THE
SIKKIM LAW REPORTS

OCTOBER - 2020

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SUBJECT INDEX

be applied in proper perspective to the obtaining fact-situation. Substantial justice being paramount and pivotal, the technical considerations should not be given undue and uncalled for emphasis – The facts evidently reveal that the applicant had approached this Court as well as the Hon'ble Supreme Court against the orders sought to be challenged in Writ Appeal No. 2 of 2019 by preferring application for review, application for reconsideration and Special Leave Petition – The facts reflect that the legal advice received by the applicant to file the review petition, Special Leave Petition and application for reconsideration was not sound. However, merely because the applicant followed the wrong advice, which was evidently received, it cannot be said that the applicant's conduct was casual and lackadaisical. The reason to withdraw the Special Leave Petition is to our mind not as important as the fact that the applicant had preferred it and later chose to withdraw it. No negligence or inaction can be imputed upon the applicant for pursuing diligently remedies before wrong forums on advice received – S. 5 of the Limitation Act provides that any appeal may be admitted after the prescribed period, if the applicant satisfies the Court that it had sufficient cause for not doing so. S. 14 of the Limitation Act provides that in computing the period of limitation the time during which the applicant had been pursuing with due diligence another proceeding shall be excluded – When we weigh the scale of balance of justice in respect of the contesting parties, justice would be better served if Writ Appeal No. 2 of 2019 is decided on merits instead of throwing it out on the ground of delay alone.

The Dean I.K. Gujral Punjab Technical University* v. *Sikkim Students Welfare Association of Chandigarh and Others ***652A***

Motor Vehicles Act, 1988 – S. 166 – S. 166 mandates rashness and negligence on the part of the driver of the vehicle as sine qua non. Where an accident occurs owing to rash and negligent driving by the driver of the vehicle, resulting in sufferance of injury or death by any third party, the driver would be liable to pay compensation therefor. The owner of the vehicle also becomes liable under the Motor Vehicles Act, 1988. As the vehicle was insured the appellant as the insurer would be statutorily liable and enjoined to indemnify the owner – The driver was neither made a party nor a witness – Respondent no. 3 who admitted during his cross-examination that he was an eye-witness chose not to give his account clearly to the Claims Tribunal. The only version available is that of claimant no. 1 which assertion was neither disputed by the appellant nor the respondent no. 3. In the circumstances, it is held that the claimants have been able to

sufficiently prove that it was due to the rash and negligence of the driver which caused the accident. Consequently, the respondent no. 2 also become liable and since the appellant was the insurer who had insured the vehicle, it was liable and enjoined to indemnify respondent no. 3 to the extent of the damages payable.

The Branch Manager, National Insurance Company Ltd.* v. *Mr. Arjun Bhandari and Others ***669B***

Motor Vehicles Act, 1988 – S. 173 – Respondent no. 3 submits that an amount of 2 lakhs paid to the deceased for his medical expenses should be indemnified by the appellant. This is an appeal under S. 173 preferred by the appellant. Although such a plea was made by the respondent no. 3 before the Claims Tribunal, the Claims Tribunal did not pass any direction in favour of respondent no. 3. – Therefore, aware, he chose not to agitate the issue before this court by filing any independent appeal, cross-appeal or cross-objection. In the circumstances, the respondent no. 3 is precluded from agitating this issue without filing any independent appeal, cross-appeal or cross-objection, in an appeal filed by the appellant.

The Branch Manager, National Insurance Company Ltd.* v. *Mr. Arjun Bhandari and Others ***669A***

Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 – S. 8 – It is evident that the portion of land on which the petitioner was allowed to construct the shed/garage was a temporary arrangement for security purposes at the relevant time as he was a sitting Minister to the Government of Sikkim. Admittedly, it was not a Government allotment made to him in terms of any Rules prevalent at that time. Evidently, he has no right over the said area sans allotment neither does he claim ownership upon it under any law. The conditions spelt out in the letter of permission allowing construction of the shed being clear and unambiguous do not require further elucidation.

D.B. Thapa* v. *Urban Development and Housing Department ***665A***

SLR (2020) SIKKIM 643

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

CRP No. 02 of 2017

Bishnu Maya Rai ….. PETITIONER

Versus

Dr. Rameshwar Prasad and Others ….. RESPONDENTS

For the Petitioner: Mr. N. Rai, Senior Advocate with Ms. Susmita Gurung, Advocate

For Respondent No.1: Mr. Sudhir Prasad and Mr. Kazi Sangay Thupden, Advocates.

For Respondent 2-3: Mr. B. Sharma, Senior Advocate with Mr. Sajal Sharma, Advocate.

For Respondent 4-7: Mr. Santosh KumarChettri, Government Advocate

For Respondent No.8: Mr. K.T. Bhutia, Senior Advocate with Ms. Sunita Chettri.

For Respondent No.9: None.

Date of decision: 3rd October 2020

A. Code of Civil Procedure, 1908 – S. 11 – *Res Judicata* – Order II Rule 2 – The dispute in the fresh Title Suit (i.e. Title Suit No.12 of 2014) pertains to the alleged encroachment made by the petitioner allegedly on plot no. 882 and is not confined to her admitted encroachment on plot no. 881 – The learned trial Court in its judgment in Title Suit No. 02 of 2010, has observed *inter alia* that plot no. 882 was not relevant for that case. It is evident that the entire suit of the parties in Title Suit No. 02 of 2010 pivoted around the ownership of plot no. 881 which ultimately was

found to be recorded in the name of "*Sarkar*" (Government). Neither was the ownership of plot no. 882 adjudicated upon nor can it be said that the respondents no. 1, 2 and 3 herein had, at any point of time, relinquished their claims over any other plot of land which was not the subject matter of the old suit (i.e. Title Suit No. 02 of 2010) – The objective of Order II Rule 2 of the C.P.C is based on the principle that the defendants should not be twice vexed for one and the same cause, thereby restraining the plaintiffs from dividing their claims and the remedies thereof. For the Rule to be invoked two conditions must be satisfied viz. the previous suit and the fresh suit must arise out of the same cause of action and they must also be between the same parties. However, the Rule does not preclude a second suit based on a distinct and separate cause of action. Merely because the parties to the fresh litigation are the ones who were involved in a previous litigation, it cannot be concluded that the matter is *res judicata* nor does it mean that the respondents no. 1, 2 and 3 had relinquished any of their claims to any other landed property – Neither the suit is barred by *res judicata* nor is it barred by Order II Rule 2 of the C.P.C – All parties to the suit are required to go into trial and establish their divergent claims considering that a new plot of land is in dispute and the *lis* cannot be adjudicated upon fully and finally without examining witnesses and documents which the parties may seek to rely upon during the course of trial to establish their opposing claims.

(Paras 10, 12 and 13)

Petition dismissed.

ORDER

Meenakshi Madan Rai, J

1. The learned Civil Judge, East Sikkim at Gangtok, by the impugned Order, dated 28.07.2016, in Title Suit No.12 of 2014 *(Dr. Rameshwar Prasad and Others vs. The Chief Secretary and Others)* was considering the two preliminary issues framed, *viz.*

(i) Whether the Suit is barred by res judicata?

(ii) Whether the present Suit is barred by the provisions of Order II Rule 2 of the CPC in view of Title Suit No.02 of 2010 having been finally decided?

The Court concluded that the Suit of the Respondents No.1, 2 and 3 herein was neither barred by *res judicata* nor Order II Rule 2 of the Code of Civil Procedure, 1908 (for short, "CPC") for reasons enumerated in the impugned order. Aggrieved thereof the Petitioner assails the Order.

2.(i) It is the Petitioner's case that the Respondents No.1, 2 and 3 as Plaintiffs had filed Title Suit No.15 of 2008 (later renumbered as Title Suit No.02 of 2010) seeking Declaration, Cancellation/quashing of documents, Injunction and Consequential reliefs *inter alia* against the Petitioner herein, who was the Defendant No.4 in the said Title Suit. The Title Suit was dismissed by the Court of the learned District Judge, Special Division II, East Sikkim, at Gangtok vide its Judgment dated 30.03.2011 and an Appeal was preferred before this Court. By its Judgment dated 30.06.2011, in Regular First Appeal No.02 of 2011, the Judgment of the learned trial Court was upheld by this Court. Dissatisfied thereof, the Respondents No.1, 2 and 3 filed a Special Leave Petition before the Hon'ble Supreme Court being Special Leave to Appeal (Civil) No.24765/2011 which was dismissed in *limine* vide its Order dated 06.02.2012.

(ii) After the dismissal of the previous Suit, the Respondents No.1, 2 and 3 again filed a Suit for Declaration, Cancellation of documents, Injunction and other reliefs *inter alia* against the Petitioner, i.e. Title Suit No.15 of 2012 which was later renumbered as Title Suit No.12 of 2014. Consequent thereto the Petitioner herein filed an application requesting the learned trial Court to frame preliminary issues on the question of maintainability of the present Suit, accordingly the two preliminary issues *supra* were framed vide Order dated 24.06.2013 and subsequently the impugned Order pronounced.

