

\$~16

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

Decided on: 30th October, 2017

+ **MAC.APP. 763/2015 & CM No. 22620/2015**

ORIENTAL INSURANCE CO LTD Appellant

Through: Mr. Pradeep Gaur, Adv.

versus

BAIJ NATH PRASAD & ORS Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. By judgment dated 04.08.2015 in the accident claim case (MAC-P No.167/2009) instituted on 06.07.2009 by the first to fourth respondents (collectively, the claimants), the motor accident claims tribunal returned a finding that Dharamshila, aged 33 years, had suffered injuries on 11.06.1997 due to negligence on the part of the fifth respondent in driving a bus bearing registration no. DL 1P 3837 (the bus), making her fall down and, on that basis, held the said fifth respondent (driver) and the sixth respondent (registered owner of the bus), jointly and severally liable to pay compensation. It awarded total compensation in the sum of Rs. 8,52,040/- and fastened the liability to initially pay, on the appellant insurance company, it admittedly having issued an insurance policy against third party risk in

respect of the bus for the period in question, though also granting it recovery rights against the fifth and sixth respondents.

2. The appeal at hand was filed by the insurance company questioning not only the computation of calculation but also the finding on the issue of negligence submitting that the same was unfounded. The claimants inspite of service have failed to appear to assist.

3. Having heard the submissions of the appellant and having perused the tribunal's record, it is found that the contention of the insurance company against the finding on the issue of negligence is correct. The tribunal has gone by the testimony of Baij Nath Prasad (PW-1) who was the sole witness and was examined on behalf of the claimants on the strength of his affidavit (Ex.PW-1/A). Baij Nath Prasad is the husband of the deceased and during cross-examination had admitted that he was not present at the time when the accident took place. It appears the tribunal has gone by the record of the corresponding criminal case. Perusal of the said record brings out no such material, *prima facie*, on which any clear conclusions could be drawn without assistance of the investigating police officer.

4. In MAC Appeal No. 165/2013 *New India Assurance Co. Ltd. vs. Devki & Ors.* the decision of the Supreme Court in *Oriental Insurance Company Ltd. v. Meena Variyal* 2007 (5) SCC 428 was noted as under: -

“On a careful understanding of the decision in Gujarat State Road Transport Corporation (supra) we cannot understand it as having held that in all claims under the Act proof of negligence as the basis of a claim is jettisoned by the scheme of

the Act. In the context of Sections 166 and 163A of the Act of 1988, we are persuaded to think that the so called obiter observations in Minu B. Mehta's case (supra) govern a claim under Section 166 of the Act and they are inapplicable only when a claim is made under Section 163A of the Act. Obviously, it is for the claimant to choose under which provision he should approach the Tribunal and if he chooses to approach the Tribunal under Section 166 of the Act, we cannot see why the principle stated in Minu B. Mehta's case should not apply to him. We are, therefore, not in a position to accept the argument of learned counsel for the respondents that the observations in Minu B. Mehta's case deserve to be ignored.”

5. This Court in *Devki & Ors.* (supra) observed thus:-

“8. In the facts and circumstances, this Court finds it difficult to follow the view taken in Pushpa Rana (supra). Since the law declared by the Supreme Court in Meena Variyal (supra) is binding, there is no escape from the conclusion that it is the burden of the claimants in a petition under section 166 of MV Act to prove negligence. Should they find it difficult to prove evidence with regard to negligence, the option to have resort to no-fault liability on the structured formula under Section 163A of MV Act is always available to seek just compensation. The case of Bimla Devi (supra) cannot be an illustration to hold otherwise inasmuch as it is clear from the narration of facts noted therein that an eye witness was available and the conclusion on facts had been reached on the basis of his testimony”.

6. In the above facts and circumstances, the approach of the tribunal cannot be approved of. The impugned judgment is set aside. In order to ensure, however, that the claimants are not denied just compensation, it is deemed proper that they are called upon and given opportunity to lead necessary evidence on the issue of negligence and,

for such purposes, the claim case is remitted to the tribunal for further inquiry.

7. The parties are directed to appear before the tribunal on 30th November, 2017. Since the claimants have not appeared at the final hearing on the appeal, it is directed that in the event of default in their appearance before the tribunal on the appointed date, it shall issue court notices to secure their presence before proceeding further.

8. All contentions on other issues are reserved. It is noted that by order dated 03.11.2015, the insurance company had been directed to deposit the entire awarded amount with the Registrar General and 50% of the said amount was permitted to be released. If any such amount has been received by the claimants, the same shall be liable to be adjusted or regulated in terms of the fresh adjudication at the end of the further inquiry, as ordered above. The amount held back in deposit shall presently be refunded to the insurance company alongwith the statutory deposit.

9. The appeal is disposed of in above terms.

OCTOBER 30, 2017

nk

R.K.GAUBA, J.