



2023:DHC:7224



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

Reserved on: 14.09.2023
Pronounced on: 06.10.2023

+ **MAC.APP. 429/2023 & CM APPL. 47486/2023**

ORIENTAL INSURANCE CO. LTD Appellant
Through: Mr.Pradeep Gaur & Ms.Sweta
Sinha, Advs.

versus

SMT MAMTA AND ORS Respondents
Through: None.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

J U D G M E N T

1. This appeal has been filed by the appellant challenging the Award dated 05.06.2023 (hereinafter referred to as the 'Impugned Award') passed by the learned Motor Accidents Claims Tribunal-01, West District, Tis Hazari Courts, Delhi (hereinafter referred to as the 'Tribunal') in MACT Case No.254/2021 titled *Mamta & Ors. v. Dharmendra Yadav & Ors..*

2. The case of the claimants/respondent nos.1 to 4 before the learned Tribunal was that on 19.05.2021, deceased- Mithlesh Jha along with his family was going in a Car, that is, Mahindra Xylo bearing registration number DL-ACNB-4704 (hereinafter referred to as the 'Mahindra Car') from Delhi to Bihar. The car was being driven by Mohd. Rizwan. They were in the third lane of the highway at a

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speed of around 40 – 50 kmph. At about 10:21 am, when they reached near village Budehari, PS Ramsanehi Ghat, Barabanki, approximately 6 km ahead of the Toll Plaza, one truck bearing registration number UP-53GT-2422 (hereinafter referred to as the ‘Truck’), which was parked on the highway in the same lane, suddenly started driving reverse without taking any note of the traffic that was plying on the highway at that particular time. The driver of their Mahindra Car, that is, Mohd. Rizwan, tried his best to save their car from the said truck, but the truck hit their car and the deceased- Mithlesh Jha received fatal injuries and his daughter Pushpanjali received multiple grievous injuries.

3. The learned Tribunal, by the Impugned Award has held that the accident had taken place due to the composite negligence of the driver of the Mahindra Car and the Truck, and attributed the same 50:50 on both the drivers. The learned Tribunal, after determining the compensation payable to the Claimants, held that as the Truck was insured with the appellant herein, the appellant shall deposit the whole of the award amount in favour of the Claimants, and may pursue legal remedies available to it as per law for recovery of half amount of the awarded amount from the driver, owner and insurer of the Mahindra Car, if so advised.

NEGLIGENCE:

4. The appellant challenges the Impugned Award on the ground that learned Tribunal has erred in holding composite negligence in the ratio of 50% each against the driver of both the vehicles, that is, the

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Mahindra Car and the Truck. The appellant states that negligence was solely of the driver of the Mahindra Car in which the deceased was travelling and not of the truck.

5. The learned counsel for the appellant submits that the learned Tribunal has erred in attributing 50% contributory negligence towards the driver of the Truck, as the said Truck was parked and was in a stationary position at the time of the accident in question and, therefore, the sole negligence was of the driver of the Mahindra Car. In support, the learned counsel for the appellant submits that there was a delay of nine days in lodging the FIR, and the same has not been dealt with by the learned Tribunal in its Impugned Award.

6. I have considered the submissions made by the learned counsel for the appellant, however, find no merit in the same.

7. The learned Tribunal, while deciding the issue of negligence of the driver of the Truck and the Mahindra Car, has held as under:

“9.3 The petitioner has examined petitioner no.01 Mamta who has specifically deposed that she was also traveling along-with deceased in the car bearing registration number DL-ACNB-4704 on the date and time of incident. The truck bearing registration number UP-53GT-2422 was in stationary condition on highway and driver of said truck suddenly started reversing it. Their driver Mohd. Rizwan tried his best, but their vehicle collided with said truck. In her cross-examination, she has deposed that speed of their car was around 50 kmph at the time of incident and the incident happened due to sudden reversing of said truck by respondent no.01. In given circumstances, it is clear that the vehicle in which the petitioner



