

\$~R-328 & 329

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

Decided on: 13th October, 2017

+ **MAC APPEAL 391/2011**

SUNITA & ORS. Appellants

Through: None

versus

DEEPAK & ANR. Respondents

Through: Mr. Sudhanshu Tomar, Adv. for
R-1 with R-2 in person

+ **MAC APPEAL 444/2011**

DEEPAK Appellant

Through: Mr. Sudhanshu Tomar, Adv.

versus

**RAJINDER SINGH THROUGH LRs.
& ANR.** Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. Indisputably, a motor vehicular accident occurred on 10.02.2005 at 7.40 p.m. in the area of Ghuman Hera Road, leading to Najafgarh involving motor cycle bearing registration no.DL-3SX-2808 (motorcycle), on the one hand, and two wheeler scooter bearing registration no.DL-9SD-3183 (scooter), on the other. It is admitted

case on both sides that the motor cycle was driven at the relevant point of time by Rajinder Singh and the scooter by Deepak. It has come in the pleadings, and the evidence, that a girl named Vandana, aged about 18 years, was riding on the pillion of the motor cycle. Due to the collision, all the three said persons suffered injuries, Rajinder Singh dying in the consequence.

2. Two accident claim cases came to be instituted, one by the wife and members of the family dependent on the deceased Rajinder Singh, it being MACT case no.786/05/08 instituted on 28.05.2005 in which the said Deepak, the scooter driver, and Ramanand, its registered owner, were impleaded as respondents. The other case (MACP 787/06/08) was instituted by the said Deepak on 30.08.2006 wherein he impleaded the legal representatives of deceased Rajinder Singh (collectively, as the first respondent) and Vijay, the owner of the motorcycle as the second respondent. In the claim on account of death, it was alleged that the accident had occurred due to the negligent driving of the scooter by Deepak. In the other case it was alleged by Deepak that the accident had occurred due to the negligent driving of the motorcycle by the deceased Rajinder Singh.

3. Both cases arising out of the accident were clubbed by the Motor Accident Claims Tribunal (Tribunal) and a common inquiry held though on issues separately framed, the crucial issue being as to who was at fault. On the basis of evidence led, the tribunal rendered its judgment dated 20.01.2011 declining to accept the evidence of the family of the deceased about negligence on the part of the scooterist Deepak. On the contrary, the case of Deepak was accepted and it was

held that the accident had occurred due to negligence on the part of the motorcyclist, Rajinder Singh. Against this backdrop, compensation was denied in the fatal accident claim case and in the case of Deepak, an amount of Rs.8,000/- was awarded as compensation.

4. The claimants in death case have filed appeal (MACA 391/2011) seeking to assail the above noted finding of the tribunal asserting that the case merited acceptance and that the finding returned by the tribunal exonerating the scooterist of any responsibility is perverse. In the other case (MACA 444/2011), the claimant Deepak has submitted that the compensation awarded is deficient.

5. Both the appeals were admitted and directed to come up on their own turn by orders dated 21.01.2013. On being taken up, there is no appearance on behalf of the appellant in the first mentioned appeal (MACA 391/2011). The submissions of the counsel in the other appeal have been heard and the record perused.

6. There is no doubt that in a claim under tort liability, the standard of proof of culpability is not the same as one applied in criminal cases. The claimants are not obliged to adduce evidence to prove negligence, or guilt, of the driver of the offending vehicle beyond reasonable doubts. The test of pre-ponderance of probabilities applies. But in a case of the present nature where both sides representing the drivers of the two vehicles, which had collided, accuse each other of the responsibility, the test of pre-ponderance of the probabilities will have to take into account the explanation offered by each side for the sequence of events leading to the mishap. Obviously, one of the drivers, having succumbed to the injuries, is not

available to give his account of the events. But then, as in the present case, if witnesses are available to put together the story, their evidence would need to be subjected to scrutiny for ascertaining the credibility and reliability of the version of the deceased driver in the light of overall facts and circumstances. It is not correct to contend that the tribunal is to return a finding on the issue of negligence only on the fact that one of the said drivers was prosecuted based on report of the police in the corresponding criminal case. If that were to become the foundation of the conclusion, the inquiry by the tribunal, or the court, would be rendered meaningless.

