

REPORTED

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

+ MAC.APP. No. 155/2005

ORIENTAL INSURANCE CO. LTD. Appellant
Through: Mr. L.K. Tyagi, Advocate.

versus

SMT. MADHU & ORS. Respondents
Through: Mr.M.M. Singh, Advocate, for
the respondents no.1 to 3.

% Date of Reserve : November 22, 2010
Date of Decision : December 6, 2010

CORAM:
HON'BLE MS. JUSTICE REVA KHETRAPAL

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?

J U D G M E N T

: REVA KHETRAPAL, J.

The present appeal is directed against the award dated 18th December, 2004 passed by the Motor Accident Claims Tribunal in Claim Petition No. 69/2004 whereby the Tribunal awarded a sum of ₹ 4,80,000/- along with interest @ 5% per annum from the date of the filing of the petition till realization, with a direction to the appellant to pay the entire award amount within one month. The appellant was, however, held entitled to recover the award amount from the respondents no.4 and 5 herein (the respondents no.1 and 2 in the Claim Petition).

2. The facts giving rise to the claim before the Motor Accident Claims Tribunal were that on 25th January, 2003 at about 10.00 p.m., one Rishi Pal was going on his motorcycle bearing No. HR-51-1742 with his daughter Aarti. When he reached near Sector 11, Rohini, Delhi, a scooter bearing No. DL-8S-2478 driven by the respondent no.4 herein in a rash and negligent manner came from the opposite side and hit the motorcycle. The result of the head-on collision was

that Rishi Pal (hereinafter referred to as ‘the deceased’) suffered fatal injuries. The claimants, being his widow and two minor daughters allege that the accident had taken place due to the negligent driving of the two-wheeler scooter by the respondent no.4 Manish Kumar.

3. The respondent driver Shri Manish Kumar and owner Shri Mahinder Lal Arora of the offending scooter (the respondents No.4 and 5 herein) did not appear before the Tribunal despite service and were proceeded *ex parte*. The respondent no.6 herein, Shri Rambir Singh, the owner of the motorcycle No. HR-51E-1742, which was being driven by the deceased at the time of accident was also proceeded *ex parte* by the Tribunal. The appellant insurance company, however, contested the case by filing a written statement wherein it was specifically pleaded that the offending vehicle, the scooter No. DL-8SD-2478 was not insured with the appellant Insurance Company and as such the appellant insurance company was not liable.

4. The learned Motor Accident Claims Tribunal, after framing the issues and affording the parties opportunity to adduce evidence thereon, on the aspect of negligence concluded as under: -

“14. In the present case, the testimony of PW2 (Ishwar Singh, the eye witness) clearly brings forth that the motor cyclist had applied sudden brakes and the scooterist who was coming from the opposite side had hit the motor cycle. It is, thus, evident that in fact, both the motor cyclist and the scooterist were negligent in driving their respective vehicles and both have contributed equally in causing the accident.”

It further held: -

“16. It has already been held in Issue no. 1 that the scooterist who is the respondent no.1 had contributed in negligence which resulted in accident and thus, he is principally liable to pay the compensation. The said scooter was owned by the respondent no.2, under whose control and supervision, the scooter was being driven by the respondent no.1 and thus, respondent no.2 is vicariously liable to pay the compensation. The respondent no.4 is admittedly the owner of the motorcycle which was being driven by the deceased at the time of accident and who had also contributed in the negligence. The said motorcycle was insured with the respondent no.3 who is also liable to pay the compensation. The liability of all the respondents is thus, held to be joint and several, though the respondent

no.1 and 2 and the respondents no.3 & 4 are liable to share the responsibility equally.”

5. On the quantum of compensation, the learned Motor Accident Claims Tribunal, after perusal of the evidence on record, came to the conclusion that the respondents no.1, 2 and 3 (who were the claimants in the claim petition) were entitled to the sum of ₹ 9,30,000/- towards loss of dependency and a further sum of ₹ 25,000/- towards loss of love and affection and loss of consortium. With regard to the apportionment of the liability to pay the aforesaid amount, the Tribunal observed: -

“26. The total compensation which is thus, calculated comes to ₹ 9,55,000/-. However, the deceased himself had contributed towards negligence, he is entitled to half of the compensation. Thus, the total compensation payable to the petitioner is in the sum of ₹ 4,77,500/- which is rounded off to ₹ 4,80,000/- alongwith interest @ 5% p.a. from the date of filing of the petition till the date of realization on the said amount.

28. Since this is a case of contributory negligence involving two vehicles and the liability to pay compensation is joint and several. The respondent no.3 is directed to pay the entire compensation amount to the petitioners within one month, though, it shall be entitled to recover

50% from the other respondents No.1 and 2 as per law.”

