

UNREPORTED

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

+ **FAO 336/2001**

NATIONAL INSURANCE CO. LTD. Appellant
Through: Mr. L.K. Tyagi, Advocate

versus

SMT. DURGESH NANDINI SHARMA AND ORS. Respondents
Through: Mr. S.C. Singhal and
Mr. Sanjay, Advocates for the
respondents No.1 to 3

+ **MAC. APP. ____/2011 (cross-objections to be numbered)**

SMT. DURGESH NANDINI SHARMA AND ORS. Appellants
Through: Mr. S.C. Singhal and
Mr. Sanjay, Advocates

versus

NATIONAL INSURANCE CO. LTD. AND ORS. Respondents
Through: Mr. L.K. Tyagi, Advocate for
the respondent No.1

% Date of Decision : October 03, 2011

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether judgment should be reported in Digest?

J U D G M E N T

: REVA KHETRAPAL, J.

1. By this common judgment, it is proposed to decide the aforesaid cross appeals filed against the judgment and award of the Motor Accidents Claims Tribunal dated 21.05.2001, whereby and whereunder a sum of ₹ 1,24,800/- (inclusive of the interim award) along with interest @ 9% per annum from the date of the order of the learned Tribunal till realisation was awarded to the claimants, being the legal representatives of the deceased Shri Upendra Nath Sharma, who died in a road accident on 04.06.1983.

2. The factual matrix is that one Upendra Nath Sharma lost his life in a road accident which took place on 4th June, 1983 when he was hit by bus No.DEP-4624 plying on route No.760 under DTC

operation, which was being driven rashly and negligently by its driver. It is not in dispute that on the date of his death, the deceased was 38 years of age and was working as a Manager in M/s. Fair Lights, CB196/2, Sadar Bazar, Delhi Cantt., on a monthly remuneration of ₹ 800/- per month. On his unfortunate demise, his legal representatives, being his wife, his son, daughter and mother (who died during the pendency of the petition), filed a Claim Petition under Sections 110A and 92A of the Motor Vehicles Act, 1939 claiming compensation in the sum of ₹ 4 lacs for his untimely demise against the driver, the owner and the insurer of the offending bus. The learned Claims Tribunal, after the conduct of the enquiry, came to the conclusion that the accident was the outcome of the rashness and negligence attributable to the driver of the offending vehicle. The learned Claims Tribunal thereafter proceeded to assess the loss of dependency of the claimants to be in the sum of ₹ 800/- per month, that is, ₹ 9,600/- per annum, after making the addition to the actual income of the deceased towards future prospects of increase in his income and after deducting one-third from the resultant sum towards

the personal expenses of the deceased. It then applied the multiplier of 13 adjudging it to be the appropriate multiplier in the case and thus worked out the total amount of compensation payable to the claimants to be in the sum of ₹ 1,24,800/- (₹ 9,600/- x 13), on which it awarded interest at the rate of 9% per annum from the date of the order till realisation. The learned Tribunal further held that the Insurance Company was liable to pay the entire amount of the award to the claimants along with interest thereon within one month from the date of the order.

3. Aggrieved therefrom, the present appeals have been filed by the Insurance Company as well as the legal representatives of the deceased. The first appeal, being FAO No.336/2001, is filed by the Insurance Company-M/s. National Insurance Co. Ltd. on the ground that the liability of the Insurance Company is limited to the extent of ₹ 50,000/- only and the second appeal, being MAC. APP. No._____/2011, is filed by the legal representatives of the deceased seeking enhancement of the quantum of compensation awarded by the

learned Tribunal. It is proposed to deal first with the appeal of the Insurance Company, being FAO No.336/2001.

FAO No.336/2001 titled as “National Insurance Co. Ltd. vs. Smt. Durgesh Nandini Sharma and Ors.”

4. At the outset, it deserves to be noted that none appeared on behalf of the insured, that is, the respondents No.5 and 6 to contest the appeal, though both the said respondents were duly served.

