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

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Decided on: 19th May, 2017

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MAC.APP. 1027/2016

THE ORIENTAL INSURANCE CO LTD.

..... Appellant

Through: Mr. S.P. Jain and Mr. Himanshu
Gambhir, Advocates.

Versus

SONIA & ORS.

..... Respondents

Through: Mr. S.N. Parashar, Advocate for
Respondents No. 1 to 5.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

1. The Award has been challenged on the ground that the DAR and the site plan show that the offending vehicle i.e. HTV – Trailer was moving in the extreme left-side lane i.e. the designated traffic lane for HTVs; LTVs are not driven in this lane but a separate said lane on the right-side of the HTV lane, therefore, the HTV was not the offending vehicle instead the damaged vehicle was in the wrong lane. It is not in dispute that the Wagon R in which the deceased was travelling crashed into the Trailer resulting in a fatal injury to him. The appellant argues that this is a deemed case of rash and negligent driving by the deceased himself leading to the accident, particularly by his driving in wrong lane. Hence, the insurer cannot be held liable for the fault of the deceased merely on the basis of the FIR.

2. The appellant argues that: (i) even assuming that both the parties were

driving in the correct lane, a safe distance should have been maintained by the vehicle behind the 'HTV-trailer' in order to avoid collision in the event of sudden brake or stoppage by the vehicle moving ahead; (ii) no evidence was led by the claimant to prove that the offending vehicle was being driven rashly and negligently; (iii) the non-deposition of the driver of the HTV cannot necessarily be construed against the insurer because the facts and documents on record otherwise would show that the driver of the HTV was not rash or negligent. He refers to para 21 of the impugned order, which reads as under:-

“21. Site plan filed along with DAR shows Mark A as the spot of accident which has not been disputed or controverted by any of the respondents. According to FIR, the offending vehicle was coming from Nangloi side and was going towards Bahadurgarh side. The deceased, in Wagon R car, was also going in the same direction behind the offending vehicle. Direction of the two vehicles mentioned and indicated in the FIR and site plan is not disputed. Accordingly, Mark A is the spot where both the vehicles were going on the left side of the road which is near the cross section of a road towards Hiran Kudna village and a police picket was located right at the cross-section of the road.”

3. The learned counsel for the parties have been heard and the records have been perused. The Court notes that the deceased was the only one in the vehicle which met with the fatal accident. The driver of the MTV could possibly not have witnessed what happened to the rear of the large HTV – trailer because its sheer size would have hidden the much smaller passenger car a Wagon R. In the circumstances his testimony would be of little relevance as to how the little car crashed into the HTV from the rear. What would be essential is the examination of site plan and contention that the

offending HTV ahead of the Wagon R stopped suddenly resulting in the fatal accident. The DAR as well as the Site Plan make out a plausible case for such a mis-happening. Accordingly, in view of ***Kaushnumma and Others v/s New India Assurance Company Limited, 2001 ACJ 421 SC***, the DAR and site plan are sufficient evidence to make out a probable cause for the accident. The contention that the alleged offending vehicle was being driven in the extreme left lane and the smaller passenger car – the Wagon R ought not to have even been in the same lane is specious; the Tribunal has observed that both the vehicles were in the same lane because they were near an approaching cross-section of roads. For a driver it is only prudent to shift into the farthest lane, either to the extreme right or left, depending on the route to be taken by the driver in order to take a safe turn at the crossing. Therefore, no fault can be found in the Wagon R car being in the left lane because there was a turning at the crossing just ahead, which perhaps its driver wanted to take. The Tribunal has recorded as under:

*“15. Nevertheless, it is also a settled legal position that in a claim petition under Section 166 of the M. V. Act, burden is on the claimants/petitioners to prove negligence. The law to this effect declared in **Minu B Mehta Vs. Balkrishna Ramchandra Nayan (1977) 2 SC 441** was reiterated by the Supreme Court in **Oriental Insurance Company Limited Vs. Meena Variyal 2007 (5) SCC 428**, which has been followed by Hon'ble High Court of Delhi in a recent case, **New India Assurance Co. Ltd. Vs. Devki & Ors., MAC APR 163/2013** decided on 29.02.2016.*

16. As per DAR, FIR was registered on the statement of an eye witness Ct. Mahender Singh who was on patrolling duty along with Ct. Sher Singh on the main road at the time of accident. According to FIR, around 12.30 in the night he along with Ct. Sher Singh was present near Hiran Kudna picket when he saw a Container bearing Regn. No. HR-38J-6776 (offending

vehicle) coming from Nangloi side at a very fast speed driven by its driver in a zig-zag, rash and negligent manner, who suddenly applied the breaks, as a result of which a Maruti WagonR car bearing Regn. No. HR-26-R-8447 iollowing the Container dashed on the back side of the Container and its driver (deceased Manish Kumar) got injured. Birgu Nath Singh (Respondent no. 1), driver of the offending vehicle was apprehended by Ct.Mahender Singh with the help of Ct. Sher Singh and was handed over to the IO alongwith offending vehicle.

17. During investigation, notice U/s. 133 of M. V. Act was given to Sh. Vashishtha Thakur (Respondent no. 2), one of the joint registered owners of the offending vehicle who In response to the notice stated that at the time of accident. Birgu Nath Singh (Respondent no. 1) was driving the offending vehicle.

