

\$~37

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 23rd February, 2016

+ **MAC.APP. 706/2005**

ORIENTAL INSURANCE CO. LTD. Appellant
Through Ms. Sakshi Mittal, Adv.

versus

ANIL YADAV & ORS. Respondents
Through Mr. Ashish Virmani, Adv. For R-1

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. On the petition under Section 166 of Motor Vehicles Act, 1988 (MV Act), registered as suit No.726/03 (2003), the first respondent herein was awarded compensation in the sum of ₹1651205/- with interest at 6% per annum from the date of filing of the petition (21.07.1998) till actual payment, by judgment dated 29.07.2005, as corrected by a subsequent order of the same date, of the Motor Accident Claims Tribunal (the Tribunal). For awarding the said amount of compensation, the Tribunal, on the basis of inquiry held, concluded that the first respondent (the claimant) had suffered the said injuries, and consequent disability to the extent of 50%, due to amputation of his right arm, on account of an accident that had occurred at about 8.15 PM in the area of Behror District Alwar, Rajasthan involving car bearing No. RJ 14 2C 3232 (the offending

vehicle) owned by the second respondent herein and driven by the third respondent herein, it admittedly being insured against third party risk covering the relevant period with the appellant insurance company (the insurer). On the basis of the conclusion that the accident had occurred due to negligent driving of the offending vehicle, its driver (the third respondent herein) having been held to be the principal tort-feasor, the owner of the offending vehicle (the second respondent herein) was found to be vicariously liable and consequentially the insurer was asked to indemnify and pay the compensation to the claimant.

2. The appeal at hand, presented under Section 173 of MV Act by the insurer, has been pressed to contend that the evidence has been manipulated and there was no involvement of the car in the injuries suffered by the claimant, the claim having been set up on the basis of false averments.

3. The background facts have been noted by the Tribunal in the opening para of the impugned judgment thus :

“Petitioner of these proceedings under the provisions of section 166 Motor Vehicles Act 1988, had the misfortune of having lost his right arm at an age of 32 years in a roadside accident. Factual matrix as pleaded by petitioner is that on 09/4/97 he visited Behror, District Alwar Rajasthan alongwith his wife Smt. Sangita Yadav and brother-in-law Anurag Gupta in order to meet his family friend Sandeep Singh. On 10/4/97 when petitioner and the said three persons were travelling in car bearing no. RJ-14-2C-3232 (herein after referred to as the offending car) the accident occurred at about 8.15pm in the area of Behror. It is pleaded by petitioner that at the time of accident the offending car was being driven by his brother-in-law Sh. Anurag Gupta. Petitioner was sitting on the rear

right seat and his wife was sitting on rear left seat while Sh. Sandeep Singh was sitting on front left seat of the offending car. After the offending car had travelled barely 1-2 km on National Highway No. 8 towards Jaipur, from opposite direction a truck came at a very high speed and on its wrong side. In order to avoid collision with the said truck respondent no. 2 swerved the offending car towards right and lost control over the same, due to which rear right portion of the car collided against a tree, causing grievous injuries on right forearm of petitioner. Immediately after the accident injured petitioner was rushed to the Government Hospital, Behror, from where he was advised to be shifted to some better hospital in Delhi as the local Behror hospital did not have adequate facilities. As such immediately petitioner was rushed to Delhi and got admitted in Apollo Hospital where his treatment continued till 06/5/97. Thereafter he was shifted to Maharaja Agarsain Hospital on the same day and his treatment continued till September 1997, whereafter he was shifted to Tirath Ram Shah Hospital. There, finally his right arm was amputated above elbow.”

