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

Date of Decision: 15th March, 2016

+ **MAC.APP. 721/2011 & CM APPL. 14792/2011**

NATIONAL INSURANCE CO LTD Appellant

Through: Mr. Pankaj Seth, Adv.

versus

MASTER PRATYAKSH & ORS Respondents

Through: Mr. Mahesh Maini & Ms. Hreeshika
Bhargava, Adv.

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Rekha Shankar died in a motor vehicular accident that occurred on 19.03.2007 when the scooty bearing registration no.DL-4SBE-0941 (the scooty), which she was riding, was statedly hit by a truck bearing registration no.RJ-14-2G-7757 (the truck). It appears that she was married to fourth respondent (Atul Srivastava) though both had fallen part. From out of her wedlock, she had given birth to a son Pratyaksh (first respondent herein) who was only six years old when death occurred. It appears that the first respondent (the claimant) was under the care and custody of his maternal uncle (Vikas Shankar) after the death of his mother. A claim petition was brought before the motor accident claims tribunal (the tribunal)

by Vikas Shankar (the next friend/guardian) for and on behalf of Master Pratyaksh (the claimant) on 17.04.2007, it having been registered as MACP no. No.281/2010. In the claim case, the driver and owner (second and third respondents herein) were impleaded as respondents in addition to the appellant/insurance company (the insurer), the latter having admittedly issued a third party insurance policy in respect of the offending vehicle for the period in question.

2. The claim petition was contested on the ground that the accident had occurred due to negligence on the part of the deceased. The tribunal framed issues, the prime one being as to whether Rekha Shankar had died due to rash/negligent driving of the truck by its driver (second respondent herein).

3. By judgment dated 03.03.2011, the tribunal awarded compensation in the sum of Rs.31,77,824/- with interest at the rate of seven & half percent (7.5%) per annum from the date of filing of the petition till realization apportioning the compensation by specifying the amounts that would fall to the share of the first respondent (son) and fourth respondent (husband). The compensation was awarded by the tribunal after returning the finding that the accident and death had occurred due to negligent driving of the truck by the second respondent, this on the basis of the fact that some documents submitted had shown that he had been prosecuted by the police on the basis of report and investigation into first information report (FIR) and further because the second respondent (party) had not offered himself as a witness which, in the opinion of the tribunal, merited adverse inference to be drawn against him.

4. The insurance company has come up in appeal questioning primarily the finding on the question of negligence contending that conclusions have been reached by the tribunal without any evidence whatsoever. It is further the contention of the insurance company that the calculation of the compensation by the tribunal was wholly erroneous, particularly on the question of loss of income (dependency).

5. At the hearing, the learned counsel for the claimant fairly conceded that in a claim case prosecuted under Section 166 of the Motor Vehicles Act, 1988 (the MV Act), the prime burden of proving the fault on the part of the offending vehicle is that of the claimant. He also conceded that an eye witness was available but was not produced. In these circumstances, the approach of the tribunal to the matter cannot be upheld. The question of drawing adverse inference against second respondent (the driver of the offending vehicle) would have arisen only after the claimant had discharged his primary burden. No such evidence having been brought on record, the finding recorded by the tribunal on the issue of fault is perverse and, thus, cannot be upheld.

6. Faced with above fact situation, the learned counsel for the claimant submitted that instead of petition being dismissed on merits, in all fairness the matter should be remitted so that the claimant can adduce proper evidence on the question of negligence. The learned counsel for the insurance company conceded and submitted that he would not oppose the said request though he would insist that its contention with regard to the calculation of the compensation be preserved to be agitated before the tribunal. Since the computation of the compensation is an issue which

would need to be taken up only after the case has been properly made out under Section 166 of the MV Act, in the given fact situation, the submission of the insurance company deserves to be accepted.

7. In above view, the appeal is allowed. The impugned judgment/award is set aside. The matter is remitted to the tribunal for further inquiry and fresh adjudication, including on the question of assessment of the compensation. The parties shall appear before the tribunal for further proceedings on 25th April, 2016. The tribunal shall first afford opportunity to the claimant to adduce further evidence. Contesting parties on the other side shall be entitled to cross-examine the additional witness(es) of the claimant and also lead evidence in rebuttal, if any.

8. Needless to add, the tribunal will approach all issues with open mind not feeling bound by the view taken by the tribunal in the judgment which was impugned before this court in the appeal at hand.

9. By order dated 09.08.2011, the insurance company had been directed to deposit the entire awarded amount with up-to-date interest with the Registrar General whereupon the execution was stayed. By order dated 30.08.2013, fifty percent (50%) of the said deposited amount was released to the first respondent (the claimant). By order dated 24.09.2013, however, it was clarified that fifty percent (50%) of the deposited amount was to be released in favour of the first and fourth respondents of the impugned judgment of the tribunal. The balance amount deposited by the appellant is still lying in FDR taken out in terms of the order dated 09.08.2011. The Registrar General shall arrange for the said FDR to be transferred to the

tribunal which shall retain the same in a nationalized bank in FDR initially for a period of six months to be renewed from time to time.

10. Having regard to the facts and circumstances of the case, it is desirable that the case is decided expeditiously. Therefore, the tribunal is requested to decide the matter afresh as early as possible, preferably within six months from the date of appearance hereby fixed.

11. The amount already released to the claimant and his father (fourth respondent) shall be subject to fresh adjudication by the tribunal. The entire share released to the first respondent is lying in FDR. It shall continue to be so held though with right to draw monthly interest for his regular maintenance. The amount retained in FDR as above shall be available to the tribunal for appropriate utilization in light of the judgment to be passed.

12. The statutory deposit, if made, shall be refunded.

13. The appeal is disposed of in above terms.

R.K. GAUBA
(JUDGE)

MARCH 15, 2016

SSC