

*** HIGH COURT OF DELHI : NEW DELHI**

MAC App. No.930 of 2006

% Judgment reserved on: 26th August, 2008

Judgment delivered on: 4th September, 2008

Sh.Anil Kumar Sharma
S/o Late Sh.Pyare Lal Sharma
R/o C-286, Shalimar Garden Extn.II
Ghaziabad, U.P.

Office Address:
Eastern Div.No.V,
Pocket-I, Delhi Development Authority
Dilashad Gardej, Delhi. Appellant

Through:Mr.S.K.Jain, Adv.

Versus

1.Sh.Amod Kumar
S/o Late Sh.Devi Singh Yadav,
R/o Vill. Chhota Lakhora
P.S.Kuraoli, Mainpuri, U.P.

(Driver & legal heir of the owner –was
proceeded ex parte)

2.Sh.Mohan Singh
S/o Late Sh.Devi Singh
R/o Vill.Chhota Lakhora,
P.S.Kuraoili, Mainpuri, U.P.

(Legal heir of the owner –was proceeded
ex parte)

3. National Insurance Co.Ltd.

Punjab Colony, Mainpuri, U.P.
(Insurer)

...Respondents.

Through:Nemo.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. To be referred to Reporter or not? | YES |
| 3. Whether the judgment should be reported in the Digest? | YES |

V.B.Gupta, J.

The present appeal under Section 173 of the Motor Vehicles Act, 1988 (for short as 'Act') has been filed on behalf of the appellant/injured seeking enhancement of the compensation as awarded by judgment dated 26th August, 2006 passed by Sh.A.S.Jayachandra, Presiding Officer, MACT, Delhi for a sum of Rs.42,000/- along with interest @ 7.5 p.a.

2. The brief facts of this case are that on 8th March, 1998, the appellant along with his wife and children were going to Mainpuri, U.P. from Ghaziabad, U.P. in a

maruti car bearing No.DDC-4215. When the vehicle reached Village Jamalpur, a truck came from the opposite side and the truck driver wanted to save stray animal and applied sudden brakes. The car was going on the left side and was crossing the truck. It is also alleged that a tractor was also coming behind the truck. When the truck driver applied the brakes, respondent No.1 who was driving tractor bearing No.UP-84-7551, moved towards the right hand side and negligently struck the maruti car of the appellant which was being driven by him. There was a head-on-collision. The maruti car was badly damaged and the inmates of the car sustained injuries. Wife of the appellant went into coma. Later on she was treated in various hospitals and ultimately she died on 23rd October, 1998. The Appellant has received injuries in the accident.

3. Devi Singh was the owner of the tractor, who died during the pendency of the proceedings pending before the trial court and his legal heirs who is

respondent No.2 herein the appeal, was impleaded. The offending vehicle was insured with respondent No.3.

4. Respondents 1 & 2 filed the written statement in the trial court.

5. Respondent No.1 in his written statement has stated that this respondent did not cause the alleged accident. The true facts are that respondent No.1 was much behind the truck and the appellant was driving the maruti car at a very fast speed. After crossing the truck, the appellant without caring for the traffic coming from the front side on the road, started overtaking a truck which was proceeding ahead of him and hence dashed against the tractor of the answering respondent with force as a result of which both the maruti car as well as tractor of the answering respondent were damaged badly. Thus, the answering respondent did not cause alleged accident and it was the appellant who has caused the accident.

6. Respondent No.3-Insurance Company has admitted the fact that the tractor in question was insured with it.

7. The notice of this appeal was issued to the respondents and all the respondents were duly served. On 19th March, 2007 counsel for respondents 1 & 2 had put in appearance. Thereafter matter was adjourned to 18th September, 2007.

8. On 18th September, 2007, none appeared for the respondents and matter was adjourned to 15th April, 2008.

9. Since 15th April, 2008 was declared as a local holiday, the matter was taken up on 21st April, 2008. On that date also, none appeared for the respondents and the matter was adjourned to 26th August, 2008.

10. On 26th August, 2008, counsel for the appellant was present but as none appeared on behalf of the respondents, the matter was passed over and on the second call again, none appeared for the respondents

and as such arguments advanced by learned counsel for the appellant have been heard.

11. The only plea taken by the learned counsel for the appellant is that the accident took place due to rash and negligent driving on the part of the tractor driver and the Tribunal has wrongly attributed contributory negligence to the appellant to the extent of 30% and had deducted 30% of compensation amount for the negligence on the part of the appellant.

12. Negligence is nothing but a failure to observe precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. Not only commission of an act but also an omission to do something which a reasonable man would do or is obligated to do amounts to negligence. Therefore, negligence does not always mean absolute carelessness, but also includes a failure to observe the degree of care and precaution and vigilance duly required under the circumstances which justly

warrant. Negligence is a relative and comparative term. No rigid formula and no mathematical ratio could be laid down as to what constitutes negligence under particular circumstances of the accident, but to determine what an act would amount or would not amount to negligence, the test would be whether a prudent and reasonable man would cause damage. In other words, not only an act but also an omission to do an act which the circumstances warrant from a reasonable man's point of view and which the law obliged would constitute negligence.

