

(2022) 11 GAU CK 0046

Gauhati High Court

Case No: MAC Appeal No. 301 Of 2017

Oriental Insurance Co.  
Ltd.

APPELLANT

Vs

Aimoni Hazarika And  
5 Ors.

RESPONDENT

---

Date of Decision: Nov. 30, 2022

Acts Referred:

- Motor Vehicle Act, 1988 - Section 166, 173

Hon'ble Judges: Arun Dev Choudhury, J

Bench: Single Bench

Advocate: N Modi, R K Bhatra

Final Decision: Dismissed

---

### Judgement

1. Heard Mr. S Dutta, learned counsel for the appellant. Also heard Mr. RK Bhatra, learned counsel for the respondent No. 6 and Mr. BK Baruah,

learned counsel for the claimant and respondent Nos. 1 and 2.

2. The present appeal is preferred by the Insurance Company under Section 173 of the Motor Vehicle Act, 1988 assailing the judgment and award

dated 19.11.2012 passed by the learned Member, Motor Accident Claim Tribunal, Nagaon in MAC Case No. 43/2009.

3. The background facts:

I. The respondent Nos. 1, 2 and 3 had preferred a motor vehicle claim petition before the learned Motor Accident Claim Tribunal, Nagaon, inter-alia

alleging that Kamal Hazarika (husband of respondent No. 1, father of respondent No. 2 and son of respondent No. 3), died in a motor vehicular

accident that took place on 05.12.2008.

II. It is claimed that on 05.12.2008, while deceased Kamal Hazarika was proceeding on foot towards Nagaon and when reached Bheluguri, a vehicle bearing registration No. AS. 02 E-1505 (Tipper) dashed said Kamal Hazarika and as a result of which, Kamal Hazarika died on the spot.

III. It was also pleaded in the claim petition that the aforesaid vehicle rammed another vehicle bearing registration No. AS-02 E-1631(Winger) and

accordingly claims that due to rash and negligent driving of the vehicle No. AS-02 E-1505, said Kamal Hazarika died and claims an amount of Rs.

20,00,000/- as compensation.

IV. In the aforesaid proceeding, the insurer, namely the Oriental Insurance Company of the vehicle bearing registration No. AS-02 E-1505 was

arrayed as OP No. 3 and the insurer of the vehicle No. AS-02 E-1631 was arrayed as OP No. 4.

V. The opposite party No. 3 took usual pleas and denied the involvement of the accident of the vehicle. No specific plea of composite negligence of

both the vehicles were raised. The said insurance company denied the allegation that the accident took place due to rash and negligent driving of both

the vehicles. However, the Oriental Insurance Company (O.P. No.3) had not led any evidence in support of the aforesaid pleading.

VI. The Bajaj Alliance General Insurance Company Ltd. (OP No.4) also filed written statement and took a specific stand that the vehicle insured with

them was not involved in the alleged accident and was not driven in rash and negligent manner and specifically pleaded that the offending vehicle

bearing registration No. As-02 E-1505 is solely negligent, being driven by its driver in a rash and negligent manner and knocked down the deceased

Kamal Hazarika and therefore the liability, if any shall be saddled against the driver and owner of the said offending vehicle. However, this Insurance

Company also did not lead any evidence in support of such pleading.

VII. The claimant side to prove their case had adduced the claimant No. 1, wife of the deceased Kamal Hazarika as CW1 and she reiterated the

pleading made in the affidavit. She claimed that her husband had a monthly income of Rs. 5,000/- and in proof of such income she exhibited one

document i.e. Income Certificate issued by Circle Officer, Samaguri, Nagaon. She also exhibited Accident Information report, the First Information Report, Charge-sheet, the Seizure list, certified copy of the GD Entry and also the Postmortem Report of her deceased husband.

VIII. Both the Insurance Company cross-examined the said witness. However, the testimony of the said witness could not be shaken by the

Insurance Company. In her cross-examination, she had reiterated that her husband was a cultivator and also having a Pan Shop and his income was

Rs. 5,000/-. She also exhibited the income certificate and she denied the suggestion that accident did not take place due to the negligence of the

Dumper (AS. 02 E-1505). She denied the suggestion put by OP No. 3 that Oriental Insurance Company is not liable to pay compensation. During

cross-examination on behalf of the Bajaj Alliance General Insurance Company Ltd. (OP No.4), she deposed that as the winger did not hit her

husband, therefore, she has not claimed any compensation from the insurer of the said vehicle and she had made claim from the insurer of the

Dumper as due to the rash and negligent driving of the Dumper, her husband died.

#### 4. Submission on behalf of the appellant:

In the aforesaid backdrop the basic contention raised by Mr. S Dutta, learned counsel for the appellant are the following:

I. That there were composite negligence on the part of both the vehicle inasmuch as in the charge-sheet, both the drivers were charge-sheeted by the

police after investigation and it was reflected in the charge-sheet that there were composite negligent on the part of both vehicles. Therefore, the

learned court below ought not to have saddled the liability only on the appellant. In support of his submission, Mr. Dutta relies on the judgment of the

Honâ€™ble Apex Court in the case of Khenyei Vs New India Assurance Company Ltd and Ors. reported in (2015) 9 SCC 273.

II. The next contention of Mr. Dutta, learned counsel is that in absence of proof by the author of the income certificate, mere exhibit of the income

certificate by the claimant is of no evidentiary value and therefore, the learned court below ought not to have relied upon the certificate.

