(2009) 05 GAU CK 0010

Gauhati High Court (Aizawl Bench)

Case No: None

National Insurance Co. Ltd.	APPELLANT
Vs	
Sh. Laltlanthanga and Others	RESPONDENT

Date of Decision: May 5, 2009

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 1 Rule 10(2)
- Industrial Disputes Act, 1947 - Section 33(2)
- Motor Vehicles Act, 1988 - Section 149(2), 166, 170, 173

Citation: (2010) 2 GLR 78 : (2009) 3 GLT 346

Hon'ble Judges: H. Baruah, J

Bench: Single Bench

Final Decision: Allowed

Judgement

H. Baruah, J.

On 25.12.2006 a motor accident took place in between Luangmual and Sazaikawn at about 3.47 p.m. and in the said accident one Hmingvanneia and another Hrangsiam died while they were proceeding in a motorbike bearing registration No. MZ-02/6568, which collided with Tipper bearing registration No. MZ-05/2898. Deceased Hrangsiama was the pillion rider while Sh. Hmingvanneia was driving the motorbike. Hmingvanneia died on the spot while Hrangsiama succumbed to his injuries on way to hospital. On account of death of Hrangsiama in the said vehicular accident his son Sh. Laltlanthanga filed a claim petition before the learned Member, MACT, Aizawl claiming compensation arraying Sashi Kant Mahto, the owner of the Tipper, Smt. B. Thangi, the owner of the Motorbike; M/s. National Insurance Co. Ltd., the insurer of accident vehicle bearing registration No. MZ-05/2898 and M/s. New India Assurance Co. Ltd., the insurer of the Motorbike bearing registration No. MZ-02/6568 (hereinafter referred as Motorbike) as the opposite parties while wife of deceased Hmingvanneia (L), Smt. B. Thangi filed a claim petition on account of death of her husband arraying Sashi Kant Mahto, the owner of the Tipper bearing

registration No. MZ-05/2898 (hereinafter referred as Tipper) and M/s. National Insurance Co. Ltd., the insurer of the said Tipper as opposite parties. On filing of the claim petition by the son and the wife of the deceased it were registered as MAC Case Nos. 24/2007 and 37/2007 respectively. The learned Tribunal after due inquiry in both the claims awarded compensation to each of the claimant amounting to Rs. 3,09,780 (MAC Case No. 24/2007) and Rs. 4,89,628 (MAC Case No. 37/2007) respectively with interest at the rate of 9% p.a. from the date of filing the claim petition until realization of the award and directed the M/s. National Insurance Co. Ltd., the insurer of the Tipper to satisfy the award.

2. The National Insurance Co. Ltd., the insurer of the Tipper being aggrieved by and dissatisfied with the impugned judgment and award passed in both the MAC Cases, on 26.5.2008 and 28.5.2008 filed the appeals aforesaid u/s 173 of the M.V. Act 1998 challenging its legnlity and correctness.

3. Since both the appeals have arisen though from two different impugned judgments, both are taken together for disposal by a common judgment considering the cause of death of the deceased from the same accident.

4. The claim petitions were filed by the claimants under provisions of Section 166 of the M.V. Act, where issue of negligence is required to be proved by each of the claimant. It is noticed from the perusal of the records maintained by the learned Member, MACT, each of the claimant adduced oral and documentary evidence. The learned Member, MACT, Aizawl while dealing with the MAC Case No. 24 of 2007 and MAC Case No. 37 of 2007 came to a conclusion that the driver of the Tipper was at fault and on account of his negligence both the deceased died who were coming riding a motorbike. During inquiry, it is seen from the records that the owners of the accident vehicles did not contest the claim for which the National Insurance Co. Ltd., the appellant in both the appeals obtained permission from the learned Member, MACT by filling an application u/s 170 of the M.V. Act to contest the claims on all grounds including the grounds provided u/s 149(2) of the M.V. Act. It is apparent from the records of MAC Case No. 24 of 2007 that the insurer of the motorbike, the New India Assurance Co. Ltd. was arrayed as opposite party No. 4 and contested the claim.

