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

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Decided on: 24.07.2019

+ **MAC.APP. 580/2018 & CM APPL. 54041/2018**

ICICI LOMBARD GENERAL INSURANCE CO LTD

..... Appellant

Through: Mr. A.K. Soni, Advocate.

versus

KHUSHBOO & ORS

..... Respondents

Through: Mr. Roshan Lal, Advocate for R-2
and R-3.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. At joint-request, the case is taken up for final arguments.
2. This appeal impugns the award of compensation dated 17.03.2018 in the claim petition bearing MACT No. 449362 of 2016 on account of the unfortunate demise of the kin of the claimants' in a road accident.
3. It is the appellant's case that the offending motor vehicle was not identified, therefore, the appellant would not be liable to indemnify the claimants and to pay the awarded amount. It was the claimants' case that at about 8:40 pm on 14.02.2010, Raja, the deceased, tried to cross the road near Metro Station, Adarsh Nagar, when the offending vehicle i.e. a Maruti

Van of white colour bearing registration no. DL-9CQ-0931, being driven rashly at a great speed in a zig-zag manner, hit the petitioner forcefully as a result of which, he fell on the road; the culprit driver fled from the site with the offending vehicle. Raja was rushed to a hospital nearby i.e. BJRM Hospital where, he was declared dead; the MLC and Post Mortem Report were prepared. The claimants had laid evidence through three eyewitnesses i.e. Abdul Shakur, Sunil Kumar and Mohd. Akeel. In the DAR filed by the Investigation Officer, the aforesaid vehicle was stated to be non-traceable and the driver-cum-owner of the vehicle, Jai Prakash, was virtually exonerated. The said Report was accepted by the Metropolitan Magistrate. Sunil had deposed that he had seen the offending vehicle hitting Raja at a great speed. His deposition, *inter alia* reads as under:-

“1. That the deponent is the eye witness no.2 of the accident in the above noted case, I am well conversant with the facts and circumstances of the case and am as such competent to swear this affidavit. The copy of my voter ID Card is exhibited as EX-PW-1/1 (OSR).

2. That the deponent states that the deponent is the supplier of Namkeen.

3. That on 14.02.2010 at about 8:40 p.m. when the deponent was going to NANDNAGRI from SARAI PEEPAL THALA, when the deponent reached near the bus stand of 100 number bus, when the deceased RAJU reached NEAR METRO STATION, ADARSH NAGAR, DELHI-110033 and tried to cross the road, then suddenly the offending vehicle bearing no.DL-9CQ-0931 (MARUTI VAN WHITE COLOUR), which was coming from the side of Azadpur, Delhi in a speedy, rash, Zig-zag and negligent manner and hit the deceased forcefully and due to which, the deceased fell down from the outside of the road and the driver of the

offending vehicle have filed away from the spot, but during this, the deponent noted down the number of the said offending vehicle, but the offending driver ran away from the spot with the offending vehicle, thereafter, the PCR call was made by me and PCR arrived.

4. That the deponent further states that the PCR took the deceased person into the PCR Van to the hospital.”

4. In his cross-examination, he has stated as under:-

“It is correct that I have been shown as complaint in case FIR No. 41/10, PS Adarsh Nagar, U/s 279/304A IPC. I have seen the accident but I do not remember the complete registration number of offending vehicle. It was white coloured Van bearing no. DL-0931. I did not disclose to police that there were some identification marks on the said Van. There were 10 white coloured Vans lying in the police station at the time of identification of the vehicle. Same number i.e 0931 was written on all the said vans. From appearance of Van only in the police station, I identified the offending vehicle as I chased it after the accident. It is correct that my statement was also recorded in criminal case concerning this accident. I did not recognize the driver of said Van. I sell spices from patri daily. The accident took place in front of the said patri. It is wrong to suggest that I do not work on patri. It is wrong to suggest that I have not witnessed the accident in question.”

