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

**Date of Decision: 03<sup>rd</sup> May, 2016**

+ **MAC.APP. 210/2013 & CM no.3863/2013**

**TATA AIG GENERAL INSURANCE CO. LTD. .... Appellant**

Through: Mr. P. Acharya, Adv.

versus

**KIRAN TIWARI & ORS. .... Respondents**

Through: Mr. Kamlesh Kumar Mishra, Adv. for  
R-1 to 5.

**CORAM:  
HON'BLE MR. JUSTICE R.K.GAUBA**

**JUDGMENT**

**R.K.GAUBA, J (ORAL):**

1. Hari Sahay Tiwari, died in a motor vehicular accident that occurred on 11.01.2012 statedly on account of negligent driving of the motor vehicle described as bearing registration no. DL-5CD-9991 (the offending vehicle (Tata Safari). His dependant family members, (first to fifth respondents herein collectively) instituted an accident claim case (suit no.90/2012) on 09.02.2012 before the motor accident claims tribunal (the tribunal), impleading the appellant/insurance company (the insurer) as one of the party respondents, in addition to sixth & seventh respondents herein, they having been described as driver and owner respectively of the Tata Safari. The driver and owner upon notice submitted the pleadings denying the involvement of the offending vehicle in the accident. The tribunal framed

issues, the prime one whereof was as to whether the death had occurred due to rash/negligent driving by the sixth respondent. The claimant led evidence by examining the first claimant (PW1) on the strength of her affidavit (Ex.PW1/A) with which the copy of the report under Section 173 of Code of Criminal Procedure, 1973 (Cr.P.C) pertaining to the first information report (FIR) no.11/2012 which had been registered by police station Kotlwali of North Delhi relating to the subject accident, was also submitted. The driver (sixth respondent) examined himself (RW1) on the basis of his affidavit (Ex.RW1/A) in which he denied that any such accident, as alleged, had taken place.

2. The tribunal, by judgment dated 09.01.2013, returned a finding in favour of the claimant's case holding the sixth and seventh respondents jointly and severally liable and the appellant/insurer liable to indemnify. The compensation in the sum of ₹66,92,300/- with interest was awarded in favour of the claimants in the wake of said finding.

3. By appeal at hand, the insurance company has raised the core issue as to whether the finding returned by the tribunal confirming the claimant's case as to the involvement of the offending vehicle and negligence on the part of the sixth respondent is correct. It is pointed out that no eye witness was examined, the solitary witness examined being PW1 who was not present at the scene. It is argued that the adverse finding has been returned primarily on the basis of the report under Section 173 Cr.P.C. which includes the copy of what purports to be statement under Section 161 Cr.P.C of an eye-witness Pankaj Jain.

4. The tribunal has taken the above approach generally following the view taken by a learned single judge of this court in *National Insurance Company Ltd. vs. Pushpa Rana*, 2009 ACJ 287, the applicability of which had come up for consideration before this court in MAC appeal no.165/2013, *New India Assurance Co. Ltd. vs. Devki & Ors*, decided on 29.02.2016. It was argued on behalf of the claimant in the said case that inference of negligence could be drawn on the basis of documentary evidence relating to the criminal case placing reliance on *Bimla Devi v. Himachal Road Transport Corporation*, 2009 ACJ 1725. *Per contra*, the insurance company had argued in the case of *Devki* (supra) that the law laid down by the Supreme Court in *Oriental Insurance Company Ltd. Vs. Meena Veriyal*, 2007 (5) SCC 428, requires the burden of proving the negligence to be discharged by the claimants. This court upheld the said contention of the insurance company in the case of *Devki* (supra) and held as under:-

“ It is well settled that in proceedings arising out of a claim petition under Section 166 of MV Act based on fault liability principle, a person cannot be held liable unless he contravenes any of the duties imposed on him by the common law or by the statute. In the case of a motor accident it is imperative that the claimants show by some evidence that the driver of the motor vehicle had been negligent in relation to the said vehicle and thereby had caused an accident resulting in bodily injuries or death or damage to the property so as to be held liable as the principal tort-feasor. The owner's liability arises out of his failure to discharge a duty cast on him by the law, on the principle of vicarious liability. Proof of negligence is necessary before the owner or the insurance company may be held liable for payment of compensation in a motor accident claim case brought under Section 166 MV Act.

