Before Avneesh Jhingan, J.

M/S GRAPHISADS PVT. LIMITED—*Petitioner*

versus

AKHTAR AND ANOTHER—*Respondent*

FAO No. 6893 of 2011

May 05, 2018

Motor Vehicles Act, 1988 — S. 166 — Injury case — Rash and negligent driving — Onus of proof — In motor accident claims, the issue has to be decided on principles of preponderance — Claimants are to prove involvement and rash and negligent driving of offending vehicle — Tribunal awarded Rs.4,65,000/- alongwith 6% per annum interest — Driver and owner of offending vehicle were held jointly and severally liable to pay compensation — Statement of claimant not supported by MLR — History as mentioned in MLR; while crossing the road claimant came in between two four-wheelers and got injured on back and lower abdomen — As per statement of claimant he was hit by the offending vehicle, because of the impact he fell down and suffered injuries — Deposition of treating doctor brushed aside by Tribunal — Doctor is expert of his field — From nature of injuries he could rule out the possibility of injury being suffered because of falling from height — FIR registered on statement of the claimant, but he never deposed in criminal case to support his version — Driver of offending vehicle and eye-witness, failed to depose before the Tribunal — Non-deposition of claimant in criminal case and of the driver of the offending vehicle before the Tribunal does not make it a case of merely adverse inference — Rather, pointer towards the fact that both conveniently helped each other by avoiding their presence in the appropriate proceedings — Finding cannot be sustained that claimant discharged onus on him to prove that he suffered injuries in an accident involving the offending vehicle — Appeal by owner allowed - Impugned award set aside.

Held, that the onus to prove involvement and rash and negligent driving of the offending vehicle is on the claimants. No doubt the onus in MACT proceedings is not as heavy as to be discharged in the criminal proceedings. In motor accident claims the issue is to be decided on principles of preponderance. In the case in hand, as per the claim petition, apart from claimant two more persons were there at the time of accident i.e. Farookh and Salim. Salim was not a stranger to

the claimant. They were working as drivers with the appellant Company. They belonged to same village.

(Para 7)

Further held, that as per the statement of the claimant he was hit by the offending vehicle and as a result of the impact, he fell down and suffered injuries. The said fact is not supported by the contents of the MLR. The history as mentioned in the MLR states that it was a history of road accident. While crossing the road he came in between two four-wheelers and got injured on back and lower abdomen. Meaning thereby, as per the detail given in the hospital, the claimant had suffered injuries while crossing the road when he came in between two four-wheelers and not because of being hit by offending vehicle.

(Para 11)

Further held, that the Tribunal brushed aside the said statement by stating that when Dr. Himanshu Garg was not present at the time of accident, then how could he say that injured was sandwiched between two trucks. The deposition of Doctor would be as per history mentioned in the MLR. Moreover he is expert of his field and from nature of injuries he could rule out the possibility of injury being suffered because of falling from height. Whereas as per the statement of the claimant, he was hit by the offending vehicle because of the impact he fell down and suffered injuries.

(Para 12)

Further held, that the contents of FIR loose significance in the above back drop. FIR was recorded on statement of Akhtar but he never deposed either in criminal case to support his version in FIR or before the Tribunal. The Tribunal while deciding the issue in favour of claimant held that adverse inference would be drawn against Salim as he failed to depose. Non-deposition of Salim in the claim proceedings and non-deposition of Akhtar in the criminal proceedings does not make a case merely of adverse inference rather it is pointer towards the fact that both conveniently helped each other by avoiding their presence in the appropriate proceedings. In such circumstance, it cannot be sustained that Akhtar discharged onus on him to prove that he suffered injuries in an accident involving the offending vehicle. The award dated 23.07.2011 is set aside and the appeal is allowed.

(Paras 16, 17 and 18)

Vipul Aggarwal, Advocate, *for the appellant.*

Sarfraj Hussain, Advocate, for respondent No.1.