4. The Tribunal’s record shows that the second and third respondents herein (i.e. the owner and driver of the offending vehicle respectively) filed their respective written statements before the Tribunal not denying the facts pleaded by the claimant. It is further seen from the record that the insurer, on being noticed, filed a written statement mainly to admit the insurance cover. The pleadings having been completed on the petition that was instituted in July, 1998, on the basis of issues framed, the Tribunal commenced the inquiry. In 2003, during the course of inquiry, an application was moved by the insurer under Section 170 of the MV Act seeking permission to contest the claim case on grounds beyond those that would be ordinarily available to it in terms of Section 149(2), this on the basis of a report of an investigator A. D. Dewidi (R3W5). The prayer of

the insurer under Section 170 of MV Act was allowed by the tribunal by order dated 01.10.2003 in the wake of which it filed additional pleadings denying the factum of accident involving the offending vehicle and taking the position that records had been manipulated to claim compensation.

5. During the inquiry both the claimant and the insurer led evidence. It may be mentioned at this stage itself that the investigator (R3W5) on whose report of 2003 the additional pleadings were filed, though examined on 17.03.2004, was not tendered for effective cross-examination to the claimant. Since the testimony of the said witness, particularly at the stage of cross-examination was not concluded and the said witness was thereafter never produced for such purposes, his part deposition cannot be referred to or relied upon.

6. The Tribunal rejected the contentions of the insurer to above effect on the following reasoning :

“In his testimony as PW4, petitioner has categorically explained the manner of accident by stating that in order to avoid collision with a truck which was coming on its wrong side from direction opposite the direction of the offending car, respondent no.2 swerved the car to his right and lost control over the same due to which right rear portion of the car rammed against a tree crushing the forearm of petitioner between car and the tree. In the name of cross examination on factum of accident. Id. Counsel for respondent jrio.3 asked only one question to which petitioner replied that speed of the car was between 30-40 kmph. Not even a defence suggestion was put to PW4 disputing the factum of accident as deposed by him. Perusal of record shows that suspicion of respondent no.3 as regards factum of accident originated out of report of their surveyor, Ex.R3W2/l-5, as per which respondent no.1 allegedly raised a claim against the insurance company as

regards damage caused to the windscreen of the offending car on being hit by a flying stone. Ex.R3W1/1 is the motor claim form of Oriental Insurance Company pertaining to the offending car as per which on 22/4/97 a stone flew from a truck and fell on the windscreen of the offending car' which got broke. Ex.R3W2/2-4 are the three photographs of the offending vehicle, taken from front side showing damage to the windscreen. Fee bill of the surveyor is Ex. R3W2/5. As admitted by this witness, the inspection done by him on 22/4/97 was pertaining to the damage caused to the offending car on the same day. Respondent no.3 did not summon respondent no.1 in the witness box to confront him with documents Ex.R3W2/1-5 for verification of his signatures thereon. A careful comparison of the signatures on Ex.R3W2/1-5 with signatures of respondent .no.1 on his written statement show that signatures on documents Ex.R3W2/1-5 which are alleged to be of respondent no.1 are infact not so. The signatures on the said documents are not only in different formations but also not with a natural flow. As such authenticity of these documents in itself is not clear. Even if the said documents are assumed to be genuine, merely because respondent no.1 raised a claim for damage to his windscreen on 22/4/97 and did not raise any claim for damage to the right door of his car caused on 10/4/97, claim of petitioner cannot be thrown out. So far as delay in registration of FIR is concerned, it cannot be ignored that petitioner remained hospitalised for a period of about 6 months during which his right arm had to be amputated. Victim of a roadside accident that occurred at a place far away from his residence in some remote area, suffering such serious life threatening injuries, cannot be expected to run after the local police in preference to his medical treatment. Even otherwise, as reflected from testimony of PW6 on 10/4/97 itself he had handed over the MLR Ex.PW4/9 to SHO Behror, petitioner rightly remained under impression that law would take its course. For laxity on the part of local police, victim of a roadside accident cannot be penalised. It appears that when no action was taken by police, after recovering from the injury petitioner lodged a fresh complaint on the

