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

% ***Judgment delivered on:23rd April, 2019***

\+ MAC. APP. 943/2018

THE ORIENTAL INSURANCE CO. LTD. ...Appellant

Through: Mr. S.P. Jain, Advocate with Mr. Himanshu Gambhir, Mr. Abhijit Chakravarty and Ms. Amandeep Kaur, Advocates.

versus

1. SMT. SUNITA
2. Ms. RITIKA
3. MASTER VARUN
4. MASTER VINEET
5. SMT. PARKASHI
6. SH. RAJENDRA KUMAR (DRIVER)
7. SH. ARUN KUMAR SHARMA (OWNER) ...Respondents

Through: Mr. Munish Kumar Sharma, Advocate for R-1 to R-5. Mr. Neeraj Kumar Jha, Advocate for R-6 to R-7.

\+ MAC. APP. 117/2019

1. ARUN KUMAR GUPTA
2. RAJENDRA KUMAR ...Appellants

Through: Mr. Neeraj Kumar Jha, Advocate.

versus

1. THE ORIENTAL INSURANCE CO. LTD.
2. SMT. SUNITA
3. Ms. RITIKA
4. MASTER VARUN

5. MASTER VINEET
6. SMT. PARKASHI ...Respondents

Through: Mr. S.P. Jain, Advocate with Mr. Himanshu Gambhir, Mr. Abhijit Chakravarty and Ms. Amandeep Kaur, Advocates for R-1. Mr. Munish Kumar Sharma, Advocate for R-2 to R-6.

CORAM:
HON'BLE MR. JUSTICE I.S.MEHTA

JUDGMENT

I. S. MEHTA, J.

1. Aforesaid two appeals are arising out of award dated 25.08.2018 in MAC No. 117/2016 passed by Sh. Devender Kumar, Presiding Officer-MACT, Shahdara District, KKD, Delhi (*hereinafter called as "The Tribunal"*) whereby compensation of Rs.30,94,000/- alongwith interest at rate of 9% p.a. on total compensation amount from date of filing of petition till its realization has been awarded to the Claimants.

2. Brief facts stated are that on 15.09.2014 at about 1:00 AM, deceased Jitender Kumar, aged 33 years was driving truck No. UP-14-DT-6979 and reached in front of Dhara Medical College, Kherar, Mainpuri, U.P. where suddenly a truck bearing No. UP-78B- 9298 (*hereinafter referred to as offending vehicle*) driven by Rajendra Kumar (*driver of the offending vehicle*) in rash and negligent manner

which resulted into the present accident, deceased received crush injuries and later died in the hospital. FIR, FIR No. 113/2014 was got registered under Sections 279 and 304A IPC at P.S. Dannahar, Mainpuri, U.P. against driver of offending vehicle. Postmortem of the deceased was got conducted. Driver of the offending vehicle was got arrested and chargesheeted.

3. Thereafter Claimants filed MAC No. 117/2016 (old MAC petition No. 291/14) on 25.11.2014 demanding a compensation of Rs. 25 Lakhs for the negligent act of driver Rajendra Kumar.

4. The insurance company (Oriental Insurance Co. Ltd.) has filed its written statement and stated offending vehicle was insured with it vide policy No. 222290/21/2014/1969 on date of the incident. Insurance company has denied territorial jurisdiction to entertain claim petition. Insurance company disputed owner having valid permit to ply the offending vehicle on road and insurance company is not liable to pay compensation.

5. Driver and Owner of the offending vehicle filed joint written statement and submitted accident was not caused due to fault of the offending vehicle but rather due to fault of the deceased. Moreover, offending vehicle is insured with appellant insurance company.

6. No replication was preferred by the claimants. Issues were framed on 18.05.2016.

7. The claimant/Respondent No.1 Sunita *(wife of the deceased*) in support of her claim petition has filed her affidavit Ex.PW1/A for the purpose of Examination-in-Chief and has specifically stated that her husband, Jitender Kumar aged 33 years was driving his truck No. UP-14-DT-6979. On 15.09.2014 she got information through telephonic call that her husband met with an accident with offending vehicle in front of Dhara Medical College near Kherar Pulia on Agra road, Mainpuri, U.P. at about 1 AM. The incident was reported to the police. The police lodged an FIR, FIR No. 113/14 under Section 279 and 304A IPC.

