THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 20TH APRIL, 2016

SINGLE BENCH : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

MAC App. No.20 of 2015

Appellants :

1. The Branch Manager,
ICICI Lombard General Insurance Company Ltd.,
Gangtok Branch,
Mundra Building, 5th Floor,
M. G. Marg,
P.O. & P.S. Gangtok,
East Sikkim.

2. The General Manager,
ICICI Lombard General Insurance Company Ltd.,
House No.414,
Veer Savarkar Marg,
Near Sidhi Vinayak Temple,
Prabhadevi,
Mumbai – 400 025.

versus

Respondents-Claimants :

1. Shri Sonam Palzor Bhutia,
S/o Late Ganden Bhutia,
Aged about 29 years

2. Miss Karma Chemi Lhamu Bhutia,
D/o Shri Sonam Palzor Bhutia,
Aged about 02 years

All residents of 8th Mile, Lingdok PW,
Sivik Lingdok Nampong GPU,
Lingdok,
P.O. 8th Mile,
P.S. Gangtok,
East Sikkim.

The Branch Manager, ICICI Lombard General Insurance Company Ltd. and Another
vs.
Shri Sonam Palzor Bhutia and Others

Respondent-Owner : 3. Smt. Wongchuk Doma Bhutia,
W/o Shri Pema Namgyal Bhutia,
R/o Rongpa PW,
Near Block Administration Centre,
Kabi Tingda, GPU, Kabi,
P.O. & P.S. Phodong,
North Sikkim.

Appeal under Section 173 of the Motor Vehicles Act, 1988

Appearance

Mr. Thupden G. Bhutia, Advocate for the Appellant.

Mr. Ajay Rathi and Ms. Phurba Diki Sherpa, Advocates for Respondents No.1 and 2.

Mr. Ashok Pradhan, Advocate for Respondent No.3.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal is directed against the impugned Judgment and Award dated 28-05-2015 passed by the Learned Member, Motor Accidents Claims Tribunal, North Sikkim at Mangan (for short "the Claims Tribunal"), in MACT Case No.20 of 2014, directing the Appellant/Insurer to pay Rs.14,99,500.52 (Rupees fourteen lakhs ninety nine thousand five hundred and paisa fifty two) only, with interest @ 10% per annum on the said sum to the Claimants from the date of filing of the Claim Petition, i.e., 12-09-2014, till full and final payment.

2. The primary thrust of the arguments advanced by Learned Counsel for the Appellants is that the Claim before the Claims Tribunal does not stand as the accident, the onus of which lies on the Claimants to prove, did not occur either due to rash or negligent driving which is a *sine qua non* for a Claim made under Section 166 of the Motor Vehicles Act, 1988 (for short "the Act of 1988"), but is attributable to natural calamity, an *Act of God*, since it occurred due to a landslide which crushed the occupants and the vehicle. That the contents of the FIR, Exhibit 2, or the Final Report, both, relied on by the Respondents do not indicate any element of rashness or negligence on the part of the deceased driver as evident from the fact that the case was registered only under Section 174 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") and not under Section 279 of the Indian Penal Code, 1860 (for short "IPC"), hence the Respondents cannot base their Claim on the principle of *res ipsa loquitur*, which is not applicable in the present facts and circumstances. Besides which, it is urged that the compensation awarded is not just and the interest of 10% is exorbitant, the impugned Judgment and Award be set aside. Learned Counsel has placed reliance on the decision of the Hon'ble Apex Court in ***Oriental Insurance Company Limited*** vs. ***Premlata Shukla and Others***[1].

1. (2007) 13 SC 476

3. *Per contra*, it was the contention of Learned Counsel for the Respondents No.1 and 2 that the facts at the site of the accident unequivocally establish that the driver of the vehicle proceeded to drive through the landslide despite being aware that the area was prone to falling boulders, without application of mind which resulted in the fatal accident, killing the victim, the driver and a third occupant. The act of the driver was undoubtedly rash and negligent and not the act of a prudent person who would have considered the risks involved in driving through the landslide area, hence the principle of *res ipsa loquitur* kicks into place. In view of the facts and circumstances of the case, the finding and Award of the Claims Tribunal requires no interference. He has relied upon a plethora of Judgments to buttress his arguments.

4. Learned Counsel for Respondent No.3 had no submissions to put forth.

5. I have heard the submissions of Learned Counsel at length. I have also perused the documents and records as well as the impugned Judgment and Award.

6. The facts of the case in a nutshell are that, the deceased, the wife of Respondent No.1 and mother of Respondent No.2, had taken a lift while returning from work in her colleague's vehicle on 24-06-2014, *enroute* the vehicle met with an accident due to a

landslide which crushed the vehicle, resulting in the death of the victim, the driver and another occupant. The Respondent No.3 is the owner of the vehicle.