(iii) Before this Court, learned Senior Counsel for the Petitioner submitted that the Title Suit No.12 of 2014 that has been filed before the learned trial Court by the Respondents No.1, 2 and 3, is in fact old wine in new bottles as it raises the same issues that have already been decided in the Title Suit No.02 of 2010 and upheld right up to the Hon'ble Supreme Court of India. That, the Respondents No.1, 2 and 3 have attempted to confuse the learned trial Court with regard to the issues involved by enumerating several Schedules in the Plaint as properties in dispute but have failed to pinpoint as to what exactly is the issue in dispute. This is in view of the fact that they are well aware that the matter was fully and finally

adjudicated upon previously and no further issues persist. That, the landed property detailed in Schedule "A" of the previous Suit i.e. Title Suit No.02 of 2010 being Plot No.882 is the same as reflected in Schedule "C" in the new Suit i.e. Title Suit No.12 of 2014. That, this plot number is not even relevant as the plot of land allotted to the Petitioner was from Plot No.881 and it has conclusively been found that the said plot of land belongs to the Government, who had the option of allotting it according to the prevailing rules and regulations. That, any construction made by the Petitioner over and above the allotted site has been duly regularized by the Respondent No.5, while one such construction measuring an area of 222 square feet of land is pending regularization, however this construction too falls within Plot No.881 which as already decided indubitably belongs to the Government. That, the learned trial Court vide its impugned Order, while dismissing the preliminary objections raised by the Petitioner failed to appreciate that the parties and the subject matter in the previous Suit and the present Suit are identical. That, settled issues cannot be re-agitated by the Respondents No.1, 2 and 3 being barred by the provisions of Section 11 of the CPC. That, the Respondents No.1, 2 and 3 are not entitled to the reliefs claimed by them for the foregoing reasons and the impugned Order deserves to be set aside and quashed. No specific arguments were put forth by learned Senior Counsel with regard to Order II Rule 2 of the CPC.

3. Learned Counsel for the Respondent No.1 submitted that the instant matter does not pertain to Plot No.881 as sought to be made out by learned Senior Counsel for the Petitioner but in fact relates to Plot No.882 on which plot the Petitioner has now encroached. That, this is evident from the fact that as per the Allotment Order, dated 25.01.2008, an area measuring 520 square feet was allotted to her from Plot No.881, a Government plot. That, the issue at hand concerns Schedule "C" of the Plaint filed by the Plaintiffs (Respondents No.1, 2 and 3 herein) before the learned trial Court in Title Suit No.12 of 2014. That, a perusal of the Inspection Report shows that the Petitioner is also in occupation of a portion of Plot No.882 when her allotment admittedly was only from Plot No.881, measuring 520 square feet. In fact, the Inspection Report indicates that she is now in occupation of 1102.00 square feet and the excess land which is shown in the said record is encroached upon from Plot No.882 which belongs to the Respondents No.1, 2 and 3, hence, the necessity for filing Title Suit No.12 of 2014. That, the question of the Suit being barred

by *res judicata* or the provisions of Order II Rule 2 of the CPC as rightly concluded by the learned trial Court does not arise since the claim of the Respondents No.1, 2 and 3 in the Title Suit No.12 of 2014 pertains to encroachment of Plot No.882 which is their ancestral property and not Government land. That, the cause of action herein is different from that of the previous Title Suit.

4. Learned Senior Counsel for the Respondents No.2 and 3 endorsed and relied upon the submissions made by the Respondent No.1 and submitted that the encroachment made by the Petitioner on Plot No.882 which belongs to the Respondents No.1, 2 and 3 is to be adjudicated upon and that the instant matter is not concerned with Plot No.881.

5. The State-Respondents No.4 to 7 had no submissions to make except to contend that the documents on record would indicate their stand. That, Plot No.881 has been found to be Government land from where the Petitioner had been allotted the land.

6. Learned Senior Counsel appearing for Respondent No.8 submitted that the Inspection Report, dated 08.01.2013, is indicative of the fact that the Respondents No.1, 2 and 3 are now laying claim to Plots No.882 and 883 whereas initially their claim was confined to Plot No.881. That, the learned trial Court has only relied on the Inspection Report of the State-Respondents No.6 and 7 which cannot be taken at face value, therefore, the Respondents No.1, 2 and 3 herein have no case.

7. Due consideration has been given by me to the rival contentions advanced by learned Counsel for the parties. I have also carefully perused all documents placed before me including the impugned Order.

8. The learned trial Court, by the impugned Order, considered the two preliminary issues already extracted *supra* and on considering the submissions of learned Counsel for the parties as well as the documents furnished, observed *inter alia* that the Respondents No.1, 2 and 3 herein, although pitted against the same parties, the dispute did not concern the same plot of land i.e. Plot No. 881 and therefore concluded that the Suit was not barred either by *res judicata* or by Order II Rule 2 of the CPC as the subject matter in the instant Suit was different from the previous Suit.

9.(i) Having perused the pleadings and the documents placed before me, it appears that the parties in Title Suit No.15 of 2008 (renumbered as Title Suit No.02 of 2010) and Title Suit No.15 of 2012 (renumbered as Title Suit No.12 of 2014) were identical with the exception of the District Collector, East, who has been impleaded as Defendant No.4 in the fresh Suit i.e. Title Suit No.12 of 2014. It is evident that vide Allotment Order No.GOS/UD&HD/ 7(272)97-98/2173, dated 29.10.1999, an area measuring 40 feet x 30 feet was allotted to the Petitioner herein, by the Defendant No.2 (Respondent No.5 herein) at the Flour Mill Area, Tadong, East Sikkim. This allotment is not the subject matter of dispute and any further discussions on its fate is truncated here.

(ii) Vide letter bearing No.38/77/3077/UD&HD, dated 25.01.2008, a site measuring 26 feet x 20 feet, equivalent to 520 square feet, was allotted to the Petitioner herein by the Respondent No.5 herein, from Plot No.881 at "Old Gangtok Bazaar" now "M.G. Marg," as described in Schedule "D" to the Plaint in the Title Suit No.12 of 2014 and Schedule "B" to the Plaint in the old Suit (i.e. Title Suit No.02 of 2010). A dispute arose between the parties i.e. the Petitioner and the Respondents No.1, 2 and 3 regarding the ownership of the land from where the allotment was made, leading to the filing of Title Suit No.02 of 2010**.** The learned trial Court came to the finding that Plot No.881 belonged to the Government. The High Court upheld the Judgment while the Hon'ble Supreme Court dismissed the Special Leave Petition filed by the Respondents No.1, 2 and 3 herein. It is also not in dispute that Plot No.881 measures a total area of 9801 square feet from where the allotment was made to the Petitioner. However, the records of the Defendant No.2 in the Title Suit No.12 of 2014 (Respondent No.5 herein) reveal that on an inspection conducted by the representatives of the Respondents No.6 and 7 herein, the Petitioner was found to be in possession of 1102 square feet of land whereas the total area allotted to her was 829 square feet. It is on this count that conflicting claims are being raised by the opposing parties.

(iii) It is relevant to clarify here that after the initial allotment of 520 square feet was made to the Petitioner, an additional area of 190 square feet was allotted to her vide order of the Respondent No.5 herein, bearing number 38(77)/ 1043/UD&HD, dated 25.04.2011 thereby adding the allotment to a total area of 710 square feet. Later 119 square feet of unauthorized horizontal construction was also regularized by the Respondent

No.5 herein, vide letter No.38(77)/UD&HD/1978, dated 30.05.2011, thus, the overall area allotted to the Petitioner measured 829 square feet. These facts are admitted by the Petitioner and can also be gleaned from the documents furnished before this Court. According to the Petitioner, a staircase on a piece of land measuring 222 square feet has been constructed by her, also in excess of the land allotted to her, which is pending regularization by the Government, and this admitted unauthorized construction, as per the Petitioner, falls on Plot No.881 ("*Sarkar*"). The Respondents No.1, 2 and 3, for their part, contend that it is not merely 222 square feet of land that she has encroached upon as the Inspection Report clearly indicates that she is in possession of 1102 square feet of land and the encroachment is not confined to Plot No.881 as attempted to be made out by the Petitioner but is from Plot No.882 which belongs to the Respondents No.1, 2 and 3.

10. On due consideration of the rival stands it thus emerges that the dispute in the fresh Title Suit (i.e. Title Suit No.12 of 2014) pertains to the alleged encroachment made by the Petitioner allegedly on Plot No.882 and is not confined to her admitted encroachment on Plot No.881, although I have to remark here that nebulous drafting on the part of the Plaintiffs (Respondents No.1, 2 and 3 herein) in the Title Suit No.12 of 2014 has confounded the matter. In view of the above flagged circumstances, as correctly held by the learned trial Court, it is clear that neither the Suit is barred by *res judicata* nor is it barred by Order II Rule 2 of the CPC.

11. Section 11 of the CPC *inter alia* provides that no Court shall try any Suit or issue in which the matter directly and substantially in issue, has been directly and substantially in issue in a former Suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent Suit or the Suit in which such issue has been subsequently raised and has been heard and finally decided by such Court. Order II Rule 2 of the CPC provides that every Suit shall include the whole of the claim which the Plaintiff is entitled to make in respect of the cause of action but a Plaintiff may relinquish any portion of his claim in order to bring the Suit within the jurisdiction of any Suit. Where the Plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

12. It is pertinent to recapitulate here that the learned trial Court in its Judgment in Title Suit No.02 of 2010, has observed *inter alia* that Plot No.882 was not relevant for that case. It is evident that the entire Suit of the parties in Title Suit No.02 of 2010 pivoted around the ownership of Plot No.881 which ultimately was found to be recorded in the name of "*Sarkar*" (Government). Neither was the ownership of Plot No.882 adjudicated upon nor can it be said that the Respondents No.1, 2 and 3 herein had, at any point of time, relinquished their claims over any other plot of land which was not the subject matter of the old Suit (i.e. Title Suit No.02 of 2010). As already noticed no specific arguments were placed before this Court with regard to Order II Rule 2 of the CPC by the Petitioner besides the averments also raises no claim of the Respondents No.1, 2 and 3 having relinquished any portion of their claim in order to bring the Suit within the jurisdiction of any Court. No averment or argument has been advanced with regard to the Respondents No.1, 2 and 3 having omitted to sue in respect of any portion of their claim or their intentional relinquishment of any portion of their claim. The objective of Order II Rule 2 of the CPC is based on the principle that the Defendants should not be twice vexed for one and the same cause, thereby restraining the Plaintiffs from dividing their claims and the remedies thereof. For the Rule to be invoked two conditions must be satisfied *viz.* the previous Suit and the fresh Suit must arise out of the same cause of action and they must also be between the same parties. However, the Rule does not preclude a second Suit based on a distinct and separate cause of action. Merely because the parties to the fresh litigation are the ones who were involved in a previous litigation it cannot be concluded that the matter is *res judicata* nor does it mean that the Respondents No.1, 2 and 3 had relinquished any of their claims to any other landed property. The requirements of the provisions of Law *supra* have to be fulfilled in order for it to apply to the Title Suit No.12 of 2014 which is not so in the instant case, as already discussed.

