping from its place on the big road of National Highway No. 52, hit our motorcycle. He had stated that the deceased had felled down on road with wife and child after hitting the bicyclist and that when the motorcycle of the deceased hit their bike, the rider Sahabuddin (deceased) was not on the said bike. In his cross-examination by the claimants' side, the said DW-1 had accepted that his statement that the bike of the deceased was absolutely responsible for the alleged accident was not correct. On his cross-examination by the O.P. No. 5 i.e. Respondent No. 8 herein, DW-1 had stated as follows - *"It is not a fact that our bike was responsible for the alleged accident and that there was no fault on the part of deceased's bike leading to the accident in question."*

15) The second witness examined by the appellant was Sri Bimal Chandra Nath. The said witness was the owner of the offending vehicle whose evidence-on- affidavit was similar to the evidence tendered by the DW-1. He had admitted that in his cross-examination by the claimants that he had not filed his written

statement. He had further admitted in his cross-examination that his contention that his bike did not hit the deceased's motorcycle is not correct. In his further cross-examination by the O.P. No. 5 i.e. respondent No. 8 herein, he had stated that it is not a fact that his statement about fact that his bike was not involved in the accident is not correct. The respondent No. 8 herein had submitted the evidence- on- affidavit of one Sri Alok Chakraborty. He had exhibited the policy of the insurance of the offending motorcycle. For the purpose of deciding this appeal, the evidence of the said witness is not found to be relevant at all.

16) It is observed that along with the written argument, the appellant had submitted the certified copy of the final report dated 31.07.2017 in connection with the FIR No. 392/05 dated 13.05.2005. As per the statement made in the written argument, the said final report was to show that accident took place only due to rash and negligent driving of the vehicle given by the deceased and there was no fault on part of the offending vehicle. The learned Tribunal was requested to judicial notice of the same.

17) As indicated above, in course of trial, the appellant did not examine their own witnesses, but they had examined the owner and pillion rider of their insured vehicle. Therefore, having not led any evidence through their officers, this is cases where the party did not appear before other witness, which is contrary to the provisions of Order XVIII Rule 3A of Civil Procedure Code. The DW-1 and DW-2 had both admitted in their cross-examination that their vehicle was involved in the accident, as such, once the said two witnesses examined by the appellant had accepted their motorcycle was involved in the accident, the same is fatal for the appellant because the appellant could not prove their stand that the deceased had hit a bicyclist and after he had fallen down on road, the un-manned motorcycle of the deceased had hit the offending vehicle and therefore, the deceased was not riding his motorcycle at the time of the actual accident involving the vehicle insured by the appellant.

18) Moreover, it is seen that final report was tendered as a document before the learned Tribunal along with written argument. Liberty was not availed by the appellant to tender the said document in evidence. It is too well settled that a mere marking of a document is not enough but the witnesses is required to prove the contents of the document, but in the present case in hand, the final report in form of the document was available with the appellant, yet, the said document was not marked as exhibit by the two DWs examined by the appellant. In this connection, this court is of the view that unless any document has been marked as exhibit, it is not open for this appellate Court to read the contents of such un-exhibited document. In light of the discussions above, this Court is constraint to hold that the appellant has not been able to prove their stand that the deceased, at the time of accident was not riding his vehicle when the offending vehicle had hit the motorcycle of the deceased.

19) Accordingly, in view of the discussion above, the point of determination framed by this Court is answered in the negative and against the appellant by holding that it could not be proved that the motorcycle bearing registration No. AS-12/C-4255 had contributed to cause the accident and that the appellant had not been successful to prove their stand taken at the trial. Resultantly, this appeal fails. The decision of the learned Tribunal on the issues No. 1, 2 and 3 as decided by the learned Tribunal is upheld. Consequently, the award passed by the learned Tribunal is also liable to be upheld.

20) Accordingly, this appeal stands dismissed. There shall be no order as to cost.

21) It is provided that the appellant may deposit the sum together with the interest as awarded by the learned Tribunal before the learned M.A.C. Tribunal No.1, Kamrup (Metropolitan), Guwahati within a period of 1(one) month from today. As directed by the learned Tribunal, if any amount had been paid towards "no fault liability", the same is liable to be adjusted.

22) Liberty is granted to the appellant to furnish a proof of deposit of the awarded sum and interest before the learned M.A.C. Tribunal, and on furnishing of such proof, the Registry of this Court may release the statutory amount to the appellant.

23) Return back the LCR.

JUDGE

MKS