IN THE HIGH COURT OF SIKKIM

M. A. C. APPEAL NO.4 OF 2004

National Insurance Company Ltd.,
represented by and through its
Branch Manager,
Gangtok Branch,
31A, National Highway,
P.O. & P.S. Gangtok,
East Sikkim. ... **Appellant.**

VERSUS

1. Smt. Kamala Rai,
W/o Late Fauda Raj Rai,

2. Master Rahul Rai, aged about 7 years
S/o Late auda Raj Rai,

3. Miss Laxmi Rai, aged about 6 years
D/o Late Fauda Raj Rai,

All residents of Sichey Busty,
P.O. & P.S. Gangtok, East Sikkim.

4. Shri Bikash Kumar Prasad,
S/o Deoji Prasad
Resident of M. G. Marg,
P.O. & P.S. Gangtok, East Sikkim.

... **Respondents.**

For the Appellant : Mr. A.K. Upadhyaya, advocate.
For the Respondents : Mr. Ajay Rathi assisted by Mr. Suraj Chhetri, Advocates.

PRESENT: THE HON'BLE SHRI JUSTICE N. SURJAMANI SINGH, CHIEF JUSTICE (ACTING).

Date of Judgment: 21st March 2005.

JUDGMENT

SINGH, C.J. (Actg.)

The Order dated 9.9.2004 passed by the Motor Accident Claims Tribunal, East and North Sikkim at Gangtok in M.A.C.T.

Case No.9 of 2004 is the subject matter under challenge in this appeal preferred by the National Insurance Company Ltd., the appellant herein. The facts of the case, in a short compass, are as follows: -

2. The claimants, respondents herein, namely, Smt. Kamala Rai, wife of late Fauda Raj Rai; her minor son Master Rahul Rai, aged about 7 years and minor daughter Miss Laxmi Rai, aged about 6 years, filed an application under Section 166 of the Motor Vehicles Act, 1988, for short Act of 1988, against the appellant and its Branch Manager by stating that the deceased Fauda Raj Rai, husband of the respondent No.1-claimant was a Government employee working as binder in the Printing and Stationary Department, Government of Sikkim and when he was on the way to home from office on 10.1.2003, he was run over by the Tata vehicle belonging to the respondent No.4, Shri Bikash Kumar Prasad in the National Highway in front of the Timber shop of one Ongyal Sherpa near Tenzing and Tenzing. In the said accident, the deceased Fauda Raj Rai sustained a head injury and died on the spot. The Tribunal upon hearing the parties awarded a compensation to the tune of Rs.7,45,377/- (Rupees seven lacs forty five thousand three hundred and seventy seven) only in favour of the claimants vide, order dated 30.10.2003.

3. Being aggrieved by the said order of the Tribunal passed on 30.10.2003, the appellant, National Insurance Company Ltd. herein filed an appeal before this Court under M.A.C. Appeal No.1 of 2004 and this Court by an Order dated 9.8.2004 remanded the case back to the learned Tribunal for fresh disposal on the point of rash and

negligent driving of vehicle in question. Thereafter, the learned Tribunal after recording fresh evidences and upon hearing the parties on the related issues pertaining to rash and negligent driving, the Tribunal under the impugned order dated 9.9.2004 came to the conclusion that the accident took place on account of rash and negligent driving of the offending vehicle by its driver.

4. Supporting the case of the appellant-Insurance Company, Mr. A. K. Upadhyaya, learned counsel contended that there was no rash and negligent driving of the offending vehicle on the part of the driver and raised the following grounds for setting aside the impugned order/award: -

(a) For that the Judgment and Award of the Learned Tribunal is contrary to law;

(b) For that the Judgment and Award of the Learned Tribunal is against the weight of evidence on record;

(c) For that the claimants failed to establish rash and negligent driving on the part of the driver.

(d) For that the Ld. Tribunal failed to appreciate the evidence on record in the proper perspective and came to a wrong finding.

(e) For that the Ld. Tribunal did not properly evaluate the evidence of the driver of the vehicle in question who is the best person to throw light in the matter.

(f) For that on the basis of the evidences of record, the Ld. Tribunal ought to have come to a finding that there was no rash and negligent driving on the part of the driver at the relevant time.

(g) For that the second schedule of the Motor Vehicles Act, 1988 has already been struck down by the Hon'ble Supreme Court and as such the award made on the basis of the second schedule is erroneous.

5. Mr. Ajay Rathi assisted by Mr. Suraj Chhetri, learned counsel appearing for the claimants, respondents herein, contended that the learned Tribunal had rightly come to the conclusion that the incident took place on account of rash and negligent driving of the offending vehicle by its driver resulting in the accident in which the deceased was run over and killed and as such there is no material on record for interfering with the impugned order of 9.9.2004 passed in the connected M.A.C.T. Case No.9/2004.

