

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

Date of Reserve: May 26, 2010

Date of Order: July 07, 2010

**MAC APPEAL No. 290 of 2009**

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**07.07.2010**

**RAM SAGAR & ANR**

**.... Appellants**

Through: Dr. Mathew D. Advocate

Versus

**NEW INDIA ASSURANCE CO. LTD. & ORS.**

**... Respondents**

Through: Mr. Kanwal Chaudhary, Advocate for  
R-1

**JUSTICE SHIV NARAYAN DHINGRA**

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether judgment should be reported in Digest?

**JUDGMENT**

1. By this appeal the appellants have assailed an award dated 21<sup>st</sup> April, 2009 whereby the learned Tribunal awarded a compensation of Rs. 5,98,343.00 and held that responsibility of paying this compensation was on the owner of the scooter since there was a breach of terms of insurance policy as the driver, who was son of the owner of the scooter, had no licence to drive the vehicle.

2. The appellants have assailed the award on the ground that the accident had occurred due to sole negligence on the part of deceased. The

deceased was driving the scooter without wearing helmet and without having driving licence. He had hurriedly taken a wrong turn through an illegal cut in middle verge of the road and hit the scooter of appellant no. 2. Due to this act of the deceased, the appellant no. 2 sustained injuries and the scooter also got damaged. There was no negligence on the part of appellant no. 2. The other ground of appeal is that the Tribunal awarded very high amount as compensation to the claimants and the Tribunal failed to appreciate that appellant no. 2 had taken out the scooter without consent of the appellant no. 1, the owner of the scooter. The appellant no. 1 was not at home when appellant no. 2 took the scooter. The Tribunal wrongly relied on testimony of PW-2 and wrongly discarded the testimony of RW3/3. It is also submitted that the Tribunal wrongly held that there was a breach of conditions of insurance policy and therefore owner of the scooter was liable to make payment of the compensation amount.

3. Brief facts relevant for the purpose of deciding this appeal are that one Rahis was going on a two wheeler scooter bearing registration no. DL-6SE-3372 along with a pillion rider Raju. The deceased was coming from Trilokpuri and was going to New Ashok Nagar. When the scooter reached near Dharamshila cancer hospital, the deceased turned his scooter from a cut in the verge of the road to his right and at that time it was hit by scooter no. DL-7SJ-7636 coming from the opposite side. As a result of accident, drivers

of both the scooters fell down on the road. The deceased received injuries on his head. An FIR was registered on the statement of Raju, the pillion rider.

4. A claim for compensation was filed against owner, driver and insurer of the offending scooter i.e. scooter no. DL-7SJ-7636 by wife, two children and parents of the deceased. It is not disputed that the driver of the offending scooter was not having driving licence. It is not known whether the deceased was having a driving licence or not.

5. A defence was taken before the Tribunal that accident had not happened due to the negligence of the driver of scooter no. DL-7SJ-7636 but due to the negligence of the deceased. The deceased had taken right turn from an unauthorized cut in the road in order to proceed to a passage in the unmetaled area of the road, leading to another road. The deceased was actually responsible for the accident. The driver of the offending scooter no. DL-7SJ-7636 was coming on right direction, at normal speed but since the scooter of deceased had suddenly come in front of the offending scooter, the offending scooter got no time to prevent the collision of his scooter with the scooter of the deceased.

6. Both the sides had produced evidence about the happening of accident and the learned Tribunal observed that since Respondent No. 2 (driver of the offending scooter) had violated law and had no driving licence

to drive the scooter, he was solely responsible for causing the accident and the accident took place due to his negligence.