5. Mrs. Helen Dawngliani, learned Counsel appearing for and on behalf of the appellant in both the appeals while arguing the appeals submitted that the learned Member, MACT committed error in law as well as facts in passing the impugned judgments appealed against. It was also submitted by her that since there was a head on collision between the offending vehicles which resulted the death of the rider and pillion rider, fastening the entire liability on the insurer of the Tipper is erroneous and illegal since evidence appearing in the face of the record speak for that both the deceased were ran over by the rear wheel of the Tipper and, therefore, no negligence could be attributable to the driver of the said Tipper. It was also argued by her that there is evidence on record to show that the driver of the Tripper

was not negligent in causing the said accident. The investigating officer who inquired of the accident registered no criminal case that goes to show that the driver was not at fault. Per evidence on record, the Tipper was carrying 300 bags of cement and the accident took place in a curve while Tipper was going downhill. The Motorbike driven by the rider deceased on which the another deceased was a pillion rider was coming up hill and the road was narrow at that point. In the face of the above evidence on record it was argued by Mrs. Helen Dawngliani that the driver of the Tipper as well as the rider of the Motorbike were negligent since neither of them have taken care and precaution in driving the vehicles in such a narrow road that too downhill and uphill. She also argued that the rider and the pillion rider fell under the rear wheel of Tipper on account of dash in between the two vehicles as a result both were ran over by the rear wheel. The manner in which the accident took place undoubtedly goes to show that the driver of the Tipper as well as the rider of the Motorbike was at fault and both were negligent in driving the vehicle. It was argued by Mrs. Helen Dawangliani, there is an evidence on record to show that the Tipper dragged the riders of motorbike to a distance of 10ft. which goes to show that there was head on collision in between the two vehicles. The finding of the learned tribunal that the driver of the tripper was negligent alone in driving the same is not based on evidence and such finding cannot hold the appellant liable to pay the award so awarded. Since the facts and the evidence clearly go to show negligence on the part of both the vehicles, the liability should be at 50:50, Mrs. Helen Dawngliani argued.

6. Admittedly there is no eye witness to the actual accident. In that view of the matter negligence on the part of the accident vehicles is to be gathered from the facts and circumstances and evidence on record. The principle of res ipsa liqueur in view of the facts and circumstances of the case cannot be applied since there was no registration of the criminal case by the police against the driver of the Tipper, Mrs. Helen Dawngliani argued. It appears from the evidence of the Asit Malsawmtluanga that after the accident, the Motorbike and the Tipper were examined by Motor Vehicle Inspector. Exhibit C-13 goes to show that the Motorbike got damaged while no damage was detected/discovered in the Tipper. The Motor Vehicle Inspector in his report also stated that the Brake, Steering, Accelerator, Clutch were all in unserviceable condition of the Motorbike while there is no indication as "serviceable/unserviceable" in respect of Brake, Steering, Accelerator, Clutch of the Tipper. Therefore, the evidence of the Asit Malsawmtluanga that the Tipper had dragged the riders of Motorbike due to mechanical failure in the brake control system cannot be accepted. Exhibit C-13 the Accident Inspection Report dated 6.3.2007 also reveals that due to mechanical failure of the brake control system, the Tipper dashed the Motorbike. Asit Malsawmtluanga was examined as one of the witnesses for and on behalf of the claimants. This witness in his examination-in-chief deposed that the Tipper and the Motorbike both collided each other. While cross-examined by the opposite party No. 4 he stated that after the Tipper/Truck dashed

against the Motorbike, the Tipper/Truck dragged/pushed the riders of the Motorbike for about 10ft. before coming to a halt. This witness while cross-examined by opposite party No. 3 supported in evidence in chief that both the vehicles collided each other. In view of the such evidence of Asit Malsawmtluanga, it was argued by Mr. Helen Dawngliani that collision occurred between the vehicles as. result of negligence on the part of the respective driver and rider of the Motorbike, while the respondents taking aid of the evidence appearing in the cross-examination by Opposite Party No. 3 put emphasis that since the Tipper dashed the Motorbike, the driver of the Tipper was at fault and therefore, the findings of the learned tribunal cannot be assailed and liability cannot be attributed at 50:50.