13. All parties to the Suit are required to go into trial and establish their divergent claims considering that a new plot of land is in dispute and the *lis* cannot be adjudicated upon fully and finally without examining witnesses and documents which the parties may seek to rely upon during the course of trial to establish their opposing claims.

14. Hence, I find that, no reason whatsoever warrants any interference in the impugned Order of the learned trial Court. The Revision Petition thus

stands dismissed and disposed of. Pending applications, if any, also stand disposed of.

15. Considering that the Title Suit pertains to the year "2012," the learned trial Court shall make all efforts to dispose of this matter within six months and no later, from the date of appearance of the parties before it.

16. The learned trial Court shall proceed in the matter as per Law and conclude it accordingly, unencumbered and unprejudiced by the observations in this Order, which are, in no manner, to be construed as findings on the merits of the Suit.

17. Copy of this Order be forwarded to the learned trial Court forthwith, for information and compliance, along with its records.

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SLR (2020) SIKKIM 652
(Before Hon'ble the Chief Justice and
Hon'ble Mr. Justice Bhaskar Raj Pradhan)

I.A. No. 1 of 2019 in
W.A. No. 2 of 2019

The Dean,
I.K. Gujral Punjab
Technical University .... APPLICANT/APPELLANT

Versus

Sikkim Students Welfare Association
of Chandigarh and Others ..... RESPONDENTS

For the Appellant:	Mr. A.K. Upadhyaya, Senior Advocate with Mr. Sonam Rinchen Lepcha, Advocate.
For Respondents 1-3:	Mr. Gulshan Lama, Advocate.
For Respondent 4, 5, 8:	Mr. Sujan Sunwar, Assistant Government Advocate.
For Respondent 6, 11:	Mr. Karma Thinlay Namgyal, Central Government Counsel.
For Respondent No.10:	Mr. Karma Thinlay Namgyal, Senior Advocate.
For Respondent No.9:	Mr. Leonard Gurung, Advocate.
For Respondent No.7:	None.

Date of decision: 7th October 2020

A. Limitation Act, 1963 – S. 5 – Condonation of Delay – The Hon'ble Supreme Court in *Esha Bhattacharjee* has categorically held that

there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay. The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose, regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation. Substantial justice being paramount and pivotal, the technical considerations should not be given undue and uncalled for emphasis – The facts evidently reveal that the applicant had approached this Court as well as the Hon'ble Supreme Court against the orders sought to be challenged in Writ Appeal No. 2 of 2019 by preferring application for review, application for reconsideration and Special Leave Petition – The facts reflect that the legal advice received by the applicant to file the review petition, Special Leave Petition and application for reconsideration was not sound. However, merely because the applicant followed the wrong advice, which was evidently received, it cannot be said that the applicant's conduct was casual and lackadaisical. The reason to withdraw the Special Leave Petition is to our mind not as important as the fact that the applicant had preferred it and later chose to withdraw it. No negligence or inaction can be imputed upon the applicant for pursuing diligently remedies before wrong forums on advice received – S. 5 of the Limitation Act provides that any appeal may be admitted after the prescribed period, if the applicant satisfies the Court that it had sufficient cause for not doing so. S. 14 of the Limitation Act provides that in computing the period of limitation the time during which the applicant had been pursuing with due diligence another proceeding shall be excluded – When we weigh the scale of balance of justice in respect of the contesting parties, justice would be better served if Writ Appeal No. 2 of 2019 is decided on merits instead of throwing it out on the ground of delay alone.

(Paras 15, 16, 17 and 18)

Delay condoned. Application allowed.

Chronology of cases cited:

1. Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy and Others, (2013) 12 SCC 649.

2. J. Kumaradasan Nair and Another v. Iric Sohan and Others, (2009) 12 SCC 175.

3. Balwant Singh (Dead) v. Jagdish Singh and Others, (2010) 8 SCC 685.

4. Bhakti Bh. Mondal v. Khagendra K. Bandopadhya and Others, AIR 1968 Cal 69.

5. Anwari Basavaraj Patil and Others v. Siddaramaiah and Others, (1993) 1 SCC 636.

6. Haro Singh v. Ajay Kumar Chawla and Others, 2004 SCC OnLine Delhi 19.

7. Babu Ram v. Devinder Mohan Kaura and Others, AIR 1981 Delhi 14.

8. Krishan Lal v. Hanuman, 1993 SCC OnLine Del 45.

9. State of West Bengal v. The Administrator, Howrah Municipality, (1972) 1 SCC 366.

10. Kunwar Rajendra Singh v. Rai Rajeshwar Bali, AIR 1937 PC 276.

ORDER

The order of the Court was delivered by ***Bhaskar Raj Pradhan, J***

1. The applicant seeks to prefer Writ Appeal No. 2 of 2019 challenging orders dated 22.07.2019, 06.09.2019 and 18.10.2019, passed by the learned Single Judge of this court in W.P.(C) No 60 of 2016 (the writ petition) as well as an order dated 03.09.2019 passed in Review Petition (C) No. 1 of 2019 (the review petition). Writ Appeals are preferred under Rule 148 of the Sikkim High Court (Practice & Procedure) Rules, 2011 which prescribes a period of 30 days from the date of the judgment, decree or final order as the period of limitation for an appeal. According to the applicant there is a delay of 103 days. The applicant explains that against the order dated 22.07.2019 they had preferred the review petition before this court which was rejected on 03.09.2019. Aggrieved thereby, the applicant preferred Special Leave Petition (C) No.22416-22418/2019 (the Special Leave Petition) against the orders dated 22.07.2019, 06.09.2019 and 03.09.2019 passed in the writ petition and the review petition. The Special Leave Petition was, however, withdrawn by the applicant with liberty to approach this court granted by the Hon'ble Supreme Court vide

order dated 30.09.2019. The applicant, thereafter, filed I.A. No. 9 of 2019 in the writ petition before this court praying for reconsideration of order dated 22.07.2019. This application was rejected by the learned Single Judge on 18.10.2019. The applicant preferred Writ Appeal No. 1 of 2019 against the order dated 18.10.2019 passed by the learned Single Judge. Writ Appeal No. 1 of 2019 was, however, withdrawn on 22.11.2019 on the ground that they had inadvertently not challenged the order dated 22.07.2019 and 06.09.2019 passed in the writ petition and the order dated 03.09.2019 passed in the review petition. The prayer to withdraw with liberty as prayed for was granted and Writ Appeal No. 1 of 2019 was disposed as withdrawn with liberty as prayed for by order dated 22.11.2019.

2. In the application, besides narrating these facts, the applicant further explains that the learned counsel for the applicant started drafting the fresh writ appeal which took two-three days. The same was submitted to the learned Senior Counsel for vetting the draft who also took two-three days to settle it. Certain clarification was sought for from the applicant and on receipt thereof, the learned counsel for the applicant redrafted the memo of appeal and resubmitted the draft to the learned Senior Counsel who then settled it. The process took few more days. Writ Appeal No. 2 of 2019 along with the present application for condonation of delay was finally ready on 02.12.2019 and filed on the same date.

3. The applicant contends that although the applicant ought to have filed a writ appeal against the order dated 22.07.2019, on a wrong advice, the applicant moved the Hon'ble Supreme Court by preferring Special Leave Petition and consequently, a delay of 103 days occurred in moving the writ appeal because of approaching wrong forums. The applicant pleads that the delay is unintentional and *bona fide* and it was for the aforesaid reasons that the applicant was prevented by sufficient cause for not preferring the writ appeal within the statutory period of limitation of 30 days. The applicant further submits that they have a genuine case on merits and if the delay is not condoned, the applicant would suffer irreparable loss.

4. The respondents no. 1 to 3 opposes the application for condonation of delay. In their affidavit dated 19.06.2020, they contend that the applicant has utterly failed to show sufficient cause and the lone reason tendered is

frivolous. It is contended that the period of limitation having expired, the respondents have obtained the benefit under the law of limitation to treat the impugned order dated 22.07.2019 as beyond challenge, and this legal right accrued to the respondents by lapse of time should not be ignored and lightly disturbed. The respondents no. 1 to 3 contends that the reasons given by the applicant are also vague and no clear picture emerges as to why the Special Leave Petition was withdrawn. They further contend that the conduct of the applicant reflects a casual and lackadaisical attitude in preferring Writ Appeal No. 2 of 2019. It is also the case of the respondents no.1, 2 and 3 that the applicant has no case on merits in the Writ Appeal No. 2 of 2019.