7. The appellant Vimal Dubey @ Lovely appeared before the trial court as a witness himself. He was the driver of the offending scooter. In his examination in chief, he stated that he was going from his home in New Ashok Nagar to Kalyanpuri and after reaching T point i.e. end point of the road leading to New Ashok Nagar, near Dharamshila Cancer hospital, he took turn to his left side to cross the *nala* bridge. The deceased was coming from Trilok puri side on two wheeler scooter and after crossing the bridge; he took turn towards *kacha* path through an unauthorized cut and hit his scooter. After collision, both the scooters fell down on the road and the drivers and pillion rider received injuries. Deceased Rahis did not observe traffic rules. His scooter was not having head light and he was driving the scooter without wearing helmet and the accident took place due to his negligence. No suggestion was given during the cross examination of this witness that there was no unauthorized cut in the road or that the deceased had not taken a turn from this unauthorized cut towards kacha path. The only suggestion given was that the witness (driver of the offending scooter) suddenly changed his lane from first to third and that was the reason of his negligence & accident.

8. The claimants had examined Raju, the pillion rider of the scooter of deceased as a witness. In his examination in chief, he stated that Rahis was driving his two wheeler scooter DL-6SE-3372 at a low speed and when scooter reached near Dharamshila Cancer hospital and was turning towards right side, a two wheeler scooter bearing no. DI 7 SJ 7636 came from opposite side i.e. from the side of New Ashok Nagar at a fast speed of 80 k.m. per hour, being driven by appellant no. 2 and hit the scooter of the deceased with the result that both fell down. In cross examination he stated that Rahis was his brother in relation and was going from Trilokpuri to New Ashok Nagar to meet some relative. He admitted that there was a canal and drainage and there was a road and there was a bridge near the place of accident. He stated that speed of scooter of Rahis was around 40 k.m. per hour. He deposed that he could not say what could be the speed of the offending scooter. He stated that he and deceased were wearing helmets. He admitted that there was a circle and traffic lights nearby the place where right turn was taken by the deceased. He denied that deceased took turn towards kacha road without giving signal.

9. Ex. P2 is the copy of police challan filed in the criminal case. This challan contains a site plan showing the place of accident and the point of accident. A perusal of the site plan would show that the accident had taken place just opposite the cut as stated by the appellant witnesses. The site plan

also shows that the road was starting from a nearby T point as deposed by Vimal Dubey, the driver of the offending scooter. The point of impact is shown just near the cut in the kacha road after crossing the road. This circumstance fortifies the fact that the scooter of deceased, after turning from the cut in the road, did not take turn in the flow of the vehicles towards right side of the road but the scooter went towards *kacha* side where it met with the accident. As already observed, it is not denied that this cut was an unauthorized cut. A person taking turn from an unauthorized cut has to be more careful and must stop at the cut and watch if any vehicle was coming from the other side. If a person on scooter takes a turn suddenly and tries to cross the road from unauthorized cut to reach the other end of the road, he behaves in a negligent manner and does not perform his duty to be vigil before crossing the road on scooter. No doubt, the driver of the offending vehicle was not having driving licence but that does not mean that the deceased had no duty to follow the rules & even if he was negligent the entire responsibility of the accident has to be thrown on the person not having a driving licence. The accident could have taken place with any vehicle being driven by a licensed driver since the manner in which the road was being crossed from an unauthorized cut to reach kacha path, without caring for incoming vehicles, it was dangerous & prone to accident.

10. I also consider that speed of the offending scooter might also have been fast; otherwise the offending vehicle would have seen the deceased's vehicle crossing the road. The accident had taken place on 6.6.2006 around 7.45 pm. It is not that dark in the month of June that you cannot see a vehicle from distance even if there was no head light or street light. Had the driver of offending vehicle been vigilant and careful in driving, the accident could have been avoided. The accident therefore seemed to have taken place due to contributory negligence. The deceased and the driver of the offending vehicle, both contributed to this accident equally. I, therefore, come to conclusion that Tribunal's observation that the driver of offending vehicle was solely responsible for accident; was not tenable and both of them were equally responsible for accident in the ratio of 50:50.