*no.01 and deceased were traveling, hit the truck in question driven by respondent no.01 from behind. The driver of their car could have certainly averted the incident had he been alert/vigilant, had he maintained safe distance and had he been really driving at speed of 50 kmph only. At the same time, it is also clear that the incident would not have happened had the driver/respondent no.01 not suddenly started reversing his truck. The petitioner side has certainly been able to bring such facts on record which proves almost at the scales of preponderance of probabilities that the incident in question took place at least due to composite negligence of driver of truck/respondent no.01. The respondent no.01 was the best witness who could have rebutted the case of petitioner side on the aspect of rashness and negligence of the driving of the offending truck bearing registration number UP-53GT-2422 by respondent no.01. But, respondent no.01 has chosen not to appear in witness box to disprove the case of the petitioner side on said aspect. Other respondents have also not lead any evidence to prove/substantiate their defence that incident has not happened due to rashness or negligence on the part of driver/respondent no.01 of truck bearing registration number UP-53GT-2422. Adverse inference needs to be drawn against the respondents due to same. Reliance can be placed upon the decision of the matter of “**Cholamandalam M. S. General Insurance Company Ltd. Vs. Kamlesh**” 2009 (3) AD (Delhi) 310 on said issue. Accordingly, issue no.01 is partly decided in favour of the petitioners/claimants and is partly decided in favour of respondents. The respondent no.01 and driver of the vehicle bearing registration number DL-ACNB-4704 are liable for the incident in ratio of 50:50 respectively.”*



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8. It can be seen from the above that the learned Tribunal has noted that the driver of the Truck, that is, the respondent no.5 herein, was the best witness who could have rebutted the case of claimants/respondent nos.1 to 4 on the cause of the accident. The respondent no.5 neither filed a Written Statement/reply to the Claim Petition, nor chose to appear in the witness box to disprove the case of the claimants/respondent nos.1 to 4 on the said aspect. Other respondents in the claim petition, that is, the appellant and the respondent no.6 herein have also not led any evidence to prove/substantiate their defence that the accident has not taken place due to the rash and negligent driving of the Truck by the respondent no.5. In the absence of any contrary evidence, the version of the claimants of the manner of the accident has rightly been accepted by the learned Tribunal.

9. As far as delay in registration of the FIR, I again do not find any merit in the submission of the learned counsel for the appellant. As noted hereinabove, the respondent nos. 5 and 6 herein neither filed their written statement nor appeared as witness to challenge the involvement of the Truck in the accident. The appellant herein, though filed a written statement to the Claim Petition, led no evidence to even cast a doubt on the involvement of the Truck in the accident. Mere delay in registration of the FIR, therefore, cannot be a ground to disbelieve the case of the Claimants. It is to be noted that a family member of the Claimants had lost his life in the accident and another had suffered injuries in the same. Their main attention would

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therefore, have been towards the deceased and the injured rather than rushing in to get an FIR registered. Even otherwise, as there was no contrary case proved by the appellant or the respondent nos. 5 and 6, the case set up by the Claimants cannot be doubted or disbelieved. It is to be remembered that the Claimants are not to prove their case beyond reasonable doubt, but only on the preponderance of probabilities. The said test stood satisfied by the Claimants.

10. I, therefore, do not find any merit in the above challenge of the appellant. The same is accordingly rejected.

CONTRIBUTORY NEGLIGENCE AND DIRECTION TO THE APPELLANT TO PAY THE COMPENSATION AMOUNT:

11. The next challenge of the appellant to the Impugned Award is by contending that the learned Tribunal erred in not impleading the driver, owner, and the insurance company of the Mahindra Car, and directing the appellant to satisfy the whole awarded amount and then subsequently recover 50% of the awarded amount from the driver, owner, and the insurance company of the Mahindra Car by way of a separate suit.

12. The learned counsel for the appellant submits that the learned Tribunal erred in not directing impleadment of the owner, driver, and the insurance company of the Mahindra Car. He submits that as this was a case of composite negligence, they were necessary and proper parties, and the appellant could not have been directed to pay more than 50% of the awarded amount. He places reliance on the judgment



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of the Supreme Court in *Savita Garg v. The Director, National Heart Institute*, (2004) 8 SCC 56.

