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

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Decided on: 20.08.2019

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MAC.APP. 738/2019 & CM Nos.37102-04/2019

HDFC ERGO GENRAL INSURANCE CO LTD. Appellant
Through: Mr. A. K. Soni and Mr. Pavan Kumar
Vashishtha, Advocates.
Versus
NAINA BHATIA & ORS. Respondents
Through:

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MAC.APP. 739/2019 & CM Nos.37105-07/2019

HDFC ERGO GENERAL INSURANCE CO LTD. Appellant
Through: Mr. A. K. Soni and Mr. Pavan Kumar
Vashishtha, Advocates.
Versus
URMILA DEVI & ORS. Respondents
Through:

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. The appellant impugns the award of compensation passed by the learned Tribunal in MACP Nos. 17/15 and 18/15 on the ground that the testimony of PW3 – Mr. Apoorva Sharma, the alleged eye-witness, is not believable. The doubt apropos the said testimony is based on his not waiting at the site of the accident till the police arrived. Furthermore, he did not contact the Investigating Officer for four days after the accident. The learned counsel for the appellant argues that the contributory negligence

ought to have been apportioned to the motor cycle rider since he crashed into the insured vehicle from the rear side.

2. These issues have been dealt with by the learned Tribunal as under:-

“9. ISSUE NO.1

The petitioners in support of their case have examined on record total four witnesses. PW1 Smt. Urmila Devi is mother of the other deceased Deepak Kumar of MACP No. 18/15, PW2 Smt.Naina Bhatia is mother of the deceased Amokesh Bhatia of MACP No. 17/15, PW3 Sh. Apoorva Sharma is an alleged eye-witness of accident and PW4 Sh. Vikas Sharma is a witness from the office of the deceased Amokesh Bhatia. However, since admittedly, neither PW1 or PW2 nor PW4 had witnessed the above accident, it is the testimony of PW3 only, which is relevant for disposal of this issue and for proving the alleged rashness and negligence on the part of R-1 in driving the above offending truck.

10. *PW3 has tendered on record his examination in chief by way of an affidavit. Ex.PW3/A and it is observed that in the said affidavit, he has made specific depositions regarding the factum as well as manner of the accident. He has deposed therein that the above accident took place at around 2 am on 10.09.2014 and at that time, he was coming back to his home at Delhi from Gurugram by driving his car. He further stated specifically in the above affidavit that when he reached at the above place of accident, the above offending truck being driven rashly and negligently and at a very high speed came from behind and driver of the truck brought the said truck ahead of the above motorcycle, after overtaking many other vehicles. He also stated specifically that driver of the offending truck suddenly applied brakes without any indicators and as a result of sudden application of brakes of the said truck, the motorcycle dashed against the offending truck with force and due to this, both boys sitting on the motorcycle fell down on road and sustained grievous injuries and became unconscious.*

He further claimed that he had made a call at no. 100 regarding the accident and further that he also subsequently joined the investigation of this case and site plan of the spot of accident was got prepared at his instance. He also tendered on record, a copy of his DL in proof of his identity.

11. PW3 was extensively cross examined on behalf of the respondents. He though, stated in his cross-examination that there was ample space towards right as well as left side of the truck for movement of vehicles and also that there was another truck ahead of the offending truck when the accident took place, but he further volunteered that driver of the offending truck overtook another truck and when he noticed that there was another vehicle ahead of his truck, he had applied sudden brakes of the truck and motorcyclists had also applied brakes in order to avoid collision. He further stated that speed of the motorcycle was around 30-40 km/hour and speed of the offending truck prior to application of brakes by its driver was around 70-80 km/hour. He also stated that both the motorcycle riders wearing helmets. He also denied the suggestions that the motorcyclist was at a fast speed and both were not wearing helmets; site plan was not prepared at his instance; the motorcyclist was not driving motorcycle in his lane and that the above accident took place due to negligence of the motorcycle riders.

