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

Date of Decision: 09.08.2023

+ **MAC.APP. 258/2018 & CM APPL. 9042/2018**

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

SUBHASH & ORS Respondents
Through: **Mr.J.S.Arya, Ms.Komal, Mr.Manender and Mr.Ajay, Advs. for R-1,2,4, 6 & 7.**

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. The present appeal has been filed by the appellant challenging the Award dated 28.11.2017 (hereinafter referred to as the 'Impugned Award') passed by the learned Motor Accidents Claims Tribunal, North-West District, Rohini Courts, Delhi (hereinafter referred to as the 'Tribunal') in MACT Case no.450128/2016.

2. The above Claim Petition was filed by the respondent nos.1 to 7 claiming that on 10.01.2003, at about 08:40 AM, the deceased-late Shri Birpal was crossing the road towards Shakur Pur, J.J. Colony, Delhi, when a scooter, bearing no. DL-1-SE-0268 (hereinafter referred to as the 'Offending Scooter') came from the side of Wazirpur Depot

Signature Not Verified Punjabi Bagh. The Offending Scooter was being driven at a

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fast speed and rashly and negligently in a zig-zag manner. It hit the deceased with great force leading to the deceased suffering grievous injuries. The deceased was taken to Babu Jagjivan Ram Memorial Hospital, Jahangir Puri by the police, from where he was referred to STC on 11.01.2003, where the doctors declared him 'Brought Dead'.

3. The learned Tribunal, by way of the Impugned Award, placing reliance on the registration of the FIR and the Charge-Sheet against respondent no. 8 herein, and the testimony of PW-1- Shri Subhash, son of the deceased, and PW-3- Shri Raju, the alleged eye-witness to the accident, held that by way of preponderance of probability, it stood proved that the deceased met with the accident due to the Offending Scooter being driven in a rash and negligent manner by the respondent no. 8 herein. The learned Tribunal awarded compensation of Rs. 8,61,000/- along with interest @ 9% per annum in favour of the respondent nos. 1 to 7.

4. The learned counsel for the appellant contends that the learned Tribunal has erred in holding that the accident in question, wherein the father of the respondent no.1 lost his life, was caused by the Offending Scooter belonging to the respondent no.9 and driven by the respondent no.8 herein, which was insured with the appellant.

5. The learned counsel for the appellant submits that the fatal accident had taken place on 10.01.2003 at about 8.40 a.m., when the deceased was crossing the road towards Shakurpur, J.J. Colony, Delhi. He submits that, admittedly, the police did not find any eyewitness to the accident at the time of reaching the spot. It was, in fact, one Mr.



Samar Pal on 11.01.2003, that he was an eye-witness to the accident and the same had taken place with one Maruti Van, which, while being driven in a rash and negligent manner, had hit the deceased and also the scooter. Based on this statement, the Investigating Officer also prepared the Site-Plan, which depicted that the accident had taken place due to an unknown Maruti Van.

6. The learned counsel for the appellant submits that almost after a month from the accident, PW-3/Mr.Raju (hereinafter referred to as 'PW-3') presented himself before the police, claiming himself to be the eyewitness to the accident and stating that the accident had taken place with the Offending Scooter hitting the deceased. The learned counsel for the appellant submits that in his cross-examination, PW-3 has admitted that he was not a summoned witness but had been called to depose by the counsel for the claimants. He submits that PW-3 also admitted that the deceased was known to him, as he used to reside in the same locality. PW-3 further stated that in his presence, the police came within 15 minutes of the accident and took the deceased in the PCR Van to the hospital. PW-3 also stated that he did not accompany the deceased and further admitted that after one month from the accident, his statement was recorded by the police in the Police Station, where the son of the deceased took him for identification of the driver of the offending vehicle/scooter. PW-3 stated that he informed the wife of the deceased about the accident immediately after the accident.

7. The learned counsel for the appellant submits that from the above statement of PW-3, it is apparent that PW-3 was planted as an



eye-witness of the accident to somehow show the involvement of the Offending Scooter and the respondent nos.8 and 9 herein in the accident. He submits that PW-3 was not a reliable witness and the learned Tribunal has erred in placing reliance on his testimony to find that the Offending Scooter had caused the accident while being driven in a rash and negligent manner.

