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

% *Judgment delivered on: 16th September, 2013*

+ MAC.APP. 428/2010

DEEPAK JAIN

..... Appellant

Through: Ms. Santha Devi Raman, Adv.

Versus

SUKHVINDER KAUR & ORS

..... Respondents

Through: Mr. Mahesh Kumar, Adv. for R1
to R5.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Vide the instant appeal, appellant has assailed the award dated 17.04.2010, whereby, ld. Tribunal has granted compensation for a sum of Rs.9,30,440/- with interest @ 7.5% per annum from the date of filing of the petition till the deposit of the amount.

2. It is pertinent to mention here that while awarding the compensation, ld. Tribunal has established that the accident took place due the contributory negligence and the liability of 60% and 40% has been fastened respectively on the appellant and deceased.

3. Ld. Counsel appearing on behalf of the appellant submits that the Id. Tribunal has not considered the evidence on record while fastening the liability of 60%.

4. She submitted that PW2 SI Mukesh Kumar, IO of the case has categorically denied that the Tanker was on the left side of the road on Kattcha portion is contrary to the site plan. As per the site plan, both the vehicles are shown at point 'A', which is a Kattcha portion on left side of the road. Therefore, the Id. Tribunal has wrongly relied upon the statement of the PW2 SI Mukesh Kumar that the said vehicle was not on the Kattcha portion.

5. It is further submitted that the offending vehicle was a stationary vehicle and was on the kuccha road and the TSR driven by the deceased did not take care of the stationary vehicle, which came down from the road and hit the offending vehicle. Therefore, there was no negligence on the part of the driver of the offending vehicle.

6. Ld. Counsel further submits that Id. Tribunal has wrongly applied the case of ***Kaushamma Begum and Ors. v. New India Assurance Co. Ltd.***, wherein the Apex Court has held that the issue of wrongful act or omission on the part of driver of the motor vehicle involved in the accident has been left to a secondary importance and mere use or involvement of motor vehicle in causing bodily injury or death to a human being or damage to property would make the petition maintainable under Section 163-A of the Motor Vehicles Act, 1988. Whereas the Id. Tribunal relied upon the said judgment for the maintenance of the petition under Section 166 and 140 of Motor Vehicles Act, 1988.

7. She further submitted that the above named SI Mukesh Kumar stated before Criminal Court that the offending vehicle was parked on the road in a negligent manner and that was without any indication and signal, due to which one TSR bearing no. DL-1RH-0843 struck against the said vehicle and due to which its driver namely Dharmender Singh died. Whereas before the Id. Tribunal he had denied that the vehicle was parked on the Kattcha road. He further deposed before the Id. Tribunal that he found the tanker in a stationery position on the left side of the road and auto rickshaw had been on the back side of the tanker. He specifically stated that he did not find anyone on the spot except HC Bagwan Singh and a Constable. The TSR was not inside the tanker with any forceful entry. It was entangled with the tanker, almost in the middle of the tanker.

8. Ld. counsel submitted that it proved that there was no negligence on the part of the offending vehicle, rather the driver of the TSR hit the offending vehicle.

9. Ld. Counsel further submitted that the said IO just to help the claimants did not bring the complete case file before the Ld. Tribunal and he stated that the photographs of the crime scene were taken by photographer Balwan Singh, however, he did not brought the same before the Id. Tribunal.

10. Moreover, Ld. Trial Court has acquitted the driver of the offending vehicle in the case FIR No.766/2005, PS Hazrat Nizzamuddin for the offences punishable under Section 279/304A IPC by recording as under:

“I have perused the statement of IO, the allegations against the accused in the present case is that he had parked his vehicle on the road in such a rash and negligent manner that it without

any indication and signal due to which one TSR bearing No. DL-1RH-0843 struck against the said vehicle and its driver Dharmender Kumar died and accused was charged under Section 279/304A IPC. Admittedly in the present case and from the statement of the IO it was the TSR, who had hit the parked Tanker and if we see the site plan which is Ex as PW1/A, the tanker was parked on Kaccha road and not on the main road.”

