

REPORTED

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

+ **MAC. APP. 331/2008**

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

versus

NEENA SOMANI & ORS. Respondents
Through: Mr. Satyavan Kudalwal,
Advocate for the respondents
No.1 and 2

+ **(CM No. _____)to be converted in MAC. APP. No. _____**

NEENA SOMANI & ANR. Appellants
Through: Mr. Satyavan Kudalwal,
Advocate

versus

UNITED INDIA INSURANCE CO. LTD.
& ANR. Respondents
Through: Mr. L.K. Tyagi, Advocate for
the respondent No.1

% Date of Decision : September 13, 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 order, it is proposed to decide both the aforesaid appeals assailing the judgment of the learned Motor Accidents Claims Tribunal in Suit No.490/04, whereby the learned Tribunal passed an award in the sum of ₹ 84,29,000/- alongwith interest at the rate of 7% per annum from the date of the filing of the petition. The appellant in the first appeal is, M/s. United India Insurance Co. Ltd., which has prayed for setting aside/modification of the impugned award on a number of grounds, whereas the appellants in the second appeal, are the claimants, who seek enhancement of the award amount on the ground that the quantum of compensation awarded to them has not been calculated in accordance with the well settled principles of law.

2. The concise facts leading to the filing of the present appeal are that a Claim Petition was filed by the parents of one Rahul Somani under Section 166 of the Motor Vehicles Act, 1988, claiming compensation on account of his death in a road accident which took

place in the night intervening 16th/17th August, 1997. On the fateful night, the car of the deceased, being a Maruti car bearing No.DL-3CA-9612, coming from the side of New Friends Colony, smashed against the back portion of a stationary truck bearing No.HRS-2102 which was parked in the middle of the road on Modi Flyover, resulting in fatal injuries on the person of Rahul Somani, who expired on the spot.

3. The insured, that is, the owner of the offending truck, did not contest the case despite service of notice upon him and was proceeded *ex parte*. A written statement was, however, filed by the insurer, (the appellant herein), denying the contents of the Claim Petition and claiming that the truck had gone out of order due to mechanical fault, and was parked on the side of the road with its rear red light on and stones and bricks placed around the stationary vehicle to give adequate indication to the oncoming vehicles. It was further stated in the written statement that the deceased was either under the influence of liquor or dozing while driving his car and had dashed against the rear portion of the parked vehicle insured with the appellant. It was

also pleaded that the accident had not taken place due to the rash and negligent driving of the truck insured with the appellant, and that the police had been misled into registering the First Information Report bearing No.872/1997, which was subsequently cancelled and thus no charge-sheet was filed against the driver of the truck.

4. The learned Tribunal, after scrutinizing the evidence on record, directed the appellant-Insurance Company to pay the awarded amount on the ground that on the date of the accident the vehicle involved was fully covered under a valid insurance policy, Ex.R2W2/1 in the name of the respondent No.3-insured. The learned Tribunal further held that cancellation of the FIR pertaining to the accident did not absolve the Insurance Company of its liability to pay compensation to the third party involved in the accident.

5. In the course of hearing before this Court, Mr. L.K. Tyagi, the learned counsel for the appellant has vociferously contended that the learned Tribunal erred in fastening the liability of the award amount on the Insurance Company and in not appreciating the fact that the accident had occurred due to the sole negligence of the deceased. Mr.

Tyagi relied upon the judgment of the Supreme Court in the case of ***Raj Rani and Ors. Vs. Oriental Insurance Co. Ltd. and Ors. 2009 ACJ 2003*** to contend that the truck being stationary, some amount of negligence on the part of the deceased could not be ruled out. According to him, the learned Tribunal ought to have apportioned the liability and fixed the contributory negligence of the deceased to the extent of 50% keeping in view the ratio of the judgment in ***Raj Rani's*** case (*supra*). He further contended that there being no eye witness to the accident and no charge-sheet having been filed against the driver of the truck, the negligence on the part of the truck insured with the appellant had not been proved on record. In such circumstances, he contended that the learned Tribunal erred in holding that the doctrine of *res ipsa loquitor* would be applicable to the facts of the case and in drawing adverse inference against the driver of the offending truck on the ground that he did not appear in the witness box. Mr. Tyagi also submitted that the driver of the truck not having been made a party to the petition, the question of his appearing as a witness did not arise

and consequently, no adverse inference could have been drawn against him.