5. The sole contention of Mr. L.K. Tyagi, the learned counsel for the appellant, is that the learned Tribunal erred in rejecting the contention of the appellant-Insurance Company that its liability was limited to the extent of ₹ 50,000/- only for the relevant period as contemplated by Section 95 of the Motor Vehicles Act, 1939, on the ground that it had not adduced any evidence whatsoever to prove the same.

6. It may be mentioned that by an order dated September 18, 2002, this Court (Hon’ble Mr. Justice S.N. Kapoor) had directed the Insurance Company to file an affidavit to prove the copy of the insurance policy produced by the counsel for the appellant. The said affidavit was filed by Shri S.K. Dadhwal, Manager of the appellant-

Insurance Company on 25.09.2002, stating therein that policy No.191/6302160, valid for the period 28.08.1982 to 27.08.1983, had been issued to the Central Bank of India, Delhi Cantt. A/c. Smt. Gian Vati and Shri Yoginder Kumar in respect of the bus (Tata) 1982 Model, Chassis No.344050133522, Engine No.692003140807. He further stated on oath that the aforesaid policy had been signed by him, carbon copy whereof was enclosed with the affidavit as an annexure. He further stated that as per the Schedule of the policy, the Insurance Company had charged a premium of ₹ 240/- for third party and that the liability of the company towards third parties as per the policy was: "Such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1939". He stated that the liability towards third party could have been increased by charging extra premium as per the Motor Tariff, but no extra premium had been charged to cover wider risk towards third parties. The extract of the Motor Tariff as was applicable in the year 1982 was also enclosed by him with his affidavit. He clarified that the premium of ₹ 440/-, ₹ 1960/- and ₹ 700/- was charged for covering the risk towards 'Own damages',

₹ 901/- had been charged to cover 53 passengers, which was the seating capacity of the vehicle, and ₹ 24/- had been charged to cover W.C. liability of the driver and cleaner and that the aforesaid sums of premium had been charged strictly as per the 'Tariff'.

7. The relevant portion of the insurance policy is reproduced hereunder:-

<i>Limits to Liability:</i> <i>Limits of the amount of the Company's liability under Section II-(i) in respect of any one accident.</i>	<i>Such amount as is necessary to meet the requirements of the Motor Vehicles Act, 1939</i>
<i>Limit of the amount of the Company's liability under Section II-I(ii) in respect of any one claim or series of claims arising out of one event.</i>	<i>Rs.50,000/-</i>

IMPORTANT NOTICE

The Insured is not indemnified if the vehicle is used or driven otherwise than in accordance with this Schedule. Any payment made by the Company by reason of wider terms appearing in the certificate in order to comply with the Motor Vehicles Act, 1939 is recoverable from the insured.

<i>See the clause headed "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.</i>		
<i>Date of Signature of proposal and declaration:</i>		
	<i>Basic</i>	<i>Rs.440.00</i>
	<i>D.70% IEV</i>	<i>Rs.1960.00</i>
	<i>RSD</i>	<i>Rs.700.00</i>
	<i>53 Pass @ 17/-</i>	<i>Rs.901.00</i>
	<i>Dr & Clnr.</i>	<i>Rs.24.00</i>
	<i>Third Party</i>	<i>Rs.240.00</i>
		<i>Rs.4625.00</i>
	<i>-10% spl disc.</i>	<i>Rs.426.50</i>
		<i>3838.50</i>
<i>Receipt No.899249 Date 30.8.83</i>		
<i>Total Net Premium: say</i>		
<i>Rs.3839/-</i>		

8. From the aforesaid affidavit/evidence, which is unchallenged and unrebutted on record, I have no hesitation in holding that the liability of the appellant-Insurance Company was limited to the extent of ₹ 50,000/- only in terms of the insurance policy proved on record through its Manger Shri S.K. Dadhwal. However, in view of the fact that the insurance policy proved on record contains an avoidance clause, the learned counsel for the claimants/respondents No.1 to 3 contends that the appellant-Insurance Company may be directed to make payment of the award amount to the claimants with the liberty

to recover the same from the insured, viz., the respondents No.5 and 6 herein.