8. He submits that, in fact, the respondent no.8/driver also stands acquitted of the offences under Sections 279/304-A of the Indian Penal Code, 1860, vide the order dated 04.09.2012 passed by the learned Metropolitan Magistrate, Rohini Courts, Delhi (hereinafter referred to as the 'Metropolitan Magistrate') in FIR No.15/2003. He submits that in spite of the acquittal of the respondent no.8/driver, the learned Tribunal has held that the accident had taken place by the Offending Scooter being driven by the respondent no.8 in a rash and negligent manner, by placing reliance only on the fact of the registration of the FIR and the charge-sheet, while ignoring that the respondent no.8 already stood acquitted in the criminal case on the date of the judgment of the learned Tribunal.

9. The learned counsel for the appellant further submits that PW-3 in his statement, has clearly mentioned that the deceased was crossing the road at a place where there is no zebra crossing, and, in fact, there was a grill installed at the divider of the road. As per PW3, the deceased was crossing the road through a passage between the grill. He submits that, in fact, the Site-Plan would show that there was no such gap in the said grill, and the deceased was, in fact, jumping over the grill while trying to cross the main road, leading to the fatal



accident. He submits that, therefore, the accident had not occurred due to the scooter being driven in a rash or negligent manner.

10. On the other hand, the learned counsel for the respondent nos.1,2,4,6 and 7 submits that the statement of PW-3 has been rightly relied upon by the learned Tribunal. He submits that PW-3 was the eye-witness to the accident. He submits that merely because the respondent no.8 stood acquitted in the criminal case, would not be sufficient to cast a doubt on the statement of PW-3 inasmuch as the burden of proof in a criminal case is vastly different from the proceedings before the learned Tribunal, which is in the nature of an inquiry.

11. I have considered the submissions made by the learned counsels for the parties.

12. First of all, reliance on the statement of PW-1 by the learned Tribunal to hold that the accident had taken place with the Offending Scooter hitting the deceased, is unsustainable. PW-1, admittedly, was not an eye-witness to the accident. His testimony, therefore, cannot be relied upon to determine whether the accident indeed took place with the Offending Scooter.

13. As far as PW-3 is concerned, he, in his Evidence by way of Affidavit, states that he knew the deceased as he was his neighbour. He states that “someone informed the police” about the accident. He states that it was the PCR van who took the deceased to the hospital. He further states that he came to the house of the deceased to inform his family about the incident. He states that on 12.02.2003, that is, after one month of the date of the accident, he went to the Police



Station to enquire about the progress of the case, when he saw a person standing in the Police Station and he identified the said person as the same who had caused the accident resulting in the death of the deceased. On his statement, the respondent no.8 was arrested. In his cross-examination, recorded by the learned Tribunal on 10.05.2016, he stated as under:

"I am not a summoned witness. I was called to depose by the counsel for the petitioner. The witness has produced his Election I Card and Aadhar Card to show his identity. Original seen and returned. I am Freelancer. I have studied upto 12th class. I was standing at the bus stop near Britannia Factory, Delhi. Volt. There are bus stands on the opposite sides of the road. It is correct that there was no Zebra crossing, subway or the overhead bridge at the place of accident at that time. Volt. The divider on the road was having grills at that time and there was a passage in between the grills and people used to cross through it. I do not know whether it was authorized passage or not. It is wrong to suggest that Maruti Van was the offending vehicle. Volt. It was a scooter. There was not much traffic at that time. There was no known person of mine at the place of accident. I did not call police after accident. I do not know who called police. It is correct that the deceased namely Birbal was known to me as he used to reside in the same locality. It is wrong to suggest that I am deposing falsely in order to favour petitioner as deceased was known to me. Police came within 15 minutes in my presence. PCR took the deceased to hospital. I did not go there. After one month of the incident, my statement was recorded by police in police station. Subhash took me to police station for identification of driver of offending vehicle. I informed the wife of deceased about the accident immediately after the accident. My statement was recorded by other court in criminal case concerning this



accident. It is wrong to suggest that Maruti Van hit the deceased Birbal as well as scooterist Ashish Sharma. It is wrong to suggest that I have falsely identified Ashish to be the offender in this case after one month of the incident. It is wrong to suggest that accident occurred due to the own negligence of deceased."

(Emphasis supplied)

14. A bare perusal of the statement of PW-3 would show that the witness had admitted that the deceased was known to the witness, as he used to reside in the same locality and was his neighbour. In spite of the same, the said witness did not accompany the deceased to the hospital nor gave his statement to the police immediately after the accident, which, according to the witness, came to the spot in his presence after 15 minutes of the accident. The police, on the other hand, recorded that no eye-witness was found at the site of the accident. He did not even give his version of the accident to the police till almost after a month from the accident. Though he states that he informed the wife of the deceased about the accident, even then the family of the deceased did not make any effort to take the witness to the police for his statement to be recorded. This is an unnatural conduct of a person who claims to be known to the deceased and had witnessed the accident. It is also unnatural conduct of the family of the deceased who knows the eye-witness to the accident, however, takes no steps while the police is proceeding on the basis of a hit-and-run case and is searching for the vehicle with which the accident had taken place.



relied upon by the learned Tribunal to hold that the accident had taken place with the Offending Scooter.

