
(2014) 03 DEL CK 0170
In the Delhi High Court
Case No : Mac. App. No. 262 of 2012

National Insurance Co. Ltd.	Vs	APPELLANT
Sangeeta K. Mithal and Others		RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2014) 2 ACC 26

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Pradeep Gaur, for the Appellant; Suman Bagga and Ms. Shruti Shukla, Advocates for Respondent Nos. 1 to 4, Mr. Sanjiv Bahl and Mr. Eklavya Bahl, Advocates for Respondent Nos. 5 and 6, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait, J.—The instant appeal is preferred against the impugned award dated 17.11.2011, whereby the learned Tribunal has granted compensation for a sum of Rs. 49,73,576/- with interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization of the amount. Brief facts of the case are that on 22.12.2001, Shri Kalp Mithal, the deceased was going to Faridabad in a Car bearing No. HR 51 H 3878, being driven by his friend Shri Rahul Malik, i.e., respondent No. 5. The weather was foggy. The offending vehicle was being driven in a rash and negligent manner by respondent No. 5. When at about 1.30 am, they reached at NHPC Chowk, Mathura Road, Faridabad, respondent No. 5 could not see the vehicle from the left side due to which the offending vehicle bearing No. HR 51 H 3878 was hit by a TATA-407 which had come from the left side. As a result of the impact, the deceased suffered multiple injuries. He was removed to Apollo Hospital, where he was declared brought dead.

2. It is pertinent to note that the offending vehicle was owned by respondent No. 6 and insured with the appellant company.

3. Learned counsel appearing on behalf of the appellant submitted that the accident had taken place on 22.12.2001 due to collision of two vehicles and the deceased Kalp Mithal sustained fatal injuries in the said accident. The driver of the other vehicle TATA-407 ran away from the spot after the accident.

4. Learned counsel further submitted that on service of the notice, the respondent Nos. 5 and 6, i.e., driver and owner of the offending vehicle filed their common written statement denying the negligence on the part of the respondent No. 5. It was further submitted that the accident was caused due to negligence of driver of other vehicle TATA-407, being driven at a fast speed and negligently without putting its head lights on.

5. The appellant is aggrieved with the opinion of the learned Tribunal, whereby the appellant company was directed to pay the award amount without considering the documents and evidence available on record.

6. It is submitted that as per the Claim Petition, while driving the insured vehicle, respondent No. 5 was negligent, which caused the death of the deceased. However, negligence was not at all proved on the part of the respondent No. 5. No criminal proceeding was initiated against him, except the solitary statement of PW1, who was not the eye witness to the accident. There was no evidence to prove the rash and negligent driving of the respondent No. 5. However, on the basis of principles of *res ipsa loquitur*, the learned Tribunal held that the respondent No. 5 was negligent.

7. Learned counsel further submitted that there was no eye witness to the accident, therefore, the negligence was not proved. The claim petition was filed u/s 166 of the Motor Vehicles Act, 1988, wherein negligence has to be proved. But in the instant case, the respondents/claimants have failed to do so, despite that the learned Tribunal has directed the appellant to pay the compensation.

8. Learned counsel for the appellant further submitted that the respondent Nos. 5 and 6, i.e., driver and owner of the offending vehicle have filed their common written statement and submitted that the offending vehicle was being driven at a speed of 40 to 45 kmph. A Tata-407 had come from the left side, being driven at a fast speed without putting its head lights on. The driver of Tata-407 was negligent. It had hit the offending vehicle. As a result of impact, the offending vehicle was badly damaged.

9. The learned Tribunal has framed issue No. 1 as under:-

Whether deceased suffered injuries in an accident which took place on 23/12/2001 due to rash and negligence driving of vehicle bearing no. HR 51 H 3878 driven by respondent no. 1, owner by R-3 and insured with R-2?

10. Shri Dharamveer Singh Chauhan R1W1 deposed that he along with Rahul and Kalp Mithal left for factory at Faridabad. It was little foggy weather. When they reached at NHPC Chowk, Faridabad, from their left side a Tata-407 came at a very fast speed and hit their car with great force due to which car was

revolved. First he came out of the car from the rear side. The person sitting on the front seat was unconscious and the respondent No. 5 sitting on the driving seat was shaken by him and enquired what had happened. However, he was stunned.

11. During cross-examination, the said witness was asked to produce the driving licence, which he had produced. He admitted that the date of issuance of the driving licence was 24.08.2007 and the said licence did not bear particulars of any old driving licence. However, he denied the suggestion that he was not holding any driving licence prior to this licence. He also denied the suggestion that he did not drive Honda City Car from Faridabad to Greater Kailash. Also denied the suggestion, he was not present in the Honda City Car at the time of the accident. Further denied the suggestion, respondent No. 5, Rahul Malik was drunk at the time of the accident and was driving the car under the influence of liquor.

