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

Date of Decision: 26th February, 2016

+ **MAC.APP. 651/2010**

NEW INDIA ASSURANCE CO LTD Appellant

Through: Mr. K. L. Nandwani, Adv. along with
Mutika Chaturvedi, Adv. proxy
counsel.

versus

SUNITA & ORS Respondents

Through: Mr. Vikas Yadav & Upma Yadav,
Advs. for R-1.

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Nitin Julka, stated to be 22 years, died as a result of injuries suffered in a motor vehicular accident that took place at about 03:00 PM on 19.06.2003 allegedly involving car bearing registration no.DL-3CV-4314 which, according to the case set up, was owned by the fifth respondent herein and driven by her daughter fourth respondent herein, it being covered under an insurance policy against third party respondent with the appellant/insurance company (the insurer) for the period in question. It was stated that the deceased was crossing the road when the car came at a high speed in a rash/negligent manner and hit him throwing him up in the air, he falling at some distance suffering the fatal wounds.

2. The mother, father and sister of the deceased (first to third respondent herein), collectively called the claimants, brought claim petition under Section 166 read with Section 140 of the Motor Vehicles Act, 1988 (the MV Act) which was registered by the motor accident claims tribunal (the tribunal) as suit no.438/2008 (2003), impleading the driver, owner and insurer of the car as party respondents. The owner and driver of the car, in their joint written statement, denied liability on their part pleading that the deceased had statedly jumped in front of the car from out of the railing (on the divider of the road) so as to fall on the front wind-shield of the vehicle losing balance and suffering injuries. It was stated that the driver had herself taken the victim to the hospital for immediate medical treatment. The insurer, in its written statement, admitted the insurance policy.

3. The tribunal held inquiry on the basis of issues framed, the prime one being as to whether the death had occurred due to rash/negligent driving of the car by its driver. No eye witness was examined. The tribunal took note of the copy of documents relating to report under Section 173 of the Code of Criminal Procedure, 1973 (Cr.P.C) which had been submitted by the investigating police in relation to the first information report (FIR) no.379/2003 which had been registered by police station R. K. Puram, New Delhi. It referred to the judgment of the Supreme Court in *Kaushnuma Begum vs. New India Assurance Co. Ltd.* (2001) 2 SCC 9 and proceeded to draw conclusions on the assumption that admission about the involvement of the car itself justified a petition to be maintained under Sections 166 & 140 of the MV Act. Drawing adverse inference as the driver and the owner of the car had not joined the inquiry or offered their own evidence, and

having regard to the documents pertaining to the chargesheet mentioned above, the issue concerning rash/negligent driving was decided in favour of the claimants and on that basis compensation assessed and awarded.

4. By appeal at hand, the insurance company submits that the Supreme Court in *Kaushnuma Begum* (supra) had not permitted the approach to the issue as taken by the tribunal. It is noted from the report of the judgment in *Kaushnuma Begum* (supra) that the Hon'ble Supreme Court took resort to the special provision as to payment of compensation as structured formula basis under no fault liability principle contained in Section 163-A of the MV Act. It needs to be noted that in *Surender Kumar Arora & Anr. vs. Manoj Bisla & Ors.*, (2012) 4 SCC 552, the Supreme Court had clarified that the dictum in *Kaushnuma Begum* (supra) would come to the assistance of the claimant, if a petition were to be filed under Section 163-A of the MV Act. The view taken in earlier decision reported as *Oriental Insurance Co. Ltd. vs. Meena Variyal*, (2007) 5 SCC 428 to the following effect was reiterated:-

“.... Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the tribunal under Section 166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.”

5. Having perused the documents relating to the chargesheet of the FIR of the case at hand as submitted before the tribunal, it is found that there is no sufficient material available from which rash or negligent driving on the part of the driver of the car could be inferred. The site plan rather shows the stretch of the road where the accident occurred is a straight one with a divider and no provision for pedestrians to cross over from one side to other. In these circumstances, it was bounden duty of the claimant to produce Santosh Kumar, the eye witness, on whose statement FIR had been recorded. On being asked, the learned counsel for claimants submitted that though endeavour was made to have Santosh Kumar summoned as a witness, the said effort were given up as the tribunal had indicated that it was inclined to grant compensation placing reliance on the decision in *Kaushnuma Begum* (supra). This, in the opinion of this court, was wholly erroneous approach. Faced with above situation, the learned counsel for the claimant fairly conceded that the matter required further inquiry. He submitted that the appeal of the insurance company may be allowed but the matter may be remitted to the tribunal to give opportunity to the claimant to prove their case under Section 166 of the MV Act, in as much as they would not be interested in converting it into a petition under Section 163-A of the MV Act as that is likely to result in a highly deficient award of compensation.

6. The learned counsel for the insurance company submits that he has nothing to say on the request of the claimants for the claim petition to be remitted for further inquiry.

7. In the foregoing facts and circumstances, the appeal of the insurance company is allowed. The impugned judgment and award are set aside. The matter is remitted to the tribunal for further inquiry in accordance with law, during which the claimants will be entitled to lead further evidence to bring home their case on the principle of fault liability. Needless to add that the parties which participate and contest shall be entitled to cross-examine such witnesses as are now presented and also will be entitled to lead evidence in rebuttal.

8. The parties shall appear for aforesaid purpose before the tribunal on 18th March, 2016.

9. By order dated 29.09.2010, the insurance company had been directed to deposit the entire awarded compensation with the Registrar General within the period specified and, out of such deposit, fifty percent (50%) was allowed to be released to the claimants in terms of the impugned judgment, the balance having been kept in fixed deposit in a nationalized bank initially for a period of one year. The balance retained in terms of the said direction shall now be refunded to the insurance company with the statutory deposit, if made. The amount already released to the claimants shall be suitably adjusted in terms of the judgment which shall now be passed by the tribunal at the conclusion of further proceedings hereby ordered.

10. The appeal is disposed of in above terms.

11. Trial court record be returned.

R.K. GAUBA
(JUDGE)

FEBRUARY 26, 2016/ssc