5. Heard Mr. A. K. Upadhyaya, learned Senior Counsel along with Mr. Sonam Rinchen Lepcha, learned counsel for the applicant; Mr. Gulshan Lama, learned counsel for respondents no. 1, 2 and 3; Mr. Sujan Sunwar, learned Assistant Government Advocate for respondents no. 4, 5 and 8; Mr. Karma Thinlay Namgyal, learned Central Government Counsel for respondents no. 6 and 11 and as Senior Counsel for respondent no. 10 and Mr. Leonard Gurung, learned counsel for respondent no. 9. None appeared for respondent no. 7.

6. During the course of hearing, Mr. A.K. Upadhyaya referred to the judgment of the Hon'ble Supreme Court in ***Esha Bhattacharjee v. Managing Committee of Raghunathpur Nafar Academy & Ors.***[1]. Paragraph 21 thereof, which enumerates the principles in deciding an application for condonation of delay, is quoted herein below:

> ***"21.*** *From the aforesaid authorities the principles that can broadly be culled out are:*
>
> ***21.1.*** *(i) There should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay, for the courts are not supposed to legalise injustice but are obliged to remove injustice.*
>
> ***21.2.*** *(ii) The terms "sufficient cause" should be understood in their proper spirit, philosophy and purpose regard being had to the fact that these*

[1] (2013) 12 SCC 649

terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation.

21.3. *(iii) Substantial justice being paramount and pivotal the technical considerations should not be given undue and uncalled for emphasis.*

21.4. *(iv) No presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.*

21.5. *(v) Lack of bona fides imputable to a party seeking condonation of delay is a significant and relevant fact.*

21.6. *(vi) It is to be kept in mind that adherence to strict proof should not affect public justice and cause public mischief because the courts are required to be vigilant so that in the ultimate eventuate there is no real failure of justice.*

21.7. *(vii) The concept of liberal approach has to encapsulate the conception of reasonableness and it cannot be allowed a totally unfettered free play.*

21.8. *(viii) There is a distinction between inordinate delay and a delay of short duration or few days, for to the former doctrine of prejudice is attracted whereas to the latter it may not be attracted. That apart, the first one warrants strict approach whereas the second calls for a liberal delineation.*

21.9. *(ix) The conduct, behaviour and attitude of a party relating to its inaction or negligence are relevant factors to be taken into consideration. It is so as the fundamental principle is that the courts are required to weigh the scale of balance of justice in respect of both parties and the said*

principle cannot be given a total go by in the name of liberal approach.

21.10. *(x) If the explanation offered is concocted or the grounds urged in the application are fanciful, the courts should be vigilant not to expose the other side unnecessarily to face such a litigation.*

21.11. *(xi) It is to be borne in mind that no one gets away with fraud, misrepresentation or interpolation by taking recourse to the technicalities of law of limitation.*

21.12. *(xii) The entire gamut of facts are to be carefully scrutinised and the approach should be based on the paradigm of judicial discretion which is founded on objective reasoning and not on individual perception.*

21.13. *(xiii) The State or a public body or an entity representing a collective cause should be given some acceptable latitude.**"***

7. Mr. A. K. Upadhyaya also referred to the judgment of the Hon'ble Supreme Court in ***J. Kumaradasan Nair & Anr. v. Iric Sohan & Ors.***[2]***,*** to seek benefit of Section 14 of the Limitation Act, 1963. The Hon'ble Supreme Court held:

"15. *The question which arises for consideration is as to whether only because a mistake has been committed by or on behalf of the appellants in approaching the appropriate forum for ventilating their grievances, the same would mean that the provision of sub-section (2) of Section 14 of the Limitation Act, which is otherwise available, should not be taken into consideration at all. The answer to the said question must be rendered in the negative.*

[2] (2009) 12 SCC 175

> ***16.*** *The provisions contained in Sections 5 and 14 of the Limitation Act are meant for grant of relief where a person has committed some mistake. The provisions of Sections 5 and 14 of the Limitation Act alike should, thus, be applied in a broadbased manner. When sub-section (2) of Section 14 of the Limitation Act per se is not applicable, the same would not mean that the principles akin thereto would not be applied. Otherwise, the provisions of Section 5 of the Limitation Act would apply. There cannot be any doubt whatsoever that the same would be applicable to a case of this nature.***"**

8. While reiterating the pleadings in the affidavit dated 19.06.2020 filed by the respondents no. 1, 2 and 3, Mr. Gulshan Lama relied upon the judgment of the Hon'ble Supreme Court and Calcutta High Court in ***Balwant Singh (Dead) v. Jagdish Singh & Ors.***[3] and ***Bhakti Bh. Mondal v. Khagendra K. Bandopadhya & Ors***.[4], respectively. He submitted that once a valuable right has accrued in favour of one party as a result of the failure of the other party to explain the delay by showing sufficient cause and its own conduct, it will be unreasonable to take away the right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party. Mr. Lama relied on the Calcutta High Court judgment to submit that it was incumbent upon the applicant to have filed an affidavit of the lawyer who had rendered wrong advice to it. He submits that failure to do so results in the failure to establish sufficient cause.

9. In ***Balwant Singh*** (supra), the Hon'ble Supreme Court held that liberal construction of the expression *"sufficient cause"* is intended to advance substantial justice which itself presupposes no negligence or inaction on the part of the applicant, to whom want of *bona fide* is imputable. There could be instances where the court should condone delay; equally there would be cases where the court must exercise its discretion against the applicant for want of any of these ingredients or where it does not reflect *"sufficient cause"* as understood in law. Reasonable time and proper

[3] (2010) 8 SCC 685
[4] AIR 1968 Cal 69

conduct of the party concerned are important considerations. The law of limitation is a substantive law and has definite consequences on the right and obligation of a party. Once a valuable right has accrued in favour of one party as a result of a failure of the other party to explain the delay by showing sufficient cause, it will be unreasonable to take away that right on the mere asking of the applicant, particularly when the delay is directly a result of negligence, default or inaction of that party.

10. The High Court of Calcutta in ***Bhakti Bh. Mondal*** (supra) had taken the view that the Limitation Act applied to election petitions. The judgment cited by Mr. Lama has been overruled by the Hon'ble Supreme Court in ***Anwari Basavaraj Patil & Ors. v. Siddaramaiah & Ors.***[5] which, *inter alia*, held that Section 5 of the Limitation Act, 1963 was not applicable to election petition.

11. Mr. Karma Thinlay Namgyal submits that wrong advice of a lawyer as pleaded by the applicant cannot be sufficient cause. To buttress his arguments, the learned Central Government Counsel, relied upon the judgment of Delhi High Court in ***Haro Singh v. Ajay Kumar Chawla & Ors.***[6]. Mr. Karma Thinlay Namgyal also sought to rely upon the judgment of the Hon'ble Supreme Court in ***Esha Bhattacharjee*** (supra) to submit that no presumption can be attached to deliberate causation of delay but, gross negligence on the part of the counsel or litigant is to be taken note of.

12. In ***Haro Singh (supra),*** the Delhi High Court preferred to follow the view taken in ***Babu Ram v. Devinder Mohan Kaura & Ors.***[7] and not the contrary view taken by the Delhi High Court in ***Krishan Lal v. Hanuman***[8]**.** The Delhi High Court was of the view that some High Courts as well as the Delhi High Court in ***Babu Ram*** (supra) had taken the view that the counsel must disclose the circumstances in which incorrect advice was given and it is not sufficient to make a perfunctory and general statement that the wrong advice was given *bona fide*. Thus, the Delhi High Court on the facts of ***Haro Singh*** (supra) held that no *"sufficient cause"* had been shown for condoning the delay.

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[5] (1993) 1 SCC 636
[6] 2004 SCC OnLine Delhi 19
[7] AIR 1981 Delhi 14
[8] 1993 SCC OnLine Del 45

13. In ***Babu Ram*** (supra), the Delhi High Court held that:

> *"**22.** There is no universal rule that every mistaken advice given by the counsel constitutes sufficient cause or constitutes "good faith". Every case depends on its own facts. In some cases a bona fide opinion given by a counsel can constitute sufficient cause. It all depends how the opinion is given. If the opinion is given after taking due care and attention then it will amount to "good faith" as well as "sufficient cause". If the opinion is given off-hand without taking trouble of knowing the law on the point it may not constitute sufficient cause and/or "good faith". Unfortunately, in the present case, the learned counsel who gave the affidavit does not mention how he honestly believed that a revision petition was to be filed. There is no magic in the senior counsel saying that he "honestly gave the opinion." The senior counsel or for that matter any other counsel ought to further tell the court why he honestly gave that opinion. What was it that led him to give the mistaken advice? Was it something in the impugned judgment which led him to give such an advice or was there something in the law which made him give the mistaken advice, it is not sufficient in such cases to merely state that 'I am a senior counsel' or 'I am a very experienced counsel and I gave the opinion'. Which is of no use. The Court naturally expects that the counsel concerned while choosing to file an affidavit for giving mistaken advice would also state what led him to give such an advice. If this much is not expected from a counsel, it may lead to arbitrary decisions by Courts.***"***

14. The Hon'ble Supreme Court in the ***State of West Bengal v. The Administrator, Howrah Municipality***[9], relying upon the judgment

[9] (1972) 1 SCC 366

rendered by the Privy Council in ***Kunwar Rajendra Singh v. Rai Rajeshwar Bali***[10] had held that mistaken advice given by a legal practitioner may in the circumstances of a particular case give rise to sufficient cause within the section though there is no general doctrine which saves parties from the results of wrong advice.