basis of which FIR was registered. So far as proximity between dates of registration of FIR and filing of petition is concerned, even .if it is assumed that petitioner got the FIR registered with objective of claiming compensation, that in itself does not show that the accident did not take place. Especially when inspite of application under section 170 Motor Vehicles Act being allowed, respondent no.3 did not take any steps to re-summon petitioner for cross examination. It cannot be ignored that the Id. trial magistrate has convicted respondent no.2 for offence under section 279IPC pertaining to this accident. On their part, respondent no.3 inspite of having obtained permission to widen the scope of their defences failed to lead any positive evidence on the issue under consideration. Although it is correct that as argued by Id. Counsel for respondent no.3, once in his statement under section 161CrPC recorded on 17/7/98 respondent no.1 named respondent no.2 as driver of the offending car there was no need for the investigating officer of the criminal case to issue notice under section 133 Motor Vehicles Act on 18/8/05, it cannot be ignored that the investigating officer of local police was not under the control of petitioner and as such any unwarranted action on the part of former cannot be used to penalise the latter. Argument of Id. Counsel for respondent no.3 that the delayed FIR shows that petitioner had time to concoct a story and as such "benefit of doubt" be given to respondent no.3 does not hold water as appreciation of evidence in the present proceedings is governed by the principle of preponderance of possibilities and the petitioner is not required to prove his case beyond reasonable doubts. The other documentary record brought by respondent no.3 in support of their version are the two photocopied sheets Ex.R3W4/l&2, allegedly taken out by them from the medical treatment record of petitioner. On the basis of these documents, it is stated that on the day of accident petitioner himself was driving his car and was under the influence of liquor. R3W4 admitted in his cross examination that neither of these two documents bears signatures of any doctor and he also could not say as to if these documents were authored by any doctor or staff member of Apollo Hospital. Respondent

no.3 tried their level best to prove both these documents by bringing in the witness box author of the same, but failed. Dr. Lokesh Kumar, Senior Consultant Plastic Surgeon of Apollo Hospital appeared in the witness box as R3W6 but these documents were not put to him by respondent no.3. Rather, as deposed by this witness the insurance officials approached the doctor in his chamber just before the day of his evidence. Another doctor, namely Dr. Harsh Bhargav, Senior Orthopaedician of Apollo Hospital was summoned as R3W7 but on being shown the document Ex.R3W4/2 he clearly stated that he could not say as to who wrote this document. He also could not say as to which official could identify the handwriting on this document. A court observation was also recorded to the effect that portion A1 to A2 on this document is written in different pen. PW6, the doctor at Behror who examined the petitioner immediately after the accident categorically deposed that petitioner was not in a drunken state. Evidentiary value of both these documents Ex.R3W4/1&2, as such is nil. Another piece of evidence relied upon by respondent no.3 to contend that no accident took place is the report of their own investigator Ex.R3W5/1 but since the witness was never tendered for further cross examination after he was partly cross examined, his testimony cannot be looked into. Even otherwise the report of investigator also is based upon the earlier mentioned documents. In view of the above discussion, argument of respondent no.3 that no accident at all took place has no force. So far as cause of accident is concerned, the very fact that respondent no.2 on seeing an on coming truck swerved to his right on the Delhi Jaipur Highway during the time of heavy traffic reflects his negligent driving. For, it is on account of this negligence that he lost control over the car and the same rammed against a tree. A reasonably prudent driver on seeing a vehicle coming on its wrong side from opposite direction would always swerve to its left and slow down or even stop. He would not swerve to his right that too on a busy highway. It is this action for respondent no.2 due to which he lost control over the offending car and the same collided against a tree. Unchallenged testimony of PW4

coupled with plea of guilt before Magisterial Court by respondent no.2 and failure of respondent no.3 to produce any positive evidence inspite of opening the doors through section170 Motor Vehicles Act clearly establish the issue under consideration. As reflected from evidence discussed above, immediately after the accident petitioner was examined by the doctor PW6 in Behror, Government Hospital who prepared his MLR Ex. PW4/9 and sent the same to the local SHO. Argument of respondent no.3 that there is no evidence to show that injuries reflected in MLR Ex. PW4/9 were sustained in a roadside accident is also not correct in view of a clear endorsement in OPD register of Behror hospital, Ex.PW6/l to the effect that the injuries sustained by petitioner were caused in a roadside accident.”