6. Upon hearing the learned counsel for the parties and also on perusal of the available material on record, I am of the view that there is sufficient evidence and material on record for establishing the factum of rash and negligent driving of the offending vehicle by its driver. This important aspect was properly examined and dealt with by the Tribunal while passing the impugned order of 9.9.2004. The relevant observations based on evidence of the Tribunal find its place in the related paragraphs 20, 21, 22 and 23 of the impugned Order dated 9.9.2004 which are relevant in the appeal in hand and accordingly, these are quoted below: -

> " 20. Admittedly, the offending vehicle was on its way up to Gangtok town from Tadong and being an uphill traffic the vehicle should have kept to the left side of the road. The offending vehicle which was not loaded, could pick up faster speed than the loaded Tata truck passing in front of it. It goes without saying that in order to overtake the loaded Tata vehicle it would be necessary for the offending vehicle to increase its speed so as to get past the vehicle passing ahead of it. Therefore from the admitted facts and from the facts that have been proved by evidence as discussed above it can be assumed that the offending vehicle went to the right side of the road from the left side by increasing its speed in its attempt to overtake the loaded vehicle passing ahead of him and thereby caused the accident in the manner as alleged. The submission of Sri A. K. Upadhyaya in this regard is that the

vehicle being uphill traffic was in second gear and the question of its being in such high speed as to amount to rash and negligent driving does not arise. No doubt the offending vehicle being driven uphill may not have been in a very high speed but undoubtedly it had to increase its speed to double that of the loaded Tata so as to get past it. It appears that speed is not the only criterion for determining the rashness and negligence of driving of vehicle. It has been held in 'Nafis Ahmed ...appellant V. State ...respondent, 1977 ACJ 268, that the main criterion for deciding whether the driving which led to the accident was rash and negligent is not only the speed at which the vehicle was running, but the width of the road, the density of the traffic and the attempt to overtake the other vehicle resulting in going to the wrong side of the road and being responsible for the accident. In 'Gobald Motor Service Ltd and another, appellants V. R.M.K. Veluswami and others, respondents AIR 1962 S.C. 1 (V.49 C 1) the Hon'ble Supreme Court applying the principle laid down by Asquith, L.J. in Barkway V. South Wales Transport, has held that where the undisputed and proved facts establish that the vehicle left the main road and the accident resulting in the death of deceased occurred on the footpath of the right side of the road a presumption has to be drawn that the accident was caused by the negligence on the part of the driver of the vehicle.

21. In the present case the offending vehicle was on its way up to Gangtok and it should have been keeping to the left side of the road as per the Traffic Rules. However, the vehicle went to the right side of the road while overtaking the loaded Tata in a speed higher than that of the loaded Tata and thereby caused the accident. These circumstances therefore go to show that the driver of the offending vehicle was not taking due care in his anxiety to overtake the vehicle. In the circumstances an inference that the offending vehicle was being driven rashly and negligently is inescapable. Therefore, on a consideration of the facts of the case in the light of the principle of law laid down in the above cited cases, it follows that the driver of the offending vehicle had driven the vehicle rashly and negligently as a result of which he ran over the deceased who was a pedestrian on the extreme right footpath of the road on his way home from Office.

22. Before coming to the final conclusion, a reference to the following evidence of the Respondent No.2 is called for.

Sri Sanjay Kumar Gupta, the driver of the offending vehicle examined by the O.P. No.2 as the sole witness in their

> behalf stated that he overtook the loaded Tata passing ahead of him at Sisha Golai and not in front of the timber godown of Ongyal Sherpa (PW.2). This statement seems to be unreliable firstly for the reason that the Sisha Golai being a turning it is improbable that the loaded Tata truck would have given pass and the offending vehicle would have overtaken it. Secondly, it runs counter to the admitted case that the accident occurred in the place and in the manner as alleged. In the third place the rough sketch map exhibited by the PW.2 which shows the place of occurrence falsifies the statement. This witness therefore does not inspire confidence.
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> 23. In view of the above, I, accordingly, hold that the accident took place on account of rash and negligent driving of the offending vehicle by its driver resulting in the accident in which the deceased was run over and killed. "

7. It is noteworthy to highlight the fact that there are sufficient evidence and material on record for establishing the factum of rash and negligent driving of the offending vehicle by its driver. Apart from the findings of the learned Tribunal inasmuch as the evidence shows that the driver drove the offending vehicle so rashly and negligently by overtaking an overloaded vehicle passing ahead to it in such a high speed which ran over the deceased Fauda Raj Rai, who was a pedestrian returning from his office for his home on the extreme right footpath of the road. Because of the rash and negligent driving of the offending vehicle an innocent young person lost his life, leaving behind him his young wife and two minor children. According to me, it is a great loss for the family of the claimants.

8. In my considered view, there are also sufficient materials on record for awarding due compensation to the claimants and as such the Tribunal ought to have awarded more compensation than the awarded money of Rs.7,45,377/- considering the nature of the case.

However, there is no appeal preferred by the claimants before this Court. I am also of the view that the award so far made by the Tribunal concerned and the findings on the rash and negligent driving of the offending vehicle by its driver are reasoned findings and as such no interference of it is called for. The motor accident took place on 10.1.2003. It is more than the two years now that the poor widow and two minor children have been facing litigation without getting the full awarded money/compensation made by the Tribunal till today. According to me, it is a sort of sad and sorrow affairs which the appellant-Insurance Company who is questioning the validity of the award and the impugned order on technical grounds making it more rigid and complex without considering the doctrine of flexibility in the matter of interpretation of related laws under the Motor Vehicles Act, 1988 pertaining to the quantum of compensation and rash and negligent driving of the offending vehicle.

9. Be that as it may, for the reasons and discussions made above, the appeal is devoid of merit and accordingly it is dismissed with a cost of Rs.5,000/- (Rupees five thousand) only, which shall be treated as part of the fund of the Sikkim Bar Association, for which the appellant shall deposit the said cost of Rs.5000/- (Rupees five thousand) with the Registry of this Court within 3 weeks from today and, after such deposit is made, the General Secretary of the Bar Association shall be at liberty to withdraw the same. It is further made clear that the appellant shall make payment of the awarded money to the respondents/claimants within 3 weeks from today

after adjusting any amount of compensation money, if so paid earlier by the appellant-Insurance Company.

(N. S. Singh)
Chief Justice (Acting)
21-03-2005