15. We have examined the application as well as the reply filed by the respondents no. 1, 2 and 3. We have also heard the learned counsel for the respective parties and perused the judgments cited at the bar. The Hon'ble Supreme Court in ***Esha Bhattacharjee*** (supra) has categorically held that there should be a liberal, pragmatic, justice-oriented, non-pedantic approach while dealing with an application for condonation of delay. The terms *"sufficient cause"* should be understood in their proper spirit, philosophy and purpose, regard being had to the fact that these terms are basically elastic and are to be applied in proper perspective to the obtaining fact-situation. Substantial justice being paramount and pivotal, the technical considerations should not be given undue and uncalled for emphasis.

16. The facts evidently reveal that the applicant had approached this court as well as the Hon'ble Supreme Court against the orders sought to be challenged in Writ Appeal No. 2 of 2019 by preferring application for review, application for reconsideration and Special Leave Petition. According to the applicant, they had approached the wrong forums on wrong advice.

17. It is, as argued by both Mr. Karma Thinlay Namgyal and Mr. Lama, not too clear as to on whose wrong advice the applicant did so. It is true that no affidavit of any lawyer has been filed to support the applicant's contention but there is no reason to disbelieve the statement of the applicant. The statement of the applicant is also supported by the narration of facts of what transpired during this period of 103 days. The application, read as a whole, cannot be termed perfunctory. It is evident that the applicant did approach different forums to ventilate its grievance before finally approaching this court by way of Writ Appeal No. 2 of 2019. The sequence of events which can be drawn from the orders passed in those proceedings does reflect that the applicant had, in fact, pursued remedy on wrong advice. It was because of the filing of the applications in the writ

[10] AIR 1937 PC 276

petition, the Special Leave Petition and Writ Appeal No. 1 of 2019, that substantial part of the total delay of 103 days had occasioned. The time taken for drafting the Writ Appeal No.2 of 2019 and settling the same, as explained in the application, was for a period of around a fortnight.

18. The applicant filed the review petition against the order dated 22.07.2019 passed by the learned Single Judge in the writ petition which was rejected on 03.09.2019 before the expiry of the period of 30 days provided for filing a writ appeal. When an order dated 06.09.2019 was passed in the writ petition, the applicant approached the Hon'ble Supreme Court and filed the Special Leave Petition against order dated 22.07.2019 and 06.09.2019 in the writ petition and order dated 03.09.2019 in the review petition. The applicant after withdrawing the Special Leave Petition, took liberty from the Hon'ble Supreme Court to approach this court and thereafter, filed an application i.e. I.A. No. 9 of 2019 in the writ petition for reconsideration of order dated 22.07.2019. This application was rejected by the learned Single Judge on 18.10.2019. It seems that only after the rejection of the application, it dawned upon it that it ought to have preferred a writ appeal. The applicant did so by filing Writ Appeal No. 1 of 2019 on 13.11.2019 but it soon realized that it had not challenged two other orders passed and accordingly withdrew the same on 22.11.2019 with liberty to file afresh. The Writ Appeal No. 2 of 2019 was thus filed on 02.12.2019 incurring a total delay of 103 days. The facts reflect that the legal advice received by the applicant to file the review petition, Special Leave Petition and application for reconsideration was not sound. However, merely because the applicant followed the wrong advice, which was evidently received, it cannot be said that the applicant's conduct was casual and lackadaisical. The reason to withdraw the Special Leave Petition is to our mind not as important as the fact that the applicant had preferred it and later chose to withdraw it. No negligence or inaction can be imputed upon the applicant for pursuing diligently remedies before wrong forums on advice received. The limitation for filing Writ Appeal No. 2 of 2019 seems to have expired due to the fact that the applicant followed the advice received and filed the review petition, Special Leave Petition and the application for reconsideration. It, however, does reflect that the applicant was aggrieved and was trying to ventilate its grievance but before wrong forums. It cannot be said that there was deliberate causation of delay on the part of the applicant. Section 5 of the Limitation Act, 1963 provides that any appeal

may be admitted after the prescribed period, if the applicant satisfies the court that it had sufficient cause for not doing so. Section 14 of the Limitation Act, 1963 provides that in computing the period of limitation the time during which the applicant had been pursuing with due diligence another proceeding shall be excluded. We are of the view that the applicant is entitled to the benefit of Section 14 of the Limitation Act, 1963 as well. We are also of the view, that when we weigh the scale of balance of justice in respect of the contesting parties, justice would be better served if Writ Appeal No. 2 of 2019 is decided on merits instead of throwing it out on the ground of delay alone.

19. In the circumstances, sufficient cause having been shown by the applicant, the delay of 103 days in preferring the Writ Appeal No. 2 of 2019, is condoned.

20. The application is thus allowed.

21. I.A. No. 1 of 2019 stands disposed.

SLR (2020) SIKKIM 665

(Before Hon'ble Mrs. Justice Meenakshi Madan Rai)

WP (C) No. 31 of 2020

D. B. Thapa ….. PETITIONER

Versus

Urban Development and Housing Department ….. RESPONDENT

For the Petitioner: Mr. Yam Kumar Subba, Advocate.

For the Respondent: Mr. Santosh Kumar Chettri, Government Advocate.

Date of decision: 17th October 2020

A. Sikkim Allotment of House Sites and Construction of Building (Regulation and Control) Act, 1985 – S. 8 – It is evident that the portion of land on which the petitioner was allowed to construct the shed/garage was a temporary arrangement for security purposes at the relevant time as he was a sitting Minister to the Government of Sikkim. Admittedly, it was not a Government allotment made to him in terms of any Rules prevalent at that time. Evidently, he has no right over the said area sans allotment neither does he claim ownership upon it under any law. The conditions spelt out in the letter of permission allowing construction of the shed being clear and unambiguous do not require further elucidation.

(Para 10)

Petition dismissed.

ORDER (ORAL)

Meenakshi Madan Rai, J

1. By filing this Writ Petition the Petitioner seeks a writ of *mandamus* and/or other appropriate writs, orders and/or directions quashing the

demolition Notice, issued vide Memo No.21/275/509, dated 03-07-2020 and letter No.21(275)197/UD&HD/628, dated 29-09-2020, to the Petitioner by the Respondent Department.

2. It is the Petitioner's case that he is a law abiding citizen and was twice elected as a Member of the Sikkim Legislative Assembly, viz., in 1994 and in 2009. He served as Minister in the Public Health Engineering Department (PHE) from 1994 to 1999 and as Minister, Urban Development & Housing Department (UD&HD) from 2009 to 2014.

3. On an application filed by the Petitioner on 04-03-2013 before the Respondent Department seeking to construct a shed/ garage for parking his vehicle, due to security reasons, permission was granted to that effect on 23-04-2013, vide letter bearing No.21(275)/1026/UD&HD. The Petitioner was allowed to construct a temporary shed/garage on certain terms and conditions as detailed in the said communication. Now, it is alleged that the Petitioner has been served with the impugned Notices arbitrarily, directing him to demolish the temporary shed. The Petitioner submitted his reply to the first Notice, *supra* but the Principal Chief Town Planner and Assistant Chief Town Planner were dissatisfied thereof and issued the final demolition order by invoking Section 8 of the Sikkim Allotment of House sites and Construction of Building (Regulation and Control) Act, 1985, violating his rights under Article 14 of the Constitution of India.

4. Learned Counsel for the Petitioner submits that the demolition order has been issued in the teeth of the permission granted earlier by the Government and is an attempt to victimize the Petitioner as he belongs to a rival political party. The parking of the Petitioner's vehicle has not caused any impediment to the flow of vehicular or pedestrian traffic and the issuance of the Notice is to harass the Petitioner as evident from the fact that there are other persons in the locality who are similarly situated with the Petitioner but no steps have been taken against them, hence the prayers in the Petition be granted.

5. *Per contra*, Learned Government Advocate submits that no right of the Petitioner has been violated and the permission granted by the Government in 2013 was merely for construction of a temporary shed with the conditions given in the said permission letter dated 23-04-2013 and duly accepted by the Petitioner. The portion of land on which the shed stands

was never allotted to the Petitioner at any point of time by the Government. In the light of the facts place before this Court no right accrues to the Petitioner with regard to the area on which he has constructed his garage. Hence, the Writ Petition deserves no consideration and ought to be dismissed *in limine.*

6. Having heard the rival contentions of the Learned Counsel I have given due consideration to the submissions and perused all documents placed before me.

7. The prayers in the Writ Petition are as follows;

(i) Issue a writ of Mandamus and/or any other appropriate writ, order or direction for quashing the impugned demolition Notices vide memo No.21/275/509 and 03.07.2020 and vide Memo No.21(275)97/UD&HD/ 1628 dated 29.09.2020 served through Principal Town Planner and Assistant town Planner of the Respondent to the Petitioner.

(ii) Pass any other appropriate order/orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

8. The facts have already been put forth *supra* and for brevity are not being repeated. Relevant reference in this context may be made to the conditions put forth in the letter dated 23-04-2013 bearing No.21(275)/ 1026/UD&HD, wherein the Petitioner was granted permission to construct a temporary shed/garage, viz.;

"*(i) That the permission is purely for security reasons;*

(ii) That, you shall have no right or claim over the land;

(iii) That you shall demolish the same as and when the Government desires; and

*(iv) That your car shall not be parked in a way that will obstruct the free flow of pedestrian movement.****"***

9. As admitted by Learned Counsel for the Petitioner these conditions have not been contested by the Petitioner since the year 2013. No change in the conditions were sought for by the Petitioner from the Respondent

Department at any point in time, till date. It is also admitted that the shed stands on land which was never allotted to the Petitioner by the concerned Department or any other Department of the Government.

