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

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Judgment delivered on: 27.07.2017

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MAC.APP. 23/2017

AJAY KUMAR

..... Appellant

Through: Mr. Pranav Jain, Adv.

versus

DEEPAK KUMAR

..... Respondent

Through: Mr. Sandeep Sehgal and Mr. S.K.
Shukla, Advs.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

MAC.APP. 23/2017 & CM No. 7411/2017

1. The award of compensation for injury suffered by respondent no.1 in a motor vehicle accident has been impugned on the ground that the evidence does not support the liability for the same fixed on the appellant. Referring to the Detailed Accident Report (DAR), the Site Plan of the accident and the evidence filed by the respondent, the learned counsel for the appellant submits that in the first instance, the version of the injured was that he had parked his motorcycle on the side of the road where his friend, who was a pillion rider, had stayed back and the claimant had crossed over to the other side of the road for some work, but on the way back he was hit by the offending motor cycle.

2. The accident happened about two years ago on 01.06.2015 at 9.40 in the morning during the peak traffic rush. The DAR records that: i) the offending vehicle was not over speeding; ii) that the victim was taken to the hospital by his friend Mr. Rajiv Kr. Jha; iii) the brief description of the accident is: *the victim was crossing the road when the offending vehicle hit him on the road*; iv) that the accident happened at a place where there was no zebra crossing; v) that the offending vehicle was not being driven dangerously or at excessive speed i.e. it was within permissible speed limits and as a corollary, in the correct lane; and vi) that the vehicle was not poorly maintained. As to whether the offending vehicle was not observing traffic rules, or was parked on the wrong side or at a prohibited place, the DAR records in the negative. The column for recording the name of witness of the accident, the DAR does not record anything.

3. The learned counsel for the respondent states that mere fact that the offending vehicle was on the road without insurance is sufficient proof that it was not being driven as per the traffic rules. However, there is nothing on record to show that mere violation of a traffic rule linked the offending vehicle to the accident and resultant injury.

4. The learned counsel for the appellant argues that although the claim petition stated that Mr. Rajiv Kr. Jha was the pillion rider, but in his deposition on 04.02.2016, the respondent stated as under:

“..... It is correct that I used to go to office alongwith Rajeev Kumar Jha. It is correct that my friend was also having vehicle. My vehicle no. is DL9SK3707 (2012 model). When I was on leave, then my friend go to his office by his own vehicle. I am working with FNB Control since 1996. The distance between the residence of my friend Rajeev Kumar from my house is about 10 minutes. I do not

remember the exact time taken to reach the spot. I was going towards Prahlad Pur at the time of the accident. I was in possession of a mobile phone at that time. I had looked on the right and left side before trying to cross the road. The accident had taken place on the side of the road. The bike had hit me from the left side. I do not remember on which side I had fallen after the hit by the motorcycle. No friend of mine was present at the spot. I was unconscious for a short while after the accident but thereafter I regained consciousness. I cannot say when the PCR has come to the spot. It is wrong to suggest that I have filed a false case in connivance with Police Officers in order to extort money or that the eye witness is planted or that the persons who were going from the spot had seen the incident or that I am deposing falsely.....”

(Emphasis added)

5. The appellant argues that as per the respondents’ deposition no friend of his was present at the accident spot, therefore, the affidavit filed by Mr. Rajiv Kr. Jha would be of no consequence and of no evidentiary value. The appellant contends that his vehicle never hit the injured, instead it was some other vehicle which had hit him and in the process the appellant too fall on the road and injured himself. He refers to the mechanical inspection of his vehicle which does not record any dent or damage to it, appellant, that mechanical condition of the offending vehicle is recorded as good. The appellant further submits that if there had been any impact with his motor cycle even at the permissible speed in traffic on that road, there would have been some damage to the motor cycle i.e. its head lights would have broken or there would be some dent or scratch to the vehicle, especially considering the nature of injuries which were caused to the respondent, such as: “*blunt trauma abdomen and chest with hemoperitonium secondary*

to splenic injury (grade 4) with left sided hemopneumothorax with multiple rib fractures left side with compound and comminuted fracture distal third right tibia and fibula”. Counsel argues that from the plain reading it is evident that the injury was grievous and the impact of the offending vehicle with the injured would have been significant. However, the mechanical inspection of the offending vehicle does not bear out any such damage, therefore, no case is made out against the appellant.