AVNEESH JHINGAN, J. (oral)

(1) The owner of vehicle bearing registration No.DL-1LB-9301 is in appeal against the award dated 23.07.2011 passed by the Motor Accident Claims Tribunal, Nuh (for short 'the Tribunal').

(2) A claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short 'the Act') was filed by Akhtar son of Fateh Mohd. The Tribunal held that Akhtar suffered injuries in an accident involving vehicle bearing registration No.DL-1LB-9301 (for short 'the offending vehicle'). It was further held that the accident occurred due to rash and negligent driving of Salim-driver of the offending vehicle. The compensation of Rs.4,65,000/- was awarded alongwith interest at the rate of 6% per annum. The driver and owner of the offending vehicle were jointly and severally held liable to pay the compensation.

(3) The present appeal has been filed by the owner of the offending vehicle, being aggrieved of the award of the Tribunal holding that Akhtar suffered injuries because of involvement of the offending vehicle. Respondent No.1 in appeal is the claimant before the Tribunal and respondent No.2 is the driver of the offending vehicle.

(4) The facts as pleaded in the claim petition are that Akhtar was working as a driver with M/s Graphicads Private Limited. On 03.04.2008 he had parked vehicle bearing registration No.DL-1LE-9253 for display on MG Road, Marble Market, Nathupur. The offending vehicle was also parked there and its driver was Salim-respondent No.2. At about 7:30 a.m. Akhtar and Farookh Khan (the alleged eye witness) were standing behind the vehicles and were talking to each other. Salim, without blowing horn, backed the offending vehicle rashly and negligently. Akhtar tried to save himself but was hit by the offending vehicle, as a result of the impact, he fell down and received serious injuries. He was taken to Neelkanth Hospital by Farookh. On notice, in the written statement filed, Salim denied involvement of offending vehicle and pleaded that he was falsely being implicated. Written statement was also filed by Graphicads Private Limited. They admitted the ownership of the offending vehicle but denied the factum of involvement of the offending vehicle in the accident. Before the Tribunal, the claimant himself appeared as PW3 and tendered his affidavit as Ex.PW3/A. He reiterated the pleadings made in the claim petition. Constable Sher Singh deposed to prove FIR Ex.P1 which was registered at Police Station DLF, Phase-II, Gurgaon, on 06.04.2008. Mukesh Kumar Ahlmad in the Court of Judicial Magistrate Ist Class,Gurgaon, was examined as PW4 as Salim was

facing trial in that Court for causing accident and charges were framed against him. Doctor Himanshu Garg, PW2, deposed to prove the injuries. The Tribunal considering the evidence held that the offending vehicle was involved in the accident and accident was caused due to rash and negligent driving of the offending vehicle.

(5) Learned counsel for the appellant contends that the Tribunal erred in holding that the offending vehicle was involved in the accident. The argument is that the claimant failed to discharge the onus as casted upon him under Section 166 of the Act.

(6) The contention raised deserves acceptance for the reasons mentioned below.

(7) The onus to prove involvement and rash and negligent driving of the offending vehicle is on the claimants. No doubt the onus in MACT proceedings is not as heavy as to be discharged in the criminal proceedings. In motor accident claims the issue is to be decided on principles of preponderance. In the case in hand, as per the claim petition, apart from claimant two more persons were there at the time of accident i.e. Farookh and Salim. Salim was not a stranger to the claimant. They were working as drivers with the appellant Company. They belonged to same village. There is a dispute whether they were related to each other or not but the claimant even in his cross-examination admitted that Salim belonged to same village.

(8) At the back of MLR, it has been stated by Salim and Farookh that they do not want that a police case to be registered. Both have appended their signatures and their mobile numbers have also been noted. At the signatures of Salim he has been mentioned as nephew (Bathija) of Akhtar. Though there is nothing on record to prove their relationship yet they were not strangers.