The law to above effect declared in *Minu B Mehta v. Balkrishna Ramchanra Nayan* (1977) 2 SCC 441 was reiterated by Supreme

*Court in Oriental Insurance Company Ltd. v. Meena Variyal 2007 (5) SCC 428. It appears there was some confusion raised with regard to these principles on account of view taken in the case of Gujarat State Road Transport Corporation v. Ramanbhai Prabhatbhai (1987) 3 SCC 234. In Meena Variyal (supra) the Supreme Court clarified as under :*

*“On a careful understanding of the decision in Gujarat State Road Transport Corporation (supra) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (supra) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored.”*

*In Pushpa Rana (supra), the learned Single Judge of this Court holding the case of the claimant as duly proved on the basis of the certified copies of the record of the corresponding criminal case, while dealing with identical contention took note of the judgment in Meena Variyal (supra) but proceeded to observe thus:*

*“13. The last contention of the appellant insurance company is that the respondents claimants should have proved negligence on the part of the driver and in this regard the counsel has placed reliance on the Judgment of the Hon'ble Apex Court in Oriental Insurance Co. Ltd. v. Meena Variyal (supra). On perusal of the award of the Tribunal, it becomes clear that the wife of the deceased had produced (i) certified copy of the criminal record of*

*criminal case in FIR No. 955/2004, pertaining to involvement of the offending vehicle, (ii) criminal record showing completion of investigation of police and issue of charge sheet under Section 279/304-A, IPC against the driver; (iii) certified copy of FIR, wherein criminal case against the driver was lodged; and (iv) recovery memo and mechanical inspection report of offending vehicle and vehicle of the deceased. These documents are sufficient proofs to reach the conclusion that the driver was negligent. Proceedings under Motor Vehicles Act are not akin to proceedings in a civil suit and hence strict rules of evidence are not required to be followed in this regard. Hence, this contention of the counsel for the appellant also falls face down. There is ample evidence on record to prove negligence on the part of the driver.”*

*In the facts and circumstances, this Court finds it difficult to follow the view taken in Pushpa Rana (supra). Since the law declared by the Supreme Court in Meena Variyal (supra) is binding, there is no escape from the conclusion that it is the burden of the claimants in a petition under section 166 of MV Act to prove negligence. Should they find it difficult to prove evidence with regard to negligence, the option to have resort to no-fault liability on the structured formula under Section 163A of MV Act is always available to seek just compensation. The case of Bimla Devi (supra) cannot be an illustration to hold otherwise inasmuch as it is clear from the narration of facts noted therein that an eye witness was available and the conclusion on facts had been reached on the basis of his testimony.”*

5. Faced with above fact-situation, the learned counsel for the claimants submitted that while the appeal of the insurance company would deserve to be allowed and the impugned award liable to be set aside, in all fairness, the claimants deserve to be granted one more opportunity to prove the allegations of negligence by examining the eye witness of the occurrence

present at the time of accident. On being asked, the learned counsel for the appellant submitted that he has nothing to say on this issue.

6. In view of above, the appeal is allowed. The impugned judgment is set aside. However, the matter is remitted to the tribunal for further inquiry in accordance with law. For this purpose, the parties are directed to appear before the tribunal on 03<sup>rd</sup> June, 2016.

7. The insurance company had been directed by order dated 08.04.2013 to deposit the entire awarded amount with up-to-date interest with the Registrar General within the period specified and out of the said deposit, 50% was allowed to be released, the balance kept in fixed deposit with UCO Bank, Delhi High Court branch. The said amount retained in fixed deposit shall be presently refunded to the insurance company with statutory deposit, if made. The amount already received by the claimants shall be subject to adjustment against the final award that is expected to be passed afresh, should the case of the claimant about negligence be upheld on the basis of evidence to be adduced in the further proceeding. Conversely, if the claimant fails to prove the negligence, the tribunal shall pass necessary directions in such regard.

8. The appeal (with application) is disposed of in above terms.

**R.K. GAUBA**  
**(JUDGE)**

**MAY 03, 2016**  
**ssc**