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

Date of Decision: 02nd March, 2016

+ **MAC.APP. 1171/2012**

RAVINDER KUMAR BATHLA Appellant

Through: Mr. R. K. Kohli, Adv.

versus

DIRECTOR VIGILANCE NDMC & ORS Respondents

Through: Respondent no.2 (Nemi Chand Mewara) in person.

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The appellant while riding on his scooter bearing registration no.DL-4SY-5917 (the scooter) suffered injuries in an accident that occurred at about 12:10 PM on 18.03.2005 near Safdarjung Flyover particularly at the place the road turns in the direction of Laxmi Bai Nagar towards left in relation to that part of the carriage of the road which moves from Sarojini Nagar towards north. The accident involved collision against ambassador car bearing registration no.DL-2CM-5694 (the car) which belonged to New Delhi Municipal Council (NDMC) and was driven by its employee Nemi Chand Mewara (second respondent herein).

2. The appellant filed a claim petition seeking compensation under Sections 166 & 140 of the Motor Vehicles Act, 1988 (the MV Act) which

was registered as suit no.435/2005 by the motor accident claims tribunal (the tribunal). It may be added here that though National Insurance Co. Ltd. was impleaded as third respondent in the claim petition on the plea that the car was insured against third party risk with it, there being no supportive proof the said party was discharged on 15.05.2007.

3. In the claim petition, the appellant had alleged that the accident had occurred because the car having overtaken from his right side had suddenly come in his way, and collided and thus, injuries were sustained by him. Noticeably, as per the averments of the appellant, he was on his way from Sarojini Nagar towards Safdarjung Airport and, thus, would have headed straight on the same road without turning (left) towards Laxmi Bai Nagar. On the other hand, it is admitted case of the respondents that the car having come to the said place from the same direction as that of the scooter, it was to take a left turn in the direction of Laxmi Bai Nagar.

4. The respondents, when noticed, conceded the factum of collision but took the plea that the appellant himself was negligent in driving the scooter since he had come at high speed and rammed into the car without any indication.

5. During the inquiry, the appellant examined himself as PW1 and affirmed on oath the facts to above effect. On the other hand, the respondents examined two witnesses, namely, Bansi Lal (R1W1) and Ashok Ahuja (R2W2). While R1W1 is stated to be a local resident who was moving on foot in the vicinity of the place of occurrence, R2W2, being member of NDMC, is stated to be a person travelling in the car driven by the second respondent. The evidence of both the said witnesses is on the lines

of the defence taken by the respondents in the written statement. Pertinent to note that R1W1 deposed that the collision took place within his sight when the scooter had come in “rash/negligent manner” from behind and hit the car while it was turning towards Laxmi Bai Nagar. He stated that the car was taking turn at a very slow speed which he would term to be in the region of 20-25 kilometres per hour and further that the driver of the car had given an indication and, thus, was compliant with the requirements of traffic rules. Concededly, R1W1 also claimed that he had accompanied the injured/appellant to All India Institute of Medical Science (AIIMS) and had left for his home only after first aid had been arranged. Concededly, he was not examined by the police nor any official of police took his name or address.

6. On the other hand, R2W2, a passenger in the car only stated that second respondent had been a driver who would move at normal speed and in a responsible manner and that he was an old hand against whom there had been no complaints in the past. All that he is able to state is that when the car was turning left, the driver having given proper indication, he had heard a “small noise” whereupon the car was stopped and it was learnt that the scooterist had hit it from the rear side.

7. Neither R1W1 nor R2W2 were examined by the police at the time of investigation into first information report (FIR) no.146/2005 that had been registered by police station Kotla Mubarakpur on the statement of the appellant (Ex.PW1/2). It has to be assumed in the absence of evidence to the contrary that neither of the witnesses of the respondents were offered (at

any stage of the investigation into the said FIR by the police) as material witnesses whose testimony would be of import.