X X X

“As described above, PW6 who examined the petitioner at Behror immediately after the accident found lacerated wound llinchx4inch bone deep on right forearm of petitioner with right radial pulse very feeble and neurological deficit present in the right hand as reflected in MLR Ex.PW4/9. Vide reference slip Ex.PW4/8, petitioner was referred from Behror Hospital to Apollo Hospital, New Delhi on 10/4/97. As reflected from Apollo Hospital records Ex.PW4/20, petitioner remained admitted there from 11/4/97 to 06/5/97 for the treatment of his injuries. Thereafter, he was shifted to Maharaja Agarsain Hospital where he remained admitted from 06/5/97 to 19/5/97 vide discharge slip Ex.PW4/21. Subsequently, petitioner repeatedly visited Maharaja Agarsain hospital for treatment of his right forearm, as reflected from discharge slips Ex.PW4/22-33. Lastly, petitioner remained admitted in Tirath Ram Shah Hospital from 05/10/97 to 08/10/97 as per Ex.PW2/1, during which period his right arm was amputated above elbow level. Thereafter, petitioner repeatedly visited Sant Parmanand Hospital for dressings. I have also perused the permanent physical disablement certificate Ex.P1 issued by a medical board duly constituted at Safdarjang Hospital certifying the

petitioner to have suffered 80% disability due to amputation of right arm above elbow.”

7. It was argued by the counsel for the appellant that in the medico legal report (Ex.PW4/9) prepared by Dr. H. S. Yadav (PW6), who was the medical officer posted in the referral hospital Behror, District Alwar, Rajasthan on 10.04.1997, there is no reference to the history of the injuries (with which the claimant had come to the said facility at 8.45 PM) to be of a road traffic accident. She further referred to the document relating to admission of the claimant in Apollo Hospital, New Delhi (Ex.R3W4/1) to point out that the claimant had informed the examining medical officer that he had suffered the side sweep injury to the right hand “while driving his car”. Pointing out from the document mark A, which is the discharge paper issued by Apollo Hospital on 06.05.1997, she drew attention of the Court that the history of road traffic accident was first referred at the time of admission of the claimant in the said hospital on transfer from Behror Hospital on 11.04.1997. She added that even though such serious injuries as claimed had been suffered, no report with the police was lodged for the criminal offences that had been allegedly committed and that the first informant report (FIR) was got registered only on 17.07.1998. She submitted that in order to prove negligence on the part of the driver of the offending vehicle, the claimant has relied upon his own testimony and has not mustered any independent evidence for corroboration. In the same context she submitted that it was against this backdrop that in the course of the hearing on the appeal time was sought for application to be moved for additional evidence of the owner and driver of the offending vehicle to be offered for which opportunity was granted by order dated 15.02.2013 but

even after application being moved, the same was withdrawn and, thus, the opportunity made available for corroborative evidence to be furnished was not availed. This, in the submission of the counsel for the insurer, further shows that the testimony of the claimant himself is not worthy of reliance.

8. This Court finds no merit in the contentions urged by the insurer in the appeal at hand. It has to be borne in mind that in a case of this nature the claimant cannot be called upon to prove his case about the negligence of the driver of the offending vehicle beyond all doubts. The standard of proof in such cases, based on liability in torts, is that of preponderance of probabilities. As noted in the initial part of this judgment, the owner and driver of the offending vehicle, who were impleaded as party respondents to the claim petition, in their respective pleadings, admitted the facts leading to the injuries suffered by the claimant as averred by him. It is trite that a fact admitted need not be proved by formal evidence. Since the facts pertaining to the accident, as narrated in the claim petition, had been admitted, absence of the owner and driver from the witness box is of no consequence. Even otherwise said parties were shown in the array as respondents. If they were to dispute the case sought to be agitated by the claimant, it was for them to come forward with their evidence. Non-examination of the said party respondents by the claimant cannot lead to an adverse inference against him. If the evidence of the said respondents was of some merit, the insurer could also have them summoned as witnesses and be examined at its instance.