7. From evidence on record both oral and documentary it becomes apparent that there was no brake failure or defect in brake control system of the Tipper. It is in the evidence that the accident took place in a curve that too in a narrow portion of the road. The Tipper was loaded at that time and going downhill while Motorbike was coming uphill. Had there been any brake failures in other words failure in the brake control system, the Tipper having had such load could not have been stopped that too in curve going downhill. There is evidence on record that the Tipper stopped on the road itself. There is also evidence that the bike got damaged. The brake, clutch, steering, accelerator of the Motorbike were discovered unserviceable while no such opinion was offered by he MVI in respect of the Tipper.

8. In view of the facts and evidence both oral and documentary claim of Mrs. Helen Dawngliani representing the appellants in both the appeals that the Tipper was not at fault cannot be accepted. A Truck/Tipper while traveling that too carrying a load of 300 bags of cement in hilly area, the driver of the said Truck/Tipper should have taken all measures, care and caution so that no untoward happens. In hilly area that too in a curve while going down the driver of the truck should be more careful while driving. In the same, way the vehicles coining uphill should also adopt the same degree of precaution and caution while driving. The facts involve and the evidence adduced together go to show that not only the Tipper was at fault but also the Motorbike. No such precaution was ever adopted by the rider of the Motorbike while coming uphill that too in a curve where the road was narrow. The findings of the learned Tribunal that the Tipper was alone at fault cannot be accepted in view of facts and evidence on record.

9. The submission of Mr. A.R. Malhotra, appearing for and on behalf of the respondent-claimant that the Motorbike never dashed against the Tipper also cannot be accepted in view of the fact that it got damaged and in view of the fact of receipt damages in the handle, fork, headlights, step holder etc. The Accident Inspection Report speaks of no damage in respect of the Tipper. It is in the evidence on record that the Tipper was going downhill while the Motorbike was coming uphill. In such a situation there is every likelihood to receiving damage by the

Motorbike than the Tipper. It is also in the evidence on record that the riders of the Motorbike were dragged/pushed by the Truck/Tipper for about 10 ft. before coming to a halt. It is also in the evidence that both the riders were ran over by the rear wheel. In such a situation dragging/pushing is possible only by the front side of the driver.

10. Mr. M. Guite, the learned Counsel appearing for and on behalf of the New India Assurance Co. Ltd. submitted that Rule 25 of Rules of The Road Regulations 1989 provides that the vehicles going uphill to be given precedence. The said Rules read as under:

25. Vehicles going uphill to be given precedence.- On mountain roads and steep roads, the driver of a motor vehicle traveling downhill shall give precedence to a vehicle going uphill wherever the road is not sufficiently wide to allow the vehicles to pass each other freely without danger, and stop the vehicle to the side of the road in order to allow any vehicle proceeding uphill to pass.

The above provision never speaks for that vehicles traveling uphill should not take care and caution and are free to move at their whims. All vehicles traveling on road, be it uphill or downhill should always maintain maximum care, caution to avoid danger/accident.

11. The Apex Court while dealing with the case in between Cholan Roadways Limited Vs. G. Thirugnanasambandam, discussed the meaning and applicability of the principle of res ipsa loquitur in paragraph 20 to 22 and 26, the Apex Court held as under:

20. The tribunal while exorcising its jurisdiction u/s 33(2)(b) of the Industrial Disputes Act was required to bear in mind the aforementioned legal principles. Furthermore, in a case of this nature the probative value of the evidence showing the extensive damages caused to the entire loft side of the bus; the fact that the bus first hit the branches of a tamarind tree and then stopped a distance of 81 ft there from even after colliding with another bus coming from the front deserved serious consideration at the hands of the tribunal. The nature of impact clearly demonstrated that the vehicle was being driven rashly or negligently.