13. Contributory negligence has been explained by the Apex Court in ***The Municipal Corporation of Greater Bombay v. Shri Laxman Iyer and Anr., JT 2003 (8) SC 108***, as under:

“To determine whether an act would be or would not be negligent, it is relevant to determine if any reasonable man would foresee that the act would cause damage or not. The omission to do what the law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute

negligence on the part of such person. If the answer is in the affirmative, it is a negligent act. Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of the other's negligence. Whichever party could have avoided the consequence of the other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. (See on Negligence, 3rd Edn. Para 328). It is now well settled that in the case of contributory negligence, courts have the power to apportion the loss between the parties as seems just and equitable. Apportionment in that context means that damage are

reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage. But in a case where there has been no contributory negligence on the part of the victim, the question of apportionment does not arise.”

14. The relevant findings of the Tribunal on the point of negligence are as under:-

“Excepting the evidence of PW1 and R3W2 who is the driver there are no other witnesses who can speak about the manner of accident and the negligence. PW1 attributed negligence to the tractor driver respondent number 1. Respondent number 1 of course did not choose to lead the evidence after taking a plea of negligence on the part of Car driver, but examined on behalf of respondent 3. I have gone through Ex.P-1 the FIR which was lodged by PW1 himself. In the FIR the mention of the stray animal sneaking into the road is not mentioned. In the oral testimony, PW 1 stated that there was a truck coming in opposite direction followed by the offending tractor. The truck driver wanted to avoid the stray cattle being mowed down. The tractor was following it but over took the truck to hit the Car of PW 1. In the cross-examination by respondent number 3, it is clearly admitted that the accident occurred due to the buffalo coming

from opposite direction. This factum can not be ignored while assessing the negligence of the offending vehicle. It is also to be borne in mind that PW 1 had noticed the cattle sneaking into the road and the truck avoiding it. He also deposed that the tractor was following the truck. In such a situation, it is common prudence that the driver of such a vehicle noticing the events ahead on the road should be highly cautious in responding to the events occurring as a sequel as any prudent driver ought to have reacted. In the above case, PW 1 who was driving the Car in which the deceased was travelling admits in cross-examination that the accident occurred because of the stray cattle. This admission itself can not be treated as the sole reason for the accident. Viewing from the oral testimony, I find that the offending tractor was rash enough to have overtook the truck without caring for the flow of traffic from opposite side alongside the lack of precautionary responsive action on the part of the PW 1 who was driving the Car also. The evidence of R3W2 is also of some relevance. He deposed that he applied sudden brakes of his tractor while a truck over-took him and imputed negligence on the part of the Car driver. He denied the negligence. This witness was cross-examined on behalf of the petitioner and he also admits that a buffalo had come in front of the truck, the truck driver applied the brakes. He denied the suggestion that he was

driving with heavy speed. The evidence of R3W2 shows that the accident occurred because of a stray cattle. This evidence also fortifies my opinion that the accident is not because of the total negligence on the part of the respondent number 1.”

15. Where a person suffers injury, partly due to the negligence on the part of another person or persons, and partly as a result of his own negligence, then the negligence of the part of the injured which contributed to the accident is referred to as his contributory negligence. Where the injured is guilty of some negligence, his claim for damages is not defeated merely by reason of the negligence on his part but the damages recoverable by him in respect of the injuries stands reduced in proportion to his contributory negligence.

16. In civil / compensation cases one is concerned with preponderance of probabilities and not proof beyond reasonable doubt.

17. As a matter of fact, PW1, Anil Sharma, the appellant/driver of the Maruti car, deposed the manner of accident before the Tribunal. In his cross-examination by respondent no.3, he admitted that the accident occurred because of the buffalo coming from the opposite direction. Except PW 1 and R3W2, there are no other witnesses who can speak about the manner of accident and negligence. PW 1 stated that there was a truck coming in opposite direction followed by the offending tractor. The truck driver wanted to avoid the stray cattle being mowed down. The tractor was following it but over took the truck to hit the Car of PW1. In the cross-examination by respondent number 3, it is clearly admitted that the accident occurred due to the buffalo coming from opposite direction.

18. Thus, in the facts of the present case, the Tribunal rightly assessed 30% of negligence on the part of the of the appellant/car driver and considered the contributory negligence while awarding compensation.

19. In that view of the matter, no interference is called for with respect to the finding of negligence recorded by the Tribunal against the Appellant, holding him 30% responsible for the accident in question. Thus, the contention of the Appellants regarding the contributory negligence is rejected.

20. The award given by the Tribunal is just, fair and equitable.

21. Hence, the present appeal is dismissed.

22. No order as to costs.

23. Trial court record be sent back.

September 04, 2008
Bisht

V.B.GUPTA, J.