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

Date of Decision: 22nd March, 2016

+ **MAC.APP. 371/2012 & CM No. 6325/2012 (stay)**

NEW INDIA ASSURANCE CO. LTD. Appellant

Through: Mr. L.K. Tyagi, Adv.

versus

NASEEM BANO & ORS. Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Abid Ali Shah, stated to be 35 years old self-employed person (labour contractor) was riding on a tractor attached with trolley bearing No. UP 24D 3048 moving in a direction of Okhla Mandi on 22.03.2009 at about 1.30 a.m., when it met with an accident resulting in he falling down and being crushed under the right wheel of the said vehicle to death. His widow and other dependant family members, first to seventh respondents herein (claimants), along with one another (since deceased), brought a claim petition under Sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) on 02.07.2009 before the motor accident claims tribunal (the tribunal) where it was registered as suit number No. 353/2010 (2009). The appellant insurance company (insurer) was impleaded as a respondent in the

said case along with the owner and driver (eighth and ninth respondents herein) on the plea that the accident had occurred due to rash/negligent driving of the tractor.

2. The insurance company, in the course of the inquiry, took the plea that the deceased was a gratuitous passenger and, therefore, it could not be asked to indemnify against the third party insurance cover.

3. The tribunal assessed the compensation in the sum of Rs. 9,09,780/- calculated thus:-

Loss of Dependency	Rs. 8,49,780/-
Funeral expenses	Rs. 25,000/-
Love & affection	Rs. 60,000/-
Loss of consortium	Rs. 25,000/-
Total	Rs. 9,59,780/-
Less interim award	Rs. 50,000/-
Balance Payable sum	Rs. 9,09,780/-

4. The tribunal awarded the above mentioned compensation with interest @ 9% per annum from the date of filing of the petition. The contention of the insurance company regarding gratuitous passenger was, however, rejected and it was asked to indemnify.

5. In calculating the compensation, the tribunal computed the loss of dependency at Rs. 8,49,780/- by notional assessment of the income at Rs. 3934/- per month, it being the rate of minimum wages and adding the element of future prospects which, in the submission of the insurer, was incorrect.

6. In the case reported as *Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121, Supreme Court, *inter-alia*, ruled that the element of future prospects of increase in income will not be granted in cases where the deceased was “self employed” or was working on a “fixed salary”. Though this view was affirmed by a bench of three Hon’ble Judges in *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.*, (2013) 9 SCC 65, on account of divergence of views, as arising from the ruling in *Rajesh & Ors. vs. Rajbir & Ors.*, (2013) 9 SCC 54, the issue was later referred to a larger bench, *inter-alia*, by order dated 02.07.2014 in *National Insurance Company Ltd. vs. Pushpa & Ors.*, (2015) 9 SCC166.

7. Against the above backdrop, by judgment dated 22.01.2016 passed in MAC Appeal No. 956/2012 (*Sunil Kumar v. Pyar Mohd.*), this Court has found it proper to follow the view taken earlier by a learned single judge in MAC Appeal No. 189/2014 (*HDFC Ergo General Insurance Co. Ltd. v. Smt. Lalta Devi & Ors.*) decided on 12.1.2015, presently taking the decision in *Reshma Kumari (Supra)* as the binding precedent, till such time the law on the subject of future prospects for those who are “self-employed” or engaged in gainful employment at a “fixed salary” is clarified by a larger bench of the Supreme Court.

8. Since the deceased was admittedly self-employed, the future prospects could not have been added. In these circumstances, the loss of dependency is recomputed. The deceased was survived by eight dependants, and, therefore, 1/5th had to be deducted towards personal & living expenses. Thus, the monthly loss of dependency works out to Rs. (3934 x 4 /5) Rs. 3947.20. Adopting the multiplier of 15, the deceased being 39 years old, the total loss of dependency comes to Rs. (3947 x 12 x15) Rs. 5,66,496 rounded off to Rs. 5,67,000/-.

9. It is noted that the tribunal did not adequately compensate under the heads of non-pecuniary heads of loss of love & affection and loss of consortium and failed to take care of the head of loss of estate. Following the view taken in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54 and *Shashikala V. Gangalakshamma* (2015) 9 SCC 150, amounts of Rs. 1,00,000/- each towards loss of love & affection and loss of consortium and Rs.25,000/- towards loss of estate are added. Taking note of, the funeral expenses awarded by the tribunal, the total compensation comes to (5,67,000 + 2,50,000) Rs. 8,17,000/-. The compensation is reduced to Rs. 8,17,000/-. It shall, however, carry interest as levied by the tribunal.