11. Ld. Counsel for the appellant submits that there is no negligence on the part of the offending vehicle, therefore, the ld. Tribunal has wrongly fastened 60% liability on them.

12. It is further submitted that while awarding the compensation, ld. Tribunal has assessed monthly income of the deceased as Rs.3,590/- as per the minimum wages of a skilled person as he was a TSR driver. Ld. Counsel is not disputing the assessment of the monthly income, however, 50% future prospects granted by the ld. Tribunal is against the dictum of ***Sarla Verma v. DTC and Ors. 2009 (6) SCC 121***, which has been further affirmed by the Full Bench of Supreme Court in the case of ***Reshma Kumari & Ors. Vs. Madan Mohan & Anr.*** delivered in ***Civil Appeal No. 4646 of 2009***.

13. She has also argued on the compensation granted on account of loss of love and affection is on higher side.

14. On the other hand, ld. Counsel appearing on behalf of the respondents/claimants submits that PW2 SI Mukesh Kumar categorically denied the suggestion that tanker was parked on the left side of the road on kaccha portion and that no damage to the light signal or indicator of the tanker was noticed by PW2. On reaching on the spot, he noticed that there

was no parking light. Thus, the driver of offending vehicle was negligent. It is categorically stated that mechanical inspector report shows that whatever damage was there on the vehicle, it was due to the accident with the TSR.

15. PW2 SI Mukesh Kumar also specifically stated that he did not find any bricks or stones etc. placed on the outer side of the tanker. The accident took place on 19.11.2005 at about 2 to 3 am and there was mist in the weather, being the winter season.

16. Ld. Tribunal noticed that as per the photographs taken by Photographer Balwan Singh, in the crime scene, there was no indicator, reflector or tree branch or barricade was placed behind the tanker to avoid accident. However, ld. Criminal Court acquitted the driver of the offending vehicle on the ground that case against the driver was that he had parked the vehicle on the road with rash and negligent manner due to which one TSR bearing no. DL-1RH-0843 struck against the said vehicle and its driver died in the said accident.

17. The fact remains that the accident took place between 2 to 3 a.m. and that is in the month of November, 2005, in winter season. There was no indicator, reflector or tree branch or barricade placed behind the tanker to avoid accident. If it is presumed that the offending vehicle was a stationery vehicle, even then the negligent and careless conduct of the offending vehicle is not ruled out. Moreover, the appreciation of evidence for assessing the negligence under the Motor Vehicles Act is standing in a different footing: the concept of proof beyond reasonable doubt is not the rule of evidence.

18. Admittedly, Id. Tribunal has fastened 40% liability of the contributory negligence on the deceased and 60% on the appellant. In view of above discussion, I do not find any discrepancy in the finding qua contributory negligence.

19. So far as the issue of 50% future prospects is concerned, recently the Full Bench of Apex Court in the case of ***Rajesh and Ors. v. Rajbir Singh and Ors. 2013 (6) Scale 563*** has held as under:

“Since the Court in Santosh Devi’s case (Supra) actually intended to follow the principle in the case of salaries persons as laid in Sarla Verma’s case (Supra) and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.”

20. Keeping in view the dictum of ***Rajesh and Ors. (Supra)***, I am not inclined to interfere with the issue of future prospects.

21. It is important to note that the deceased left behind three minor children including wife and mother. Id. Tribunal rightly considered the above fact and relied upon ***Kailash Kaur vs. New India Assurance Co. Ltd.*** for granting compensation on account of love and affection.

22. Accordingly, instant appeal stands dismissed.
23. Consequently, balance award amount shall be released in favour of the respondents / claimants.
24. Statutory amount be also released in favour of the appellant.

SEPTEMBER 16, 2013
Jg/RS

SURESH KAIT, J