8. It may be added here that in addition to his oral testimony, the appellant also relied on the record pertaining to the report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C) (Ex.PW1/1) which was submitted in due course of completion of investigation into the FIR by the police. The said record includes certified copy of the site plan (Ex.PW1/3) which was prepared by the investigating police officer depicting the layout of the roads in question, directions taken by the two vehicles and the position of the vehicles after the accident.

9. The tribunal considered the plea of the appellant regarding accident having been caused due to rash/negligent driving of the car by the second respondent and the counter-plea of the respondents that the appellant himself was responsible for the collision and on the basis of scrutiny of the evidence, particularly the site plan referred to above, had reached the finding that the drivers of both vehicles had failed to comply with the duty of the care and, thus, were equally responsible for the collision. Thus, both were held liable for contributory negligence.

10. The tribunal assessed the compensation payable in the case to be ₹2,48,081/-. But, on the basis of finding of contributory negligence directed the payment of compensation by the respondents to be restricted to fifty percent (50%) of the said amount, which was allowed with interest from the date of filing of the petition till realization.

11. The appellant, feeling aggrieved with the finding of contributory negligence and consequent reduction of the compensation, has come up to this court by appeal at hand. His contention is that the evidence has not been properly appreciated and the finding of contributory negligence is unjust and unfair.

12. When this appeal was filed, notices were issued to the respondents, in answer to which they appeared seeking to contest. The appeal, however, was suffered to be dismissed in default on 28.10.2013. Later, application was moved for restoration on which fresh notices were issued. The restoration request was allowed and the appeal was restored by order dated 01.10.2014. Thereafter, the matter has been listed thrice for hearing. On the last two dates, only the second respondent was represented. No one has been appearing, despite notice, on behalf of the first respondent. The situation remains the same even today when even counsel for the second respondent is not available.

13. There is no good ground to adjourn the matter yet again. Thus, arguments have been heard and record perused.

14. On reappraisal of the evidence on record, this court finds merit in the contention of the appellant. The site plan clearly shows that the appellant was moving straight on the road. It was not for him to take any turn at the place where the collision took place. His evidence clearly shows, and that has been his consistent stand since beginning (refer to FIR Ex.PW1/2), that the car had come from behind at fast speed and after overtaking him had started turning left which resulted in his scooter colliding against it. This part of the testimony has not been refuted by any evidence of the

respondents. Noticeably, the second respondent who was at the wheel of the car was in the best position to explain the circumstances which had led to the collision. He did not offer his testimony. Therefore, the fact that the collision occurred when the car had overtaken the scooter has gone un rebutted. This fact itself shows that the speed of the car would have been higher than that of the scooter.

15. The evidence of R1W1 and R2W2 does not deserve to be accepted. Both were not offered as witnesses to the police during the investigation which had continued from 18.03.2005 (when the accident occurred) till 20.04.2005 (when the chargesheet was filed). They surfaced for purpose of evidence in these proceedings from November, 2009 onwards. The evidence of R2W2 even otherwise is of no consequence as he was sitting in the rear seat of the car and his attention was drawn only when he had heard a small noise of collision from behind.

16. In the facts and circumstances, the conclusions of contributory negligence on the part of the appellant cannot be upheld. The said finding is set aside. In the consequence, the directions to the respondents to pay only fifty percent (50%) of the compensation assessed also needs to be vacated. Ordered accordingly. It is directed that the respondents shall be liable to pay the entire compensation assessed by the tribunal in impugned judgment.

17. The learned counsel for the appellant submitted that fifty percent (50%) of the compensation, as made payable by the tribunal, has already been received with corresponding interest. The respondents are now directed to pay the balance by depositing it with the tribunal within 30 days

of this judgment, failing which the appellant shall be entitled to take out appropriate execution proceedings to recover the amount.

18. Trial court record be returned with a copy of this judgment.

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

MARCH 02, 2016
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