9. The evidence of the investigator (R3W5), on whose inquiry the insurance company took the permission under Section 170 of MV Act and came up with the additional pleadings, is not available to it for reasons

stated earlier. The reference to the medico legal report of 10.04.1997, referred to above is insufficient. The said document has to be read alongside the contemporaneous entry made by Dr. H. S. Yadav (PW6) as per extract (Ex.PW6/1) in the register of the hospital. The said document duly proved by the medical officer confirms that the claimant had told the examining medical officer at 8.30 PM on 10.04.1997 that the injuries suffered by him have been sustained in a road traffic accident. Thus, it cannot be said that this theory was developed only later when the claimant got himself discharged from the hospital in Behror (Rajasthan) to shift for treatment to Apollo Hospital in New Delhi where better facilities could be availed. Since the witness from Apollo Hospital was not questioned in this regard, it cannot be urged that the history of injuries noted in its records was at instance of the claimant.

10. The argument with reference to the delay in registration of the FIR, on first blush, did appear to be substantial. But then, it is noted that while lodging the FIR in 1998 the claimant had explained the delay. He had been severally injured on 10.04.1997 and had remained under treatment for a prolonged period during which, on account of complications that had developed, his right upper limb had to be amputated in a surgical procedure done on 06.10.1997. For the claimant, who was an ordinary resident of New Delhi, his treatment was the priority during the relevant period. Accident had occurred in the distant town of Behror District Alwar, Rajasthan. As pointed out with reference to the document (Ex.PW4/9) prepared by PW6 on 10.04.1997, an intimation about the medico legal report had been directed to be sent to the station house officer of the local police station. In these circumstances, the delay in registration

of the first information report has to be explained by the local police rather than by the claimant.

11. For the foregoing reasons, the view taken by the Tribunal on the contentions urged by the insurance company cannot be faulted.

12. Thus, the appeal is unmerited and liable to be dismissed.

13. By order dated 29.08.2005, the insurer (appellant) had been directed to deposit 30% of the compensation awarded by the Tribunal within the period specified upon which the operation of the impugned award was to stand stayed. By order dated 01.08.2006, the said deposit was allowed to be released to the claimant. This direction was stayed by subsequent order dated 08.08.2006. The stay against the execution granted by order dated 29.08.2005, was confirmed later by order dated 09.07.2007. On 30.03.2009, however, directions were modified and insurer was directed to deposit entire awarded amount with up-to-date interest with the Tribunal within specified period and out of said deposit ₹ 2,50,000/- was allowed to be released to the claimant, the remaining having been kept in fixed deposit in his name for a period of 10 years with liberty to him to draw periodical interest.

14. Since the appeal is being dismissed, it is directed that the insurance company (appellant) shall now satisfy the award of compensation granted by the Tribunal in terms of impugned judgment. The claimant (first respondent) is entitled to release of the amounts deposited, whether in this Court or with the Tribunal, in terms of the aforementioned earlier orders, with up-to-date accrued interest forthwith. The Registrar General and the Tribunal shall take necessary steps in this regard. If any amount remains

outstanding, the appellant shall be entitled to take out appropriate execution proceedings before the Tribunal for such purposes.

15. The statutory deposit, if made, by the insurance company (appellant) shall be refunded only after the award has been satisfied.

16. The appeal is disposed of in above terms.

**R.K. GAUBA
(JUDGE)**

FEBRUARY 23, 2016/VLD

