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

% *Judgment delivered on: 22nd August, 2013*

+ MAC.APP. 853/2012

NEW INDIA ASSURANCE CO LTD. Appellant
Through: Ms. Minakshi Midha, Adv.

versus

ISRAEL @ ILIYAS & ORS. Respondents

Through: Mr. Navneet Goyal, Adv. for R1 and
R2.
Mr. Vinod Sharma, Adv. for R3 & R4.

CORAM:
HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J. (Oral)

1. Instant appeal has been preferred against the impugned award dated 31.03.2012, whereby, Id. Tribunal has awarded a sum of Rs.1,45,000/- as a compensation with interest @ 7.5% per annum on the said amount from the date of filing the claim petition till realization.

2. Ms. Minakshi Midha, Id. Counsel appearing on behalf of the appellant has argued that instant appeal has been filed mainly on the ground that the offending vehicle was insured with the appellant as a private vehicle whereas at the time of the accident, the said vehicle was carrying children, thus being used as a commercial vehicle.

3. She has drawn the attention of this court to the translated copy of the FIR at Page 32 wherein it is recorded that Bus No. DL-4CD-1668 of Vidya Bhawan School was coming from opposite side and hit the son of the claimant in front of Bijli Ghar at Pathshala Road, due to which Gulfam and his friend got injured seriously.

4. Ld. Counsel further submits that in reply to Para 16 & 18 in their written statement filed before the Id. Tribunal it was specifically stated as under:

“That these Paras under reply are matter of record. However, vehicle in question bearing NO. DL4 CD 1668 is insured with the respondent no. 3 vide Policy No. 311301/31/08/02/00002510 from 26.12.2008 to 22.12.2009 in the name of Sudhir Kumar even than the respondent is entitled to protection Under Section 95/96-A of M.V. Act, 1939 or of Section 147, 149 of M.V. Act, 1986 and Section 64-VB of Insurance Act and the liabilities of respondent no. 3, if any, is subject to the terms and conditions of the Insurance Policy and provisions of MV Act in that case petition is bad for want of fitness certificate, valid permit of the vehicle in question and valid driving licence of driver of alleged offending vehicle, and if driver was not holding proper effective and valid driving licence required under the MV Act to drive the type of vehicle involved in the alleged accident in that case / event the respondent no. 3 shall not be liable to indemnify that amount of compensation if at all found liable to pay as the same is violation of terms and conditions of Insurance Policy and as such violation of relevant provisions of MV Act.”

Thus, the Id. Tribunal has failed to consider the said aspect and despite the violation of the terms of the policy, the Id. Tribunal has not granted recovery right against the driver and owner of the offending vehicle.

5. Counsel for the appellant has relied upon a case of ***National Insurance Co. Ltd. V. Rattani & Ors. AIR 2009 SC 1499***, wherein it is stated as under:

“The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers. As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose.

14. An admission made in the pleadings, as is well-known, is admissible in evidence proprio vigore. We, thus, are of the opinion that the Tribunal as also the High Court committed a serious error in opining that the insurance company was liable.

Reliance placed by the learned counsel on a decision of this Court in National Insurance Co. Ltd. v. Baljit Kaur and Others [(2004) 2 SCC 1] is misplaced. The question which arose for consideration therein was as to whether the words & any person; shall include a gratuitous passenger despite the amendment made in Section 147 of the Act by reason of the Motor Vehicles (Amendment) Act, 1994.

Following New India Assurance Co. Ltd. v. Asha Rani [(2003) 2 SCC 223], it was categorically held:

20. It is, therefore, manifest that in spite of the amendment of 1994, the effect of the provision contained in Section 147 with respect to persons other than the owner of the goods or his authorized representative remains the same. Although the owner of the goods or his authorized representative would now be covered by the policy of insurance in respect of a goods vehicle, it was not the intention of the legislature to provide for the liability of the insurer with respect to passengers, especially gratuitous passengers, who were neither contemplated at the time the contract of insurance was entered into, nor was any premium paid to the extent of the benefit of insurance to such category of people. In National Insurance Co. Ltd. v. Cholleti Bharatamma and Others [(2008) 1 SCC 423], this Court categorically held: “27. The learned counsel appearing for the respondent, submitted that from the aforementioned finding, it is evident that the respondent was travelling as the owner of the goods. We do not think that the said submission is correct. PW 2, in his evidence, stated:

“I am doing tamarind business. I witnessed the accident which took place about 3 years back at about 6 a.m. at Borrampalem junction beyond Talluru. At the time of the accident I was in the crime lorry by the side of the driver. Myself and 6 others were carrying tamarind in that lorry belonging to us. We boarded the lorry along with our load of tamarind at Dharamavaram to go to Rajanagaram. We were selling the tamarind at

Rajanagaram in retail by taking the tamarind there in our lorry from our village of Dharamavaram.

28. The Tribunal, therefore, correctly recorded that according to PW 2, he was travelling with his goods as owner thereof and not the deceased.”

We, therefore, in the facts and circumstances of the case, have no hesitation to hold that the victims of the accidents were travelling in the truck as gratuitous passengers and in that view of the matter, the appellant herein was not liable to pay the amount of compensation to the claimants.”

6. I have perused the record. As per the FIR, nowhere it is stated that the offending bus was carrying the children and was used for commercial activities. Ld. Tribunal has considered this fact and recorded in the impugned order that R3W2 Sh. Pritpal, Assistant, New India Assurance Company Ltd., deposed that vehicle no. DL-4CD-1668 was insured as a private vehicle. He exhibited the copy of the insurance policy as R3W2/1 and also exhibited the copy of notice Under Order 12 Rule 8 CPC sent to driver and owner of the offending vehicle through their counsel for production of the original policy. The said witness further stated that the neither the driver nor the owner of the offending vehicle replied to the said notice nor produced the above said document.

7. Perusal of the record reveals that in the FIR it is recorded that accident was caused by bus of Vidya Bhawan School. The said FIR was lodged on the statement of father of the deceased. Nowhere it is stated by any of the witnesses that the said bus was carrying children and was on the commercial activities. Moreover, the appellant failed to establish that how did their

investigator reached to the conclusion that the vehicle was used for carrying the children.

8. In view of the facts and circumstances of the case, the case of *Rattani (Supra)* is not applicable and moreover, the witnesses produced by the appellant has not proved that the said bus was carrying children and was used for the commercial activities. Therefore, I do not find any merit in the instant appeal.

9. Accordingly, instant appeal is dismissed with no order as to costs.

10. I note, vide order dated 29.11.2012, appellant / insurance company was directed to deposit the entire amount with up-to-date interest with the Claims Tribunal. On deposit, 50% of the award amount was also directed to be released with proportionate interest in favour of the respondents / claimants in terms of the award passed by the Id. Tribunal.

11. Ld. Counsel for the appellant has informed this court that order dated 29.11.2012 has been complied with. Ld. Tribunal is therefore directed to release the balance amount in favour of the respondents / claimants on taking steps.

12. Statutory amount be released in favour of the appellant.

SURESH KAIT, J

AUGUST 22, 2013

Jg/sb