6. The learned counsel for the respondent referring to the same DAR especially column 5(b) & (c) which records the name of the victim i.e. Mr. Deepak Kumar and witness Mr. Rajiv Kr. Jha, submits that this proves that Mr. Rajiv Kr. Jha was present at the spot. The learned counsel for the appellant submits that column 5 is apropos the person who reported the accident to the police whereas column 13 is about the person who witnessed the accident. The latter being silent, it cannot be construed that Mr. Rajiv Kr. Jha was witness to the accident and he could at best been on the side of the road waiting for his friend to resume their joining. The learned counsel refers to the written statement/reply to the claim petition, in particular, paras 3, 4 & 5, which read as under:

“..... 3. That the present petition against the respondent No. 1 is without any cause of action and is liable to be dismissed under Order VII Rule 11 C.P.C. It is submitted that the vehicle/ motor cycle bearing Registration No. DL-4S-AR-6498 (Hero Honda Passion) driven by the respondent No. 1 was not at all involved in the alleged accident. The answering respondent was driving his motor cycle in a very slow speed holding valid Driving License observing all traffic rules and norms and one of his friend namely Sh. Ayodhya Sah was sitting as pillion

rider. Moreover the motor cycle of the respondent is very old model (2005) and can run only slow speed and especially when pillion rider is also sitting then it never be possible at any stage to run at average speed. Due to fitness condition of the bike, the respondent No. 1 applied the break at the appropriate time and the motor cycle also did not skid due to which neither serious accident could happen nor any parts of the body could scratched but bike fallen down on the foot of the Respondent No. 1 and only knee got injured without any scratches on other parts of the body. When the unknown maruti car hit to upper portion of the body of the Respondent No. 1 which was not covered with his fallen bike and sustained internal injuries and bleeding from the mouth. The pillion rider Sh. Ayodhya Sah also fallen down on the road and unknown maruti car also hit the pillion rider and sustained greivous (sic grievous) injuries. The allegation of alleged rash and negligence driving of the motor cycle are absolutely false and frivolous. The allegation made against the Respondent No 1 is only a false and planted allegation by the police in collusion with the Petitioner whereas the police officials have failed to disclose the offending vehicle.

It is submitted that the accident in question had occurred with some other vehicle(s) which was/were coming from behind. The petitioner had already crossed the motor cycle but vehicles coming from behind hit the motor bike of the respondent no.1 as well as respondent no. 1 alongwith his friend (pillion rider) and the petitioner also. The respondent No. 1 also sustained Internal Injuries on his body alongwith his friend who sustained greivous Injuries. Since the respondent no. 1 was wearing ISI mark helmet as such his life was saved with the grace of Almighty God. The respondent had fallen on the road and was unconscious, therefore, couldn't note down the

registration number of the offending maruti car responsible for the accident. The respondent No. 1 sustained Internal Injuries on his body without any scratches and remained on medical leave from his office about one month. The pillion rider also sustained major internal injuries without any scratches on the body. The PCR van took the petitioner to DDU Hospital but he left the said hospital inspite of the fact that he was neither discharged nor referred to some other hospital. The petitioner of his own accord got himself admitted in Max Hospital with collusion of Police official to raise exaggerated bills. Driver of unknown vehicle/ Maruti Car who caused said accident fled away from the spot alongwith offending vehicle. Police officials did not investigate the matter properly and involved the respondent in the case of alleged rash and negligent driving in collusion of petitioner. The vehicle of the respondent No.1 is not at all involved in this case. In fact it was "hit and run" case wherein the vehicle driven by the respondent no. 1 has been falsely implicated by the police officials of Police Station Delhi Cantt. New Delhi with the collusion of Petitioner. The Respondent No. 1 was waiting for DAR report in order to have detailed information so that Suit may be filed against the offender/ offending vehicle but it did not happen as the police officials in collusion with the petitioner involved the motor cycle present at the accident site in this case and evaded their obligation of tracing the offending vehicle involved in the accident. The police official not only evaded their obligation but also closed the door of the Respondent No. 1 to know the actual offender/offending vehicle.

When the respondent No. 1 after getting released the motor bike on supardari took the same to nearest mechanic shop then its axle and bike frame were having bend which could not bend due to falling but was result of

hitting by a heavy vehicle. As such the petition against the respondent No. 1 is without any cause of action and the same is liable to be dismissed U/s 7 Rule 11 C.P.C.

4. That the DAR in its present form is not maintainable and sustainable in law as the same is liable to be dismissed on this ground alone.