6. Aggrieved by the aforesaid direction of the Tribunal, the appellant has preferred the present appeal on the ground that the liability of the respondents no.4 and 5, viz., the driver and owner of the two-wheeler scooter which was not insured could not be fastened upon the appellant, which was the insurer of the motorcycle owned by the respondent no.6 and driven by the deceased Rishi Pal at the time of the accident.

7. In the above context, Mr. L.K. Tyagi, the learned counsel for the appellant heavily relied upon the judgment of the Supreme Court in the case of *Tamil Nadu State Transport Corporation, Tanjore vs. Natarajan and Ors. (2003) 6 SCC 137*. In the said case the driver under the appellant-Corporation while driving a bus of the Corporation collided against a private bus coming from the opposite direction, resulting in fracture of his right leg which had to be ultimately amputated. The Motor Accident Claims Tribunal on his claim petition found contributory negligence on the part of the drivers

of both the buses and apportioned their liability equally. A Single judge of the Madras High Court upheld that award. In the Letters Patent Appeal before a Division Bench of the High Court, however, the Division Bench directed the compensation awarded to be borne equally by the insurer of the private bus and the Corporation. Aggrieved therefrom, the Corporation filed a Special Leave Petition before the Supreme Court. The Supreme Court in paragraph 9 of its judgment made the following pertinent observations: -

“9. From the facts of the case and nature of the claim stated above, we find absolutely no justification in law for the Division Bench of the Madras High Court in its impugned order imposing liability to the extent of 50% on the appellant/Corporation. The Division Bench of the High Court completely over-looked that the claimant himself was driver of the Corporation bus and was found negligent to the extent of 50% for causing accident. In view of the above finding of contributory negligence on the part of the claimant as driver of the Corporation bus, the Corporation as an employer cannot be held to be vicariously liable for the negligence of the claimant himself. The claim petition did not make the Corporation a party to the claim obviously because the claimant exercised option of approaching the Claims Tribunal under the Motor Vehicles Act against the owner and insurer of the private bus. He did not file any

claim under the Workmen Compensation Act against the employer. Since the Corporation was not at fault and the accident was caused because of the contributory negligence of the drivers of both the buses, the Corporation could not be held liable under the provision of Motor Vehicles Act. It was not a claim based on “no fault liability”. It was a claim petition filed by the claimant against the owner and insurer of the private bus. The claimant is also represented before us and on his behalf it is stated that he has been given compassionate appointment on suitable alternative job and he never desired to obtain any other compensation from his employer. The Division Bench of the High court therefore committed a serious error in apportioning and fastening 50% liability of compensation on the appellant Corporation. This part of the award therefore deserves to be set aside. The liability of the respondent/insurance company as insurer of private bus is found to be only to the extent of 50% of the total compensation determined.”

8. Mr. M.M. Singh, the learned counsel appearing for the respondents no.1, 2 and 3 (the claimants in the claim petition) sought to rebut the contentions of the learned counsel for the appellants by relying upon the three-Judge bench decision of the Supreme Court in the case of *National Insurance Co. Ltd. vs. Baljit Kaur and Ors. (2004) 2 SCC 1*. He pointed out that in the said case the Supreme

Court while directing the appellant-insurance company, to satisfy the award amount in favour of the claimants, gave to it the right to recover the same from the owner of the vehicle. In order to facilitate the recovery, the Supreme Court clarified that for the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject matter of determination before the Tribunal and the issue had been decided against the owner and in favour of the insurer.

9. The aforesaid reliance placed by the learned counsel for the respondents no.1 to 3 on the judgment of the Hon'ble Supreme Court in *Baljit Kaur's case* (supra), in my opinion, is entirely misplaced. The Court in the said case was dealing with the question as to whether an insurance policy in respect of a goods vehicle covered even gratuitous passengers. Examining the effect of the 1994 amendment on Section 147, the Supreme Court observed that inspite of the amendment of 1994, the effect of the provisions contained in Section 147 of the Motor Vehicles Act, 1988, with respect to persons other

than the owner of the goods or his authorized representatives remains the same. Therefore, instead of and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. In this background, the Court observed that since the law was not clear so long, the legal position clarified would have prospective effect; therefore, the interest of justice would be subserved if the appellant-Insurance Company was directed to satisfy the award amount in favour of the claimants and recover the same from the owner of the vehicle subsequent thereto. The judgment of the Supreme Court in the said case is in consequence of no assistance to the claimants.

