

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

Date of Decision: 1st November, 2012

+ **MAC.APP. 869/2010**

ORIENTAL INSURANCE CO. LTD. Appellant
Through: Mr.Pradeep Gaur, Advocate

versus

NIRMALA & ORS. Respondents
Through: Mr.S.K.Pandey, Adv for R- 1 and 2
Mr.S.C. Phogat, Adv for R- 3 and 4

+ **MAC.APP. 1151/2012**

NIRMALA & ANR Appellants
Through: Mr.S.K.Pandey, Adv

versus

ORIENTAL INSURANCE CO. LTD & ORS. Respondents
Through: Mr.Pradeep Gaur, Advocate

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The Cross-Objections filed by Respondents No.1 and 2 be registered as MAC APP. No. 1151/2012.
2. These two Appeals arise out of a judgment dated 04.10.2010 whereby a compensation of Rs.3,75,000/- was awarded in favour of Respondents No.1 and 2 for the death of a minor Master Jeetu in a motor vehicle

accident which occurred on 11.5.2007.

3. For the sake of convenience, the Appellant in MAC APP No.869/2010 shall be referred as the Insurance Company and the Cross-Objectionist/Appellants in MAC APP No. 1151/2012 shall be referred as the Claimants.
4. As per the case set up by the Claimants, on 11.5.2007 at about 1:40 p.m., Master Jeetu was paddling a bicycle when he was hit by a tractor No.HR-10-H-6260 which was being driven by Respondent No.3 in a rash and negligent manner. Master Jeetu succumbed to the injuries.
5. On appreciation of the proceedings, the Claims Tribunal found that the accident was caused on account of rash and negligent driving of the tractor by Respondent No.3. The Claims Tribunal further held that Master Jeetu also contributed to the accident as he being a child of nine years could not handle the cycle having the height of 22 inches. Thus, the Claims Tribunal held that the deceased also contributed to the accident to the extent of 50% and reduced the compensation by 50%.
6. The Appellant's plea of breach of the terms and conditions of policy that the tractor could be used only for agricultural purposes was also rejected by the Claims Tribunal.
7. It is urged by the learned counsel for the Appellant Insurance Company that the tractor was covered by a Kisan Package Policy and thus the tractor could be used only for agricultural purposes. The accident was caused while the tractor was being plied on the road and the Appellant Insurance Company was not liable as there was breach of the terms and conditions of the policy. It is further argued that the trolley which was

attached with the tractor at the time of accident, in fact, caused the accident as is evident from the FIR No.238/2007 registered at PS Bawana lodged by Ram Charan, the deceased's father. Since the trolley was not insured with the Appellant, they had no liability to pay the compensation.

8. On the other hand, it is urged by the learned counsel for the claimants that the Claims Tribunal rightly made the Appellant liable to pay the compensation as the Appellant failed to prove any breach of the terms and conditions of the policy. It is contended that the Claims Tribunal erred in holding that the deceased contributed to the accident by his own negligence as he was unable to handle a cycle meant for adults. It is urged that the manner of accident clearly indicates that the accident was caused solely on account of the negligent driving of tractor No. HR 10X 6260 by Respondent No.3 and that the accident was caused by the trolley attached to the tractor.
9. While dealing with the issue of negligence, the Claims Tribunal held as under:

“Respondents no.1 and 2 took a plea that accident had not taken place with their offending tractor but deceased while playing with the cycle struck against footpath and died but none of them appeared in the witness box to prove this defence. Even no such suggestion was given to PW-1 who is also an eye witness of the incident and had lodged FIR Ex.PW1/B. There is no dispute that respondent No.1 is facing criminal prosecution for causing death of child due to rash and negligent driving of tractor-trolley. As per police charge-shee, tractor was caught along with respondent no.1 at the spot of accident itself. Respondent no.2 got the same released from the court on superdari lateron.

FIR was lodged by the PW-1 in which he stated that wheel of the trolley crushed the deceased but in the court he stated that wheel of the tractor dashed against the cycle and deceased. This contradiction in my view itself is not sufficient to exonerate the rashness or negligence of the respondent no.1.

Respondents no.1 and 2 have failed to explain why their tractor was falsely involved in the accident. The deposition of PW-1 regarding rash, negligent, dangerous zig-zag manner driving of tractor by respondent no.1 is not virtually disputed in his cross examination and thus has to be believed as correct. MLC and Post mortem report of the deceased Ex.PW1/I and PW1/J also proves that instant death had taken place due to road accident. Tractor was coming from behind and could look the small child from a distance but even then continuing to run the tractor at fast speed shows negligence of the respondent no.1.