10. The plea of the insurance company with regard to the gratuitous passenger was dealt with by the tribunal thus:-

“It be observed that in reaching on the conclusion of exoneration of insurance company's liability, it is first required to prove as whether the deceased indeed was travelling on the tractor trolley in capacity of gratuitous passenger and whether the said fact has been duly established on record, and who was under the liability to establish the above fact. It be observed that the nature of evidence required to be produced on the

above aspect, has to satisfy reasonably and conclusively the fact put to challenge. Thus, the nature of evidence require in this regard, is to be substantive evidence as the issue at hand is no more to be treated akin merely to an inquiry. It is also to be observed that since the failure of determination of the issue is going to be detrimental to the interest of the insurance company, the onus is put up on the insurance company to establish that the deceased was a gratuitous passenger on the tractor trolley. Though, great efforts have been made by learned Shri B.K.Sharrna, to meet the distance, the insurance company has still fallen short of meeting it. It be observed that it is in order to establish the above fact, the requirement may would have satisfy if the insurance company had produced the complainant, Rashid in the witness box, it could have then been conclusively established as what was the status of the deceased while he was travelling on the trolley. As is shown in the FIR arid in the petition as well, the trolley was being plied to Okhla Mandi and was, loaded with vegetables for the purpose of sale. It is to be presumed that apart from the driver, the owner has to employ some labour for loading/unloading of the goods before they are made to reach the shops for sale. The driver alone could not have handled the huge load of the vegetables which was in trolley and it is apparent tha,t his services of labourer would have been deservant. In such circumstances, it is in this background appears more probable fact that the services of the deceased who was a labourer, would have been employed from the village for the purpose of unloading at the Mandi, which was the destination for sale. It is also probable that the complainant hesitated to say so in unequivocal terms in the FIR since he may have been feeling obliged himself qua owner to be allowed to be travelled on trolley and due to the said reason nowhere he even disclosed his own capacity to travel on the offending vehicle.

15. There is no cross-examination of the owner on the above aspect. No effort whatsoever has been made to extract clearly the status of the deceased while he was sitting on the tractor trolley. Shri S.K.Soni, Deputy Manager of the insurance company has also not been able to establish the above fact

conclusively as he has merely proved the notice issued under Order 12 Rule 8 CPC and the policy between the owner and the insurance company. Having regard to the circumstances above and in view of the judgment of National Insurance Company Versus Neelam, 2009 (1) ACC 64, since the insurance company asserted the fact of deceased being travelling in capacity of gratuitous passenger and since it is the insurance company which is likely to suffer if the above fact is not duly established, the onus in such circumstances was on the insurance company to conclusively show that the capacity of the deceased indeed was that passenger and since there is complete failure of the above aspect, the plea of the insurance company Cannot be accepted and is to be turned down. Having regard to the judgments relied upon by learned Shri B.K.Sharma, they are of no consequence as they are not attracted to the facts and circumstances of this case. Having said so, the insurance company is directed to discharge the liability of the award amount within 30 days from today”.

11. This Court upholds the contention of the insurance company that the tribunal has failed to appreciate the evidence on record correctly. The claimants had not stated that the deceased was a non-gratuitous passenger or was moving on the motor vehicle in question with his own goods. The tribunal appears to have indulged in imagining the possible explanation for the travel of the deceased on the tractor during the fateful journey. The very fact that the claimants have not disclosed the capacity in which he was travelling, it should have resulted in presumption being raised in favour of the contention of the insurer. The burden to prove otherwise had to be on the opposite party. Having regard to the view taken by Supreme Court in *Oriental Insurance Co. Ltd. vs. Brij Mohan & Ors.* (2007) 7 SCC 56, it is held that the deceased being a gratuitous passenger, the insurance company

could not have been burdened with the responsibility to indemnify, not the least without being granted recovery rights.

12. By order dated 11.04.2012, the insurance company was directed to deposit the entire awarded amount with upto date interest, which was directed to be kept in fixed deposit receipt with UCO Bank, Delhi High Court initially for a period of six months to be renewed from time to time. The Registrar General shall now calculate the amounts payable to the claimants in terms of the modified award and release the same from out of the said deposit, refunding the excess to the insurer with statutory deposit, if made.

13. The insurer shall have the right to recover the amount paid to the claimants under this award from the owner and driver (eighth and ninth respondents) who are held jointly and severally liable.

14. The appeal is disposed of in above terms.

R.K. GAUBA
(JUDGE)

MARCH 22, 2016
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