6. As regards the quantum of compensation awarded to the legal representatives of the deceased, Mr. Tyagi submitted that the learned Tribunal erred in considering the income of the deceased on the basis of his income-tax return filed for the assessment year 1997-98 and in not taking into consideration the fact that the business continued even after the death of the deceased and was being run by the father of the deceased. It was also contended by him, relying upon the judgment of the Supreme Court in the case of *Smt. Sarla Verma and Ors. vs. Delhi Transport Corporation and Anr. (2009) 6 SCC 121*, that in view of the fact that the deceased was unmarried, the learned Tribunal erred in deducting one-third ($1/3^{\text{rd}}$) from his income towards his personal expenses and that the deduction should have been not less than one-half ($1/2$) of the income of the deceased. Relying upon the judgment of the Supreme Court in the case of *New India Assurance Co. Ltd. vs. Smt. Shanti Pathak and Ors., I (2008) ACC 45*, he further contended that the age of the father of the deceased being 52

years, the appropriate multiplier could not have been more than 8 years and the Tribunal erred in applying the multiplier of 11 years to ascertain the total loss of dependency of the appellants.

7. Needless to state, all the aforesaid contentions of the learned counsel for the appellant-Insurance Company were strongly refuted by Mr. Satyavan Kudalwal, the learned counsel for the claimants/respondents No.1 and 2, who sought to support the findings of the learned Tribunal on all counts, except to urge that considering the age of the deceased, the amount of the award should have been more, keeping in view the fact that had the deceased not met with the unfortunate accident his income would have most certainly increased with the passage of time.

8. Adverting first to the issue of contributory negligence, the undisputed facts are that the claimants have proved on record copy of the FIR as Ex.PW1/1 and the appellant has also proved on record the copy of the FIR as Ex.R2W1/2, which shows that both the parties have relied upon the First Information Report. The factum of the accident is thus not in dispute as also the manner in which the same

took place. However, Mr. Tyagi's contention regarding the contributory negligence of the deceased does not find favour with me for the reason that the question as regards contributory negligence is essentially a question of fact, and the facts in the instant case do not inculcate the deceased. In the instant case, the accident occurred in the dead of the night, that is, at 12.30 A.M., on a flyover, being the Modi Flyover. The site plan Ex.PW1/2, which was prepared by the police in the course of investigation of case FIR No.872/97 shows that the place of the accident is in the middle of the road. It further shows that the stationary truck was lying parked in the middle of the road abandoned by its driver in a dangerous condition. There is no evidence produced by the respondent No.3 – owner to prove that the driver or any other person was left on the driver's seat who had the licence to drive the vehicle. There is also no evidence adduced by the respondent No.3 to prove that any indicator, indicating that the truck was stationary or non-operational, was there on the abandoned vehicle. As regards the contention of the counsel for the appellant that the deceased was either under the influence of alcohol or was

dozing, this contention is without merit as there is on record the toxicological analysis report of the body of the deceased as Ex.PW1/5, which proves that the deceased was not under the influence of any drug or alcohol at the time of the accident.

9. The plea of the appellant that the truck was out of order due to some mechanical defect is also unsubstantiated on record. No mechanical inspection of the truck was conducted even though its number was readily available with the police after the registration of the FIR. Strangely, the appellant-Insurance Company has taken the plea that the rear red light of the truck was on and stones and bricks had been placed around the non-functional vehicle, but not an iota of evidence in this regard has been brought on record. Neither the driver of the alleged truck who had left the vehicle in such a manner has been examined nor the owner of the truck has been produced in the witness box. In such circumstances, in my view, the learned Tribunal rightly concluded that the truck driver was guilty of violation of the express provisions of Sections 122, 126 and 127 of the Motor Vehicles Act, 1988 by leaving the offending truck unattended,

without due and proper caution, in the middle of the road, and that too on a flyover. For the sake of convenience, Sections 122, 126 and 127 are reproduced hereunder:

“Section 122. Leaving vehicle in dangerous position.— No person in charge of a motor vehicle shall cause or allow the vehicle or any trailer to be abandoned or to remain at rest on any public place in such a position or in such a condition or in such circumstances as to cause or likely to cause danger, obstruction or undue inconvenience to other users of the public place or to the passengers.

“Section 126. Stationary vehicles.— No person driving or in charge of a motor vehicle shall cause or allow the vehicle to remain stationary in any public place, unless there is in the driver's seat a person duly licensed to drive the vehicle or unless the mechanism has been stopped and a brake or brakes applied or such other measures taken as to ensure that the vehicle cannot accidentally be put in motion in the absence of the driver.

“Section 127. Removal of motor vehicles abandoned or left unattended on a public place.— (1) Where any motor vehicle is abandoned or left unattended on a public place for ten hours or more or is parked in a place where parking is legally prohibited, its removal by a towing service or its immobilisation by any means including wheel clamping may be

authorised by a police officer in uniform having jurisdiction.