From the cross examination of PW-1, some contributory negligence on the part of deceased child as well as on the part of his father also is appearing. A small of 9 years was given a new cycle of 22 inches for plying as admitted by PW-1 in his cross examination. This big and high cycle of 22 inches is not suitable at all for a small kid of 9 years as such type of cycle is meant only for a grown up man. Keeping in view the judicial notice of the average height of 9 year child as well as guidelines about size selection of cycles taken from the website of Hero Cycles Company, it can be said that cycle of 22 inches was not possible to be driven by a small child of this age easily. It is not the case of petitioners that their child was earlier also plying the cycle and it had not come in his hand first time. FIR shows that it was a new cycle which means and leads to the inference that the child was not used to ply the same. Such like small child of 9 years cannot ply such big cycle effectively and properly and his foot would not touch the ground in any circumstances while plying the same. PW-1 was not accompanying with the deceased or was not helping him in plying the cycle but admittedly was sitting at a distance of 100-

150 feet away from the spot. He was also clearly negligent in handing over the big size cycle to his small son and not supervising his driving the same by remaining along with him. In such circumstances, I am of the view that due to contributory negligence, at least 50% compensation has to be reduced.

In such circumstances, it is held that offending vehicle bearing no. HR-10-H 6260 had caused the accident which was being driven by respondent no.1 in rash and negligent manner and due to accident, deceased expired. There was also negligence of the part of the deceased and his father which contributed and facilitated the accident. In view of the above discussions, issue no.1 is decided accordingly.”

10. Learned counsel for the Appellant Insurance Company has taken me through the FIR No.238/2007, i.e., EX.PW1/B purported to have been lodged by Ram Charan, the father of the deceased. It is true that in the FIR it is mentioned that the deceased was run over by the trolley. However, a perusal of PW1's testimony by way of affidavit EX.PW1/A reveals that the accident was caused not by the trolley, but by the front wheel of the tractor. PW1's testimony with regard to the manner of accident was not disputed in cross-examination. PW1 Ram Charan was not even questioned if he had lodged any FIR with the police. The contents of the FIR were not confronted to PW1 Ram Charan. In the circumstances, the Appellant cannot take advantage of the purported statement made by Ram Charan to the police. Since the tractor was duly insured the Appellant cannot avoid its liability on the ground that the tractor did not cause the accident.
11. As far as the finding of contributory negligence is concerned, PW1 was categorical that tractor No. HR-10-H- 6260 was being driven at a very high speed in a rash and negligent and in a zig zag manner. This part of

the testimony was again not challenged in cross-examination. Respondent No.3, the tractor driver could have noticed a minor child paddling a cycle ahead of him and he ought to have been more careful while overtaking him. In the instant case, instead of being extra cautious, the Third Respondent had continued to drive the tractor at a high speed and in a zigzag manner. Thus from the manner of accident it cannot be said that there was any contributory negligence on the part of the deceased nor any inference of contributory negligence can be raised against the child simply because he was nine years old and could not handle a cycle having the height of 22 inches. The finding of contributory negligence reached by the Claims Tribunal cannot be sustained and therefore the same is set aside.

12. At this juncture I would take up the plea raised by the Appellant Insurance Company that the vehicle was being used for a purpose not allowed by the permit. This plea was not proved by the Appellant Insurance Company neither it was shown that the tractor could be used only for agricultural purpose nor the Schedule of the Insurance Company Ex.RW1/5 placed on the Trial Court Record by the Appellant Insurance Company reveals that the tractor could be used only for agricultural purposes. In the circumstances, the Appellant Insurance Company has failed to establish that there was any breach of the terms and conditions of the policy.
13. Consequently, the Appeal filed by the Insurance Company (MAC APP No. 869/2010) has to fail. On the other hand, Cross Appeal (MAC APP No. 1151/2012) has to be allowed.
14. The Appellant Insurance Company shall be liable to pay the entire

compensation of ₹3,75,000/- along with interest @ 7.5% p.a. The balance compensation of ₹1,87,500/- along with interest as awarded shall be deposited by the Appellant with the UCO Bank within six weeks.

15. The enhanced compensation shall be equally apportioned amongst the claimants. The compensation lying deposited shall be released in terms of the order as passed by the Claims Tribunal.
16. 75% of the enhanced compensation awarded by this Court shall be held in fixed deposit for a period of two years, four years and six years in equal proportion in UCO Bank, Delhi High Court. Rest shall be released on deposit.
17. Both the Appeals are disposed of in above terms.
18. Statutory amount of ₹25,000/- shall be refunded to the Appellant Insurance Company.

(G.P. MITTAL)
JUDGE

NOVEMBER 01, 2012
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