

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

Date of Decision: September 05, 2018

+ **MAC.APP. 53/2018**

SHARMILA & ORS. Appellants

Through: Mr. Anshuman Bal, Advocate

versus

NEW INDIA ASSURANCE CO LTD & ORS. Respondents

Through: Mr. J.P.N. Shahi and Ms. Komal
Dhingra, Advocates

Mr. Rajiv Kumar Tiwari, respondent No. 3 in
person

+ **MAC.APP. 171/2018**

RADHA DEVI & ANR.Appellants

Through: Mr. S.N. Parashar, Advocate

versus

RAJIV KUMAR TIWARI & ORS. (THE NEW INDIA
ASSURANCE CO LTD) Respondents

Through: Mr. J.P.N. Shahi and Ms. Komal
Dhingra, Advocates

Mr. Rajiv Kumar Tiwari, respondent No. 3 in
person

+ **MAC.APP. 187/2018**

ANITA DEVI & ORS.Appellants

Through: Mr. S.N. Parashar, Advocate

versus

RAJIV KUMAR TIWARI & ORS (THE NEW INDIA
ASSURANCE CO LTD)Respondents

Through: Mr. J.P.N. Shahi and Ms. Komal
Dhingra, Advocates

Mr. Rajiv Kumar Tiwari, respondent No. 3 in
person

CORAM:

HON'BLE MR. JUSTICE SUNIL GAUR

JUDGMENT
(ORAL)

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1. The above captioned three appeals arise out of common impugned Award of 9th October, 2017 vide which appellants' claim petitions have been dismissed on ground of there being no negligence on part of driver of insured vehicle.
2. With the consent of learned counsel for the parties, these appeals have been heard together and are being decided by this common judgment.
3. The facts as noted in the impugned Award are as under:

“These petitions are filed by the petitioners stating that on 10.05.2015 Sh. Jay Krishna Tiwari (deceased) alongiwith Sh. Santosh Kumar Tiwari (deceased) and Sh. Ram Kumar Dubey (deceased) was coming to Delhi from village Tiwari Chak Rajaj Ram, Distt. Bhadohi by car No. DL 9 CY 5619 (Swift Dzire) which was being driven by its driver Atul Kumar Tiwari (deceased) at a very high speed rashly and negligently and in a zig zag manner without taking care of

the safety of car inmates/co passenger. The driver was warned by the co passengers not to drive the car in such a manner but of no avail and continued driving the car on his whims and fancies. At about 9:30 to 10 AM, when the Swift Car reached at Kishun Dev Pur, Railway Phatak, PS Gopi Ganj, a train was coming on the same railway track, the car driver in a great hurry at a very high speed, rashly and negligently tried to cross the railway crossing while the train was about to reach on the same crossing. Suddenly the car wheels got stuck into the pitfall on the railway track. In the meanwhile, a train came on the railway track and hit the Swift car with a great force. As a result of this, Swift Car got crushed and all passengers and driver of the said car sustained fatal injuries and died on the spot. They were taken to MCS Distt. Hospital Gyanpur, SRN Bhadohi where their postmortem were conducted. DD No. 20/15 was registered at PS Gopi Ganj, Distt. Bhadoi. Thereafter, petitioners have filed three petitions for compensation i.e. Claim petition No. 15430/2015 titled Sharmila & Ors. V/s Hari Nath Tiwari & Ors., claim petition No. 15456/15 titled Radha Devi & Ors. V/s Rajiv Kumar Tiwari & Ors. & claim petition No. 15457/15 titled Anita Devi & Ors. V/s Rajiv Kumar Tiwari & Ors. The respondents in all the petitions are common except petition No. 15430/15. ”

4. Respondent-Hari Nath Tiwari, legal heir of driver of the insured car, was *ex-parte* before the learned Motor Accident Claims Tribunal (henceforth referred to as the “Tribunal”) and service upon respondent-Rakesh Mishra, the erstwhile owner of the insured vehicle is dispensed with, as he was also *ex-parte* before the Tribunal. Otherwise, the subsequent owner of the insured vehicle-Rajiv Kumar Tiwari has appeared in person in these appeals.