10. It is thus evident that the portion of land on which the Petitioner was allowed to construct the shed/garage was a temporary arrangement for security purposes at the relevant time as he was a sitting Minister to the Government of Sikkim. Admittedly, it was not a Government allotment made to him in terms of any Rules prevalent at that time. Evidently, he has no right over the said area sans allotment neither does he claim ownership upon it under any law. The conditions spelt out in the letter of permission allowing construction of the shed being clear and unambiguous do not require further elucidation.

11. In consideration of the submissions of Learned Counsel for the parties, the facts involved in the instant matter, the conditions laid down in the letter granting permission to construct the temporary shed and in the absence of any indication that the any right of the Petitioner has been violated, I am of the considered opinion that the matter merits no further consideration and nothing remains for adjudication thereof.

12. The Writ Petition deserves to be and is accordingly dismissed and disposed of.

13. In view of the observation *supra*, I.A. No.01 of 2020, which is an application for stay and issuance of interim directions to restrain the Respondent from executing the impugned Notice and demolition order, also stands disposed of.

SLR (2020) SIKKIM 669

(Before Hon'ble Mr. Justice Bhaskar Raj Pradhan)

MAC Appeal No. 06 of 2019

The Branch Manager,
National Insurance Company Ltd. ….. APPELLANT

Versus

Mr. Arjun Bhandari and Others ….. RESPONDENTS

For the Appellant: Mr. Thupden G. Bhutia, Advocate

For Respondent 1-2: Mr. Ajay Rathi and Mr. Bhushan Nepal, Advocates.

For Respondent 3: Mr. Sushant Subba, Advocate.

Date of decision: 21st October 2020

A. Motor Vehicles Act, 1988 – S. 173 – Respondent no. 3 submits that an amount of 2 lakhs paid to the deceased for his medical expenses should be indemnified by the appellant. This is an appeal under S. 173 preferred by the appellant. Although such a plea was made by the respondent no. 3 before the Claims Tribunal, the Claims Tribunal did not pass any direction in favour of respondent no. 3. – Therefore, aware, he chose not to agitate the issue before this court by filing any independent appeal, cross-appeal or cross-objection. In the circumstances, the respondent no. 3 is precluded from agitating this issue without filing any independent appeal, cross-appeal or cross-objection, in an appeal filed by the appellant.

(Paras 26 and 29)

B. Motor Vehicles Act, 1988 – S. 166 – S. 166 mandates rashness and negligence on the part of the driver of the vehicle as *sine qua non*. Where an accident occurs owing to rash and negligent driving by the driver of the vehicle, resulting in sufferance of injury or death by any third party, the driver would be liable to pay compensation therefor. The owner of the

vehicle also becomes liable under the Motor Vehicles Act, 1988. As the vehicle was insured the appellant as the insurer would be statutorily liable and enjoined to indemnify the owner – The driver was neither made a party nor a witness – Respondent no. 3 who admitted during his cross-examination that he was an eye-witness chose not to give his account clearly to the Claims Tribunal. The only version available is that of claimant no. 1 which assertion was neither disputed by the appellant nor the respondent no. 3. In the circumstances, it is held that the claimants have been able to sufficiently prove that it was due to the rash and negligence of the driver which caused the accident. Consequently, the respondent no. 2 also become liable and since the appellant was the insurer who had insured the vehicle, it was liable and enjoined to indemnify respondent no. 3 to the extent of the damages payable.

(Para 30)

Appeal allowed.

Chronology of cases cited:

1. Oriental Insurance Company Limited v. Premlata Shukla and Others, (2007) 13 SCC 476.

2. Ranjana Prakash and Others v. Divisional Manager and Another, (2011) 14 SCC 639.

JUDGMENT

Bhaskar Raj Pradhan, J

1. The National Insurance Company Limited is the appellant (the appellant). The respondent nos. 1 and 2 are the claimants (the claimants) and the respondent no.3 is the owner (the owner) of the Mahindra & Mahindra passenger carriage jeep bearing registration no.SK-01-J-2576 (Maxx vehicle) driven by one Sandip Kumar Pathak (the driver).

2. On 05.11.2013 an accident occurred when the motor bike bearing registration no. W.B. 74E/9160 (Bajaj Pulsar) (the motor bike) collided with the Maxx vehicle owned by the respondent no.3. As a result of the accident Binay Bhandari-the driver of the motor bike (the deceased) expired on 11.10.2014.

3. A First Information Report (FIR) dated 06.11.2013 was lodged at Singtam Police Station by the driver of the Maxx vehicle alleging that while escorting the vehicle's owners from Majitar to Singtam, the deceased riding a motor bike came in high speed and hit the Maxx vehicle. As a result of the accident, the deceased was taken to Singtam hospital in a serious condition by them for treatment after which he was referred to the Central Referral Hospital, Tadong.

4. The claimants, as parents of the deceased, preferred a claim under Section 166 of the Motor Vehicles Act, 1988 on 04.02.2016 against the appellant and the respondent no.3 before the Motor Accident Claims Tribunal (the Claims Tribunal). The particulars provided in the claim petition were that the deceased was 23 years of age at the time of the accident, he had the qualification of Bachelor of Technology in Civil Engineering having passed B.Tech in Civil Engineering with 92.70% and was employed in Rural Management and Development Department, Government of Sikkim, as a Technical Assistant earning a salary of Rs.10,000/- per month. It was claimed that the deceased had potential to earn not less than Rs.35,955/-. As per the claim petition the deceased was riding the motor bike and coming towards his home from Central Pendam. While reaching near *"Ghantey Kholsa"*, the Maxx vehicle, coming uphill from the wrong direction/wrong lane caused the accident with the motor bike driven by the deceased. It was stated that the deceased had blown horn in the turn but the driver did not heed to it which resulted in the accident. It was asserted that the cause of the accident was due to rash and negligent driving of the driver.

5. The claimants claimed that the deceased had suffered multiple fracture of the spinal cord as a result of which plating was grafted. The deceased was advised continuous physiotherapy; he had to ambulate on wheel chair and had to be on continued catheter clamping. It was also stated that the deceased had suffered quadriplegia due to cervical spine C5 fracture. It was asserted that the deceased was taken to various hospitals and finally to the Central Referral Hospital, Tadong, East Sikkim, after which he was discharged on 01.12.2013. It was asserted that the deceased was bedridden with 100% disability and a certificate of disability had also been issued by the Board of Doctors of the STNM Hospital, Gangtok, East Sikkim. It was stated that on 11.10.2014 the victim died due to result of the injuries sustained in the accident.

6. The claimants claimed that the deceased was under treatment of various doctors at the District Hospital, Singtam, East Sikkim, Central Referral Hospital, North Bengal Neuro Hospital, Siliguri and STNM Hospital, Gangtok. It was claimed that the deceased was bedridden from the date of accident i.e. 05.11.2013 till he breathed his last on 11.10.2014. The claimants asserted that the Maxx vehicle had been duly insured and the insurance policy was valid and effective from 13.06.2013 to 12.06.2014. It was also asserted that the driver of the Maxx vehicle had a valid driving license issued by the Licensing Authority, Motor Vehicle Department, Government of Sikkim, Gangtok, East Sikkim. A claim of Rs.82,09,710/- was sought for as total compensation. The claimants asserted that the accident occurred due to the rash and negligent act of the driver.

7. The appellant filed written objection dated 06.04.2016. The appellant pleaded that the claimants were not entitled to any relief; they had not approached the Claims Tribunal with clean hands and that there was no cause of action against them. The appellant asserted that the claim was bad for non-joinder of necessary parties and mis-joinder of unnecessary parties. The owner and the Insurance Company of the motor bike had not been made a party and that the First Information Report (the FIR) dated 06.11.2013 reveals that the case under Sections 279 and 304 of the Indian Penal Code, 1860 (IPC) had in fact been registered against the deceased. It was asserted that contributory negligence on the part of the deceased cannot be ruled out and as such it was of utmost importance that the Insurance Company of the motor bike was also made a necessary party. If it was found that this was a case of contributory negligence, the responsibility of the accident was to be fixed in the ratio of 50:50. The claim of the monthly income of the deceased was also disputed as on the date of death of the deceased he had been employed on ad hoc basis on a fixed salary of Rs.10,000/- only. It was asserted that there was no reason to seek a higher claim of Rs.35,995/- as salary. It was submitted that the assessment made by the claimants for payment of future professional tax to be deducted on the future earnings was illogical. The appellant disputed the claimants were dependent on the deceased. The quantum of compensation was also disputed.

8. The respondent no.3 filed his written objection dated 01.07.2016. The respondent no.3 claimed that the Maxx vehicle had a valid registration certificate; fitness and token tax paid; it was duly insured and the policy was

valid till the midnight of 12.06.2014. The respondent no.3 claimed that the vehicle was driven by a qualified driver who had a valid driving license issued by the Licensing Authority and he was duly authorised to drive the vehicle. The respondent no.3 also claimed that the vehicle had a valid route permit issued by the State Transport Authority, Motor Vehicles Division, Transport Department, Government of Sikkim and that he had issued an authorisation certificate in the name of the driver which was also valid on the date of the accident. The respondent no.3 claimed that he was not liable to pay any compensation under Section 166 of the Motor Vehicles Act, 1988 and as there was contributory negligence on the part of the deceased, the respondent no.3 could not be made liable for the compensation claimed. The respondent no.3 asserted that the insurer of the motor bike was a necessary party. The respondent no.3 also disputed the amount of salary and the quantum of compensation claimed by the claimants.