9. It may be noted at this juncture that Mr. L.K. Tyagi, the learned counsel for the Insurance Company, pressed into service the judgment rendered by the three Judge Bench of the Supreme Court in *New India Assurance Co. Ltd. vs. C.M. Jaya & Ors., 2002 ACJ 271*, to urge that where the liability of the Insurance Company is limited under the policy, it is not liable to pay as compensation anything more than the amount of its limited liability. I am not inclined to agree with the aforesaid contention of the learned counsel for the appellant-Insurance Company in view of the fact that the policy in the instant case contains an avoidance clause as is evident from the 'Important Notice' contained in the Schedule of the policy. The said avoidance clause is captioned "AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY". This avoidance clause is contained in Section III of the Standard Form for 'Commercial Vehicles Comprehensive Policy' and significantly reads as follows:-

***“AVOIDANCE OF CERTAIN TERMS AND
RIGHT OF RECOVERY***

Nothing in this Policy or any endorsement hereon shall affect the right of any person indemnified by this Policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act 1939 Section 96

BUT the Insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.”

10. In the case of *New Asiatic Insurance Co. Ltd. vs. Pessumal Dhanamal Aswani and Others, 1958-65 ACJ 559 (SC)*, the aforesaid ‘Avoidance Clause’ and the ‘Important Notice’ in the Schedule to the policy were interpreted by the Supreme Court and it was held that the provisions of the Act do not affect the right of a third party to recover any amount if the contract between the Insurance Company and the insured provides for the Insurance Company to undertake such a liability to third parties. It was further held that the avoidance clause was effective only between the insured and the Insurance Company. The relevant portion of the judgment of the Supreme Court is as follows: (ACJ, P.565, paras 21 and 22)

“The Act contemplates the possibility of the policy of insurance undertaking liability to third parties providing such a contract between the insurer and the insured, that is, the person who effected the policy, as would make the company entitled to recover the whole or part of the amount it has paid to the third party from the insured. The insurer thus acts as security for the third party with respect to its realising damages for the injuries suffered, but vis-a-vis the insured, the company does not undertake that liability or undertake it to a limited extent. It is in view of such a possibility that various conditions are laid down in the policy. Such conditions, however, are effective only between the insured and the company, and have to be ignored when considering the liability of the company to third parties. This is mentioned prominently in the policy itself and is mentioned under the heading 'Avoidance of certain terms and rights of recovery', as well as in the form of 'an important notice' in the Schedule to the policy. The avoidance clause says that nothing in the policy or any endorsement thereon shall affect the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of the Act. It also provides that the insured will repay to the company all sums paid by it which the company would not have been liable to pay but for the said provisions of the Act. The 'Important Notice' mentions that any payment made by the company by reason of wider terms appearing in the certificate in order to comply with the Act is

recoverable from the insured, and refers to the avoidance clause.

Thus the contract between the insured and the company may not provide for all the liabilities which the company has to undertake vis-a-vis the third parties, in view of the provisions of the Act. We are of opinion that once the company had undertaken liability to third parties incurred by the persons specified in the policy, the third parties' right to recover any amount under or by virtue of the provisions of the Act is not affected by any condition in the policy. Considering this aspect of the terms of the policy, it is reasonable to conclude that proviso (a) of para 3 of section II is a mere condition affecting the rights of the insured who effected the policy and the persons to whom the cover of the policy was extended by the company, and does not come in the way of third parties' claim against the company on account of its claim against a person specified in para. 3 as one to whom cover of the policy was extended."