5. The Tribunal in the impugned Award, has considered evidence of eye-witness-Manoj Tiwari, but had chosen not to rely upon it, as this

eye-witness did not call the police at the spot and gave no reason for not doing so. According to this eye-witness (*PW-3*), his statement was not recorded by police and site plan of the spot was also not prepared by police at his instance.

6. The challenge to impugned Award by learned counsel for appellants in these three appeals is on the ground that the eye-witness-*Manoj Tiwari* in his evidence has clearly stated that insured car was being driven in rash and negligent manner and there is no cross-examination of eye-witness and the Tribunal has erred in not relying upon the evidence of eye-witness (*PW-3*). It is submitted that the three deceased were the passengers in the insured car and so, due compensation to their legal heirs cannot be denied on the ground that driver of insured car (who had also died in this accident) was not negligent. It is pointed out that respondent-Insurer has not led any evidence to demolish the evidence of eye-witness and so, the impugned Award deserves to be set aside and the matter be remanded back for decision afresh on merits.

7. Upon hearing and on perusal of evidence of eye-witness, DD Report and the other evidence on record, I find that there is nothing in the DD Report of 10th May, 2015 from which it could be inferred as to who was negligent in causing the accident in question. A scrutiny of the evidence of eye-witness (*PW-3*) reveals that he had just signed his evidence tendered by way of affidavit prepared by the counsel for the claimants. The presence of eye-witness (*PW3*) on the spot is ruled out from the fact that he did not even inform the police about the accident. As per evidence of this eye-witness, the police did not prepare the site plan

of the spot at his instance. It has come in the evidence of this eye-witness (PW-3) that the railway crossing, where accident in question took place, was unmanned and without any protection gate. It has also come in the evidence of this witness (PW-3) that the insured vehicle in question was struck in the pitfall between the railway tracks.

8. Had the insured car in question been driven rashly and negligently, then it would not have struck in the pitfall. In all probability, the insured car was being driven at a normal speed and therefore, it had got stuck in the pitfall on the railway tracks. The occupants of the insured car had died in the accident in question. It cannot be inferred from evidence of this eye-witness PW-3 that he had heard occupants of car telling the driver of insured car to drive carefully. In the face of the aforesaid evidence on record, I find that there is no basis to conclude that the accident in question had taken place due to rash and negligent driving by driver of insured vehicle, who had also died in this accident.

9. Supreme Court in *Kaushnuma Begum and others Vs. New India Assurance Co. Ltd. and others* 2001 ACJ 428 has declared that 'Rule of Strict Liability' is applicable in claims for compensation made in respect of motor accidents. Applying the ratio of the decision in *Kaushnuma Begum (Supra)* to the facts of the instant case, negligence if any, is of railway authorities and not of driver of insured vehicle. In the considered opinion of this Court, the Tribunal has rightly concluded that the negligence of driver of insured car does not stand proved.

10. In the facts and circumstances of this case, it is deemed appropriate to set aside the impugned Award with direction to the Tribunal to treat

the claim petitions filed be appellants as one under Section 163-A of *the Motor Vehicles Act, 1988* and to proceed further in accordance with law, to expeditiously decide the claim petitions afresh. Needless to say, the negligence aspect is not required to be considered while proceeding with the claim petitions under Section 163-A of *the Motor Vehicles Act, 1988*.

11. Parties through their counsel shall appear before the concerned Motor Accident Claims Tribunal on 6th October, 2018 for further proceeding in accordance with the law.

12. With aforesaid directions, these three appeals are accordingly disposed of.

(SUNIL GAUR)

JUDGE

SEPTEMBER 05, 2018

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