7. The Claims Tribunal in consideration of the evidence on record decided all the four issues settled by it for determination in favour of the Respondents No.1 and 2, accordingly the impugned Judgment and Award was passed.

8. It is not the case of the Respondents that they are detracting from the facts as laid down in Exhibit 2, the FIR or for that matter the Final Report, therefore, the authority relied on by the Appellants in ***Oriental Insurance Company Limited***[1], *inter alia*, as extracted hereunder has no bearing to the case:-

> **"15.** A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to run round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. ....."

9. Admittedly there were no eye-witnesses to the incident. It is also not in dispute that the vehicle was insured, the documents of the vehicle were valid and the driver had a Licence, which would, therefore, take us to the question as to whether the accident was *Vis*

Major, as the Claimants are entitled to get compensation under Section 166 of the Act of 1988 only if the "tort feasor", viz., driver of the vehicle, was driving the vehicle rashly and negligently and not when the accident is the outcome of an *Act of God*.

10. In this regard, the ratio in ***Divisional Controller, KSRTC*** vs. ***Mahadeva Shetty and Another***[2] may be referred to profitably. The Hon'ble Apex Court held therein, *inter alia*, as follows:-

> **"9.** The expression "act of God" signifies the operation of natural forces free from human intervention, such as lightning, storm etc. It may include such unexpected occurrences of nature as severe gale, snowstorms, hurricanes, cyclones, tidal waves and the like. But every unexpected wind and storm does not operate as an excuse from liability, if there is a reasonable possibility of anticipating their happening. An act of God provides no excuse unless it is so unexpected that no reasonable human foresight could be presumed to anticipate the occurrence, having regard to the conditions of time and place known to be prevailing. For instance, where by experience of a number of years, preventive action can be taken, Lord Westbury defined the act of God (*damnum fatale* in Scotch Laws) as an occurrence which no human foresight can provide against and of which human prudence is not bound to recognize the possibility. This appears to be the nearest approach to the true meaning of act of God. Lord Blancaburgh spoke of it as "an irresistible and unsearchable providence nullifying our human effort".**"**
>
> **[emphasis supplied]**

Thus, the above succinctly explains that *Act of God* is what no human could have predicted in relation to the time and place known to be prevailing, so as to enable one to take preventive action. Negligence *per contra* is a specific tort and is the failure to exercise

2. (2003) 7 SCC 197

that care which circumstances demand, in other words, it is an omission to do something which a reasonable man would do or to do something which a prudent and reasonable man would not do. Rashness, of course, tantamounts to doing an act without careful consideration.

11. Based on the touchstone of the principles extracted in the Judgments *supra*, it can be inferred from the facts of the instant case that the incident took place on 24-06-2014 in the midst of Monsoons in Sikkim. In such a situation, it was for the driver to have taken sufficient precaution before embarking on her journey homeward by checking the area for landslides and thereby taking preventive action. The question of rashness and negligence is a matter of inference to be drawn from the attendant circumstances at the spot, the degree of care required in the particular situation depends on the surrounding circumstances. While addressing the matter at hand since the accident did occur and all occupants of the vehicle are dead one has of necessity to take recourse to the principle of *res ipsa loquitur*.

12. In ***Ashish Kumar Mazumdar*** vs. ***Aishi Ram Batra Charitable Hospital Trust and Others***[3], the Hon'ble Apex Court while discussing the maxim opined as follows:-

3. (2014) 9 SCC 256

> **"10.** The maxim res ipsa loquitur in its classic form has been stated by Erle, C.J.
>
> > "…. *where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.*" [Scott v. London & St. Katherine Docks Co. : (1865) 3 H & C 596 at 601] (emphasis supplied)
>
> The maxim applies to a case in which certain facts proved by the plaintiff, by itself, would call for an explanation from the defendant without the plaintiff having to allege and prove any specific act or omission of the defendant.
>
> **11.** In *Shyam Sunder* v. *State of Rajasthan* [(1974) 1 SCC 690] it has been explained that the principal function of the maxim is to prevent injustice which would result if the plaintiff was invariably required to prove the precise cause of the accident when the relevant facts are unknown to him but are within the knowledge of the defendant. It was also explained that the doctrine would apply to a situation when the mere happening of the accident is more consistent with the negligence of the defendant than with other causes.**"** **[emphasis supplied]**

Thus, the principle of *res ipsa loquitur* requires no further explanation and while analysing the facts of the instant case indicate that the maxim squarely applies to the facts of the case.

13. So far as the Report under Section 174 of the Cr.P.C. is concerned, the matter pertains to unnatural death and the Police while invoking the Section enquires into the limited purpose of the cause of death in unnatural circumstances, *inter alia*, by accident. Obviously since all occupants of the vehicle had died it would serve

no purpose to submit a charge-sheet under Sections 279/304A of the IPC as there would be no person to prosecute, the victim driver herself having succumbed to the accident. The logic behind Section 174 Cr.P.C. has been laid down in ***Podda Narayana and Others*** vs. ***State of Andhra Pradesh***[4] wherein it has been held that –

> **"11.** A perusal of this provision would clearly show that, the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under S. 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report. ....."

