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

Decided on: 24th July, 2017

\+ MAC.APP. 417/2016

THE NEW INDIA ASSURANCE COMPANY LTD. ..... Appellant

Through: Mr. Parveen Kumar Mehndiratta, Advocate

Versus

SUMAN SHARMA & ORS. ..... Respondents

Through: Mr. A.K. Sharma, Advocate for R-1 to 5

Ms. Satvinder Kaur, Adv. for R-8

Ms. Suman Bagga, Adv. for R-9

\+ MAC.APP. 786/2016 and CM No.35944/2016 and 35946/2016

NIRBHAL SINGH ..... Appellant

Through: Ms. Satvinder Kaur, Advocate

versus

SUMAN SHARMA AND ORS ..... Respondents

Through: Mr. A.K. Sharma, Adv. for R-1 to 5

Ms. Suman Bagga, Adv. for R-9

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

JUDGMENT (ORAL)

1. Manik Chand Sharma, aged about 47 years, earning his livelihood as a cutting master in a private engagement, suffered injuries and died in the consequence on account of a motor vehicular accident that took place on 01.02.2012. His wife, three children and mother, first to fifth respondents in these appeals (hereinafter referred to as “the claimants”) instituted accident claim case (MAC 209/2016) on 19.03.2012 seeking compensation.

2. In the said claim petition, it was stated that the deceased was moving on a bicycle towards Kailash Nagar and at about 7.15 p.m. when he had reached near cremation ground abutting Geeta Colony Road, Delhi, he came across a car bearing registration no.PB-28D-1683 (hereafter “the car”) stationary in the middle of the road and just as he was overtaking the said stationary vehicle, the driver of the car suddenly opened the right side door in a negligent manner knocking him down. It was further stated that, at that very moment, a bus bearing registration no.DL-1PA-4135 (hereinafter referred to as “the bus”) driven in high speed came from behind and run over the cyclist Manik Chand Sharma crushing him to death.

3. In the claim petition, the driver and insurer of the bus were impleaded as first and second respondents, the said insurer of the bus being now appellant in MACA 417/2016. The claimants had also impleaded the driver, owner and insurer of the car on the allegations that the said driver of the car was also negligent. The owner of the car

is the appellant in MACA 786/16, its insurer being the respondent in both the appeals.

4. The Motor Accident Claims Tribunal (Tribunal), on the basis of evidence led, found both the driver of the car as well as driver of the bus negligent. It awarded compensation in the sum of Rs.18,46,000/-, this inclusive of loss of dependency calculated at Rs.15,21,000/- and award in the sum of Rs.1 Lakh each on account of loss of love and affection, loss of consortium and loss of estate besides funeral expenses in the sum of Rs.25,000/-.

5. The Tribunal held it to be a case of composite negligence. It upheld the contention of the insurer of the car that the driver was not holding a valid or effective driving licence, this resulting in the breach of the terms and conditions of the policy. It fastened the liability to pay the compensation on the two insurance companies, apportioning the liability equally amongst them, adding interest at the rate of 12% p.a. On the basis of finding of breach of the terms and conditions of the policy of car, its insurer was granted recovery rights against the owner of the car.

6. The insurer of the car, by its appeal (MACA 417/2016), contends that the facts and circumstances leading to the evidence would show that the deceased cyclist was also negligent in that he was moving on the road meant for motor vehicles even though there was a side road (service road) available for movement of non-motorised vehicles such as cycles. He also argued that the fact that the cyclist had tried to overtake the stationary car from the right side shows that

he was oblivious and unconcerned about the risks he was unduly taking.

7. The insurance company further submits that the calculation of loss of dependency on the assumed income of Rs.13,000/- on the basis of evidence of PW-4 and PW-5 was not proper and that the tribunal should have instead gone by minimum wages to make the assessment of earnings. It is also the contention of the insurer of the bus that the levy of interest at the rate of 12% is excessive.

8. By his appeal (MACA 786/2011), the owner of the car questions the grant of recovery rights.

9. There is substance in the plea of the insurer of the bus that the cyclist himself was also responsible, to an extent, for the mishap. The motor vehicular accident was subject matter of investigation by the local police, it having registered FIR no.35/12 under Sections 279 / 304 A IPC in police station Gandhi Nagar. The local beat constable Ashwani Kumar Narwal (PW-7) was an eye witness. He was accompanied by a Head constable Surender, both on patrolling duty. His deposition, read alongside the report of the police (Ex. PW1/1 collectively), clearly shows that the car was stationary in the carriage way meant for movement of vehicular traffic from south to north which is also the direction taken by the deceased at the relevant point of time. The site plan (at page-321 of the tribunal's record) prepared by the investigating police shows that a service road existed running parallel to the said carriage way. The cyclist, for some reasons which are not explained in any manner by the claimants had decided to overtake the said stationery car from the right side ignoring not only

the service road which was available but also the other traffic which was moving at that point of time. It does appear that the car driver was negligent in that he opened the right side door without caring for the movement of the slow non-motorised traffic like a cycle resulting in the cyclist losing balance and falling down. The negligence on the part of the bus driver is writ large on the facts and circumstances in that he should have not only noticed the stationery car in the middle of the road but also the cyclist who was negligently coming in his way in the faster lane on which the said vehicle was moving. The fact that the speed of the bus was such that it could not be stopped and the vehicle ended up crushing the cyclist to death speaks volumes about the negligence on the part of the bus driver.

