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

Date of Decision: 29th March, 2016

+ **MAC.APP. 991/2012**

ORIENTAL INSURANCE CO LTD Appellant

Through: Mr. A. K. Soni, Adv.

versus

RAHUL & ORS Respondents

Through: Mr. Anshuman Bal, Adv. for R-1 & 2.

AND

+ **MAC.APP. 994/2012**

ORIENTAL INSURANCE CO LTD Appellant

Through: Mr. A. K. Soni, Adv.

versus

KRISHNA DEVI & ORS Respondents

Through: Mr. Anshuman Bal, Adv. for R-1 & 2.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. On 22.03.2011, at about 10:00 AM, a motor vehicular accident occurred involving two vehicles, one being scooter bearing registration

no.DL-8SN-2978 (the scooter) and the other being Indica car bearing registration no.DL-3CAX-0964 (the car). Admittedly, three persons were moving on the scooter at the time of collision, they being Amit, Rahul & Vishal. As a result of fall, at least Amit & Rahul suffered injuries, with the former (Amit) dying in the consequence.

2. Two accident claim petitions under Sections 166 & 140 of the Motor Vehicles Act, 1988 (the MV Act) were instituted on 11.05.2011, both being presented by the same counsel (Mr. Karan Bal, Advocate) engaged for such purposes. One of the said claim petitions (MACT case no.151/2011) was filed by the parents of the deceased Amit, while the other (MACT case no.235/2011) was filed by Rahul, the injured. Both the cases were inquired into together leading to a common judgment passed by the motor accident claims tribunal (the tribunal) on 29.05.2012 which is impugned in these two appeals by Oriental Insurance Co. Ltd. (the insurer) which had admittedly issued a third party insurance policy in respect of the car for the period in question.

3. It may be mentioned that the driver and the registered owner of the car (the insured) were also impleaded as respondents in the two claim cases; the driver (Rajender Kumar), by way of his written statement, taking the position that the accident had occurred due to sole negligence of the scooter driver.

4. By the impugned judgment, the tribunal returned the finding that the accident had occurred due to negligence on the part of the car driver. It assessed the compensation in the sum of ₹9,76,668/- in the death case (on

the claim petition presented by parents of the deceased Amit) and ₹1,35,000/- in the case of injuries (suffered by Rahul). It was awarded in the two cases with interest at the rate of nine percent (9%) from the date of the filing of the petition(s) till realization. The insurer was directed to satisfy the award and also to pay ₹80,000/- as out of the pocket expenses to the counsel representing the claimants in the two cases.

5. The insurer by these appeals questions the correctness of the finding recorded by the tribunal on the issue of negligence. Its argument is that the story set out in the two cases about Amit being the driver of the scooter was false, as exposed, *inter-alia*, by the first information report (FIR) that had been registered vide no.60/2011 in police station South Rohini on 22.03.2011 on the statement of Rahul (claimant in MACT case no.235/2011) showing that it is he himself who was driving the said vehicle with Amit and other person (Vishal) being pillion riders. The appellant (in MAC appeal no. 991/2012) submits that since the evidence shows that Rahul was guilty of contributory negligence, the amount of compensation deserves to be reduced proportionately.

6. By appeal in the death case (MAC appeal no.994/2012), the insurance company argues that the element of future prospects was wrongly factored in, even though the income had been assessed notionally on the basis of minimum wages. It further points out that the multiplier of 14 was incorrectly adopted ignoring the fact that the age of the mother (first respondent in MAC appeal no.991/2012) was 46 years and 7 months as on the relevant date in which view, per the dictum in *Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 12, the proper

multiplier should have been 13. The insurance company is further aggrieved with the burden of out-of-pocket expenses being directed to be paid to the counsel representing the claimants in these two cases. The insurance company also questions the addition of ₹1,00,000/- towards loss of estate.

7. *Per contra*, the counsel for the claimants in death case, (first and second respondents in MAC appeal no.994/2012) pointed out that amount of ₹30,000/- though held proved (para 6 of the judgment) it having been incurred towards medical expenses for the deceased during his treatment, was not included in the final calculation.

8. Having heard the learned counsel on both sides, this court finds substance in the plea raised by the insurer on the question of negligence. The copy of the report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C) which included the copy of the FIR had come on record with the detailed accident report (DAR) submitted on 07.06.2011 by Inspector (Accident Investigation Unit) of Outer District, Delhi. The said document clearly shows that immediately after the accident that had occurred at about 10:00 AM on 22.03.2011, the investigating police officer from the local police station had contacted Rahul (first respondent in MAC appeal no.991/2012) and recorded his statement. In the said statement, Rahul described himself as a person aged 17 years and had told the investigating police officer that he was driving the scooter in the direction of market for making some purchases with Amit (the deceased) and Vishal (the other person) also travelling with him as pillion riders. He described the sequence of events wherein the car had come in a rash speed and even

though he had tried to apply brakes, it had collided against the scooter head-on resulting in injuries being suffered by him and Amit.

9. As noted at the beginning of this judgment, both the claim petitions were drafted and presented by the same counsel. It is interesting to note that in the death case (MACT case no.151/2011) it was mentioned, against column no. 9 that the deceased Amit was going on the scooter “as pillion rider” while it was being driven by “Rohit”. The learned counsel for the insurance company has placed on record (MAC appeal no.994/2012) certified copy of the claim petition presented at the same time in respect of the injuries suffered by Rahul (MACT case no.235/2011). In the said claim petition, against column no.9, it was vaguely mentioned that the petitioner (Rahul) alongwith his friends Amit and Vishal were going on scooter when it met with an accident. Noticeably, in the said pleadings, the name of the person who was driving the scooter was not indicated. It is further pertinent to note that there was no reference in the said case to any person named “Rohit” being one of the three travellers on the scooter at the time of the collision. Though possibility cannot be ruled out that the wrong name “Rohit” was deliberately introduced in the pleadings in the death case, it is equally possible that this may be a case of typographical error.