12. When the statement made by this witness is read in entirety, it inspires confidence and there is no reason or ground available to this tribunal to discard the same. He is found to be an independent witness of the accident as there is nothing on record to suggest that he was related to any of the two deceased or petitioners herein. His claim of witnessing of above accident is further substantiated by documents of the criminal case as he is found to be one of the witnesses cited in charge-sheet of the criminal case, copy of which has been enclosed with the DAR. Hence, simply because he appeared before this tribunal on his own or on being asked by the petitioners and without any summons is not a ground to discard his testimony.

13. Further, though, R-3/Insurance Co. has examined on record, IO of the present case namely SI Deepak Panwar as R3W1 in an attempt to doubt the presence of this witness and also to make it to be a case of contributory negligence on the part of one of the motorcycle riders driving the same; but it is observed from perusal of testimony of the IO/R3W1 that the same does not serve the purpose of defence and rather, it corroborates the case of petitioners as well as of PW3 regarding his being an eye-witness of the above accident. Again, though the statement of IO suggests that the above witness, i.e., RW3, was not present when IO arrived at the spot on receiving information on the basis of a DD entry registered at PS about this accident, on receipt of a PCR call, but the statement of IO certainly reflects that PW3 was an eye-witness of the said accident and was also the PCR caller and IO has not only recorded statement of this witness during investigation, but also got verified the place of occurrence from this witness.

14. Further, during the course of his cross-examination conducted by Ld. Counsel for the petitioners, IO has also deposed about the statement under Section 161 Cr.P.C. dated 14.09.2014 of this witness recorded by him regarding the accident as Ex.R3W1/P-1 and this also substantiates the claim of petitioners and the above witness regarding the accident having been seen by him. Again, during his above cross-examination, IO also proved some other documents of the criminal case filed alongwith the DAR as part of the charge-sheet, which include a copy of notice under Section 133 of the MV Act as Ex.R3W1/P-2, its reply given by R-2 as Ex. R3W1/P-3 as well as the site plan of place of occurrence as Ex. R3W1/P-4 and these documents also corroborate the case of petitioners on the above aspect and also about involvement of the offending truck and R-1 as its driver in the above accident. Simply because some photographs of the place of accident taken by the IO in his mobile got deleted by his mistake or could not be preserved is not a ground to doubt the place or manner of occurrence. Non seizure of helmets of the two motorcycle riders is also not fatal to the case of the

*petitioners as IO has also stated specifically that he had noticed some broken pieces of helmets at the spot of accident, though he did not seize them. In any case, it is well settled that the onus placed upon the petitioners for proving their case in this inquiry is only as per the principle of preponderance of probabilities and not by strict proof of the facts alleged. Reference in this regard can be made to the prepositions of law laid down by the Hon'ble Supreme Court in the case of **Bimla Devi and others Vs. Himachal Road Transport Corporation and others, reported in (2009) 13 SC 530**, which were reiterated in the subsequent judgment in the case of **Parmeshwari Vs. Amir Chand and others 2011 (1) SCR 1096 (Civil Appeal No.1082 of 2011)** and also recently in another case **Mangla Ram Vs. Oriental Insurance Co. Ltd. & Ors., 2018 Law Suit (SC) 303 etc.***

15. Though it is the contention of Ld. Counsel for R-3 that there is a material discrepancy in case of petitioners as the documents of criminal case do not show with certainty as to which of the two deceased was driving the motorcycle at the time of accident. On this aspect, it is observed that the investigation carried by the IO established that the motorcycle was being driven by the deceased Amokesh Bhatia, which fact has also been deposed by mother of the deceased in their respective affidavits. Moreover, it does, not in any manner found to have been affecting the claim of the petitioners.

16. It is also the contention of Ld. Counsel for R-3 that the victim/deceased Amokesh Bhatia, who driving the motorcycle, was equally responsible for the accident as he failed to apply brakes of his motorcycle in time and rammed it against the offending truck from behind. Hence, he has argued that the contribution of above deceased in causing the accident has to be taken as 50% and he has also referred to some judgments on this aspect, though, copies thereof have not been made available to this tribunal. On the other hand, Ld. Counsel for the petitioners has argued that in the absence of there being any clear and cogent evidence on record to establish contributory negligence on the part of deceased, no finding of

contributory negligence can be arrived at. He has also referred to various judgments on the subject and made available copies thereof for perusal.

