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

Decided on: 14th September, 2017

+ **MAC.APP. 989/2016**

SURJIT & ORS.

.....Appellants

Through: Mr. Roshan Saini, Advocate with
Mr. Anuj Sharma, Advocate

versus

SYED ASGAR HUSSAIN & ORS.

..... Respondents

Through: Mr. S.K. Raghav, Adv. for R-2.
Mr. Dushyant Yadav, Adv. &
Mr. Puneet Kumar, Adv. for R-3.
Mr. Pradeep Gaur proxy counsel for
Mr. A.K. Soni, Adv. for R-4.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The appellants with the fifth respondent (Ram Pati) as co-petitioners had filed the accident claim case (Suit No.656/2012) on 17.09.2012 before the Motor Accident Claims Tribunal (the tribunal) at Delhi seeking compensation on account of death of Ram Baksh in a motor vehicular accident that had statedly occurred on 23.04.2004 within the jurisdiction of Police Station Paschim Vihar, New Delhi allegedly involving two vehicles, one being three wheeler scooter bearing registration No.DL-1RE-4161 (the TSR) and, the other, bus bearing registration No.DL-1PA-3421 (the bus). In the said claim

petition four parties were impleaded as respondents they now being the first to fourth respondents in the appeal, the first of them being described as the owner-cum-driver of the TSR, the reference to the others being in relation to the bus. The claim petition was dismissed as not maintainable by the tribunal by order dated 07.12.2015 for the reason the claim petition had earlier been presented before the forum at Mainpuri, U.P. which was dismissed in default on 13.03.2007, the exception taken by the tribunal being that in absence of the earlier petition being restored or steps being taken to seek its withdrawal, a fresh petition on the same cause of action could not have been instituted before the tribunal at Delhi. The appellants moved an application for recall of the said order but the same was also dismissed by a cryptic order dated 22.09.2016, not dealing with the contentions raised but only referring to the previous order dated 07.12.2015 to throw out the claim petition.

2. On this appeal whereby the challenge is brought to such dismissal of the claim petition by the tribunal notices were issued by order dated 28.11.2016. While the service of fifth respondent (Ram Pati) was dispensed with by order dated 30.01.2017, the other respondents except the first respondent having been served have appeared through their respective counsel, the first respondent continuing to be elusive in spite of attempts, it not being possible to have him expeditiously served. It is pointed out at the hearing, as is also borne out from the tribunal's record, that the first respondent had been duly served by the tribunal but he had chosen to suffer the

proceedings *ex-parte* and remained absent from the proceedings throughout the period, the petition remained pending on the file of the tribunal. It is noted that the case was still at the threshold when thrown out, no relief having come the way of the claimants even though the accident took place in 2004.

3. In the above facts and circumstances, it is deemed proper that the appeal be taken up for hearing and considered without the presence of the first respondent being secured at this stage. In view of dis-interest shown by him in the earlier proceedings before the tribunal, such efforts seemingly would be a mere formality. The needful compliance with the requirement of law for he to be afforded due opportunity at the inquiry can always be made by requisite directions to such effect to the tribunal.

4. Coming to the merits of the contentions urged against the dismissal of the claim petition by the tribunal, reference needs to be made only to the provision of Order IX Rule 4 of the Code of Civil Procedure, 1908 (CPC). A case which is suffered to be dismissed in default on account of non-appearance of the party that had instituted it does not bar a fresh one to be filed. The claimants had shown to the tribunal by documents that the claim petition filed at Mainpuri, U.P. had been dismissed in default. In this view, the dismissal of the claim petition as not maintainable was neither just nor proper nor endorsed by law.

5. In view of the above, the impugned orders of the tribunal are set aside. The claim petition is restored on the file of the tribunal to be taken up for further proceedings in accordance with law.

6. From the submissions of the parties and the pleadings in the appeal, it appears that Ram Pati, mother of the deceased person who had earlier joined the appellant as co-petitioner has fallen out. In view of this, the tribunal shall permit she to be transposed as a *proforma* respondent, on appropriate application being moved for such purposes. Needless to add, she and the first respondent (the driver of the TSR), will be served afresh by appropriate steps being taken by the appellants.

7. The parties shall appear before the tribunal on 16th October, 2017.

8. The appeal stands disposed of in above terms.

SEPTEMBER 14, 2017

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R.K.GAUBA, J.