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

Judgment Reserved on : 11.07.2014.
Judgment Pronounced on : 22.07.2014

+ MAC.APP. 477/2007

SUNITA & ANR. Appellants
Through Mr.Rana Ranjit Singh and Mr.Vivek
Singh, Advocates.

versus

AJAY SINGH YADAV @ SATBIR & ORS. Respondents
Through Ms. Nanita Sharma and Mr.Harish
Nautial, Advocates for R-3.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. The present appeal is filed against the Award dated 24.04.2007 seeking enhancement of compensation awarded by the Tribunal. The appellants are the widow and daughter of the deceased Shri Rajiv. He was stated to be working as a helper with M/s Capital Transport Company at Kamla Market at a salary of ₹3,300/- per month. It is stated that a vehicle was taken on contract and when the vehicle reached Rohtak Road, the driver applied sudden brake. It is alleged that the left side door of the vehicle suddenly opened due to the rash and high speed driving of the driver and the deceased fell down on the road. Due to the impact on hitting the road, he died on the spot. It is said that the deceased was travelling in the offending vehicle sitting on the left side and because the lock of the left door was

defective, he fell from the vehicle after the sudden halting.

2. The present appellants have filed the present petition before the Ld. MACT under Section 163A of the Motor Vehicles Act. Based on the pleadings, the Tribunal framed the following issues:-

- “1. Whether Shri Rajiv sustained fatal injuries on 27.03.04 due to rash and negligent driving of the vehicle bearing no.MP-16A-7539 by Respondent No.1?
2. Whether the petitioners are entitled to compensation, if so, to what amount and from whom?
3. Relief.”

3. On issue No.1 the Tribunal noted that initially a criminal case under Section 302 IPC for murder of the deceased Rajiv was recorded. However, the police carried out further investigation and as per fresh post-mortem report the case was converted into Section 279/304-A IPC. Based on the record of the criminal case, the Tribunal concluded that the deceased expired due to injuries sustained by him by use and involvement of the offending vehicle.

4. On issue No.2 the Tribunal noted that the claimants are comprised of the wife and minor daughter of the deceased. The mother was impleaded as a respondent. Based on evidence on record it was concluded that the deceased was working for M/s Capital Transport Company at Kamla Market. The minimum wages was taken as ₹3,000/- per month and multiplier of 17 was applied. 1/3rd of the income was deducted as expenditure of self. Based on the same, the total loss of dependency was calculated at ₹4,10,000/- (Rupees four lac and ten thousand only).

5. The Award further holds that the accident took place due to contributory negligence of the deceased. The Award rejects the contention of the appellants that the deceased while travelling in the vehicle was sitting on the left side of the vehicle. The Award concludes that the deceased was

actually sitting on the right side of the vehicle. It further holds that the deceased was habitual of eating zarda because of which he had to spit frequently. He opened the door for spitting and fell down as the driver of the vehicle applied strong brakes on the speed breaker. Hence, the Award concludes that it was because of the negligent act of the deceased the accident had occurred and that deceased himself contributed towards the accident. Accordingly, the Tribunal held that the appellants are liable to receive 50% of loss of dependency and accordingly reduced the loss of dependency to ₹2,05,000/- (Rupees two lac and five thousand only).

6. On the issue of liability of insurer, owner and the driver, the award fastens the liability on the driver and owner. The Award concludes that the owner respondent No.2 had failed to prove that the vehicle in question was running on a valid permit and hence an inference had to be drawn against the said respondent No.2. In view thereof there was a violation of the policy of insurance.

7. The Award also holds that the deceased was a gratuitous passenger in the vehicle and in view of judgment of the Supreme Court in the case of *United India Insurance Co. Ltd, Shimla vs. Tilak Singh and Ors., II (2006) ACC 1 (SC)* the insurance company was not liable to make payment of compensation to the appellants. Respondents No.1 and 2 being the owner and the driver were only held liable to pay.

8. Learned counsel appearing for the appellants has made two submissions. He accepts the calculation of the total loss of dependency, as per the Award. He firstly submits that the conclusion in the impugned Award of contributory negligence is erroneous. He submits that the conclusion in the Award that the deceased was sitting on the right side and not on the left side of the vehicle and that the door on the left side was not

faulty is completely an erroneous conclusion based on no facts. He further submits that the actual fact is that the deceased was sitting on the left side and the door of the left side had a defective lock which opened due to a jerk because of sudden braking and the deceased fell outside the vehicle resulting in the accident. He denies that because of the Mechanical Inspection Report Ex.PW-1/5 it can be said that the left door lock was not defective.

9. Learned counsel has secondly submitted that finding of the impugned Award that the deceased was a gratuitous passenger in the vehicle is also totally incorrect. He relies upon the statement of Mr.Jitender Singh, the employer of the deceased, under Section 161 Cr.PC who says that the deceased was employed by him. Hence, according to him the insurance company, respondent No.3 is also liable alongwith the driver and owner.

10. Learned counsel appearing for respondent No.3 has vehemently argued that in view of the fact that the deceased was a gratuitous passenger there is no liability on the said insurance company. He has further argued that the appellants or the owner respondent No.2 failed to place on record the insurance policy, permit or driving license despite a notice by the insurance company under Order XII Rule 8 CPC for production of the said documents.