5. The learned counsel for the appellant has relied upon the statement of the police officer, retired Sub-Inspector Krishan Lal, that Sunil was unable to identify the vehicle when Maruti vans of white colour, bearing similar number, were arranged before him at the Police Station. However, the Court would note that the alleged inability of Sunil to identify the offending

vehicle was never made an issue by the appellant in Sunil's cross-examination. Furthermore, Abdul Shakur, PW-4, has deposed in his affidavit, as under:-

1. *"That the deponent is the eye witness no.2 of the accident in the above noted case, I am well conversant with the facts and circumstances of the case and am as such competent to swear this affidavit. The copy of my Voter ID Card is exhibited as EX-PW-1/1 (OSR).*
2. *That the deponent states that the deponent is running a meat shop NEAR METRO STATION, ADARSH NAGAR, DELHI-110033.*
3. *That on 14.02.2010 at about 8:40 p.m. when the deceased RAJU reached near METRO STATION, ADARSH NAGAR, DELHI-110033 and tried to cross the road, then suddenly the offending vehicle bearing no.DL-9CQ-0931 (MARUTI VAN WHITE COLOUR), which was coming from the side of Azadpur, Delhi in a speedy, rash, zig-zag and negligent manner and hit the deceased forcefully and due to which, the deceased fell down from the outside of the road and the driver of the offending vehicle fled away from the spot, but during this, the deponent noted down the number of the said offending vehicle, but the offending driver ran away from the spot with the offending vehicle, thereafter, the PCR call was made by me and PCR arrived.*
4. *That the deponent further states that the PCR took the deceased to B.J.R.M. Hospital, Jahangir Puri, Delhi.*
5. *That the deponent further states that thereafter, the police officials investigated the matter at the spot."*

6. His cross-examination reads as under:-

“

I tender my evidence by way of affidavit which is Ex. PW4/A bearing my signatures at points A & B, Contents of my affidavit are true and correct.

XXXXXX-By driver cum owner.

Nil, opportunity given.

XXXXXX-By Sh. S.K. Tyagi, counsel for Insurance Company.

I made a call on 100 number but from the mobile phone of some other person. The police recorded my statement in police station. The white coloured Van was bearing no. DL-9CQ-0931 and I disclosed it to police. I went to police station Adarsh Nagar for identification of the offending Van. There were 8-10 similar vans lying there. My shop is about 60 to 20 feet away from the spot of accident in question. At about 08:00 to 08:30 PM, I closed my shop on the date of accident and thereafter I heard a loud sound and on seeing there, I found that the accident in question has occurred. I know Sushila and Netra Pal i.e. parents of deceased for the last about 25 to 30 years. It is wrong to suggest that I have come to depose today at their instance. I have not received any summons for today. I was called today by counsel for the petitioners through telephone as I was shown witness in DAR. At the time of accident, my mobile phone was at home. I have not disclosed my mobile number to police as it was not asked for. My mobile number is 9718649334. This number is functional for the last 7 to 8 years. The mother of deceased came to my home and asked me to appear before the court to depose. I do not remember the date or month when my affidavit Ex. PW4/A was

prepared or when it was signed by me. I do not remember the date or month when I first met counsel for the petitioner who is present today. The name of police person to whom I disclosed the registration number of offending Van was Kishan. I did not accompany the deceased to hospital. It is wrong to suggest that I did not witness the accident in question or that I did not visit the police station concerning this accident or that I am deposing falsely or that I have falsely implicated the Van in question.