12. He further deposed that while they were on the way to hospital, he informed brother of respondent No. 5, Rahul Malik about the accident through cell phone of Rahul, who got admitted Rahul Malik and the deceased as well in the Apollo Hospital. He admitted that despite having the cell phone, they did not inform the police immediately after the accident. Voluntarily stated that he personally went to Faridabad to inform the police and denied the suggestion that they personally went to Faridabad to avoid registration of the case against Rahul Malik in collusion with the police officials.

13. In cross-examination conducted on 03.02.2007, R1W2, Rahul Malik deposed that respondent No. 6 was the registered owner of Honda City Car bearing No. HR 51 H 3878. He admitted that there were three Directors in their company and he was one of them. The aforesaid car was being driven by him at the time of the accident. Thereafter, R1W2 Rahul Malik was again called for further cross-examination on 03.10.2007, wherein he admitted that the offending car used to be mostly at his disposal. However, denied the suggestion that on the date of the accident, the car was parked at his residence at Greater Kailash. Most of the time, this vehicle was driven by him. Voluntarily stated, sometime driver of the company also used to drive the same; however, he did not remember his name. He admitted that Shri Dharamveer Singh Chauhan was/is contractor engaged by the company but he was not an employee of the company. Again stated, earlier he was also an employee of the company, being Supervisor and Director as well. He denied the suggestion that Shri Dharamveer Singh Chauhan was not an employee of the company and he was deposing falsely with regard to the non-availability of the record. He denied the suggestion that there was none in the offending vehicle except deceased and himself. He denied the suggestion that Shri Dharamveer Singh Chauhan was not accompanying them in the car.

14. Learned counsel submitted that the driver of the alleged offending vehicle was not negligent, thus, the appellant is not liable to pay compensation as directed by the learned Tribunal.

15. On the other hand, learned counsel appearing on behalf of the respondents/ claimants submitted that though no eye witness was examined by the claimants, however, if the circumstances show that the principles of *res ipsa loquitor* can be made applicable, in that case, even in the absence of an eye witness, inference, on the basis of principles of *res ipsa loquitor* can be drawn.

16. Learned counsel further submitted that in para 23 of the petition, it has been averred by the claimants that the offending vehicle was being driven in a rash and negligent manner by respondent No. 5. Further submitted, respondent Nos. 5 and 6 have taken the defence that the deceased had come to the house of respondent No. 5. Shri Dharamveer Singh Chauhan was also there. All of them had left for Faridabad in the offending vehicle.

17. Learned counsel further submitted that the respondent Nos. 5 and 6 have not denied the fact that the deceased was in the offending vehicle at the time of the accident and that deceased had suffered injuries in the accident in question. However, they blamed the driver of the alleged Tata-407. In the MLC Ex. PW3/B, the doctor had mentioned that the deceased as well as his friend were smelling alcohol and that the deceased was brought dead.

18. Learned counsel further submitted that the above noted facts were incorporated in the MLC Ex. PW3/B by the doctor being stated by the respondent No. 5, who had a talk with the doctor while narrating the facts as to how the accident had taken place. In the process, the doctor might have smelled alcohol and had accordingly recorded the same in the MLC. Thus, the respondent No. 5 had not come to the court with clean hand as opined by the learned Tribunal.

19. Learned counsel submitted that the respondent No. 5 did not produce the mechanical inspection report of the car to substantiate the fact that it had been hit by any vehicle from left side. An FIR bearing No. 481/2001 was registered at P.S. Sarai Khwaza, Faridabad. An untraced report Ex. PW3/C was filed by PW3, SI Raghubir Singh. It was for the respondent No. 5 to produce the entire documentary evidence, be it his MLC or the mechanical inspection report of the offending vehicle to show that he was not negligent.

20. Learned counsel further submitted that the site plan Ex. PW3/A shows that the accident had taken place at the intersection. The respondent No. 5 claimed that he was driving the vehicle at the speed of 35 to 40 kmph. The accident had taken place at about 1.30 am on 23.12.2001. It is established that the respondent No. 5 was driving the vehicle at a speed of 40 to 45 kmph and while proceeding towards the intersection, he was negligent. He was also drunk at that time.

21. Learned counsel further submitted that R1W1 Shri Dharamveer Singh Chauhan was a planted witness. In fact, he was not accompanying the respondent No. 5, Rahul Malik. Moreover, R1W2, Rahul Malik has also not come to the court with clean hands.

22. Learned counsel further submitted that respondent No. 5/Rahul Malik in para 4 of his affidavit has deposed that the complaint was immediately made to the police authority by the Contractor Shri Dharamveer Singh Chauhan. In his cross-examination conducted on 03.10.2007, he deposed that "I know that when the accident take place and it causes personal injuries, the police has to be immediately informed. I told my staff to inform the police about the accident. I do not remember the name of my staff whom I instructed to inform the police. I do not know if the police reached on the spot of accident."