She further stated deceased has left behind claimants i.e. herself Sunita (*wife of the deceased*) aged 30 years, Ms. Ritika (*daughter of the deceased*) aged 5 years, Master Varun and Vineet (*sons of the deceased*) aged 3 years and 8 months respectively and Smt. Parkashi (*widowed mother of the deceased*) aged 60 years.

The aforesaid claimants were dependant on the deceased. Deceased was healthy and was employed with PW3 Virender Singh and was getting a salary of more than Rs. 15,000/- per month. Driving License of deceased is Ex.PW1/2, Salary certificate is Ex.PW1/3, Aadhar card of her and her mother-in-law is Ex.PW1/4 and Ex.PW1/5 respectively. The attested copy of family register is Ex.PW1/6 and rent agreement is Ex.PW1/7.

The Claimant has also examined eye-witness PW2 Pappu. He filed his affidavit Ex.PW2/A as Examination-in-Chief. PW2 in his affidavit has stated that he is witness to the incident. He stated on intervening night of 14.09.2014 at about 1 AM he was going to

Mainpuri by his car/taxi, when he reached Dhara Medical College, offending vehicle came from back in a very high speed and overtook his car as well as deceased's truck and suddenly turned left and applied heavy brake wrongfully and negligently which resulted into consequent accident. Deceased got crushed between the two vehicles on the spot. He made call to the police and caught hold of the accused driver. Police arrived and took the injured to the hospital.

Claimants has also examined another eye-witness PW4 Raja Ram Yadav who has seen the incident and stated that on 15.09.2014 he was posted as Security Guard at Dhara Medical College. At around 1:00 AM he saw offending vehicle coming at about 90 km/hr in rash and negligent manner and suddenly turned towards left and applied heavy brakes, as a result the accident took place.

Claimant further examined PW3 Virender Singh, employer of deceased Jitender Kumar who deposed deceased was his permanent employee and used to receive a total salary of Rs. 15,000/- per month by cash alongwith other benefits.

8. Insurance company has examined R3W1 Ms. Neelam Rani, assistant, Oriental Insurance Company who deposed the offending vehicle i.e. UP-78B-9298 was insured in the name of Sh. Arun Kumar Gupta vide insurance policy Ex.R3W1/1 (policy No. 222290/21/2014/1969). Insurance company issued notice Ex.R3W1/2 to owner of the offending vehicle for production of original insurance policy and fitness certificate (permit) of insured the offending vehicle. Since, owner failed to produce the same the insurance company is not

liable to pay compensation.

9. On the basis of pleadings and evidence led by the parties, impugned award dated 25.08.2018 was passed by the Tribunal.

10. Insurance Company being aggrieved from the impugned award has filed MAC. APP. 943/2018 on following grounds:

a. There is no negligence on part of the accused driver, deceased did not maintain safe distance and was negligent. Further, proof of eye-witnesses PW2 and PW4 are contrary to each other and not probable by any stretch of imagination. Further, PW4's version that driver of offending vehicle came from left side and turned right and applied sudden heavy brake, resulting in deceased's vehicle hitting offending vehicle from back is not believable.
b. Tribunal has also awarded exorbitant amount of compensation and no proof was filed to substantiate income of the deceased being Rs. 15,000/- per month.
c. The Tribunal has only granted rights of recovery qua Driver and Owner and have not absolved insurance company from liability.

11. Owner alongwith driver of the offending vehicle too preferred to file the instant appeal MAC. APP. 117/2019 on following grounds:

a. The impugned award is based on surmises and conjectures as the Tribunal failed to appreciate that the instant appellant has furnished a copy of permit to the counsel for the insurance company and the same has been recorded in Order Sheet dated 28.01.2018. Therefore, the insurance company has to compensate only and no right of recovery lies qua owner and driver.

b. That Ld. Tribunal failed to appreciate that insurance company has not lead any evidence that instant appellant is plying the vehicle without any permit or fitness certificate.