7. Before proceeding further, it would be of advantage to take note of certain observations of the Supreme Court in two celebrated cases concerning the burden of proof in accident claim cases. In *Oriental Insurance Company Ltd. Vs. Meena Variyal*, 2007 (5) SCC 428, it was held :

“On a careful understanding of the decision in Gujarat State Road Transport Corporation (supra) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (supra) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We

are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored."

8. While dealing with the similar issues in MACA 165/2013, *New India Assurance Co. Ltd. Vs. Devki and Ors.*, decided by this court on 29.02.2016, it was observed thus :-

"5. It is well settled that in proceedings arising out of a claim petition under Section 166 of MV Act based on fault liability principle, a person cannot be held liable unless he contravenes any of the duties imposed on him by the common law or by the statute. In the case of a motor accident it is imperative that the claimants show by some evidence that the driver of the motor vehicle had been negligent in relation to the said vehicle and thereby had caused an accident resulting in bodily injuries or death or damage to the property so as to be held liable as the principal tort-feasor. The owner's liability arises out of his failure to discharge a duty cast on him by the law, on the principle of vicarious liability. Proof of negligence is necessary before the owner or the insurance company may be held liable for payment of compensation in a motor accident claim case brought under Section 166 MV Act."

9. In the case of *Devki* (supra), the counsel representing the claimants had relied on the decision of the Supreme Court in *Bimla Devi Vs. Himachal Road Transport Corporation*, (2009) ACJ 1725 (SC) as also the decision of learned single Judge of this court in *National Insurance Company Ltd. Vs. Pushpa Rana*, 2009 ACJ 287. It was argued that since the proceedings under the Motor Vehicles Act are not akin to proceedings in a civil court, strict rule of evidence do not apply and that certified copy of the record of criminal case would

suffice so as to reach the conclusion that the driver of the vehicle in question was negligent. It was further submitted that inference of negligence could be drawn on the basis of documentary evidence relating to the criminal case. In *Pushpa Rana* (supra), a learned single Judge while taking the view that the claimant could base his case on the certified copies of the record of the corresponding criminal case had observed thus :-

“13. The last contention of the appellant insurance company is that the respondents claimants should have proved negligence on the part of the driver and in this regard the counsel has placed reliance on the Judgment of the Hon'ble Apex Court in Oriental Insurance Co. Ltd. v. Meena Variyal (supra). On perusal of the award of the Tribunal, it becomes clear that the wife of the deceased had produced (i) certified copy of the criminal record of criminal case in FIR No. 955/2004, pertaining to involvement of the offending vehicle, (ii) criminal record showing completion of investigation of police and issue of charge sheet under Section 279/304-A, IPC against the driver; (iii) certified copy of FIR, wherein criminal case against the driver was lodged; and (iv) recovery memo and mechanical inspection report of offending vehicle and vehicle of the deceased. These documents are sufficient proofs to reach the conclusion that the driver was negligent. Proceedings under Motor Vehicles Act are not akin to proceedings in a civil suit and hence strict rules of evidence are not required to be followed in this regard. Hence, this contention of the counsel for the appellant also falls face down. There is ample evidence on record to prove negligence on the part of the driver.”

10. This court in *Devki* (supra) held as under :-

“8. In the facts and circumstances, this Court finds it difficult to follow the view taken in Pushpa Rana (supra). Since the law declared by the Supreme Court in Meena

Variyal (supra) is binding, there is no escape from the conclusion that it is the burden of the claimants in a petition under section 166 of MV Act to prove negligence. Should they find it difficult to prove evidence with regard to negligence, the option to have resort to no-fault liability on the structured formula under Section 163A of MV Act is always available to seek just compensation. The case of Bimla Devi (supra) cannot be an illustration to hold otherwise inasmuch as it is clear from the narration of facts noted therein that an eye witness was available and the conclusion on facts had been reached on the basis of his testimony.”