#### 5. Submission on behalf of respondent No. 6:

Mr. RK Batra, learned counsel for the respondent No. 6 submits the followings:

I. It is not a case of composite negligent rather this is a clear case that the vehicle insured with the Oriental Insurance Company is the offending vehicle and for the rash and negligent driving by the driver of the said vehicle, the husband/ father of the claimants died. Therefore, without any material available on record and without any evidence being led by the Oriental Insurance Company, it cannot be held that there were composite negligence only on the ground that in the charge-sheet both the drivers were charged as accused. To come into a finding of composite negligent the charge sheet cannot be the sole basis inasmuch as the determination in a motor vehicle accident case must be made on the basis of material available on record in the proceeding itself and not taking recourse to a charge-sheet, which is having a different footing, argues Mr. Bhatra, learned Counsel.

II. While concluding his argument, Mr. Bhatra submits that the learned Tribunal below has rightly passed the award in absence of any material adduced by the Oriental Insurance Company to the effect that the accident took place for composite negligence of both the vehicles. In support of his contention, Mr. Bhatra relies on the judgment of Bijoy Kumar Dugar Vs Bidya Dhar Dutta and Ors reported in (2006) 3 SCC 242. He also relies on the decision of Parmeshwari vs Amir Chand & Ors reported in (2011) 11 SCC 635.

6. Argument of Mr. BK Baruah, learned counsel for the claimant:

Mr. Barua, learned counsel for the appellant, while adopting the argument of Mr. Bhatra submits the following:

I. That the actual offending vehicle is the vehicle insured with the Oriental Insurance Company Ltd. Therefore, the learned trial court below has rightly passed the award.

II. The Insurance Company has not raised any dispute regarding the validity and genuineness of the Income Certificate and therefore, the learned Tribunal had rightly relied on the same in determining the income.

III. In such a situation, the income should be Rs. 6,500/- and in support of his contention, he relies on the judgment of Sayed Sadiq and Ors vs Divisional Manager, United India Insurance Company Ltd reported in (2014) 2 SCC 735.

7. Decision and determination:

I. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties. Also perused the original records including the depositions.

II. The basic thrust of argument of the learned Senior counsel for the appellant/ Insurance Company is composite negligence on the part of both the drivers.

III. By different judicial pronouncement negligence has been defined as failure to exercise care towards others, which a reasonable and prudent person would do in a circumstance. The Hon<sup>ble</sup> Apex court in T. O. Anthony vs Karvarnan And Others reported in (2008) 3 SCC 748 while dealing with the difference between contributory and composite negligence held at paragraph 6 as under:

“6. 'Composite negligence' refers to the negligence on the part of two or more persons. Where a person is injured as a result of negligence on the part of two or more wrong doers, it is said that the person was injured on account of the composite negligence of those wrong-doers. In such a case, each wrong doer, is jointly and severally liable to the injured for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. In such a case, the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. On the other hand where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.”

IV. In Khenyei (supra) it was further clarified that the deceased or person concerned should be shown to have contributed either to the accident and the impact of accident upon the victim could have been minimized if he had taken care.

V. Therefore, the determination of composite negligence is to be evaluated on the principle as discussed hereinabove. The composite negligence on the part of the other driver is to be decided by the person who alleges such composite negligence.

VI. In the case in hand, the appellant/ Insurance Company has not raised any pleading or whisper regarding any kind of composite negligence on the part of the driver of the other vehicle, which is insured with the Bajaj Alliance Insurance Company Ltd. No evidence has also been led by the appellant/ Insurance Company. Even no cross-examination is done raising any dispute regarding composite negligence. Therefore, there was nothing before the learned Tribunal to make a determination on the point of composite negligence.

VII. Though, during cross-examination, some suggestions were given, however, the PW1 remained unshaken to the effect that the negligence was on the part of the driver of the vehicle, which was insured with the appellant/ Insurance Company. The claimant had pleaded and proved negligence on the part of the driver of the vehicle insured with the appellant/ Insurance Company.

VIII. In case of T.O. Anthony (supra), it has been clarified by the Honâ€™ble Apex Court that in case of a composite negligence, the injured need not establish ‘the extent of responsibility’ of each wrong doers separately and that it is not necessary of the court to determine (the extent of liability) of each wrong doers separately. However, to apply those principles a foundation should be laid by way of pleading that it is a case of composite negligence. Therefore, the principle as laid down in Khenyei (supra) and relied on the learned senior counsel for the appellant/ Insurance Company cannot be applied in the present case inasmuch as neither any composite negligence is alleged nor proved by the Insurance Company.

IX. Though a Motor Vehicle Tribunal need not strictly bound by the pleadings and under Section 166 it is duty bound to determine the just and fair compensation, when an accident takes place by reason of negligence of a driver of a motor vehicle. However, to make a claim of composite negligence the basic foundation should be raised/ alleged to enable a Tribunal to determine such issues, which is not the case in the present litigation.

Therefore, the claim of the Insurance Company regarding the composite negligence is rejected.

X. Coming to the question of the dispute regarding the income certificate, the Insurance Company has not questioned the authenticity of the income

certificate. From the cross-examination of PW1, it is discernable that one suggestion was made that the husband of the appellant did not earn Rs.

60,000/- per annum and during cross-examination, the PW1 reiterated that her husband was a cultivator and had the business of betel nut and Pan.

Even otherwise, if the income is determined on the basis of Minimum Wages Act, which is permissible under Motor Vehicle Act, the income will be

similar. Therefore, even if the notional income is considered, the income of the deceased, which can be treated as unskilled worker will be the same.

Thus, the contention of the learned Senior counsel for the appellant/ Insurance Company regarding the income of the deceased is also rejected.

8. Accordingly, in terms of the aforesaid, the present appeal is dismissed.