Thus prays impugned award be set aside/modified in favour of the instant appellants.

12. Ld. counsel for insurance company has argued that bare reading of documents make it clear that negligence was on part of the deceased as he hit the alleged offending vehicle from behind and thus failed in maintaining sufficient distance while driving. He further pointed out that fitness certificate (permit) of the alleged offending vehicle was verified and was found in order. He argued that testimony of eye-witnesses i.e. PW2 and PW4 are contrary to each other as PW2 states that alleged offending vehicle came from right and suddenly turned left and applied heavy brake, while PW4 states that the vehicle came from left and suddenly turned right and applied heavy brake. He further stated that the income of Rs. 15,000/- per month of deceased was not proved by any document and claimants have only examined PW3, owner of the vehicle and employer of the deceased, to

substantiate the claim of income. He pointed out that minimum wage of Rs. 244.70 per day was prescribed in 'Public Motor Transport' in U.P. on the relevant time. He further stated that the Ld. Tribunal had no territorial jurisdiction to entertain, try and dispose of the claim petition filed by the claimants. Ld. Counsel for the insurance company relied on Supreme Court judgments in ***Rani & Ors. v. National Insurance Company Ltd. & Ors.*** Civil Appeal Nos. 9078-9079/2017 decided on 31.07.2018, ***Nishan Singh & Ors. v. Oriental Insurance Co. Ltd. & Ors.*** II (2018) ACC 609 (SC). He also relied on Delhi High Court judgments in ***Reliance General Insurance Co. Ltd. v. Kiran Sharma & Ors.*** MAC. APP. 610/2015 decided on 10.08.2017, ***Reliance General Insurance Co. Ltd. v. Shakuntala & Ors.*** MAC. APP. 15/2017 decided on 08.11.2017 and ***United India Insurance Co. Ltd. v. Mahima Singh & Ors.*** III (2018) ACC 396 (Del.).

13. Ld. Counsel for owner and driver of offending vehicle submits that despite handing over of fitness certificate to the tribunal, right to recovery was wrongly passed against the owner and driver. He further submits that the fitness certificate (permit) was duly verified by the insurance company and was found to be correct.

14. Per contra, learned counsel for the claimants have submitted that the compensation awarded is just and fair, both the appeals deserves to be dismissed.

15. The Claimants in their claim petition specifically stated that

deceased Jitender Kumar met with an accident at Dhara Medical College, Kherar, Mainpuri, U.P. on 15.09.2014 at about 1 AM and received crush injury at the spot. He was later taken to the hospital where he succumbed to his injuries. The factum of the accident has not been disputed by Rajendra Kumar (driver), Arun Kumar Gupta (owner) or insurance company.

The driver of the offending vehicle Rajendra Kumar has admitted that he was driving the offending vehicle i.e. UP-78B-9298 on 15.09.2014 at about 1 AM at Dhara Medical College, Kherar, Mainpuri, U.P.

However, he has disputed that he was not driving the offending vehicle rashly and negligently.

The plea of Rajendra Kumar loses its significance in presence of the statement of PW2 Pappu and PW4 Raja Ram Yadav who are eye witness to the incident. Moreover, there is no explanation on record on behalf of the driver as to why he has not examined himself to rebut the statement of eye-witnesses i.e. PW2 and PW4. The statement of PW2 and PW4 remains un-rebutted qua driver and owner on the record.

The PW4 Raja Ram Yadav is one of the witness on whose instruction the site plan of spot of the accident during the investigation was prepared. The PW4 during the cross examination has clarified that he has witness to the incident and the site plan too was prepared on his instruction during the investigation by the police in the criminal case registered vide FIR No. 113/2014 under Section 279 and 304A IPC. Nothing material is coming out from the cross examination of PW2 and PW4 done on behalf of insurance company which could suggest that they are not witness to the incident and has falsely implicated driver Rajendra Kumar in the present case.