11. In *Amrit Lal Sood v. Kaushalya Devi Thapar, 1998 ACJ 531* (SC), the Supreme Court, placing reliance upon the case of *New Asiatic Insurance Co. Ltd. (supra)*, reiterated that the avoidance clause is effective only between the insured and the Insurance Company and not a third party. In paragraph 14 of the Report, it observed thus:

“14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of single judge of the High Court under the Letters Patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.”

12. In *Oriental Insurance Co. Ltd. vs. Cheruvakkara Nafeessu and Others, 2001 ACJ 1 (SC)*, again the question before the Supreme Court was:

“What is the extent of liability of an insurance company towards the third party as per section 95(2)(b) of Motor Vehicles Act, 1939 (hereinafter called ‘the Act’), and what are its rights in case of payment of an amount in excess of the limits of the liability under the insurance policy vis-a-vis the insured?”

13. On a consideration of the avoidance clause of the policy and Section II of the policy dealing with “Liability to Third Party”, the Supreme Court in the aforesaid case observed: (ACJ, P.3)

“A conjoint reading of all the terms of the policy of insurance executed in this case indicate that the total extent of liability of the insurance company is Rs.50,000/- but the company is liable to indemnify the insured against all sums including claimant’s costs and expenses which insured becomes liable to pay and nothing in the policy affects the right of any person indemnified by the policy or any other person to recover an amount under or by virtue of the provisions of section 96 of the Act. However, the insured is liable to repay to the company all sums paid by the company which the company would not have been liable to pay but for the condition of liability relating to third party.”

14. In a recent decision of the Supreme Court in *New India Assurance Co. Ltd. vs. Vimal Devi and Ors., 2010 ACJ 2878 (SC)*, in an appeal filed by the Insurance Company which was aggrieved by the High Court order directing the Insurance Company to pay the entire compensation amount of ₹ 4,90,000/- along with interest to the claimants and then to recover the amount beyond its liability of ₹ 50,000/- from the owner of the vehicle involved in the case, the Supreme Court dealt with the matter as follows:

“3. Mr. K.L. Nandwani, learned Counsel appearing for the insurance company, submitted that the liability of the Appellant being limited to Rs. 50,000/-, the High Court was in error in making such a direction. In respect of the submission, he relied upon a Constitution Bench decision of this Court in **New India Assurance Co. Ltd. v. C.M. Jaya and Ors.** MANU/SC/0031/2002 : (2002) 2 SCC 278.

4. Mr. M.R. Calla, learned senior counsel appearing for the Respondent, in his reply submitted that the reliance placed on the Constitution Bench decision was misplaced and the Appellant overlooked the finer point of distinction made in the decision in C.M. Jaya. He submitted that in the case in hand, the High Court had noticed the Avoidance Clause in the policy which was in the following terms:

AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY.

Nothing in this Policy or any Endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicle Act, 1939, Section 96.

But the Insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but the said provisions.

5. The Avoidance Clause came up for consideration before a three Judges Bench of this Court in **Amrit Lal Sood and Anr. v. Kaushalya Devi Thapar and Ors.** (1998) 3 SCC 744. In its decision in that case this Court observed:

13. In the policy in the present case also, there is a clause under the heading:

AVOIDANCE OF CERTAIN TERMS AND RIGHT OF RECOVERY" which reads thus:

Nothing in this policy or any endorsement hereon shall affect the right of any person indemnified by this policy or any other person to recover an amount under or by virtue of the provisions of the Motor Vehicles Act, 1939, Section 96. BUT the insured shall repay to the Company all sums paid by the Company which the Company would not have been liable to pay but for the said provisions.

14. The above clause does not enable the insurance company to resist or avoid the claim made by the claimant. The clause will arise for consideration only in a dispute between the insurer and the insured. The question whether under the said clause the insurer can claim repayment from the insured is left open. The circumstance that the owner of the vehicle did not file an appeal against the judgment of the Single Judge of the High Court under the letters patent may also be relevant in the event of a claim by the insurance company against the insured for repayment of the amount. We are not concerned with that question here.