9. The claimant no.1 filed his evidence on affidavit dated 15.02.2017 before the Claims Tribunal asserting all those facts averred in the claim petition which was confirmed and authenticated on 15.02.2017. The claimant no.1 was cross-examined by the respondent no.3 as well as the appellant. As many as 55 documents were exhibited by the claimant no.1.

10. On behalf of the appellant one Binod Arjel, its investigator filed his evidence on affidavit dated 01.08.2017. In his evidence he claimed that he had investigated the case and obtained all necessary documents. It was asserted that on 05.11.2013 at around 13:15 hours while the deceased was driving towards his home to Central Pendam he met with an accident at *"Ghantey Kholsa"* as a result of which he sustained serious injuries. His investigation also revealed that deceased was driving the motor bike which collided with the Maxx vehicle driven by the driver. Due to the injury sustained by the deceased in the accident he was immediately admitted to the District Hospital, Singtam, from where he was evacuated to Central Referral Hospital, Tadong for further treatment. However, on the same day the deceased was shifted to North Bengal Neuro Hospital, Siliguri, for further treatment. As per his investigation he found that the deceased was thereafter, advised to be taken back to Gangtok where he was admitted to STNM Hospital till 07.11.2013. On 08.11.2013 the deceased was once again admitted to Central Referral Hospital where he underwent treatment till 01.12.2013. The deceased was bedridden for months and finally succumbed to his injuries on 11.10.2014 i.e. after 14 months and 5 days. Binod Arjel

asserted that he had met the claimants as well as the respondent no.3 and the driver of Maxx vehicle. He claimed to have visited the spot, made inquiries with the local people and recorded the statements of the claimant no.1, the respondent no.3 as well as the driver and one witness Bishnu Maya Chettri. According to him, the respondent no.3 claimed before him that it was the deceased who was driving the motor bike in a rash and negligent manner and that the driver had himself evacuated the deceased to the hospital. He also claimed that the driver had stated that it was not his fault, but it was because of the rash and negligent driving of the deceased who drove the motor bike in excessive speed that resulted in the accident. He claimed that Bishnu Maya Chettri had stated to him that the deceased was negligent and that he was known to be a negligent driver. He further stated that his investigation revealed that FIR dated 06.11.2013 in connection with this case had been registered against the deceased under Sections 279 and 304 IPC and that no FIR had been registered against the driver. He opined that the accident took place due to the negligence of the deceased as he was known to be notorious for his rash and negligent driving. He also opined that no post mortem was conducted after the death of the deceased and therefore, what was the actual cause of the death could not be ascertained. He authenticated his evidence on affidavit on 20.08.2018. He was cross-examined by the claimant and the respondent no.3. He exhibited his investigation report (exhibit R2-2), the voter identity card of the claimant (exhibit-R2-3), the pension payment book of claimant no.1 (exhibit-R2-4) the date of birth certificate of the deceased (exhibit-R2-5) and agreement dated 04.01.2014 (Document-A) and the attested insurance policy of the Maxx vehicle (exhibit-R2-6).

11. The respondent no.3 filed his evidence on affidavit dated 25.04.2017 in which he stated that the driver had lodged the FIR on 06.11.2013 stating that the deceased who was driving the motor bike had suddenly hit the Maxx vehicle. He also stated that as per the final report the Investigating Officer had opined that the accident had occurred due to spillage of motor engine oil on the road. It was asserted that the claimants had not furnished any document to prove that the deceased was the owner of the motor bike and that he was authorised to ride it. It was claimed that the driving license of the deceased had also not been filed. The respondent no.3 claimed that no case had been registered against the driver of Maxx vehicle. He exhibited the attested copy of certification of registration, fitness and token tax of the vehicle (exhibit-R-1(2)), attested copy of goods

carriage permit (exhibit-R-1(3)), attested copy of driving license of the driver (exhibit-R-1(4)), the attested copy of authorization letter issued by him in favour of the driver (exhibiy-R-1(5)) and copy of insurance policy of the MAXX vehicle (exhibit-37 and 38).

12. The respondent no.3 claimed that they had given a sum of Rs.2 lakhs for medical treatment of the deceased for which an agreement was executed in the presence of local panchayat and witnesses (exhibit-R-1(6)). The respondent no.3 authenticated his evidence on 25.07.2018. He was cross-examined by the claimants as well as the respondent no.3. During cross-examination by the respondent no.3 he admitted that he was an eye witness and as per his evidence of affidavit the accident occurred due to the negligence of the deceased.

13. The Claims Tribunal framed a solitary issue i.e. whether the claimants are entitled to the compensation claimed? If so, who is liable to compensate them? The Claims Tribunal decided the issue in favour of the claimants vide judgment dated 31.08.2018. The Claims Tribunal took the monthly income of the deceased as Rs.10,000/- and an amount of Rs.22,37,529/- was directed to be paid by the appellant to the claimants with interest @ 10% per annum from the date of filing of the claim petition till full and final payment. Accordingly, an award dated 31.08.2018 for the said amount was passed by the Claims Tribunal. The Claims Tribunal held that the certificate of insurance cum policy (exhibit-36) revealed that the Maxx vehicle owned by respondent no.3 was insured with the appellant w.e.f. 13.06.2013 till the midnight of 12.06.2014 and it was valid during the time of accident.

14. The Claims Tribunal held that the date of birth of the deceased was 20.07.1990 and therefore, on the date of the accident the deceased was 23 years 3 months and 16 days. It was further held that the appellant had not adduced any evidence to show that there was any breach of the terms and conditions of the insurance policy by the owner of the vehicle and that the driver was duly employed as the driver of the Maxx vehicle by respondent no.3 who held a valid driving license and a valid authorization letter. It was found that the certificate of the insurance cum policy (exhibit-36) of the Maxx vehicle was also valid. The Claims Tribunal thus concluded that Maxx vehicle was registered in the name of the respondent no.3 and insured with the appellant.

15. Heard Mr. Thupden G. Bhutia, learned counsel for the appellant, Mr. Ajay Rathi, learned counsel for the claimant nos. 1 and 2 and Mr. Sushant Subba, learned counsel for the respondent no.3.

16. Mr. Thupden G. Bhutia, submits that the claimants had failed to prove that it was due to the rash and negligence of the driver of the Maxx vehicle which led to the accident and therefore, one of the vital requirements of Section 166 of the Motor Vehicles Act, 1988 has not been fulfilled. He also took this court through the evidence led by parties before the Claims Tribunal and submitted that this was a clear case of the contributory negligence on the part of the deceased and therefore, it was incumbent that the ratio should have been fixed at 50:50. He further submitted that the deceased had died after 14 months but no post mortem had been conducted on his dead body. As a result, the cause of the death was still unknown. He submits that there was no nexus between the accident and the death.

17. Mr. Ajay Rathi submits that the fundamental fact that it was the driver's rash and negligence that caused the accident has been clearly asserted by Claimant no.1 which has not been disputed and no contrary material has been placed before the Claims Tribunal.

18. Mr. Sushant Subba submits that the Maxx vehicle had been duly insured at the time of the accident and it was valid. He also submitted that the driving license of the driver as well as the authorization letter issued by the respondent no.3 in his favour were both valid at the time of the accident. He submits that the respondent no.3 had not violated any of the terms and conditions of the insurance policy. The respondent no.3 had, in his written objection before the Claims Tribunal, stated that he and the driver had paid an amount of Rs.2 lakhs to the deceased for his medical expenses and should the Claims Tribunal come to the conclusion that it was the appellant who was liable to pay the claim amount then the amount of Rs.2 lakhs paid by respondent no.3 to the deceased should be indemnified by the appellant. He therefore, sought a direction upon the appellant to do so from this court. Mr. Sushant Subba sought to rely upon the two judgments of the Supreme Court for the said purpose. They are:- ***Oriental Insurance Company Limited v. Premlata Shukla & Ors[1].*** and ***Ranjana Prakash & Ors. v. Divisional Manager & Anr.[2].***

[1] (2007) 13 SCC 476
[2] (2011) 14 SCC 639

19. This court shall now deal with the concerns raised by Mr. Thupden G. Bhutia. It is his case that the claimants had failed to prove that it was due to the rash and negligent act of the driver of the Maxx vehicle which led to the accident- a vital requirement of Section 166 of the Motor Vehicles Act, 1988.

20. The Claimants were the parents of the deceased. Out of the two claimants the claimant no.1 filed his evidence on affidavit before the Claims Tribunal. He, *inter alia*, asserted that-

> ***"4.*** *That my deceased son was riding a Motor Cycle (Bajaj Pulsar) bearing Registration No.WB 74 E/9160 and was coming home from Central Pendam. While reaching Ghantey Kholsa near the house of Shri Bhagirath Acharya, the vehicle (Maxx), bearing Registration No.SK-01-J-2576 which is owned by the Respondent No.02 and driven by its driver Sandip Kumar Pathak came from the opposite direction at a high speed in a wrong lane and hit the said Motor Bike as a result of which my beloved son sustained grave and fatal injuries.* ***5.*** *That, I say that my deceased son had even blown the horn in the said turning, but the offending driver paid no heed to it. Furthermore, the road was wide enough to pass two Light Motor Vehicles. I further say that the cause of the accident was solely due to the rash and negligent driving on the part of the driver, Sandip Kumar Pathak who was driving vehicle (Maxx), bearing Registration No.SK-01-J-2576 at the relevant time and there was no any conributory negligence on the part of my deceased son. I can say for sure that my deceased son was wearing protective gear/helmet at the relevant time, but the force of the vehicle was as such, my deceased son sustained injuries on head/ skull also. .....****"***

21. The claimant no.1 was cross-examined by the appellant. During his cross-examination it was suggested to him by the appellant's counsel that the deceased had died while riding the motor bike and that the accident occurred while the Maxx vehicle collided with the motor bike ridden by the deceased while coming uphill. The appellant did not cross-examine the claimant no.1 on the assertions made by him in paragraphs 4 and 5 quoted above. In paragraphs 4 and 5 quoted above there is a clear assertion that the accident occurred when the Maxx vehicle driven by the driver came from the opposite direction at high speed in a wrong lane and hit the motor bike. It also asserts that the deceased had even blown the horn in the turn, but the driver paid no heed to it and that the cause of the accident was therefore, solely due to the rash and negligent driving of the driver of the Maxx vehicle. It further asserts that there was no contributory negligence on the part of the deceased who was wearing protective gear/helmet at the relevant time.