13. The learned counsel for the appellant submits that the insurance company is not required to file a separate suit for recovering the amount of proportionate share of the negligence of the other tortfeasors, and the same can be recovered by filing execution before the Tribunal itself. He submits that in the present case, however, the recovery cannot be initiated against the other tortfeasors mentioned hereinabove by way of filing an execution, as they were not a party in the proceedings before the learned Tribunal. He submits that, therefore, the rights of the appellant have been prejudiced by the Impugned Award.

14. I find no merit in the above challenge.

15. The Supreme Court in *Khenyei v. New India Assurance Company Limited and Others*, (2015) 9 SCC 273, while dealing with the issue relating to the impleadment of joint tortfeasors in cases of composite negligence, has held as under:

“22. What emerges from the aforesaid discussion is as follows:

22.1. In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

22.2. In the case of composite negligence, apportionment of compensation between two tortfeasors vis-à-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3. In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open

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to the court/Tribunal to determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4. It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.”

16. From the above, it is apparent that in case of composite negligence, it is the option of the Claimant to sue both or any one of the joint tortfeasors and to recover the entire compensation as the liability of joint tortfeasors is joint and several. Therefore, it is not incumbent upon the Claimants to implead the driver, owner, or the insurance company of the other vehicle and the Claimants may file their claim against the driver, owner and the insurance company of only one of the vehicles involved in the accident. Neither can impleadment of the driver, owner or the insurance company of the other vehicle be a condition precedent for the maintainability of the



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Claim Petition, nor can it be necessarily directed by the learned Tribunal.

17. It is only where all the joint tortfeasors have been impleaded and evidence is sufficient, that it is open to the learned Tribunal to determine *inter se* extent of composite negligence of the drivers of the two vehicles. Such determination is also only for the purpose of the *inter se* liability so that one may recover the same from the other after making the whole of the payment to the Claimants. In fact, it would not be appropriate for the learned Tribunal to determine the extent of composite negligence of the drivers of the two vehicles in the absence of impleadment of the other joint tortfeasor. Where the other joint tortfeasor is not a party to the Claim Petition, the impleaded joint tortfeasor should be left, in case it so desires, to sue the other joint tortfeasor in independent proceedings after the passing of the Award.

18. In the present case, the Claimants chose not to implead the driver or the insurance Company of the Mahindra Car in the Claim Petition. They were within their rights not to do so, nor could they be compelled to do so. In the absence of the driver and the insurance company of the Mahindra Car, in fact, the learned Tribunal has erred in assessing the extent of composite negligence of the driver of the Mahindra Car; the same could not have been done by the learned Tribunal. The learned Tribunal should have stopped at its determination that there was contributory negligence of the driver of the Mahindra Car, without quantifying such contributory negligence.

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19. Even otherwise, in the absence of the driver and the insurance Company of the Mahindra Car, the learned Tribunal has rightly directed the appellant to pay the compensation amount to the Claimants and, if so advised, recover the portion of the same, in separate proceedings, from the driver/insurance company of the Mahindra Car.

20. Reliance of the learned counsel for the appellant on the judgment of the Supreme Court in **Savita Garg** (Supra), also cannot be accepted. Apart from the direct precedent on the issue in **Khenyei** (supra), in **Savita Garg** (Supra) also, it was held that:

“9. ...So far as the law with regard to the non-joinder of necessary party under the Code of Civil Procedure, Order 1 Rule 9 and Order 1 Rule 10 of the CPC there also even no suit shall fail because of misjoinder or non-joinder of parties. It can proceed against the persons who are parties before the court. Even the court has the power under Order 1 Rule 10(4) to give direction to implead a person who is a necessary party. Therefore, even if after the direction given by the Commission the doctor concerned and the nursing staff who were looking after the deceased A.K. Garg have not been impleaded as opposite parties it cannot result in dismissal of the original petition as a whole.”

21. I, therefore, find no merit in the above challenge of the appellant. The same is, accordingly, rejected.



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**CONCLUSION:**

22. In view of the above, I find no infirmity in the Impugned Award and the same does not warrant any interference of this Court.

23. The appeal along with the pending application is accordingly dismissed. There shall be no orders as to costs.

24. The statutory amount, if deposited by the appellant, shall be released in its favour along with interest accrued thereon. In case the appellant has not deposited the statutory amount, it shall stand exempted from doing so.

NAVIN CHAWLA, J.

OCTOBER 06, 2023/AS

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