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

Decided on: 10th July, 2017

+ **MAC.APP. 487/2014 & CM Nos. 9145/2014, 41993/2016**

UNITED INDIA INSURANCE CO LTD Appellant

Through: **Mr. Pradeep Gaur, Advocate**

versus

SMT VIMLESH GUPTA & ORS Respondents

Through: **Mr.S.N. Parashar, Advocate for
R-1 to 5.**

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. Satish Babu Gupta, then aged 57 years, working as Superintendent Engineer with New Delhi Municipal Council (NDMC) was driving two wheeler scooter bearing registration No. DL 7SF 1805 (scooter) at about 10.30 a.m. on 17.07.2005 when he came to be involved in a motor vehicular accident resulting in injuries that eventually caused his death. It is stated that the accident involved two other vehicles, they being Maruti Zen car bearing registration no. DL 2CK 7967 (the car), and a three wheeler scooter bearing registration no. DL 1RJ 1698 (TSR). It is stated that the deceased was a widower and his legal heirs, five married daughters, they being first to fifth respondents herein (collectively, the claimants), joined together to

institute accident claim case (suit no. 35/13/2006) seeking compensation. In the said proceedings taken out under Section 166 of Motor Vehicles Act, 1988, the owner cum driver of the car, and its insurer, were impleaded as first and second respondents. The insurer of the car is now the appellant before this Court while owner cum driver of the car is the sixth respondent. The claimants also impleaded the driver, owner and insurer of the TSR, they being respondents no.3 to 6 before the tribunal (now seventh to tenth respondents in the appeal).

2. In the claim petition, both set of respondents i.e. owner-cum-driver and insurer of the car and the owner, driver and insurer of the TSR put in contest, their plea being that there was no involvement on their side and that the accident had occurred due to negligence on the part of the deceased scooterist. It is pointed out that the deceased was also moving on the scooter without wearing helmet. Pertinently, it needs to be noted that the car driver (sixth respondent) pleaded that he was only an eye witness to the occurrence, the collision having taken place between the TSR and the scooter and that he had been falsely implicated. Reference in this regard was made to the report of investigation carried out by the police in the wake of registration of first information report (FIR) No. 162/2005 of police station Chanakya Puri, New Delhi.

3. The tribunal accepted the evidence led by the claimants, particularly the account given by Dinesh Singh Patwal (PW-3) who was presented as an eye witness and returned finding that the accident had occurred due to negligence on the part of the car driver and,

therefore, awarded compensation, fastening the liability on the appellant insurance company.

4. By the appeal at hand, the insurer of the car questions the above-noted finding, its contention being that PW-3 could not have been believed in that, in the police investigation, it had been concluded that there was no involvement of the car. It is also pointed out that in the report of investigation into the FIR, the police had filed an untraced report. The insurance company, at the same time, argues that the evidence shows that the deceased himself was guilty of negligence in that he was moving on two wheeler scooter without taking the precaution of wearing a helmet. The insurance company also submits that the married daughters (the claimants) could not have been treated as dependents and, therefore, the tribunal was right in declining any award under the head of loss of dependency. It is argued that the award under the head of loss of estate it having been calculated on the lines of calculation of the loss of dependency was an erroneous approach.

5. *Per contra*, the claimants argued that the negligence on the part of the car driver was duly proved and that the award under the head of loss of love and affection and funeral expenses are inadequate and the rate of interest levied is also deficient.

6. Having heard the learned counsel on both sides and having gone through the record, this Court finds no reasons to disturb the finding of the tribunal as to the negligence on the part of the car driver. Mere fact that the police investigation had initially resulted in an “untraced” report being submitted does not mean that it would be

the ultimate test of the truth of the matter. The claimants had also brought on record before the tribunal that, on their protest petition, further inquiry was held by the court of magistrate and, on the basis of evidence adduced, summoning order against the car driver was issued and he is facing criminal prosecution on the charge of causing death of the scooterist due to rash or negligent driving of the car on his part.

7. The evidence of PW-3 nails the issue in favour of the claimants in the proceedings arising out of the claim petition. Pertinent to note, neither the car driver nor the TSR driver entered the witness box. Both of them admitted their presence at the scene and involvement of their vehicles in the collision is also substantiated. If the sequence of events was different from what was testified by PW-3, they should have appeared as witnesses and deposed about the necessary facts. The omission to do so on their part leads to adverse inference. In the given fact-situation, there is no reason why the evidence of PW-3 should be disbelieved as to the sequence leading to fatal accident.

8. At the same time, however, it cannot be ignored that the evidence on record clearly indicated that the deceased himself was guilty of negligence in that he was moving on a two wheeler scooter without taking the precaution of wearing a helmet on his head. This indeed added to the reasons for the fatality. This Court would attribute half of the responsibility for the fatal occurrence to the deceased himself and, therefore, the element of contributory negligence to the extent of 50% will have to be factored in. The claimants, thus, would be entitled to release of compensation only to the extent of 50%.

9. The claimants undoubtedly are married daughters. The deceased was a widower. In these circumstances, it is not correct on the part of the insurance company to argue that there would be no loss to the estate. Instead, the loss would be to the extent of 50% of the earnings inasmuch as he being the only person in the household for whose purposes he was earning, the deductions on account of personal and living expenses would have to be similar to that in the case of a bachelor. Thus, this Court finds no error in the approach of the tribunal to the issue of loss of estate.

10. However, the grievance of the claimants with regard to non-pecuniary damages and rate of interest is correct. Following the view taken in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54 and *Shashikala V. Gangalakshamma* (2015) 9 SCC 150, compensation in the sum of Rs.1 lakh on account of loss of love & affection and Rs.25,000/- towards funeral expense are added. Thus, the total compensation works out to (25,93,898+ 90,000) Rs.26,83,898/- rounded off to Rs.26,84,000/-. Since the element of contributory negligence has to be applied, the claimants would be entitled to $(26,84,000 \div 2)$ Rs. 13,42,000/- only.

11. Following the consistent view taken by this Court, the rate of interest is increased to 9% per annum from the date of filing of the petition till realization. [see judgment dated 22.02.2016 in MAC.APP. 165/2011 *Oriental Insurance Co Ltd v. Sangeeta Devi & Ors.*].

12. Needless to add, the petitioners shall be entitled to equal shares in the awarded amount.

13. By order dated 23rd May, 2014, execution of the award granted by the tribunal was stayed. The stay order is hereby vacated though with caution that it is final award, as modified above by this Court which will have to be enforced. The insurance company is directed to deposit the requisite amount in terms of the modified award within 30 days from today whereupon it shall be released. In case of default, claimants will have the liberty to take out appropriate proceedings for its execution.

14. Statutory deposit shall be refunded upon proof being shown as to the satisfaction of the award.

JULY 10, 2017
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R.K.GAUBA, J.