15. In the result, we hold that the insurance company is also liable to meet the claim of the claimant and satisfy the award passed by the tribunal and modified by the High Court. The judgment of the High Court insofar as it exonerates the insurance company (5th Respondent herein) from the liability, is set aside. The award passed by the Division Bench of the High Court can be enforced against the 5th

Respondent also. The appeal is allowed to the extent indicated above. The parties will bear their respective costs.

6. Mr. Calla further submitted that in C.M. Jaya and Ors. a Constitution Bench of this Court indeed held that in a policy for limited liability it was not open to the Court to direct the insurance company to make any payment beyond the amount of the limited liability but it took note of the decision in Amrit Lal Sood with approval. He referred to paragraphs 10 and 16 of the judgment in C.M. Jaya where the decision in Amrit Lal Sood is noticed with approval.

7. The Avoidance Clause in the policy in this case makes all the difference and the direction of the High Court to the Appellant, insurance company to make payment of the full amount of compensation to the claimants and to recover its dues from the owner of the vehicle is directly in accordance with that Clause. In our view, the submission of Mr. Calla is well founded. The Appellant in this case can derive no benefit from the decision in C.M. Jaya.

8. We find no merit in these appeals. These are dismissed.”

15. In view of the aforesaid legal position as enunciated by the Supreme Court, it is held that even though the liability of the Insurance Company in the present case must be held to be limited *qua* the insured as claimed by it, the liability of the Insurance Company *qua* third parties such as the claimants in the present case cannot be said to be limited. The necessary corollary is that the appellant-

Insurance Company shall make payment of the award amount to the respondents No.1 to 3/claimants in accordance with the terms of the insurance policy, but shall be entitled to recover the amount paid by it in excess of its liability from the insured in accordance with law.

MAC. APP. No. /2011 titled as “Smt. Durgesh Nandini Sharma and Ors. vs. National Insurance Co. Ltd. and Ors.”

16. The appellants in this appeal are the legal representatives of the deceased Upendra Nath Sharma. The respondent No.1 is the Insurance Company, the respondent No.2 is the driver of the offending vehicle and the respondents No.3 and 4 are the co-owners of the offending vehicle. Aggrieved by the quantum of compensation awarded by the learned Tribunal, the appellants have filed the present appeal seeking enhancement of the award amount.

17. A three-fold contention has been raised by Mr. S.C. Singhal, the learned counsel for the appellants:-

- (i) The learned Tribunal erroneously applied the multiplier of 13 to augment the multiplicand constituting the loss of dependency of the appellants, whereas the appropriate multiplier in the instant case, keeping in view the fact

that the deceased was 38 years of age, would be the multiplier of 15.

- (ii) No amount whatsoever was awarded by the learned Tribunal towards non-pecuniary damages under the heads of loss of love and affection, loss of consortium to the widow, loss of the estate of the deceased and towards the funeral expenses of the deceased.
- (iii) The learned Tribunal erred in not awarding interest on the award amount to the appellants from the date of the institution of the petition till the date of realisation and in confining the award of interest from the date of the order of the learned Tribunal till realisation.

18. Mr. L.K. Tyagi, the learned counsel for the Insurance Company, on the other hand, sought to support the award of the learned Tribunal by contending that the computation of compensation in the instant case was just and fair and in accordance with the settled principles of law.