5. That the allegations mentioned in the DAR are false, frivolous and contradictory in itself. As such the respondent is not at all liable to pay any compensation to the petitioner.

It is absolutely false to allege that the accident in question has occurred due to allege rash and negligent driving of the motor cycle by the Respondent No. 1....”

7. The Court would note that the DAR filed on 20.10.2015 does not absolve the appellant of the accident having been caused by his vehicle; it records that the offending vehicle belongs to the appellant. The Tribunal has noted that the appellant has not been able to show whether the Investigating Officer had any reason to falsely implicate him. In any case, no such complaint was made against the I.O. A complaint was for the first time filed against the injured respondent in February, 2016 for falsely implicating the appellant, but no complaint was ever made against the I.O.

8. The learned counsel for the respondent refers to Form-54 i.e. Accidents Information Report of the Delhi Police dated 14.10.2015 which was posted on its website. This records that the name of the injured as Mr. Deepak Kumar as well as Mr. Ayodhya Shah; the offending vehicle is mentioned as DL-4S-AR-6498, Motorcycle; the injury of Mr. Deepak Kumar is shown as ‘Grievous’, while nothing is mentioned against injury of Mr. Ayodhya Shah. The Tribunal has appreciated the evidence as under:

“.....11. Now coming to the factual matrix of the present case it be seen that the factum of accident has been admitted by respondent. Though he has denied the negligence on his part. He had also deposed that he sustained injuries in the accident. The petitioner and PW2 who is an eyewitness of the accident, have categorically deposed that the accident had taken place on account of rash and negligent driving of offending vehicle by respondent. As per final report under Section 173 of Cr.PC, respondent has been charge sheeted for, offences under Section 279/338 IPG and as per arrest memo he has been arrested in the present case. Though he had made complaint dated 04.2.2016 to the SHO, PS Delhi Cantt. thereby requesting for registration of FIR against the injured but since he had hit the pedestrian, the negligence on his part cannot be ruled out. Further the said complaint has been lodged at the much later stage i.e. after examination of petitioner and might have been filed in order to avoid liability on seeing the huge amount on the treatment of petitioner. Though he had pleaded that his vehicle was not fit for driving at the high speed, then if he was not at a high speed or was at the controllable speed then why he could not control his motorcycle and hit the pedestrian crossing the road. He has not proved that he applied due care to avoid the accident but on account of sole negligence of petitioner, the accident could not be avoided.”

9. Referring to settled principles in **Bimla Devi and others Vs. Himachal Road Transport Corporation and others (2009) 13 SC 530** the Tribunal concluded that strict proof of accident is not required in cases of accident by motor cycle instead the standard of proof beyond reasonable doubt has to be applied. Applying the ratio of **Parmeshwari vs. Amir Chand and others 2011 (1) SCR 1096 (Civil Appeal No.1082 of 2011)** and

National Insurance Company Limited vs. Pushpa Rana 2009 ACJ 287 the Tribunal noted that in view of investigation by the police and issuance of chargesheet under Section 279/338 IPC certified copy of the DAR, the Tribunal held that the present appellant had caused the accident because of rash and negligent driving.

10. The learned counsel for the appellant states that in the alternative if it is found that the appellant was responsible for the injury, then the element of contributory negligence should have been examined and appropriately factored in the compensation awarded. He relies upon the judgment of the Supreme Court in ***Municipal Corporation of Greater Bombay vs. Shri Laxman Iyer & Ors. AIR 2003 SC 4182.***

11. In the aforesaid case, the test to be applied was: *what was or what were the causes of damages* i.e. the act of omission amounting to want of ordinary care or in defiance of duty or obligation on the part of the complaining party which, conjointly with the other party's negligence, was the proximate cause of the accident that renders it to result in contributory negligence.

12. In his reply to the DAR, the appellant has accepted that after the motorcycle was released on superdari, it was taken for repairs to the nearest mechanic shop, where it was found that its axel and frame had been bent. The reply also contends that this could not have happened due to falling of the bike but as a result of hitting a heavy vehicle. The court is unable to accept this argument as the said disrepair of the motorcycle could well have occurred because of its forceful impact against another object or person on the road. There is no evidence or reference as to which other offending vehicle his motorcycle hit against. The appellant did not file any complaint

against such other offending vehicle for the injuries suffered by him and for the damages caused to his motor vehicle. Hence, the sequitur is that it had hit and injured the respondent/claimant and this forceful impact caused the bend to its axle and frame. Thereafter the motorcycle fell and some injuries were caused to the appellant.