10. The fact, however, remains that in the course of inquiry, commonly held in the two cases, clubbed for such purposes, Rahul (the claimant in the injury case) appeared as the sole witness to the occurrence, he being examined as PW2. The claimants in both the cases, including Rahul himself, have relied upon the said evidence with regard to the sequence of events leading to the collision and the injuries being suffered by the two

persons. Pertinently, Vishal, the third person on the scooter was not offered as a witness.

11. In his affidavit (Ex.PW2/A), Rahul (PW2) claimed that he alongwith Amit and Vishal were going on the scooter when the car had come at a high speed driven in a rash/negligent manner on the wrong side causing the accident. He would not state in the said affidavit as to who was the person driving the scooter. During his cross-examination, he was questioned in this regard at length and confronted with the version recorded in the FIR registered at his instance. It is at that stage that he took the plea that he had signed the statement before the investigating officer without reading its contents. He claimed that he was a pillion rider on the scooter which was driven by Amit (the deceased).

12. In the aforementioned facts and circumstances, the word of Rahul (PW2) about he only being a pillion rider and not the driver of the scooter cannot be believed. It is clear that the pleadings were drafted in such a manner as to create a wrong impression that the scooter was driven by someone other than Rahul. The first version (appearing in FIR), of Rahul himself cannot be discarded. It clearly shows that it was he who was driving the scooter when he met with an accident. Thus, it is held that the finding recorded by the tribunal on this issue is incorrect.

13. Rahul (PW2), during his cross-examination, admitted that he was only 17 years old at the relevant point of time. He also admitted that he did not know how to drive. In the face of these admissions, the plea of contributory negligence on his part must be accepted. In the overall factual matrix of this

case, it is held that the responsibility for the accident will have to be shared equally by Rahul, the scooter driver, and Rajender Kumar, the car driver.

14. Thus, Rahul (first respondent in MAC appeal no.991/2012) is held entitled to receive compensation only to the extent of 50% of the amount awarded by the tribunal, i.e. $(1,35,000 \div 2)$ ₹67,500/-. Needless to add, it shall carry interest as levied by the tribunal.

15. It is noted that in absence of proper proof of employment or even educational qualifications, the tribunal made a notional assessment of income of Amit at the rate of minimum wages payable to an unskilled worker, ₹6084/- per month at that point of time and added 50% towards future prospects of increase.

16. 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.

17. 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. In the above noted fact-situation, the element of future prospects has to be kept out of consideration. Thus, monthly dependency in case of death of Amit is calculated as $(6084 \div 2)$ ₹3042/-.

18. The document (Ex.PW1/3) on record shows the date of birth of the mother (first respondent in MAC appeal no.994/2012) is 23.08.1964. Since the accident had occurred on 22.03.2011, she would have turned 46 years and 7 months old at the relevant point of time. In these circumstances, the multiplier of 13 only could have been invoked. Therefore, the total loss of dependency is calculated as $(3042 \times 12 \times 13)$ ₹4,74,552/-, rounded off to ₹4,75,000/-.

19. The award of ₹1,00,000/- towards loss of estate was unduly high and improper. At the same time, it is noted that ₹10,000/- awarded towards funeral expenses is inadequate. There is merit in the contention of the claimants in the death case that though the tribunal accepted the proof of medical expenses to the tune of ₹30,000/-, it failed to include it in the final computation.

20. Following the view taken in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54 and *Shashikala V. Gangalakshamma* (2015) 9 SCC 150, ₹25,000/- each towards loss of estate and funeral expense seem to be just

and proper, this of course would be in addition to ₹1,00,000/- awarded towards loss of love & affection

21. Thus, the total compensation awardable in the death case comes to (4,75,000+ 1,00,000/+25,000+25,000+30,000) ₹6,55,000/-. The compensation in favour of the first and second respondents in MAC appeal no.994/2012 is consequently reduced to ₹6,55,000/-. It shall carry interest as levied by the tribunal.

22. The direction about out-of-pocket expenses to the counsel for the claimants in these two cases, being uncalled for, is set aside.

23. Both these appeals were taken up for consideration on 07.09.2012. By identical orders passed on the said date, the insurance company was directed to deposit 50% of the awarded amount (excluding counsel fee and out of pocket expenses) with up-to-date interest with UCO Bank, Delhi High Court branch in the name of respective claimants. The amounts thus deposited were ordered to be kept in FDR for period of six months to be renewed from time to time. By the same order in MAC appeal no.991/2012, ₹20,000/- was released in favour of the claimant (Rahul). Similarly, in the other case, by same order dated 07.09.2012, ₹50,000/- each were released in favour of the claimants in the said case (first and second respondents). By subsequent order passed on 22.08.2013 in each of these appeals the balance of the amount deposited with UCO Bank High Court of Delhi was also ordered to be released to the claimants.

24. In view of the finding about contributory negligence, and consequent reduction of the compensation payable to Rahul (first respondent in MAC

appeal no.991/2012), no further amount requires to be paid to him. The insurer in the other appeal (MAC appeal no.994/2012) shall deposit the balance of its liability with the tribunal within 30 days, whereupon the same shall be released to the claimants in terms of the impugned judgment, modified as above.

25. The statutory amounts, if deposited, shall be refunded in both these appeals.

26. The appeals are disposed of in above terms.

MARCH 29, 2016
ssc

R.K. GAUBA
(JUDGE)