10. The facts in *Natarajan's case* (supra), on the other hand, squarely fit the facts in the instant case and the law laid down therein is, therefore, apposite. It can thus safely be said that the Tribunal erred in fastening the liability of 50% of the compensation amount on the appellant-Insurance Company. In view of the finding rendered by the Tribunal of contributory negligence of the deceased in driving his motor cycle to the extent of 50% as the respondents no. 4 and 5 alone could have held liable for payment of the remaining 50% of the

compensation amount, in view of the fact that the scooter of which the respondents No.4 and 5 were the driver and owner was not insured.

11. I am fortified in coming to the aforesaid conclusion from the decision of the Supreme Court rendered in *Ningamma & Anr. vs. United India Insurance Co. Ltd. 2009 (8) SCALE 244*. In the said case the question which fell for consideration was as to whether the legal representatives of a person, who was driving a motor vehicle after borrowing it from the real owner, who meets with an accident without involving any other vehicle, would be entitled to compensation under Section 163A of the Motor Vehicles Act or any other provision of law, and also whether the insurer who issued the insurance policy would be legally bound to indemnify the deceased or his legal representatives. It was forcefully argued in the said case that the claimants were not third parties and therefore, were not entitled to claim any benefit under Section 163A of the Act. While referring to the case of the *Oriental Insurance Co. Ltd. vs. Rajni Devi (2008) 5*

SCC 736 and New India Assurance Co. Ltd. vs. Sadanand Mukhi and Ors. (2009) 2 SCC 417, the Supreme Court held as under: -

“18. In the case of *Oriental Insurance Company Ltd. v. Rajni Devi and Ors. (2008) 5 SCC 736*, wherein one of us, namely, Hon'ble Justice S.B. Sinha is a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof. It was held in the said decision that Section 163A of the MVA cannot be said to have any application in respect of an accident wherein the owner of the motor vehicle himself is involved. The decision further held that the question is no longer res integra. The liability under Section 163A of the MVA is on the owner of the vehicle. So a person cannot be both, a claimant as also a recipient, with respect to claim. Therefore, the heirs of the deceased could not have maintained a claim in terms of Section 163A of the MVA. In our considered opinion, the ratio of the aforesaid decision is clearly applicable to the facts of the present case. In the present case, the deceased was not the owner of the motorbike in question. He borrowed the said motorbike from its real owner. The deceased cannot be held to be employee of the owner of the motorbike although

he was authorised to drive the said vehicle by its owner, and therefore, he would step into the shoes of the owner of the motorbike.

19. We have already extracted Section 163A of the MVA hereinbefore. A bare perusal of the said provision would make it explicitly clear that persons like the deceased in the present case would step into the shoes of the owner of the vehicle. In a case wherein the victim died or where he was permanently disabled due to an accident arising out of the aforesaid motor vehicle in that event the liability to make payment of the compensation is on the insurance company or the owner, as the case may be as provided under Section 163A. But if it is proved that the driver is the owner of the motor vehicle, in that case the owner could not himself be a recipient of compensation as the liability to pay the same is on him. This proposition is absolutely clear on a reading of Section 163A of the MVA. Accordingly, the legal representatives of the deceased who have stepped into the shoes of the owner of the motor vehicle could not have claimed compensation under Section 163A of the MVA.”

12. The Supreme Court in the aforesaid case also examined the issue as to whether the claim could be considered under the provisions of Section 166 of the Motor Vehicles Act and held that when such a claim is made by the legal representatives of the

deceased, it has to be proved that the deceased was not himself responsible for the accident by his rash and negligent driving. It would also be necessary to prove that the deceased would be covered under the policy so as to make the insurance company liable to make the payment to the heirs.

13. In this case it stands proved that the deceased was himself responsible for the accident by his rash and negligent driving and the learned Tribunal has held the deceased guilty of contributory negligence and hence entitled to receive only 50% of the compensation otherwise due to him. The appellant cannot be held liable for the rashness and negligence of the deceased in driving the motor cycle insured with the appellant. In so far as the other vehicle is concerned, viz., the scooter, the appellant not being the insurer of the said scooter cannot be roped in to pay the award amount on behalf of the owner and driver of the same. Thus, there does not appear to be any justification in law for the Tribunal fastening any liability on the appellant.

14. Resultantly, the direction given by the Tribunal to the respondent no.3 to make the payment of the compensation amount in the first instance and to recover the same from the respondents no.4 and 5, cannot be sustained and is set aside. The rest of the award is upheld with the modification that the respondents no.4 and 5 shall pay the compensation amount to the petitioners in terms of the award within one month from today.

15. The appeal stands disposed of accordingly.

REVA KHETRAPAL
(JUDGE)

December 6, 2010

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