13. The DAR implicates the appellant's motor cycle for the injury caused to the respondent. However, insofar as the DAR also records that the victim was crossing the road when the offending vehicle hit him, the case requires to be reconsidered to examine the issue of contributory negligence. According to the DAR, the appellant's motor cycle was not being driven dangerously or at excessive speed, in other words that it was being driven in its lane and within the permissible speed limit. However, it is possible that, despite the vehicle being driven in permissible limit, an accident can occur when a jaywalker suddenly appears on the road. Such people apart from impairing his own life also posed a threat to the safety and security of the ongoing traffic. The fact that the victim chose to walk across a busy road near the airport, with heavy morning traffic, he knowingly exposed himself to dangers that such risk may entail. It exhibits his negligence towards his own safety. The DAR also records that the vehicle was not poorly maintained nor was it flouting any traffic rules. Therefore, if the vehicle was in good condition, being driven in the right lane at the right speed, the accident which was caused at a non-zebra Crossing by it hitting the victim, it could be attributed to the sudden appearance of the jaywalker in front of the offending vehicle. In the circumstances, a portion of the blame and negligence would have to be shared by the respondent/victim/ claimant.

14. In the same vein, if the vehicle was being driven at the permissible limit and maintaining fair distance with the vehicle moving ahead of it, it could be said that there was a fair chance of the accident being avoided by bringing the vehicle to stop or avoiding an impact by the sudden appearance of the victim in front of the motorcycle. In the circumstances, negligence on the part of both the parties is made out.

15. However, if the appellant was riding in his lane at a safe distance from the vehicle ahead of him and within the permissible speed i.e. not more than 50 k.m. per hour, still he is not expected to have a literal tunnel view or blinkered view of only his lane. A careful motor vehicle driver keeps in perspective the entire width of the road, so as to not only drive in one's own lane but also to avoid accidents on account of mistakes of other road users. One has also to bear in mind that not all city roads are carefully marked for pedestrian or zebra crossing. The time of the accident was about 9.40 a.m. The visibility was clear. The appellant could have well seen from some distance, the movement of the pedestrian crossing the road and could have taken appropriate measures to avoid collision with him. His failure to avoid the accident is the proximate cause leading to contributory negligence. In a similar case, in ***Narasimhaiah vs The General Manager & Anr. 1998 ACJ 775***, the High Court of Karnataka held as under:

“.... 7. The appellant in this case was a pedestrian who virtually walked into the path of the vehicle and got injured. There is a wrong notion which prevails that pedestrians have the birth-right to wander around the stroll on the roads according to their whims and fancies and that even if they make every effort to get run over, that the vehicle drivers are supposed to still try and save them. It has been pointed out in this judgment that the rules of the

road require pedestrians to avoid strolling on to the road and that the roads can be crossed only at designated places. A breach of these rules immediately holds the pedestrian liable for negligence and if it is demonstrated that the injury of death occurred due to the negligence of the pedestrian, the driver of the vehicle, the owner and the insurer would then be entitled to disclaim their liability. This is an aspect of the law that has been grossly overlooked and which requires to be very clearly restated and specifically brought to the notice of the public. The present accident took place on one of the busy roads in the city of Bangalore and the evidence indicates that people were indiscriminately walking about on the road virtually between the vehicles that were moving regardless of any concern for safety. Where a pedestrian demonstrates suicidal tendencies by behaving in this manner, he will be precluded from then holding others liable if he gets injured or killed and it is very necessary that this message goes out loud and clear. In the present instance where the driver of the vehicle and the injured appellant are both demonstrated to have been negligent, the first one for the manner in which the truck was being driven and the second one for having crossed the road at a point where he should not have done, this Court has had to evaluate the degrees of negligence for purposes of deciding whether the injured should be entitled to compensation and if so, how much. The degree of negligence on the part of the pedestrian having been of a relatively lower order, the Court has limited the compensation payable to the extent of GO of the amount computed. In cases of proven negligence however, the compensation awarded could be much lower or even nothing at all.”

16. In view of the aforesaid, the Court finds that the accident occurred on account of near equal negligence of both the parties. Hence the

compensation amount is reduced by 45% as being the component of contributory negligence on behalf of the injured/ respondent . The appeal is disposed off in the above terms.

NAJMI WAZIRI, J

JULY 27, 2017/kk