22. The respondent no.3 also gave his evidence on affidavit. In his evidence on affidavit, however, the respondent no.3 did not state either that he was himself present at the time of the accident nor as to what transpired, save that the driver had lodged an FIR on 06.11.2013 before the Singtam, Police Station, stating that the deceased who was riding the motor bike had suddenly hit the Maxx vehicle. The respondent no.3 was cross-examined by the appellant. According to the FIR lodged by the driver (exhibit 2) the owner's of the Maxx vehicle were also in the car and therefore, witnesses to what transpired. However, during cross-examination of respondent no.3 no suggestion was given, to even suggest that what the claimant no.1 had asserted in his evidence on affidavit was untrue. The FIR led to an investigation which culminated in a final report (exhibit 53). The final report however, opined that the accident occurred when the motor bike came from the opposite direction, slipped on the mobil (motor engine oil) that was on the road and struck the Maxx vehicle. According, to the final report neither the driver of the Maxx vehicle nor the driver of the motor bike had committed any mistake/carelessness. Therefore, both were not guilty. However, the evidence of claimant no.1 given before the Claims Tribunal and tested through cross-examination asserting that the accident occurred due to the rash and negligence act of the driver of the Maxx vehicle remained undisputed. Even the evidence of Binod Arjel, the insurance investigator, suggests that as a result of the accident the deceased suffered

serious injuries and finally succumbed to it. According to Binod Arjel the respondent no.3 had claimed before him that it was the deceased who was driving the motor bike in a rash and negligent manner. No such claim was made by the respondent no.3 in his evidence on affidavit before the Claims Tribunal. The respondent no.3 did accept the suggestion from the counsel of the appellant that he was an eye witness. However, there was no reason for him not to assert it in his evidence on affidavit. His evidence on affidavit reads as if he was not there and therefore, it was only the driver who had lodged the FIR. A perusal of the FIR and the sketchy facts placed by the respondent no.3 before the Claims Tribunal it does seem that respondent no.3 was in fact present at the time of the accident but the narration or the failure to narrate the facts precisely creates serious doubts on the version sought to be portrayed. More so when the court sees the hesitation of the respondent no.3, to speak the truth. Although the appellant was privy to the investigation by Binod Arjel, the appellant chose not to lead any evidence of witnesses whose statements had been recorded by Binod Arjel, as claimed by him. Neither the driver nor Bishnu Maya Chettri, an independent witness, claimed to have been examined by Binod Arjel, were examined as witnesses.

23. Mr. Thupden G. Bhutia next submitted that this is a case of contributory negligence on the part of the deceased. The assertion of Binod Arjel that it was so was based on his investigation on examination of the driver and Bishnu Maya Chettri both, as stated above, were not examined. During cross-examination he admitted that he was not an approved investigator. He also admitted that he had not recorded the statement of the deceased and had he done so, his report may have been different. The detailed cross-examination of Binod Arjel by the claimants and admissions made by him creates serious doubts on his deposition.

24. Mr. Thupden G. Bhutia insist that the FIR lodged by the driver clearly reflects that it was due to the rash and negligence of the deceased that caused the accident and therefore, it was a clear case of contributory negligence also. The FIR was lodged by the driver who is neither a party nor a witness. The FIR was investigated by the police and a final report filed. The final report disproved the allegation made in the FIR save the factum of accident. The appellant has however, not led any evidence to disprove the assertion made by the claimant no.1. Therefore, there is no

evidence, which could lead the court, to believe that there was contributory negligence of the deceased.

25. Mr. Thupden G. Bhutia would finally submit that there was no nexus between the accident and the death. The claimant no.1 gave a detailed statement as to what transpired after the accident till the time of the death of the deceased. He deposed about how the deceased was treated at the District Hospital, Singtam, the Central Referral Hospital, Tadong, North Bengal Neuro Hospital, Siliguri, STNM Hospital, Gangtok and thereafter, back at the Central Referral Hospital, Tadong. The medical records pertaining to the treatment done during this period and the expenses incurred have all been produced before the Claims Tribunal. Claimant no.1 clearly asserted that the deceased died due to the injury sustained in the accident. Although the claimant no.1 was not an eye witness he did spend more than 14 months with the deceased which was enough time to learn as to what transpired. The cross-examination of the claimant no.1 by the appellant reflects that these facts were not even disputed by it. In fact, even the appellant's sole witness, Binod Arjel, asserted that the deceased died as a result of the accident. Thus, it is evident that there was a clear nexus between the accident and the death of the deceased.

26. Mr. Sushant Subba, learned counsel for the respondent no.3 submits that the amount of Rs.2 lakhs paid to the deceased for his medical expenses should be directed to be indemnified by the appellant. This is an appeal under section 173 of the Motor Vehicles Act, 1988 preferred by the appellant. Although such a plea was made by the respondent no.3 before the Claims Tribunal, the Claims Tribunal did not pass any direction in favour of the respondent no.3. In spite of that, the respondent no.3 chose not to prefer an appeal. He now seeks the direction from the Appellate Court, in an appeal by the appellant based on his assertion that he had paid an amount of Rs.2 lakhs to the deceased.

27. In ***Oriental Insurance Company Limited (supra)*** the Supreme Court held, while examining the provision of Section 147 (2) of the Motor Vehicles Act, 1988, that insurance is mandatory under Section 147(2) and hence the insurer would be liable to reimburse the insured to the extent of the damages payable by the owner to the claimants, subject to the limit of its liability as laid down in the Motor Vehicles Act, 1988 or the contract of

insurance. The agreement (exhibit-R-1(6)) does not even state that the amount of Rs.2 lakhs relates to the damages payable by the respondent no.3 to the claimants.

28. In ***Ranjana Prakash (supra)*** the Supreme Court examined the provision of Section 173 of the Motor Vehicles Act, 1988. The claimants therein had not challenged the award of the Claims Tribunal on the ground that the Claims Tribunal had failed to take note of the future prospects and add 30% to the annual income of the deceased. The Supreme Court found from the facts that the claimants therein were not aggrieved by the amount taken as the monthly income and therefore, there was no need for them to challenge the award of the Claims Tribunal. But where in an appeal filed by the owner/insurer, if the High Court proposes to reduce the compensation awarded by the Claims Tribunal, the claimants can certainly defend the quantum of compensation awarded by the Claims Tribunal, by pointing out other errors or omissions in the award, which if take note of, would show that there was no need to reduce the amount awarded as compensation. In such circumstances, the Supreme Court held that the fact that the claimants did not independently challenge the award will not therefore, come in the way of their defending the compensation awarded, on other grounds. The Supreme Court however, also held that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections.

29. Although, the respondent no. 3 had made such assertion before the Claims Tribunal and therefore, aware, he chose not to agitate the issue before this court by filing any independent appeal, cross-appeal or cross-objection. In the circumstances, this court is of the considered view that the respondent no.3 is precluded from agitating this issue without filing any independent appeal, cross-appeal or cross-objection, in an appeal filed by the appellant.

30. Section 166 of the Motor Vehicles Act, 1988 mandates rashness and negligence on the part of the driver of the vehicle as *sine qua non*. Where an accident occurs owing to rash and negligent driving by the driver of the vehicle, resulting in sufferance of injury or death by any third party, the driver would be liable to pay compensation therefor. The owner of the vehicle also becomes liable under the Motor Vehicles Act, 1988. As the

vehicle was insured the appellant as the insurer would be statutorily liable and enjoined to indemnify the owner. The driver was neither made a party nor a witness so we do not have his version on record. The respondent no.3 who admitted during his cross-examination that he was an eye witness chose not to give his account clearly to the Claims Tribunal. The only version available is that of the claimant no.1 which assertion was neither disputed by the appellant nor the respondent no.3. In the circumstances, it is held that the claimants have been able to sufficiently prove that it was due to the rash and negligence of the driver which caused the accident. Consequently, the respondent no. 2 also become liable and since the appellant was the insurer who had insured the Maxx vehicle it was liable and enjoined to indemnify the respondent no.3 to the extent of the damages payable.

31. The appellant has not agitated the issue as to whether the insurance covered such an accident. The appellant has also not agitated the quantum of compensation awarded by the Claims Tribunal, save the issue of contributory negligence which has already been dealt with above.

32. All the grounds agitated by Mr. Thupden G. Bhutia on behalf of the appellant having been considered and rejected, the judgment and award both dated 31.08.2018 passed by the Claims Tribunal are upheld. Consequently MAC Appeal No. 06 of 2019 is dismissed.

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