11. The other ground for assailing the order of Tribunal is about the liability fixed by the Tribunal for payment of compensation by the owner. The Tribunal had relied upon *Sardari & Ors. vs. Sushil Kumar & Ors.* III (2008) SLT 605 where Supreme Court held as under:

*“Although, in terms of a contract of insurance, which is in the realm of private law domain having regard to the object for which Sections 147 and 149 of the Act had been enacted, the social justice doctrine as envisaged in the preamble of the Constitution of India has been given due importance. The Act, however, itself provides for the cases where the Insurance Company can avoid its liability. Avoidance of such liability would largely depend upon violation of the conditions of contract of insurance. Where the breach of conditions of contract is ex facie apparent from the records,*

*the Court will not fasten the liability on the insurance Company. In certain situations, however, the Court while fastening the liability on the owner of the vehicle may direct the insurance Company to pay to the claimants the awarded amount with liberty to it to recover the same from the owner.”*

12. The Tribunal also relied upon *National Insurance Co. Ltd. Co. Ltd. vs. Swaran Singh & Ors.* (2004) 3 SCC 297 wherein Supreme Court observed as under:

*“We have analysed the relevant provisions of the said Act in terms whereof a motor vehicle must be driven by a person having a driving licence. The owner of a motor vehicle in terms of Section 5 of the Act has a responsibility to see that no vehicle is driven except by a person who does not satisfy the provisions of Section 3 or 4 of the Act. In a case, therefore, where the driver of the vehicle, admittedly, did not hold any licence and the same was allowed consciously to be driven by the owner of the vehicle by such person, the insurer is entitled to succeed in its defence and avoid liability. The matter, however, may be different where a disputed question of fact arises as to whether the driver had a valid licence or where the owner of the vehicle committed a breach of the terms of the contract of insurance as also the provisions of the Act by consciously allowing any person to drive a vehicle who did not have a valid driving licence. In a given case, the driver of the vehicle may not have any hand in it at all e.g. a case where an accident takes place owing to a mechanical fault or vis major.”*

13. I agree that the conclusion arrived at by the Tribunal that where it is established beyond doubt that the driver of the offending vehicle had no licence at the time of accident, it will be responsibility of the owner to pay the damages and not the responsibility of the insurance company. It was one of the prime conditions of the insurance policy that insured vehicle shall

be driven by a person having valid driving licence and in case it was not driven by a person having valid licence, it would amount to breach of terms and conditions of the insurance policy and the insurer will not be liable to pay the compensation. In view of the fact that insured in this case was father and the driver of the vehicle was his son, who had no driving licence, a clear breach of terms of the policy stood established. The plea taken by the father that scooter was taken out without his permission is not tenable. The manner in which the scooter was being driven on a main road of Delhi shows that son was driving his (father's) scooter with his knowledge & consent for sufficient long time and it was not his first trial drive on the scooter.

14. I find that compensation for loss of dependency has been calculated by the Tribunal taking into consideration right parameters. The Tribunal considered the income of the deceased as per Minimum Wages Act, of an unskilled person. The Tribunal deducted 1/4<sup>th</sup> towards own expenses looking into the fact that the deceased left behind a wife, two children and parents as dependents. The Tribunal applied a multiplier of 17 as the age of deceased was 30 years on the date of accident. However, the Tribunal awarded Rs. 50,000/- for loss of consortium which is not in conformity with the decision of Supreme Court in *Sarla Varma & Ors. vs. Delhi Transport Corporation & Anr.*; (2009) 6 SCC 121 . The Tribunal awarded another Rs. 50,000/- towards loss of Estate, Love & Affection. I consider that amount

of Rs. 10,000/- for loss of consortium for wife, Rs. 10,000/- for loss of Estate and Rs. 10,000/- for loss of Love & Affection would be just amount. I, therefore, modify the award & the total compensation in this case should have been Rs. 4,94,343/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- = Rs. 5,24,343/-

15. The appellants would be liable to pay 50% of this compensation because the accident had taken place due to contributory negligence. The award of the Tribunal is therefore modified to the above extent and it is held that the appellant would be liable to pay a sum of Rs. 2,62,172/- to the claimants with simple interest @ 7% p.a. from the date of filing claim till recovery. The appeal of the appellants is allowed to the above extent.

**July 07, 2010**  
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**SHIV NARAYAN DHINGRA, J.**