The above extract soundly quells any questions with regard to non-mentioning of details in proceedings under Section 174 Cr.P.C. in the instant matter. It may also be clarified here that it is not necessary for the FIR to mention minute details of the incident, a broad picture of the incident without specific details suffices for the purpose.

14. In view of the discussions above, I have reached the finding that the accident was not on account of *Vis Major* but due to to the rash and negligent act of the deceased driver of the vehicle.

4. AIR 1975 SC 1252

15. Coming to the question of compensation, the Claims Tribunal calculated the Loss of Earning as Rs.13,52,000.52 *inter alia*, on grounds that income of the deceased was Rs.10,000/- (Rupees ten thousand) only, per month and as she was working on fixed income 30% was added as Future Prospects on Rs.10,000/- (Rupees ten thousand) only, relying on the Judgment of ***Rajesh and Others*** vs. ***Rajbir Singh and Others***[5]. However, on perusal of the said authority it is, *inter alia*, held as follows;

> **"8.** Since, the Court in *Santosh Devi case* [(2012) 6 SCC 421] actually intended to follow the principle in the case of salaried persons as laid in *Sarla Verma case* [(2009) 6 SCC 121] and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. **In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects.** Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.**"**
>
> **[emphasis supplied]**

16. Consequently, in view of the above extract, Future Prospects to be added to the fixed income of the deceased would be 50% and not 30% as held by the Claims Tribunal. Although this issue was not raised by the Counsel for the Respondent Nos.1 and 2, however, it is settled law that compensation granted does not have

5. (2013) 9 SCC 54

to be confined to the Claim, it may be in excess of the Claim with the rider that it should be 'just' and not arbitrary or unjustifiable.

17. Now, coming to the question of multiplier adopted by the Claims Tribunal, there appears to be an error in adopting the multiplicand of '13'. As per the table in ***Sarla Verma (Smt) and Others*** vs. ***Delhi Transport Corporation and Another***[6] the multiplicand for the age of 31 to 35 years is '16'. In this regard, we may usefully refer to paragraph 42 of the said Judgment wherein it was held that –

> **"42.** We therefore hold that the multiplier to be used should be as mentioned in Column (4) of the table above (prepared by applying *Susamma Thomas* [(1994) 2 SCC 176], *Trilok Chandra* [(1996) 4 SCC 362] and *Charlie* [(2005) 10 SCC 720]), which starts with an operative multiplier of 18 (for the age groups of 15 to 20 and 21 to 25 years), reduced by one unit for every five years, that is M-17 for 26 to 30 years, **M-16 for 31 to 35 years**, M-15 for 36 to 40 years, M-14 for 41 to 45 years, and M-13 for 46 to 50 years, then reduced by two units for every five years, that is, M-11 for 51 to 55 years, M-9 for 56 to 60 years, M-7 for 61 to 65 years and M-5 for 66 to 70 years.**"**
>
> **[emphasis supplied]**

Since the victim was 32 years old, the correct multiplier would be '16'.

18. Hence, the total amount of compensation requires recomputation and is calculated as follows;

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6. (2009) 6 SCC 121

Monthly income of the deceased		Rs. 10,000.00
Future Prospects		Rs. 5,000.00
Annual income of the deceased **(Rs.15,000 x 12 months)**		Rs. 1,80,000.00
Less $^{1}/_{3}$ of Rs.1,80,000/- [in consideration of the expenses which the victim would have incurred towards maintaining herself, had she been alive]	**(–)**	Rs. 60,000.00
Net yearly income		Rs. 1,20,000.00
Multiplier to be adopted '16' (Rs.1,20,000 x 16) [as per Judgment of *Sarla Verma*]		Rs.19,20,000.00
Funeral expenses [as per Judgment of *Rajesh* vs. *Rajbir Singh*]	**(+)**	Rs. 25,000.00
Loss of Consortium [as per Judgment of *Rajesh* vs. *Rajbir Singh*]	**(+)**	Rs. 1,00,000.00
Loss of Estate	**(+)**	Rs. 2,500.00
Loss of Love and Affection	**(+)**	Rs. 20,000.00
	Total -	**Rs.20,67,500.00**

(Rupees twenty lakhs sixty seven thousand and five hundred) only

19. The Award shall be divided in terms already fixed by the Claims Tribunal.

20. In the result, the Appeal is dismissed with the above modification to the compensation.

21. No order as to costs.

22. Copy of this Judgment be sent to the Claims Tribunal for information and compliance.

23. Records of the Claims Tribunal be remitted forthwith.

(Meenakshi Madan Rai)
Judge
20-04-2016