16. The plea of the insurance company, that, owner has not produced the fitness certificate (permit) of offending vehicle despite notice under Order 12 Rule 8 CPC loses its significance in presence of handing over of the fitness certificate of the offending vehicle to the counsel of the Insurance Company before the Tribunal on 18.01.2018 in MAC No. 117/16 for its due verification. Order sheet of Ld. Tribunal in MAC No. 117/16 dated 18.01.2018 is reproduced as under:

> *"MAC No. 117/16*
> *18.01.2018*
> *Present:-*
> *Ld. Counsel for the petitioner.*
> *Ld. Counsel for respondent No.1 and 2.*
> *Ld. Counsel for Insurance Company.*
> *No RW is present.*
>
> *Process issued to RW not received back. Be awaited.*
> *Meanwhile, issue fresh process to RW on PF on the next date of hearing.*
> *Ld. Counsel for the Respondent No.2 has handed over the copy of permit of offending vehicle and one copy is to be handed over within one week to insurance company to verify the same.*
> *Put up for RE on 23.3.2018."*

Aforesaid order sheet indicates that counsel of owner and driver of the offending vehicle has in fact handed over copy of fitness certificate (Serial No. 0702481) of the offending vehicle for its due verification to counsel of the insurance company. However, insurance company neither brought on record the verification report of that fitness certificate before Tribunal nor lead any evidence to prove otherwise. The Tribunal consequently passed the impugned award.

The appellant owner and driver of the offending vehicle again pointed out this fact before this Court and insurance company was directed to verify the fitness certificate vide order dated 22.01.2019. Counsel for the insurance company filed the verification report of the fitness certificate vide diary No. 119798 on 05.05.2019 where fitness certificate was found to be valid and genuine.

The insurance company also admitted that there exists a valid permit and fitness certificate of the offending vehicle on the date of the accident in its written arguments. Para 12 of written argument filed by the insurance company is reproduced as under:

> *"12. ... The owner filed copy of permit and fitness certificate after filing the appeal to the Insurance Company. The Insurance Company verified the permit and fitness of the Truck and the same were found in order."*

Therefore, there is no merit in contention of insurance company that there is no liability of insurance company and it be absolved.

17. So far, the plea of insurance company that income of deceased is not proved by the claimants is concerned, PW3 has specifically stated that he employed the deceased Jitender Kumar as driver at a

monthly salary of Rs. 15,000/- per month. PW3 in his cross examination has reiterated the same. Claimants have even furnished salary certificate of the deceased Ex.PW1/3. Therefore, Tribunal has rightly determined the compensation amount based on the income of the deceased. There seems no requirement to interfere with the compensation amount which has already been determined.

18. So far, the plea of insurance company that the Tribunal lacks the jurisdiction to entertain, try and dispose of the claim petition in MAC No. 117/16 does not seems to be correct, sub section 2 of Section 166 of Motor Vehicles Act categorically lays down the claim petition be filed at the option of the claimant.

19. Reliance placed by insurance company on ***Rani & Ors.*** *(supra)*, ***Nishan Singh*** *(supra)*, ***Kiran Sharma & Ors.*** *(supra)*, ***Shakuntala & Ors.*** *(supra)* and ***Mahima Singh & Ors.*** *(supra)* is misplaced.

20. The appeal of Owner and Driver in MAC. APP. 117/2019 is allowed inasmuch as insurance company only will compensate the claimants, insurance company will have no right to recover qua owner and driver of the offending vehicle. I find no merit in appeal filed by insurance company in MAC. APP. 943/2018, same is dismissed. Reliance is placed on ***National Insurance Company Ltd. v. Pranay Sethi*** (2017) 16 SCC 680 and on ***Oriental Insurance Co. Ltd. v. Sonia*** (2009) 158 DLT 111.

21. The impugned award in MAC No. 117/16 is modified accordingly. All pending applications are accordingly disposed of. Insurance company is directed to make the payment of the balance awarded amount with the interest accrued to the claimant as per the direction of Tribunal. Award amount deposited with Registrar General, Delhi High Court be released in favour of the claimants after making proper application in this regard.

22. Let one copy of this judgment be also placed in MAC. APP. 117/2019. LCR File be sent back. No order as to costs.

I.S.MEHTA

(JUDGE)

APRIL 23, 2019