10. In the facts and circumstances noted above, negligence on the part of the cyclist had also apparently added to the fatality, his contributory negligence being assessed to the extent of 10% corresponding to which there will have to be a deduction in the compensation.

11. The claimants had examined, in their endeavour to prove the earnings of the deceased, Sunita Sharma, advocate (PW-4) and Manish Jain (PW-5). PW-5 was produced as special attorney of the proprietor of a firm Anubhuti Creations on the strength of special power of attorney (Ex. PW5/1). PW-4, on the other hand, is a practicing advocate at Karkardooma Courts and claimed in her testimony that the deceased was working part time as a care taker with her. The tribunal has accepted the said evidence to conclude the earnings of the deceased were in the range of Rs.13,000/- p.m.

12. As pointed out by the counsel for the insurer of the bus, there are many a discrepancy in the evidence of PW-4 and PW-5. There are no corresponding records of actual engagement of the deceased with either of them. The proprietor of the firm in question did not appear for reasons which are not properly explained. There is no corresponding record in the name of employment register, salary register, income tax returns or any other material from which the said evidence could be accepted as good so as to be acted upon.

13. During the course of arguments, suggestion came that these witnesses be recalled and given opportunity to produce the corresponding records once again. The counsel for the appellants, however, submitted that he would not insist on the assessment of loss of dependency to be made on the basis of evidence of PW-4 or PW-5 and would rather pray that the minimum wages of a semi-skilled worker be taken as the bench-mark.

14. In the above facts and circumstances, taking into account the fact that the deceased was working as a cutting master, minimum wages of Rs.7,358/- p.m. as applicable to semi-skilled workers on the relevant date are assumed to be income of the deceased.

15. 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 SCC 166.

16. 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.

17. Since there is no proof of regular engagement and the income has been assumed on the basis of minimum wages, assessment is made without the element of future prospects.

18. Going by the number of dependents, and the age of the deceased, the Tribunal had made deduction of one-fourth towards personal and living expenses and applied the multiplier of 13, correctly so. Thus, the loss of dependency is re-calculated as (Rs.7,358/- x 3/4 x 12 x 13) Rs.8,60,886/-, rounded off to Rs.8,61,000/-.

19. The non-pecuniary damages awarded by the tribunal are not in *sync* with the dispensation followed by this court. Having regard to the date of the accident (01.02.2012), the non-pecuniary damages in

the sum of Rs.1,50,000/- each towards loss of love and affection and loss of consortium and Rs.50,000/- each towards loss to estate and funeral expenses are added. Thus, total compensation comes to (Rs.8,61,000/- + Rs.1,50,000/- + Rs.1,50,000/- + Rs.50,000/- + Rs.50,000/-) Rs.12,61,000/-.

20. In view of the finding of contributory negligence recorded above, the claimants will be entitled to (Rs.12,61,000(-) Rs.1,26,100/-) Rs.11,34,900/-, rounded off to Rs.11,35,000/-. The award is modified accordingly.

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

22. The award is modified accordingly.

23. The tribunal had apportioned the award by specifying the amounts payable to the claimants. By order dated 18.05.2016, on the file of MACA 417/2016, the insurer of the bus had been directed to deposit the entire awarded amount with interest at the rate of 9% p.a. and from out of such deposit, 40% was allowed to be released to the claimants in terms of the directions in the impugned judgment. Since the amount of compensation has been reduced, it is directed that the amounts already released to the claimants other than the widow shall be treated as the apportionment of the compensation in their respective favour. The entire balance now to be paid shall fall to the share of widow Suman Sharma and shall be released accordingly.

24. The registered owner of the car (appellant in MACA 786/2016) had not led any evidence before the Tribunal, this inspite of opportunity given. The plea raised in the appeal that the car had actually been handed over to Pradeep Kumar, son in law at the time of marriage of the daughter of friend of the insured and so the car was not in the control of the registered owner, takes the appellant nowhere. The fact remains that the car continued to be registered in the name of the appellant. The appeal of Nirbhal Singh, registered owner of the car, thus, is found devoid of substance and is liable to be dismissed.

25. The Tribunal shall now release the balance amount to the first claimant widow Suman Sharma in terms of the award modified as above refunding the excess to the respective insurance companies. The statutory amount shall also be refunded to the appellant in MACA 417/2016.

26. The captioned appeals and the pending applications are disposed of in above terms.

R.K.GAUBA, J.

JULY 24, 2017
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