*17. After going through the judgments being referred and the rival submissions being made by Ld. Counsels on this issue, this tribunal is of the considered opinion that since no evidence at all has been led on record by the respondents to establish any such contributory negligence on the part of the deceased Amokesh Bhatia, the above argument of Ld. Counsel for R-3 is not tenable, as has been held in catena of judgments by the Hon'ble Supreme Court, including **Meera Devi & Anr. Vs. HRTC & Ors. 2014 LawSuit (SC) 162, Sarla Devi & Ors. Vs. Divisional Manager, Royal Sundaram Alliance Insurance Co. Ltd. 2014 LawSuit (SC) 698 and Yerramma & Ors. Vs. G. Krishnamurthy & Anr., 2014 LawSuit (SC) 696** as well as by the different Hon'ble High Courts in judgments including **Oriental Insurance Co. Vs. Bhupindere Kaur & Ors. 2014 LawSuit (Delhi) 1270 and Mithlesh & Anr. Vs. Rajesh Kumar & Ors. 2017 LawSuit (Del) 3724** etc., being relied upon by Ld. Counsel for the petitioners. In the present case, the depositions made by the eye-witness, i.e. PW3 Sh. Apoorva Sharma, clearly show that it was only the driver of offending truck, i.e. R-1, who was responsible for the above accident and even R-1 has not come forward to challenge the depositions made by PW3 or to allege contributory negligence part of the deceased Amokesh Bhatia. Hence, it is held that the above accident had taken place due to rash and negligent driving on the part of R-1 only.*

*18. Though it is also the contention of Ld.Counsel for R-3 that some contributory negligence on the part of deceased be taken as both the riders were not wearing helmets, but even this submission is not tenable as merely because of that no inference of rash and negligent driving on the part of deceased can be drawn. Reference in this regard can be made to judgment of the Hon'ble High Court in the case of **India Lease Development Ltd., Vs. Savita & Ors. 2012 LawSuit (Del) 582**, which has been relied upon by Ld. Counsel for the petitioners.*

Moreover, it has already been discussed above, the IO had noticed some broken pieces of helmets at the spot of accident, though he did not seize them in this case.

19. In view of the above, it is held that the oral and documentary evidence led on record establishes that the above said accident resulting into death of the deceased Amokesh Bhatia and Deepak Kumar was caused due to rash and negligent act of R-1 in driving the vehicle no. HR-55K-3040, which was owned by R-2 and insured with R-3 at the time of accident. This issue stands accordingly decided in favour of the petitioners and against the respondents.”

3. What emanates from the above is that PW3 - the eye-witness had called the police from the site of the accident and a PCR vehicle reached the spot. Since it was 2 o'clock in the night, it is possible that the witness went home. Nevertheless, he discharged his duty as a good samaritan by calling the police. Furthermore, he cooperated with the police in the investigation and narrated to them the sequence of events as he had witnessed them. He was not necessarily required to go to the police the very next day. He did his bit by calling the police in the first instance. His testimony withstood the cross-examination and it was found to be plausible.

4. Furthermore, it is the contention of the appellant that if the insured vehicle was being driven at a speed of 70-80 km/hour and the motorcycle was being ridden at a speed of 30-40 km/hour, then the accident could not have taken place because the offending vehicle would have crossed and overtaken the motorcycle. However, the Court would note that the said testimony is based on a rough estimation by the witness who was coming in his own car and if the offending vehicle had crossed the motorcycle riders and it stopped suddenly on the road, such a sudden application of brakes

could have caused the motorcyclists to crash into it. The narration of the events makes the accident plausible. Hence, there is no reason to doubt the testimony of PW3.

5. In view of the above, the Court finds no reason to interfere with the impugned order. The appeal is without merits and is accordingly dismissed alongwith pending applications.

6. The awarded amount which has been deposited by the Insurance Company, alongwith interest accrued thereon, shall be released to the beneficiaries of the award in terms of the scheme of disbursement specified therein.

7. The statutory amount of Rs.25,000/- each, alongwith interest accrued thereon, be refunded to the appellant.

NAJMI WAZIRI, J.

AUGUST 20, 2019

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