11. Undoubtedly, Deepak (the scooterist) was prosecuted by the State on the basis of evidence gathered during the investigation of the corresponding FIR. Noticeably, in the said criminal case, Vandana, the pillion rider on the motorcycle, was also cited as a witness. The copies of the statements before the police, as also in the court, made by the said Vandana are part of the material which was placed before the tribunal by the scooterist / Deepak. The said material shows that Vandana was also taken in injured condition to the hospital and when examined by the police initially on 13.02.2005, three days after the occurrence, she had stated that the motorcycle had hit some article as a result of which she and the motorcycle rider (deceased) had fallen down though she would not be able to describe the nature of the article. This initial version (Ex. RW1/11) is to be contrasted against her supplementary statement (Ex. RW1/2), recorded on 21.04.2005, when for the first time she stated that the motorcycle was moving leisurely on its correct side but the scooter had come on the wrong side so as to hit against it thereby attributing fault to the scooterist.

But when examined in the court (Ex. RW1/14) on 03.07.2007, the said pillion rider did not support the prosecution story. She spoke about she having taken a lift on the motorcycle, it being a rainy dark night, she not being aware as to the cause of the accident, her cross-examination by the prosecutor not evincing any material so as to bring the responsibility to the door of the scooterist.

12. Vandana, to the knowledge of the claimants in the death case, was an eye witness. Since she was injured in the same accident and since she was riding on the pillion of the motorcycle of the deceased, she being the only surviving person connected to that vehicle was a crucial witness. She was never called in the witness box by the claimants in the death case. The claimants, however, relied on the evidence of Des Raj (PW-2) who was introduced as a chance witness. Des Raj had not presented himself before the police immediately after the occurrence. He had not accompanied the victims to the hospital. His testimony has been closely examined by the tribunal and rejected, in the opinion of this court, for sound reasons. The witness had surfaced for the first time on 12.03.2005 (Ex. PW2/1). According to his version, he was present at the scene with one Azad Singh. This is what makes his evidence all the more incredible. Azad Singh is a close relative (*saadu*) of the deceased Rajinder Singh. If Rajinder Singh was indeed a person present at the scene there would not have been any difficulty for PW-2 also being immediately aware of the identity of the motorcyclist. His report and statement to the police recorded much later, would, however, not show such acquaintance. Azad Singh, if he was also present at the scene with PW-2, would

have been even more crucial witness. After all, he being a close relative (co-brother) would have immediately taken steps not only to accompany the victims to the hospital but also arrange for proper evidence to be gathered. There is no explanation as to why neither he, nor PW-2, would surface till about one month after the occurrence.

13. The tribunal has referred to the site plan (RW1/6) which was proved during the inquiry at the instance of the claimants. This site plan was prepared by the investigating police officer in the course of investigation into the corresponding FIR no.12/2005 of police station J.P. Kalan. The site plan clearly shows that the road in question is divided by a central verge. Concededly, the motorcycle was moving in the direction from north to south while the scooterist was moving from south to north. The site plan reveals that the motorcycle had come in the wrong carriageway coming in the path of the scooter which, the evidence shows, was an act of gross-negligence on the part of the motorcyclist. The road is indicated by the site plan to be taking a turn quite close to the place of collision. It is clear that the motorcycle had come in the way of the scooter all of a sudden leaving no scope for the scooterist to avoid the collision.

14. In the foregoing facts and circumstances, the finding on the issue of negligence returned by the tribunal does not call for any interference.

15. Coming to the issue of compensation, it is clear from the evidence that the injuries suffered by the scooterist were simple in

nature. In these circumstances, there is no case made out for any enhancement.

16. Thus, both the appeals are dismissed.

R.K.GAUBA, J.

OCTOBER 13, 2017

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