$~R-428 & 429

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

Decided on: 07th November, 2017

\+ MAC APPEAL 1091/2011

ORIENTAL INSURANCE CO. LTD. ..... Appellant

Through: Mr. Saurabh Kumar Tuteja for Mr. Tarkeshwar Nath, Advocate

versus

NEELAM SHARMA & ORS. ..... Respondents

Through: Mr. Nitinjya Chaudhary and Mr. Rajiv Trivedi, Advocate for R-1 to 3

\+ MAC APPEAL 470/2017

NEELAM SHARMA & ORS. ..... Appellants

Through: Mr. Nitinjya Chaudhary and Mr. Rajiv Trivedi, Advocate

versus

ORIENTAL INSURANCE COMPANY LIMITED & ORS. ..... Respondents

Through: Mr. Saurabh Kumar Tuteja for Mr. Tarkeshwar Nath, Adv. for R-1

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

JUDGMENT (ORAL)

1. Rakesh Sharma, then aged 46 years, was crossing the road

known as Netaji Subhash Marg from one side to the other on 18.02.1999 at about 4.20 p.m. when he was hit by a bus bearing registration no.DL-1P-0054 and died as a result of the injuries suffered, he having been crushed under the wheels of the said vehicle. His wife and two children, they being appellants in MACA 470/2017 (collectively, the claimants) instituted accident claim case (suit no.59/2006) on 02.06.1999 impleading the driver, owner and insurer of the said bus as party respondents, they being respondents in both the appeals, the said insurer having also come up in appeal, it being MACA 1091/2011.

2. On the basis of the evidence adduced, the tribunal held that the accident had occurred due to the negligent driving of the bus. It, however, also held that the deceased was guilty of contributory negligence due to jay walking, assessing the said contributory negligence to be to the extent of 20%. The tribunal computed the compensation in the total sum of Rs.9,30,000/- but directed the amount of Rs.7,50,000/- only to be paid on account of the contributory negligence. The amount of compensation determined, includes Rs.9,00,000/- towards loss of dependency, Rs.5,000/- towards funeral expenses and Rs.25,000/- towards consortium and loss of love and affection.

3. The insurer, by its appeal, submits that in the given facts and circumstances brought out through the evidence, the contributory negligence should have been to the extent of 50%. It also submits that the calculation of the loss of dependency by the tribunal is incorrect as the income of Rs.5,000/- was wrongly assessed. It is submitted that

given the ruling of the Constitution Bench of the Supreme Court rendered on 31.10.2017 in *SLP (C) 25590/2014, National Insurance Company Ltd. Vs. Pranay Sethi and Ors.*, the element of future prospects of increase in income in the present case cannot be more than 25%. It also points out that the tribunal had wrongly applied the multiplier of 15, the appropriate multiplier being 13, since the deceased was 46 years old on the relevant date.

4. *Per contra*, the claimants argue that the conclusion about the contributory negligence is erroneous as reckless driving of the bus by its driver was the sole reason for the fatal accident. The claimants further submit that the non-pecuniary damages be appropriately increased in view of the ruling in *Pranay Sethi* (supra).

5. It is noted that the claimants had examined Rakesh Kumar (PW-4) as the eye witness. The testimony of this witness has clearly brought out that there was not much traffic on the road. Judicial notice can be taken note of the fact that Netaji Subhash Marg is a busy road passing through a densely populated locality. The place where the accident occurred is particularly located in a busy market area where pedestrians do cross over from one side to the other. It may be that at the relevant point of time there was not much traffic moving on the road. But then, that would not give a licence to the bus driver to be reckless. The fact that the bus not only hit the deceased crossing the road but also crushed and dragged him along shows the excessive speed at which the bus was moving beyond the control of the driver. In these circumstances, the accident undoubtedly occurred due to the gross rash driving on the part of the bus driver. Without any material

in respect of the plea of contributory negligence being shown, it was unfair to discount the compensation on such ground. Pertinent to note here that there is nothing brought out in the testimony of the sole eye-witness examined at the inquiry to indicate presence of any zebra crossing in the vicinity. In these circumstances, the finding of the tribunal on the issue of contributory negligence is set aside.

6. The plea of the insurance company about the income of the deceased, however, is found to be correct. There was no basis to the finding that the income of the deceased was Rs.5,000/- p.m. The claimants had pleaded that he was running some business of operating popcorn and juice vending machine at Vishal Cinema. But, no documents worth the name were brought out.

7. In these circumstances, the minimum wages (Rs.2348 p.m.) would have to be the benchmark for assessing the income. Following the ruling in *Pranay Sethi* (supra), the factor of future prospects of increase in income to the extent of 25% is added and the multiplier of 13 adopted. After making deduction of one-third towards personal and living expenses, the loss of dependency is re-calculated as [Rs.2,348/- x 125 / 100 x 2/3 x 12 x 13] Rs.3,05,240/-, rounded off to Rs.3,06,000/- (Rupees Three Lakh and six thousand only).

8. Following the ruling in *Pranay Sethi* (supra), the non-pecuniary damages in the sum of Rs.40,000/- towards loss of consortium and Rs.15,000/- each on account of loss of estate and funeral expenses are added. Thus, the total compensation to which the claimants are held entitled is worked out as [Rs.3,06,000/- + Rs.40,000/- + Rs.15,000/- + Rs.15,000/-] Rs.3,76,000/- (Rupees Three Lakh and seventy six

thousand only).

9. Following the consistent view taken by this Court, the rate of interest is increased to 9% per annum (nine percent) 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*.]

10. The insurance company had been directed by orders dated 05.12.2011 and 05.12.2016 in MACA 1091/2011 to deposit the compensation awarded by the tribunal with UCO Bank, Delhi High Court Branch. The Registry shall now take steps to ensure that the amount of compensation payable to the claimants in terms of the modification ordered above is released from out of such deposit, the excess being refunded to the insurance company.

11. The statutory deposit made by the insurance company shall be refunded.

12. Both appeals are disposed of in above terms.

R.K.GAUBA, J.

NOVEMBER 07, 2017
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