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IN THE HIGH COURT OF DELHI AT NEW DELHI

Decided on: 20th November, 2017

+ MAC.APP. 670/2012 & CM No.10926/2012(stay)

NATIONAL INSURANCE COMPANY Appellant

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

versus

JITENDER DABAS & ORS. Respondents

Through: Mr. Navneet Goyal, Adv. for
R1.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The first respondent (the claimant) was riding the pillion of motor cycle bearing registration no. DL-3S-AW 1549 (motor cycle) driven by the second respondent (the motor cycle rider cum owner) on 30.12.2006 in the area of Balraj Farm House, Pooth Khurd, Delhi at about 5:20 PM. The motor cycle came to collide against stationary bus bearing registration no. DL-1-PB-2174 (the bus) of Delhi Transport Corporation (DTC). As a result, the claimant suffered injuries which have rendered him permanently disabled. He instituted accident claim case (MACT 768/10/07) on 13.12.2007 in which the motor cycle rider, the driver of the bus, DTC and National Insurance Company Ltd. (the insurer), which had issued an insurance policy covering third party risk in respect

of the bus, were impleaded. The tribunal held inquiry and, by judgment dated 09.02.2012, returned a finding that the accident had occurred due to the composite negligence of both the drivers i.e of DTC and the motor cycle. It granted compensation in the total sum of Rs.35,11,500/- and fastened the liability to pay only on the insurer of the bus, this along with Rs. 50,000/- as counsel fee to the claimant's counsel.

2. The appeal by the insurer of the bus is pressed only to submit that in a case of composite negligence, the driver of motor cycle also having been found responsible, the liability to pay should have been equally apportioned. Reliance is placed on the ruling of the *Supreme Court of India in Kenyei Vs. New India Assurance Company Ltd 2015 ACJ 1441 of 2015 (9) SCC 273* wherein the following principles were settled:-

“22.1. In the case of composite negligence, the plaintiff/claimant is entitled to sue both or any one of the joint tortfeasors and to recover the entire compensation as liability of joint tortfeasors is joint and several.

22.2. In the case of composite negligence, apportionment of compensation between two tortfeasors vis-à-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them.

22.3. In case all the joint tortfeasors have been impleaded and evidence is sufficient, it is open to the court/Tribunal to

determine inter se extent of composite negligence of the drivers. However, determination of the extent of negligence between the joint tortfeasors is only for the purpose of their inter se liability so that one may recover the sum from the other after making whole of the payment to the plaintiff/claimant to the extent it has satisfied the liability of the other. In case both of them have been impleaded and the apportionment/extent of their negligence has been determined by the court/Tribunal, in the main case one joint tortfeasor can recover the amount from the other in the execution proceedings.

22.4. It would not be appropriate for the court/Tribunal to determine the extent of composite negligence of the drivers of two vehicles in the absence of impleadment of other joint tortfeasors. In such a case, impleaded joint tortfeasor should be left, in case he so desires, to sue the other joint tortfeasor in independent proceedings after passing of the decree or award.”

3. The second respondent has been duly served. By order dated 26.02.2016, the appeal was directed to be shown in the list of “Regulars” for it to come up for hearing on its own turn. When the appeal is taken up for hearing, there is no appearance on behalf of the second respondent. The learned counsel for the insurer and for the claimant have been heard and with their assistance the record perused.
4. Though negligence on the part of the DTC bus driver has been found primarily on the ground that he had parked the bus in the

middle of the road without any indication, the evidence overwhelmingly shows that the negligence was also of the motor cycle rider. It is he who had driven his two wheeler vehicle rashly. The motor cycle was driven right into stationary bus causing injuries to the claimant rendering him permanently disabled. It is on this basis that the tribunal found that the motor cycle rider was also guilty of composite negligence. Since he was also a party to the claim case, the tribunal should have apportioned the liability and granted *inter se* rights to the insurer to recover. As a result of tribunal's failure to do so, necessary directions are required to be issued by this court.

5. Having regard to the sequence of events leading to the collision, the liability is apportioned equally amongst the drivers of the bus and of the motor cycle. In the consequence, the appellant insurance company is granted rights to recover 50% of the amount paid or payable under the impugned judgment to the claimant from the second respondent. For execution of such rights, it is given liberty to take out appropriate execution proceedings before the tribunal.
6. There was no good ground to award Rs. 50,000/- towards payment of counsel fee. The order of the tribunal to this extent in favour of the claimant is set aside.
7. By order dated 03.07.2012 and 19.11.2012, it was brought to the notice of the court that the amount of compensation had been recovered by attaching the account of the Insurance Company. In terms of order dated 19.11.2012, 50% of the awarded amount was

permitted to be released to the claimant in terms of the impugned judgment. The balance amount was kept in fixed deposit receipts. The tribunal shall take steps to ensure that the amount towards counsel fee is refunded to the Insurance Company and the balance amount with accumulated interest paid to the claimants in terms of the impugned judgment.

8. The statutory amount shall be refunded to the appellant insurance company.
9. The appeal is disposed of in above terms.

R.K.GAUBA, J.

NOVEMBER 20, 2017

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