16. Even the learned Metropolitan Magistrate, in his order dated 04.09.2012, passed on FIR No. 15/2003, PS: Saraswati Vihar, titled ***State vs. Ashish Sharma***, has refused to believe PW-3 to be an eye-witness to the accident, observing as under:-

“9. As per statement of the IO who was examined as PW-7, he on receipt of DD No. 5 A went to the spot along with Ct. Sudesh As per his deposition no eyewitness was found on the spot. He also deposed that the eyewitnesses Raju and Kalu went to Vigilance Branch of the police stating that they were the eyewitnesses of the incident. PW-3 Raju and PW-4 Kalu Ram have coherently deposed that on 10.01.2003 when they were standing at the bus stop near Britannia Chowk they saw the scooterist who they correctly identified as the accused, hit one person who was crossing the road due to which both, the scooterist and that person fell down on the road. As per the testimony of PW-4 he had informed the police regarding the said accident while calling at 100 number but this fact is not corroborated by PW-3 Raju. Further it has not been mentioned that from where the call to PCR was made, from the mobile phone or from any PCO. No reason has been put forward by the prosecution as why there was so much delay on the part of the IO to find out the witnesses. Why did not the witnesses approach the local police or wait at the site for the police, than approaching the ACP Ashok Vihar for the said purpose. They have also not deposed about the number of the TSR in which as per their testimony the injured were sent by them to hospital. As per statement of PW-5 HC Ranbir Singh the distance between the spot and Shanti Nursing home is about half km. If these two witnesses were so much eager to help the prosecution agency they could have waited on



the spot for the police to arrive or could have accompanied the deceased in the TSR to the hospital. As per the evidence on record, the IO reached the spot within half an hour of the accident and it was not that the said witnesses could not have waited for him. As per the testimonies of PW-3 and PW-4 both the persons i.e. the deceased and the scooterist (Accused) were put by them in a TSR and sent to hospital whereas as per testimony of PW-6 Ct. Sudesh and PW-7 IO SI Samarpal they were taken to BJRM by PGR. The time of the incident deposed by these two witnesses is of 08:30/08:45 pm whereas the accident is said to have taken place at around 08:45 am. No cross examination was conducted by Ld. APP on this aspect. The conduct of the witnesses is not natural and does not inspire confidence of the court them being eyewitness to the incident

In view of the above observations the said PWs being the eyewitness to the accident comes under shadow of doubt.”

17. The learned Tribunal, in reaching the conclusion that the accident had taken place because of the Offending Scooter, also placed reliance on the registration of the FIR and the charge-sheet against the respondent no.8 herein. The relevant observation of the learned Tribunal is reproduced herein below:

“12. That the FIR No. 15/2003, u/s 279/337/304 A of IPC, PS Saraswati Vihar was registered against the R-1 Sh. Ashish Sharma and he was charge sheeted and therefore, these are the sufficient material to prove that the accident took place because of the rash and negligent driving of the vehicle bearing no. DL-1-SE-0268 being driven by R-1 in a rash and negligent driving of the vehicle.”



the charge-sheet can act as a corroborative and vital piece of evidence to show that the accident had taken place in the manner as described therein, however, in the present case, it could not have been so done. Before the Impugned Award of the learned Tribunal, the respondent no.8/driver already stood acquitted of the charges framed against him. This aspect has completely escaped the notice of the learned Tribunal. While it is true that the burden of proof in a criminal case is far more stringent than the inquiry to be conducted by the learned Tribunal, at the same time, the reasons for the acquittal in the criminal case should have been, at the least, taken cognizance of by the learned Tribunal.

19. The learned Metropolitan Magistrate, while acquitting the respondent no.8 herein, apart from observing that PW-3 and PW-4 produced therein as eye-witnesses to the accident could not be believed to be so, has observed as under:

“10. In the cross examination of the IO he admitted recording statement of one Lovleen Jetley which is Ex. PW-7/DA on 11.01.2003 who as per him approached him claiming to be eyewitness of the incident. As per this witness the accident took place by some maruti van which was being driven in a zig zag manner and the deceased had jumped over the divider in order to cross the road and was hit by a maruti van. Though the IO In his cross examination has mentioned that after recording statement of this witness it was revealed that the accident took place due to the negligence of the accused Ashish and not that of the maruti van but as per the site plan point A is shown as the place where unknown Maruti van had hit the deceased and point B is the place where scooter rider had fallen. The site plan is dated 11.01.2003 i.e. the next day of the incident. The prosecution has not been



able to give any explanation as to why the site plan mentions the deceased being hit by Maruti Van whereas as per their story the deceased was hit by a scooterist. In his statement under Section 313 Cr.P.C the accused has also mentioned about this fact that he as well the deceased were hit by one maruti van who fled away from the spot after hitting them. What was the reason for the IO to disbelieve the statement of Lovleen Jaithley who approached him on the very next day stating that he is the eyewitness and to believe PW-3 Raju and PW-4 Kalu who appeared in the picture after unexplained gap of 15 days, remains unanswered.

11. Lastly even otherwise there was no occasion for the deceased to cross the road from the place where as per site plan is shown to have crossing the road. He had climbed the central verge to go to other side of the road which was not having any zebra crossing or otherwise for the said purpose. Vehicles cannot contemplate as anyone can come from anywhere suddenly, it is for the pedestrians also to take sufficient care and precautions to guard themselves from obvious dangers which are inherent on a busy road.

12. Just because an accident has taken place and a person has sustained injuries or expired it does not goes to show that the other person was at fault. Not all accident are caused by the rash or negligent act of the driver of the vehicle. It is possible that he had taken all precaution but still the accident happened due to the victim being negligent or otherwise. One is expected to remain cautious while driving a vehicle but one is not expected to be over cautious. One cannot drive in contemplation that any one from anywhere can just come ahead of the vehicle. Driver is expected to be cautious while approaching an intersection, a pedestrian way or zebra crossing where he can contemplate that



someone might be crossing the way.”

20. In view of the above, I find that the respondent nos.1, 2, 4, 6 and 7 have been unable to prove that the accident in question had taken place due to the Offending Scooter being driven by the respondent no.8 in a rash and negligent manner.

21. Under the Motor Vehicles Act, 1988, compensation to a victim of a motor accident can be awarded in three different situations and the compensation in each of these situations would differ; (i) where the offending vehicle which caused the accident is known, but was not being driven in a rash or negligent manner; (ii) where the offending vehicle which caused the accident is known and was being driven in a rash and negligent manner; and, (iii) where the identity of the offending vehicle which caused the accident could not have been ascertained, that is, it was a hit-and-run accident.

22. In the present case, the respondent nos. 1 to 7 had presented their claim before the learned Tribunal on the basis of the second situation, however, from the evidence on record, it appears that the case was covered by the third situation mentioned hereinabove.

23. In ***Surender Kumar Arora & Anr. v. Manoj Bisla & Ors.*** (2012) 4 SCC 552, the Supreme Court held as under:

“9. Admittedly, the petition filed by the claimants was under Section 166 of the Act and not under Section 163-A of the Act. This is not in dispute. Therefore, it was the entire responsibility of the parents of the deceased to have established that Respondent 1 drew the vehicle in a rash and negligent manner which resulted in the fatal accident. Maybe, in order to help Respondent 1, the claimants had not



taken up that plea before the Tribunal. Therefore, the High Court was justified in sustaining the judgment and order passed by the Tribunal. We make it clear that if for any reason, the claimants had filed the petition under Section 163-A of the Act, then the dicta of this Court in Kaushnuma Begum v. New India Assurance Co. Ltd. (2001) 2 SCC 9 would have come to the assistance of the claimants.

10. *In our view the issue that we have raised for our consideration is squarely covered by the decision of this Court in Oriental Insurance Co. Ltd. v. Meena Variyal (2007) 5 SCC 428. In the said decision the Court stated:*

“27. ... Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.”

24. In the present appeal, the claimants have, in my opinion, failed to prove the first pre-requisite for invoking Section 166 of the Act.

25. The Impugned Award is accordingly set aside. At the same time, it cannot be denied that the deceased had died due to meeting

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with an accident with a motor vehicle. The claimants shall, therefore, be entitled to compensation under Section 161 of the Act as applicable on the date of the accident. The respondent nos.1,2,4,6 and 7 shall be entitled to make a claim thereof in accordance with law. The period between the date of the accident and the making of the above claim shall be excluded from the computation of any period of limitation provided for the same.

26. The present appeal is allowed in the above terms.

27. The amount deposited by the appellant be released to the appellant alongwith interest accrued thereon.

28. The statutory amount deposited by the appellant be also released to the appellant alongwith interest accrued thereon.

29. The pending application also stands disposed of.

NAVIN CHAWLA, J

AUGUST 9, 2023/Arya/AS

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