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

Date of Decision: 10.05.2016

+ **MAC.APP. 329/2013 and CM No.5845/2013**

NEW INDIA ASSURANCE CO. LTD. Appellant

Through: Mr. P. Acharya, Advocate

versus

SHASHI NEGI & ORS. Respondents

**Through: Mr. M.S. Rohilla and Mr. Balraj Singh,
Advocates for R-1 to 3**

Mr. S.N. Parashar, Adv. for R-4 & 5

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. By judgment dated 14.12.2012, the Motor Accident Claims Tribunal (tribunal) decided accident claim case (suit no.121/2010) instituted by the first to third respondents on their behalf and on behalf of sixth and seventh respondents (collectively the claimants) and directed the appellant insurance company (insurer) to pay compensation in the sum of Rs.50,31,760/- with interest at the rate of 9% p.a. from the date of filing of the petition (i.e. 16.03.2010) till realization on the basis of finding that Jitender Singh Negi

had died in a motor vehicular accident that occurred on 11.09.2009 due to involvement and negligent driving of truck bearing registration no.UP 20G 6701 (truck) admittedly insured against third party risk for the period in question with it.

2. The insurer which has been burdened with the liability to pay is in appeal primarily raising the grievance that the involvement of the truck in the accident or negligence on the part of its driver (fourth respondent) was not proved by any evidence.

3. It is noted that only two witnesses were examined before the tribunal. They included the first claimant Shashi Negi (PW-1) and ASI Virender Kumar Singh (PW-2). PW-1 admittedly was not an eye witness. PW-2 was examined to prove the income of the deceased. Concededly, no witness to the sequence of events was examined. The tribunal referred to the judgment of the learned single Judge of this court in *National Insurance Company Ltd. v. Pushpa Rana*, 2009 ACJ 287 to hold that the certified copies of the criminal case record were sufficient to affirm findings to such effect.

4. A similar contention was raised before this court in *New India Assurance Co. Ltd. Vs. Devki & Ors.*, MACA 165/2013, decided on 29.02.2016 wherein this court held as under :-

4. The insurance company, feeling aggrieved, came up with the appeal at hand raising questions about the propriety and correctness of the finding of facts concerning the involvement of the offending bus and negligence on the part of its driver. Per contra, the counsel for the claimants submitted that the Tribunal has correctly appreciated the evidence presented before it, referring in this context to the view taken by a

learned Single Judge of this Court in National Insurance Company Ltd. v. Pushpa Rana 2009 ACJ 287. The counsel submitted that since the proceedings under the Motor Vehicles Act are not akin to proceedings in a civil suit, strict rules are not required to be followed. He argued that the certified copies of the record of criminal case such as FIR, mechanical inspection report, post mortem report etc. submitted should be taken, and have been rightly taken, by the Tribunal as sufficient proof to reach the conclusion that the driver was negligent. The counsel also referred to Bimla Devi v. Himachal Road Transport Corporation 2009 ACJ 1725 (SC) to argue that inference of negligence can be drawn on the basis of documentary evidence relating to the criminal case.

5. *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.*

6. *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.”

7. *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.”

8. *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.*

9. *It is clear from the perusal of the evidence adduced before the Tribunal, and the view taken thereupon, that the claimants did not examine any witness, whether in the nature of eye witness of the actual occurrence or of the circumstances attending upon the events leading to the death. The version of the conductor Manoj Kumar in the FIR (Ex.PW1/1) is in the nature of his statement to the police under Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C.). It is trite that a statement whether made under Section 154 or Section 161 Cr.P.C. cannot be treated as evidence in the strict sense of the term. The said witness, it is conceded, has been available all along and could have been summoned to prove the circumstances. It may be that there is no eye witness available to the actual occurrences wherein the deceased went to sleep on the ground during the night near the Kela Devi fair and on next morning was found having been crushed by the offending bus. But then, the circumstances in which the deceased had*

retired for the night, and the circumstances in which his dead body was found crushed under the wheels of the said bus at least could have been brought home through evidence which is available. In absence of the witnesses of such circumstances, the principle of res ipsa loquitur also cannot be invoked on the available material brought before the Tribunal...”

5. The learned counsel for the claimants now fairly concedes that the appeal may be allowed and the impugned judgment set aside. He, however, requests that the matter may be remitted to the tribunal so that the claimants can have opportunity to prove their case as to the involvement of the truck and negligence on the part of its driver. The request is granted. The impugned judgment is set aside.

6. The matter is remitted to the tribunal for further inquiry in accordance with law. In the said further inquiry, the claimants will be granted opportunity to lead further evidence. Needless to add, parties which contest will be entitled to cross-examine the additional witnesses of the claimants and also lead evidence in rebuttal, if any. The parties are directed to appear before the tribunal on 08.07.2016.

7. It is noted that by order dated 12.04.2013, the insurance company had been directed to deposit the entire awarded amount with upto date interest with the Registrar General of this court within the period specified, whereupon the said amount was directed to be kept in fixed deposit receipt initially for a period of six months to be renewed periodically with liberty to draw monthly interest granted to the claimants. By subsequent order dated 10.04.2015, an amount of Rs.5 Lakh was released to the first respondent (claimant) and Rs.1 Lakh each released to the fourth and fifth respondents. The amounts already released to the said parties (claimants) shall be subject

to adjustment against the award that may be passed by the tribunal on the conclusion of the proceedings hereby remitted, of course, subject to a finding being returned upholding the case of the claimants as to the involvement of the truck and negligence on the part of its driver. Should the tribunal reach conclusions contrary to the case of the claimants, the said amounts earlier released would be liable to be refunded. The balance of the deposit already made by the insurer under the interim order shall presently be refunded to it alongwith the statutory deposit, if made.

8. The appeal and the pending application are disposed of in above terms.

9. The tribunal is requested to conclude the proceedings expeditiously, preferably within six months of the date of first appearance fixed as above.

10. *Dasti.*

MAY 10, 2016
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R.K. GAUBA
(JUDGE)