

\$~10

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

% *Decided on: 08.11.2019*

+ **MAC.APP. 428/2018**

THE ORIENTAL INSURANCE CO LTD Appellant
Through: Mr. J.P.N. Shahi, Adv.

versus

KAMLA DEVI & ORS Respondents
Through: Mr. S.N. Parashar, Adv.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J (Oral)

MAC.APP. 428/2018 & CM No. 17990/2018 & 1137/2019

1. This appeal impugns the award of compensation dated 16.03.2018 passed by the learned MACT in MACP No. 112/2015 which has fastened the liability for payment on the insurer. It is argued that the learned Tribunal has erred in relying upon the evidence of respondent no.2, an alleged bystander who claims to be an eye-witness to the motor vehicular accident. The impugned order has dealt with the evidence of the said witness as under:

“....PW2 Sh. Sonu Singh has also tendered on record his examination in chief by way of his affidavit Ex. PW2/A, in which he has specifically stated that he is an eye witness of the above said accident. He has deposed in the said affidavit that on the above date and time of accident, he was standing near the Shiv Murti on road Mahipalpur to Gurgaon, when the above offending car bearing registration no. DL-1VB-8057 had struck against the above delivery van being driven by the deceased. He has also stated specifically that the above offending car was being driven by its driver at a very high speed, rashly, negligently, without taking necessary precautions, without proper lookouts, violating the traffic

rules, in a zig zag manner and without blowing any horn. He has further stated on record in the said affidavit that the offending car came without blowing any horn and it had hit against the delivery van with great force, as a result of which the delivery van overturned on the road and its driver sustained grievous injuries and was immediately taken to AIIMS Hospital where he was declared brought dead. He further stated in clear and specific terms that the above accident was caused due to rash and negligent driving of driver of the offending car and had the driver of the car been careful and cautious enough, the above accident could have been averted and the deceased would not have died unnatural and untimely death in the accident.

14. PW2 was duly cross-examined on behalf of R-1 & R-2 and even during his cross-examination he has stated specifically that he was present on the spot at the time of accident and the police recorded his statement about the accident, which has been exhibited as Ex. PW2/R3/1 on record. Though, during his cross-examination, some contradictions have come with regard to his depositions made by him in his affidavit Ex. PW2/A regarding the above offending car being driven by its driver at a high speed, rashly, negligently, without taking necessary precautions, without proper lookouts, violating the traffic rules, in a zig zag manner and without blowing any horn, but it is observed that even despite these contradictions, his testimony is found to be trustworthy so far as his claim of being present on the spot at the relevant time of accident, being a witness of the said accident and further the said accident having been caused by the rash and negligent driving of the offending car by R-1 are concerned. It is so because even despite the above confrontations, he is found to have stated in his above statement Ex. PW2/R3/1 that he was taking bidis from a shop at the relevant time when he suddenly heard the huge sound of accident and he attended the scene of accident (word "scene" is wrongly recorded as 'seen'). He has also denied the suggestions given to him that his affidavit Ex. PW2/A was based on wrong depositions and facts or that it was filed falsely at the instance of the petitioners. He has further denied the suggestions that he had not seen the above

accident or that he was deposing falsely in the Court. Further, he has nowhere suggested on behalf of any of the respondents that the above accident did not take place due to rash and negligent driving on the part of R-1, while driving the above offending car. Also that, the very fact that both the vehicles were moving in the same direction and the offending car had gone to hit against the delivery van of the deceased from behind is in itself a circumstance to show the rash and negligent driving of R-1.

*15. Moreover, R-1 being the driver of the offending car, was the best witness who could have challenged or controverted the testimony of this witness by himself stepping into the witness box for proving his innocence or the fault of the deceased in causing the above accident, but for the reasons best known to him, he has chosen not to do so. Hence, an adverse inference can also be drawn against the respondents on this aspect, in view of the law laid down in the case of **Cholamandalam M.S. General Insurance Company Ltd. vs Kamlesh**, reported in 2009 (3) AD (Delhi) 310. Against, the petitioners have also, inter-alia, relied upon the documents of DAR as Ex. PW1/3 (colly) which consists of record of the charge-sheet, mechanical inspection report of the two vehicles and site plan etc. filed in the above said case and the fact that R-1 stands already charge-sheeted for offences under Section 279/304-A IPC for causing death of the deceased by his rash and negligent driving of the above offending car is also a circumstance to corroborate and support the evidence led on record by the petitioners on this aspect. The fact that death of the deceased has resulted from the above accident is also duly established from the contents of the post-mortem report and other documents on record. In view of the above, issue no.1 is accordingly decided in favour of the petitioners and against the respondents.....”*

2. The learned counsel for the appellant submits that one portion of the testimony speaks about the said eye-witness witnessing the entire incident, yet in the same breath, he says that he heard a loud sound. It is argued that if a person is watching the occurrence of an accident, then the loud sound

would be a part of the continuous action, i.e. he would have seen the accident, whereas the statement that he heard a loud sound implies that he was looking elsewhere at the time of hearing the said loud sound. Only one of the situation could be possible. It could not be the case that he was watching it and did not hear the loud sound. Hearing a loud sound in vicinity and turning one's gaze towards it takes less than a fraction of a second. The nature of the accident would have been perceived instantly. The other part of the testimony clearly establishes the fault of the offending vehicle. The learned Tribunal concluded that the evidence of respondent no.2 remained unshaken. His testimony could not be doubted apropos his actual witnessing of the entire accident and that the offending vehicle was being driven in rash and negligent manner.

3. It further reasoned that it would always be open to the insurer to summon the driver of the insured vehicle for leading his testimony because the said driver would be the best witness to the accident. For reasons best known to it, the insurer did not summon the driver. In the circumstances, the only conclusion that could be drawn is that the sole eye-witness whose testimony withstood the cross-examination would have to be accepted.

4. In view of the above, the Court finds no reason to interfere with the impugned order.

5. The appeal is without merit and is accordingly, dismissed. The interim order stands vacated. The awarded amount shall be released to the beneficiaries of the award in terms of the scheme of disbursement specified therein.

6. The statutory amount deposited, along with interest accrued thereon, be deposited with the 'AASRA' Fund created by this Court.

NAJMI WAZIRI, J

NOVEMBER 08, 2019/kk