11. As far as the first contention raised by learned counsel for the appellants is concerned, in my view there is merit in the same. The Award concludes that the death of the deceased took place on account of his habit of eating zarda because of which he was spitting outside by opening the door and fell due to the sudden braking of the vehicle, while sitting on the right side. The Award also holds that the door on the left side was not defective.

12. There is no evidence on record to show that the deceased was habitual of eating zarda. The owner of the vehicle/respondent No.2 has in his

affidavit (Ex.R2W1/A) by way of evidence mentioned about the same. However, in his cross-examination that has taken place on 7.12.2006 he has categorically stated that he has no personal knowledge that the deceased used to consume zarda. Hence, the statement of the said witness made in his affidavit has no basis and cannot be accepted. It is only a desperate defence raised without any basis. Apart from the said statement of the said witness, there is no other evidence on record to show that the deceased used to consume zarda. Hence, the findings in the impugned Award that the deceased on account of consumption of zarda, had to spit out frequently and fell while spitting when the driver applied the brake suddenly is a finding without any proper evidence whatsoever.

13. Further, the impugned order has concluded on the basis of the Site Plan Ex.PW-1/4 that the deceased was sitting near the right hand door of the tempo as the body was found lying towards the right side of the tempo. This conclusion is again without any basis inasmuch as the right hand seat of the tempo would be occupied by the driver. It is difficult to conceive as to how the deceased and the driver could both be sitting on the right side of the tempo. Merely because the body was lying on the right side of the tempo cannot mean the deceased was sitting on the right side, squeezed with the driver.

14. Further, the impugned Award concludes that the Mechanical Inspection Report Ex.PW-1/5 does not mention any defective door lock. On this basis, a conclusion is drawn that the contention of the appellants is incorrect and there was no defective door in the vehicle.

15. In my view, principle of *res ipsa loquitur* would clearly be applicable. *Res ipsa loquitur* is essentially an evidential principle and the said principle is intended to assist a claimant who, for no fault of his own, is unable to

adduce evidence as to how the accident occurred.

16. The Supreme Court in the case of *Municipal Corporation of Delhi vs. Subhagwanti & Ors*, AIR 1966 SC 1750 held as follows:-

“4....It is true that the normal rule is that it is for the plaintiff to prove negligence and not for the defendant to disprove it. But there is an exception to this rule which applies where the circumstances surrounding the thing which causes the damage are at the material time exclusively under the control or management of the defendant or his servant and the happening is such as does not occur in the ordinary course of things without negligence on the defendant's part. The principle has been clearly stated in Halsbury's Laws of English, 2nd Edn., Vol.23, at p.671 as follows:-

“An exception to the general rule that the burden of proof of the alleged negligence is in the first instance on the plaintiff occurs wherever the facts already established are such that the proper and natural inference immediately arising from them is that the injury complained of was caused by the defendant's negligence, or where the event charged as negligence ‘tells its own story’ of negligence on the part of the defendant, the story so told being clear and unambiguous. To these cases the maximum *res ipsa loquitur* applies. Where the doctrine applies, a presumption of fault is raised against the defendant, which, if he is to succeed in his defence, must be overcome by contrary evidence, the burden on the defendant being to show how the act complained of could reasonably happen without negligence on his part.”

17. The accepted fact is that the deceased was travelling in the tempo and on the sudden braking has fallen out and died. In these circumstances, clearly a conclusion has to be drawn about negligence of the driver.

18. Hence, in my view the findings of the impugned Award holding that the accident took place on account of negligence of the deceased are liable

to be modified. The accident took place on account of negligence of the driver of the vehicle/respondent No.2 and there is no contributory negligence. As a consequence thereof, a deduction of 50% of loss of dependency on account of contributory negligence is not justified. The appellants would be entitled to full loss of dependency as computed by the Award, namely, ₹4,10,000/- (Rupees four lac and ten thousand only). All other compensation will remain the same as provided in the Award.

19. As far as the second submission of learned counsel for the appellant is concerned, there is no evidence on record to show in what capacity the deceased was sitting in the tempo. The deceased was employed by M/s Capital Transport Company as is apparent from the statement of the owner of the said company which is on record. In the absence of any evidence on record, there can be no reason to interfere with the findings recorded in this aspect by the impugned Award. Further the Award has also concluded that the permit of the vehicle has not been proved. Hence, even otherwise, the Insurance Company would have no liability.

20. Accordingly, the compensation amount would be enhanced to ₹4,19,500/- (Rupees four lac nineteen thousand and five hundred only). The additional sum of ₹2,05,000/- (Rupees two lac and five thousand only) would also be the liability of Respondents No.1 and 2. The appellant is also entitled to interest @ 6% per annum on the said amount which would be payable by respondents No.1 and 2 from the date of filing of the claim petitions till deposit before this Court. The said respondents are directed to deposit the said amount in Court within 30 days from today. As the accident took place on 27.3.2004, ten years ago it would be in the interest of justice that $\frac{1}{3}^{\text{rd}}$ of the amount each be released to appellant No.1 and appellant No.2 respectively and $\frac{1}{3}^{\text{rd}}$ be released to respondent No.4. Appeal is

accordingly disposed of.

**JAYANT NATH
(JUDGE)**

JULY 22, 2014/n