(emphasis supplied)

7. The Police Officer, R2W1, has deposed as under:-

“On 14.02.2010, I was posted as SI at PS Adarsh Nagar. I was on emergency duty from 8:00 pm to 8:00 am. I received a DD no.34A regarding accident. After that I along with HC Ram Karan reached the accident spot, GTK Road near Metro Station, Adarsh Nagar. I come to know that the PCR van removed the injured to BJRM Hospital. No eye witness met me at the spot at that time. After that I went to the BJRM Hospital along with HC Ram Karan where injured Raja was found admitted in the hospital and collect the MLCs and doctor declared the injured brought dead and mentioned alleged history of RTA. The dead body of the Raja S/o Nepal was sent to mortuary for post mortem. I came back to the spot where one Mr. Sunil met me and I recorded the statement of Sunil and registered the present FIR bearing no.41/10 u/s 279/304A IPC. On the identification of the complainant, I prepared the site plan. The dead body of Raja was handed over to the parents after post mortem. The wife of the deceased namely Khushboo was present in the MACT Court and give a number of vehicle Maruti Van bearing registration no. DL9CQ0931 to the Court on record. Thereafter, I issued a notice to the owner of the aforesaid vehicle.

He produced the vehicle in the police station and thereafter I seized the above said vehicle and arrest the driver namely Jai Prakash who is also owner of the vehicle. I recorded the statement of witnesses namely Abdul Sattar and Mohd. Akeel. As per statement of complainant, Sunil Kumar, the TIP of accused was got conducted and the complainant Sunil Kumar could not identify the driver in the TIP. The witness Mohd. Akeel refused to participate in the TIP proceedings. After discussion with the Senior Officer, the location of the mobile phone of Sh. Jai Prakash was collected and found that on the date of accident i.e. 14.02.2010, he was in the area of Saharanpur tower of Airtel which is situated in the village of Ghuman Hera, Najafgarh and I inquired in the village from public persons, they told me that Mr. Jai Prakash and his vehicle veering no. DL9CQ0931 was in his village Ghuman Hera. I collect the copy of PCR call from the office. I recorded the statement of Mohd. Dulare who told me that one Mohd. Shakur Called the police from my mobile phone. Mr. Mohd. Shakur told the vehicle no. DL-0931 in PCR call. There is no incriminating evidence against Jai Prakash. Therefore, we filed the untraced report in the Court of MM which was accepted by the Court.”

8. What emanates from the above statements is that while the police officer may have stated what he did, the statement of Abdul Shakur that he had closed his shop around 8-8:30 pm and has seen the accident and deposition of Sunil that he had seen the offending vehicle hitting Raja at a great speed both remain unshaken.

9. The only issue the learned counsel for the appellant contends is that according to the testimony of the police officer, with reference to the DAR, Abdul Shakur's meat shop was about 60 meters from the site of the accident.

The Court would note that the said distance of the shop actually adds to the reliability of the witness and a plausible reason for him to be present at the place. His testimony that at about 8-8:30 pm on the date of accident, he had closed his shop, and when he heard a sound, he turned towards the direction of the sound and saw that the accident had occurred is believable.

10. He, obviously, then noted down the number of the vehicle and intimated the same to the police. This testimony remains unshattered and for the purposes of an MACT claim, preponderance of probability is sufficient and strict rules of evidence for proving culpability as that in a criminal case are not required. Abdul Shakur has stood by his testimony and so has Sunil Kumar. In the circumstances, the Court finds no error in the impugned order which held the offending vehicle bearing no. DL-9CQ-0931 to have caused the accident.

11. However, at this stage, the learned counsel for the appellant submits that the impugned order has erred in awarding interest in the entire period of pendency of the appeal while in its own order dated 10.05.2014, it had recorded that the claimants would not be entitled to interest as the claimant had not examined any witnesses. The Court would note that this order was continued till 11.07.2016. Therefore, interest between 10.05.2014 till 11.07.2016 shall be excluded. It is so ordered.

12. The entire awarded amount has been deposited by the appellant before the learned MACT. In view of the above, interest for the period of 10.05.2014 to 11.07.2016 shall be refunded to the insurance company.

13. The appeal is disposed-off in the above terms.

NAJMI WAZIRI, J.

JULY 24, 2019
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