19. As regards the first contention of Mr. Singhal, I find substance in his contention that the appropriate multiplier in the instant case would be the multiplier of 15. It is not in dispute that the deceased was 38 years of age on the date of the accident. The appropriate multiplier where the age of the deceased is between 36 to 40 years is the multiplier of 16 as specified in the Second Schedule to the Act. However, in the case of *Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and Anr. (2009) 6 SCC 121*, the Supreme Court, in order to ensure uniformity in the computation of compensation awarded to victims of motor accidents, laid down certain guidelines to be followed by all Courts and Tribunals. In paragraph 40 of its aforesaid judgment, the Supreme Court tabulated the multipliers applicable to different age groups of deceased persons. For the age group of persons between 36 to 40 years of age, the multiplier approved of and tabulated by the Supreme Court in the said case was the multiplier of 15, which multiplier, it was noticed, was also the approved multiplier in the case of *U.P. State Road Transport Corporation and Ors. vs. Trilok Chandra and Ors., (1996) 4 SCC*

362 and in New India Assurance Co. Ltd. vs. Charlie and Anr., (2005) 10 SCC 720.

20. In view of the aforesaid, it is held that the appellants are entitled to re-computation of the compensation awarded to them by the learned Tribunal by application of the multiplier of 15 instead of the multiplier of 13. Thus calculated, the compensation payable to the appellants comes to ₹ 9,600/- (annual loss of dependency of the appellants) x 15 = ₹ 1,44,000/- (Rupees One lac Forty Four Thousand Only). In addition to the aforesaid compensation towards the loss of dependency, the appellants are also held entitled to pecuniary damages towards the funeral expenses of the deceased in the sum of ₹ 5,000/- and a further sum of ₹ 10,000/- each is also awarded under the heads of loss of love and affection, loss of consortium and loss of estate of the deceased, that is, in all a sum of ₹ 1,79,000/- (Rupees One Lac Seventy Nine Thousand Only) is awarded to the appellants.

21. Adverting to the third contention of the learned counsel for the appellants pertaining to non-award of interest on the award amount from the date of the institution of the petition till the date of passing

of the award, it is well settled that interest is the money paid for forbearance and detention of the principal amount and ordinarily ought not to be denied to the claimants. The reason assigned by the learned Tribunal for denying interest to the claimants is that the claimants themselves were responsible for causing delay in the disposal of the petition, inasmuch as the petition was dismissed in default on 16.05.1994 and notice of the restored claim petition could not be served on the respondent No.3 till 26.09.2000.

22. It, however, emerges from the record that though the petition was dismissed in default on 16.05.1994 for wrong noting of date by the counsel, an application for restoration of the petition was promptly filed, which was allowed by the Tribunal's order dated 27.06.1994. Notice of the petition, which was ordered to be served, was served on the respondents No.1, 2 and 4 on different dates and ultimately the respondent No.3 was served by affixation on 26.09.2000. The unfortunate dismissal of the Claim Petition and the mere fact that the respondent No.3, who was a lady, was successful in evading service of notice of the petition for three years, despite the

fact that her son (the respondent No.4), who was a co-owner of the vehicle was served and appeared on 22.09.1997, in my opinion, does not show that the claimants were deliberately delaying the disposal of the petition. Rather, it shows that the delay was being caused by the respondents. It is well known that avoidance of service of notice issued by Courts is a dilatory tactic adopted by many a litigant. If the respondents evaded service of notice, the appellants cannot be penalized for their dilatory tactics. The order of the learned Tribunal denying interest to the claimants, therefore, cannot be sustained. Accordingly, it is held that the appellants shall be entitled to interest from the date of the institution of the petition till realisation at the rate of 9% per annum.

23. Resultantly, the award is enhanced from ₹ 1,24,800/- to ₹ 1,79,000/- with the direction to the Insurance Company to pay the enhanced amount of compensation to the appellants along with interest as awarded hereinabove by depositing the same with the Registrar General of this Court within 30 days from the date of the

passing of this order. The enhanced amount shall enure solely to the benefit of the widow of the deceased.

24. Both the appeals are allowed in the above terms. There shall be no order as to costs.

25. Records of the Claims Tribunal be sent back to the concerned Tribunal.

**REVA KHETRAPAL
(JUDGE)**

October 03, 2011
km