18. If is not disputed by the respondents that Container bearing Regn. No. HR- 38J-6776 (offending vehicle) was involved in the accident. It is also not disputed by any of the respondents that Respondent no. 1 was driving the offending vehicle at the time of accident. There is no contest about the manner of accident also ie., the car driven by the deceased had dashed on the rear side of the offending vehicle.

19. It is the case of the petitioners that the car of the deceased dashed on the rear side of the offending vehicle as respondent no.. 1, who was driving the offending vehicle, suddenly applied the breaks. On the other hand, plea taken by the respondent no. 1 in the written statement is that deceased was driving the; vehicle in a rash and negligent manner who had hit the offending vehicle from behind.

20. Since the eye witness has not been examined by the petitioners, the other evidence on record is taken into consideration to-decide the issue of rash and negligent conduct of respondent no.1.

21. Site plan filed along with DAR shows Mark A as the spot of accident which has not been disputed or controverted by any of the respondents. According to FIR, the offending vehicle was coming from Nangloi side and was going towards Bahadurgarh side. The deceased, in Wagon R car, was also going in the same direction behind the offending vehicle. Direction of the two vehicles mentioned and indicated in the FIR and site plan is not disputed. Accordingly, Mark A is the spot where both the vehicles were going on the left side of the road which is near the cross section of a road towards Hiran Kudna village and a police picket was located right at the cross-section of the road.

22. Time of accident was mid night when the traffic is not heavy on roads and speed of the vehicles is comparatively higher. Just because the deceased had dashed the car on the rear side of the offending vehicle will not lead to presumption that he was rash and negligent. Two vehicles can collide in that manner also when the vehicle going ahead suddenly comes to a halt. There is no basis for drawing presumption against the deceased because such an act would be suicidal and there is nothing on record to suggest so. It is conceded by the respondent No. 1 that he has been charge-sheeted under Section 279, 304-A IPG. Therefore, onus lies on the respondent no. 1 to rebut that he did not apply sudden brakes and also prove that he was diligent and exercised all due care while driving the offending vehicle.

23. Besides a general averment in the written statement that accident took place due to the negligence of deceased, there is no evidence as to how was the deceased negligent and whether respondent no. 1 took due care while driving the offending vehicle. Respondent no. 1 has not deposed as a witness about the manner of accident.

24. Considering the site plan, the spot of accident is very close to a police picket and near the road cross-section. It appears that respondent no. 1 had applied brakes suddenly to slow down

the offending vehicle, as a result of which car driven by the deceased dashed on the rear, side of the offending vehicle, as he did not have sufficient time to divert and avoid the collision. In the absence of any evidence led by the respondent no. 1 to prove his defence, the evidence on record is sufficient to establish that accident was caused due to rash and negligent driving of Birgu Nath Singh (Respondent no. 1) driver of the offending vehicle.

*25. As per the. MLG of deceased Manish Kumar from Bhagvvan Mahavir hospital, he was brought to casualty of hospital with the alleged history of road traffic accident and was declared dead on arrival. As per the postmortem report, he died on 25.06.2012 and cause of death was **'injuries on head, abdomen and lower limb structures due to blunt force Impact'** possible in a road traffic accident. The report is not disputed by any of the respondents with respect to cause of death."*

4. In view of these facts, the Tribunal concluded that the offending vehicle was indeed being driven rashly and negligently. This Court finds no reason to conclude otherwise. The contention regarding contributory negligence is also not made out because a sudden stoppage of a motor vehicle on the highway at night, when vehicles are being driven at a good pace, would invariably lead to a collision of the vehicles behind it. It is possible that the deceased could have attempted to avoid the collision with the vehicle ahead by shifting into another lane, however, this option at that critical moment could well have been fraught with the possible collision with vehicles in the adjacent lane. The fault of the offending vehicle has been rationally concluded and this is all that matters when determining the liability. Therefore, the contention that this was a case of rash and negligent driving by the deceased or of his contributory negligence, is untenable. In the circumstances, the Court finds no reason to interfere with

the conclusion arrived at by the Tribunal holding the Insurance Company liable to pay the compensation.

5. Apropos the quantum, the learned counsel for the insurer contends that the Tribunal had taken the monthly salary of the deceased as Rs.12,368/-, which included an amount of Rs.2,600/- towards special allowance which was clarified to be a special loan by the employer; hence, this amount should have been deducted along with Rs.486/- which was computed towards arrears. There is merit in this contention. Accordingly, taking into consideration the Wage Slip Ex.PW2/3 the monthly income would be modified by deducting the said two amounts (Rs. 12368 – Rs. 2600 – Rs. 486) resulting in a monthly salary of Rs. 9282/-. Taking this salary into consideration, the computed annual salary would be reduced to Rs.83,538/-. Accordingly, the loss of financial dependency would be reduced by Rs.3,97,800/- from Rs.18,17,946/- to Rs.14,20,146/-. There is no challenge to the other non-pecuniary compensation totalling Rs.4,00,000/-. Thus the total compensation amount of Rs.22,17,946/- stands reduced to Rs.18,20,146/- alongwith interest at the rate of 9% per annum. This modified compensation amount shall be released to the beneficiaries of the Award as specified therein. The excess amount with proportionate interest earned thereon alongwith the statutory deposit shall be released to the appellant.

6. The appeal stands disposed off in the above terms.

NAJMI WAZIRI, J.

MAY 19, 2017

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