(9) Inspite of this, in his written statement filed, he denied his rash and negligent driving and involvement of the offending vehicle. Not only this, he never stepped into the witness box.

(10) As per the statement of the claimant, he was taken to the hospital by Akhtar who was the alleged eye witness to the accident. The fact is duly supported by the contents of medico-legal report (MLR) which states that the injured was brought by Farookh (cousin). For the reasons best known, Farookh was also not examined by the claimant. Two best witnesses available had not come forth.

(11) As per the statement of the claimant he was hit by the

offending vehicle and as a result of the impact, he fell down and suffered injuries. The said fact is not supported by the contents of the MLR. The history as mentioned in the MLR states that it was a history of road accident. While crossing the road he came in between two four-wheelers and got injured on back and lower abdomen. Meaning thereby, as per the detail given in the hospital, the claimant had suffered injuries while crossing the road when he came in between two four-wheelers and not because of being hit by offending vehicle.

(12) At this stage, the deposition of Dr. Himanshu Garg-PW2 assume importance. In his statement it is stated that the claimant was sandwiched between two vehicles and sustained multiple fracture of pelvis, transverse process of L3 and L4 vertebrae. Further, in his cross-examination, Dr. Himanshu Garg stated that the possibility of causing such injury by falling from height is not there. The Tribunal brushed aside the said statement by stating that when Dr. Himanshu Garg was not present at the time of accident, then how could he say that injured was sandwiched between two trucks. The deposition of Doctor would be as per history mentioned in the MLR. Moreover he is expert of his field and from nature of injuries he could rule out the possibility of injury being suffered because of falling from height. Whereas as per the statement of the claimant, he was hit by the offending vehicle because of the impact he fell down and suffered injuries.

(13) The Tribunal while deciding this issue has placed heavy reliance on the fact that Salim was facing trial for causing accident and he had not made any complaint regarding his implication by the police. According to the Tribunal it meant that he was satisfied with the investigation. The issue does not appear to be that straight forward.

(14) Learned counsel for the appellant has produced the orders of the Judicial Magistrate Ist Class, Gurgaon dated 07.06.2014. The same is quoted below:

> "No PW is present. Sufficient opportunities have been availed by the prosecution, but prosecution has failed to conclude its evidence. Hence, prosecution evidence is closed by court order.
>
> To come upon 1.7.2014 for recording statement of accused u/s 313 Cr.P.C."

(15) The order dated 01.07.2014 passed by the Judicial Magistrate Ist Class, Gurgaon, was also produced in which Salim was acquitted while giving benefit of reasonable doubt. He was acquitted as

the claimant/injured i.e. Akhtar never deposed before the criminal Court. The claimant and respondent No.2 were from the same village and employed in the same Company. It is strange to be a co-incidence that respondent No.2 chooses not to step into the witness box before the Tribunal and claimant conveniently avoid his witness in the criminal proceedings. It was not a case where Akhtar was not aware about the criminal proceedings. In his cross- examination, he states that "FIR No. 89 of 2008 is continuing in the Court at Gurgaon. I was called in the aforesaid case at Gurgaon about I'm months back. I was called for giving my evidence in the case, but I do not remember month and date. The name of Hon'ble Judge might be Narinder Kumar."

(16) The contents of FIR loose significance in the above back drop. FIR was recorded on statement of Akhtar but he never deposed either in criminal case to support his version in FIR or before the Tribunal.

(17) The Tribunal while deciding the issue in favour of claimant held that adverse inference would be drawn against Salim as he failed to depose. Non-deposition of Salim in the claim proceedings and non-deposition of Akhtar in the criminal proceedings does not make a case merely of adverse inference rather it is pointer towards the fact that both conveniently helped each other by avoiding their presence in the appropriate proceedings.

(18) In such circumstance, it cannot be sustained that Akhtar discharged onus on him to prove that he suffered injuries in an accident involving the offending vehicle.

(19) The award dated 23.07.2011 is set aside and the appeal is allowed.

V.Suri