2.1. Res ipsa loquitur is a well-known principle which is applicable in the instant case. Once the said doctrine is found to be applicable the burden of proof would shift on the delinquent. As noticed hereinabove, the enquiry officer has categorically rejected the defence of the respondent that the bus was being driven at a slow speed.

22. In Pushpabai Purshottam Udeshi v. Ranjit Ginning and Pressing Co. (P.) Ltd. this Court observed, (SCC pp. 750-51, para 6)

6. The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the

accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of res ipsa loquitur. The general purport of the words res ipsa loquitur is that the accident ''speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence.

26. The burden of proof was, therefore, on the respondent to prove that the vehicle was not being driven by him rashly or negligently.

12. In the cases, it is already observed that there is no eye witnesses to the actual accident. The tribunal while deciding the claim petition relied on the evidence of the claimants and evidence of a common witness and some documents, therefore, the negligence, fault on the part of the vehicles which met with an accident is required to be gathered from the facts and circumstances of the case and evidence on record. We have already discussed about the facts and the evidence. When no eye witness is found to have been examined, the principle of res ipsa loquitur would came into play, since there is evidence on record that the Tipper stopped dragging the riders of the Motorbike to a distance of 10ft. and came to halt. The damages received by the Motorbike would mean an mean that both the vehicles were at fault. The manner in which the accident took place clearly demonstrates that both the vehicles were driven rashly and negligently. The normal rule is that it is for the claimant to prove negligence in a claim made u/s 166 of the M.V. Act. But when the facts and circumstances of the case and the evidence reveal that both the vehicles were at fault or driven negligently or rashly then and then it can be said there is contribution of negligence in between the vehicles. The Apex Court while dealing with the case (supra) also had taken recourse of the observation adopted by the Apex court in Pushpabai Purshottam Udeshi v. Ranjit Ginning & Pressing Co. (P.) Ltd. in respect of application of principle of res ipsa loquitur.

13. Mrs. Helen Dawngliani while justifying her argument in the context of contributory negligence also relied the decision in the case between Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others,

14. In paragraph 12 of the judgment in the case (supra) the Apex Court held as under:

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 PW2 who was traveling 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 has a head-on collision. MACT has not accepted the evidence of PW2 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 PW2 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 the 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.

15. In our present cases also it appears that neither of the vehicles while going downhill and coming uphill took care and precaution in driving the vehicles, which resulted dashing against each other, in other words collided each other. Therefore, there was contributory negligence in respect of both the vehicles and the award so made should be borne in equal shares. Since both the vehicles were insured with appellant company and the New India Assurance Co. Ltd., both companies are required to bear compensation in equal shares of the award granted in MAC Case No. 24 of 2007, while no such direction can be made since New India Assurance Co. Ltd. was not made party in MAC Case No. 37 of 2007.

16. In the result MAC Appl. No. 21 of 2008 is partly allowed. The award passed in MAC Case No. 24 of 2007 shall be apportioned 50 : 50 in between the appellant and the insurer of the Motorbike, the M/s. New India Assurance Co. Ltd. No interference in the interest part. The judgment and award dated 28.5.2008 passed in MAC Case No. 37 of 2007 is set aside and quashed. Case is remanded back. Learned Tribunal shall implead New India Assurance Co. Ltd., the insurer of the Motorbike bearing registration No. MZ-02/6568 invoking provisions of Rule 10(2) of Order I of the CPC as one of the opposite parties and after affording opportunity to contest the claim, decide the claim in accordance with law.

17. Both the appeals are stands allowed.