23. During further cross-examination, he deposed that he did not know as to when and how the police was informed about the accident. He admitted that his car was not apprehended by the police from the place of accident.

24. R1W1, Shri Dharamveer Singh Chauhan, during his cross-examination on 29.11.2007 admitted that "nobody informed the police about the accident from the spot of accident."

25. He further admitted that despite cell phone being there, they did not inform the police immediately after the accident. Further deposed, after admitting respondent No. 5/Rahul Malik, he along with Factory Manager, Shri Ajay Kumar went to Faridabad to inform the police about the accident. He did not have the cell phone. We did not inform the police on telephone. Voluntarily deposed, they personally went to Faridabad to inform the police. But in the FIR, which was recorded on his statement, he stated that "Aaj dinank 23.12.2013 ko Apollo hospital main gate par aap mil gaye aap ko byan likha diya.....".

26. Learned counsel for the respondents/claimants further submitted that there has been concealment of material evidence on the part of driver/respondent No. 5, who denied the suggestion that he was under the influence of alcohol at the time of accident. While he admitted that he received multiple injuries, he withheld his own MLC from being placed on record as the said MLC could have clearly shown smell of alcohol. In the MLC of the deceased, it was recorded by the Doctor that there was smell of alcohol from the mouth of deceased as well as his friend who brought the deceased to the hospital. As per respondent No. 5's admission, he had taken the deceased to the hospital. The IO did not take the blood sample of the respondent No. 5/driver despite smell of alcohol from the friend mentioned in the MLC of the deceased.

27. Learned counsel further submitted that respondent No. 5/driver had set up an eye witness and had set up the case that the said eye witness Shri Dharamveer Singh Chauhan, R1W1 had driven the Honda City Car and brought the Car to the house of respondent No. 5 from the factory at Faridabad and thereafter three of them, i.e., Rahul Malik, deceased and the said eye witness started proceeding towards Faridabad in the Honda City Car, which was being driven by respondent No. 5 and R1W1 was present in the car at the time of the accident.

28. I have heard the learned counsel for the parties and have perused the record.

29. From the evidence of respondent No. 5, it is clear that he was in the management and control of the use of vehicle, therefore, he was a better person to explain the manner and mode of the accident, but he not only concealed the material evidence, i.e., his own MLC, mechanical inspection report of the car, he also did not immediately inform the police about the accident and removed the deceased, the offending car from the site of the accident so that the mode and manner of the accident could not be properly investigated by the police. The police was informed at 11.00 am, while the accident had taken place at 3.00 am. Eight hours time was sufficient to destroy the evidence and to mislead the police. Even the Investigating Officer, who examined the claimants, had not conducted the investigation properly.

30. Admittedly, respondent No. 5 suffered multiple injuries to his shoulders and head and the car was also badly damaged but the respondent No. 5 chose to drive the car himself after the accident, which is not believable particularly if the said eye witness R1W1 was present in the car, who had allegedly drove the car from Faridabad to Greater Kailash. The said eye witness could not produce his driving licence. He admittedly, did not own a car. He was not an employee of respondent No. 1 but was a Contractor. Therefore, the story put forth by the respondent No. 5 that R1W1, Shri Dharamveer Singh Chauhan was present in the car at the time of the accident is a concocted one.

31. In Law of Torts, the events of the accident must be of a kind which does not happen in the ordinary course of nature. Further, the events which caused the accident must be within the respondents' control. The reason for the second requirement is that whether the respondent has control of the thing which caused the accident, he is in a better position than the plaintiff to explain as to how the accident occurred.

32. On perusal of the trial court record and evidence brought by the respondents/claimants, it is established that there were two vehicles involved in the accident in the present case. The facts and circumstances of the case clearly suggest that the respondent No. 5 had attributed to the accident, who was driving the vehicle at a speed of 40 to 45 kmph in foggy weather at 3.00 am in the morning. In such a situation, it is a case of composite negligence and as per the case bearing Civil appeal No. 1082/2008 titled as "T.O. Anthony Vs. Karvarnan & Ors.", decided on 01.02.2008, the Apex Court had held that in a case of composite negligence, it is the choice of the claimants to sue one or all the wrongdoers. In such a case, each wrongdoer is jointly and severally liable to the injuries for payment of the entire damages and the injured person has the choice of proceeding against all or any of them. The vehicle, i.e., Honda City Car was owned by respondent No. 6, insured with the appellant and was being driven by respondent No. 5. Hence, all the respondents are jointly and severally liable to pay the compensation on account of death of the deceased.

33. In view of the above discussion, I am of the considered opinion that the learned Tribunal has rightly decided the issue of negligence against the

respondent No. 5/driver by applying the principles of "res ipsa loquitor" and has rightly fastened the liability on the Insurance Company.

34. Finding no merit, the instant appeal is dismissed accordingly. Consequently, the Registry of this Court is directed to release the statutory amount in favour of the appellant and the remaining compensation amount be released in favour of the claimants in terms of the award.