(2) Where an abandoned, unattended, wrecked, burnt or partially dismantled vehicle is creating a traffic hazard, because of its position in relation to the public place, or its physical appearance is causing the impediment to the traffic, its immediate removal from the public place by a towing service may be authorised by a police officer having jurisdiction.

(3) Where a vehicle is authorised to be removed under sub-section (1) or sub-section (2) by a police officer, the owner of the vehicle shall be responsible for all towing costs, besides any other penalty.”

10. Further, on the aspect of negligence of the driver of the offending truck, the learned Tribunal has, in my view, rightly held that the standard of proof is altogether different in criminal cases and in civil cases. The proceedings before the Motor Accidents Claims Tribunal are of a civil nature and it is settled law that in civil cases it is the preponderance of probability and not the rule of proof beyond any reasonable doubt which holds the field. Adverse inference was also rightly drawn by the learned Tribunal against the driver who did not appear in the witness box to explain the manner in which the accident occurred.

11. As regards the non-impleadment of the driver by the claimants and the reliance placed by the counsel for the appellant on the case of *The Oriental Insurance Co. Ltd. vs. Meena Variyal and Ors., 2007 (5) SCALE 269*, I am constrained to hold that the claimants cannot be faulted for not impleading the driver of the offending truck. The record reveals that initially the driver of the offending truck was arrayed as a party respondent to the proceedings, but since the name and address of the driver could not be ascertained and the same were not furnished by the other respondents to the Claim Petition, the driver of the offending truck was deleted from the array of parties on 20.02.2003. As noted by the learned Tribunal, notice was given to the owner of the offending truck by the Tribunal, but notwithstanding the owner of the offending truck did not attend the court proceedings and chose to stay away. Since neither the Insurance Company nor the owner of the offending truck disclosed the name of the driver, and even the police of the concerned Police Station did not disclose the name of the driver of the offending truck, the claimants were left with no option but to pray for the deletion of the name of the driver from

the array of parties. It was incumbent upon the police to have issued notice under Section 133 of the Motor Vehicles Act to the owner of the truck for disclosing the name of the truck driver, but it failed to do so. The reliance placed by the counsel for the appellants, in the above context, on the judgment of the Supreme Court in the case of *Meena Variyal (supra)* is also misplaced. In this case, the name of the driver of the truck, Mahmood Hasan, was known to all concerned and it was in such circumstances that the Hon'ble Supreme Court held that the Tribunal ought to have directed the claimants to implead Mahmood Hasan who was allegedly driving the vehicle at the time of the accident, the rationale being that when a car belonging to the owner, insured with the Insurance Company and being driven by a driver employed by the insured, meets with an accident, the primary liability under law for payment of compensation is that of the driver. The liability of the owner is only vicarious and that of the insurer is by virtue of the contract of Insurance with the owner. In the instant case, on the other hand, the name of the driver is not forthcoming on the record and it is not known who was the driver when the truck was

parked in the middle of the road. For the same reason, the reliance placed on behalf of the appellant upon the judgment of a Single Bench of the Madhya Pradesh High Court in *New India Assurance Co. Ltd. vs. Munnidevi and Ors., I (1994) ACC 648* is also misplaced.

12. Adverting next to the aspect of quantum of compensation awarded by the learned Tribunal, in my opinion, the learned Tribunal cannot be faulted for assessing the quantum of compensation on the basis of the income-tax return of the deceased for the assessment year 1997-98, which was filed prior to the death of the deceased, as it pertains to the financial year 1996-97. According to this Return, the deceased was earning ₹ 11,45,410/- per annum. Even though, subsequent to his death, his father became the proprietor of the business of the deceased, but the profit and turnover of the business were reduced substantially, which fact is evident from the income-tax returns for the assessment years 1999-2000 to 2002-2003 placed on record as Ex.PW1/8 (collectively). Thus, in my view, the Tribunal rightly assessed the income of the deceased to be in the sum of

₹ 11,46,000/- per annum. The deceased being self-employed and no other evidence having been brought on record to show a rising trend in his income, the Tribunal rightly did not take into account the future prospects of the deceased.

13. As regards the deduction made by the learned Tribunal towards the personal expenses of the deceased, I am at one with the learned counsel for the appellant-Insurance Company that the Tribunal ought to have deducted one-half ($1/2$) instead of deducting one-third ($1/3^{\text{rd}}$) of the income of the deceased towards his personal expenses, the deceased being a bachelor and his only dependents being his parents. Thus calculated, the annual loss of dependency of the parents of the deceased comes to ₹ 5,73,000/- per annum. It is settled law that this multiplicand must be augmented by the use of an appropriate multiplier in consonance with the age of the deceased or the age of the claimants, whichever is higher. It is not in dispute that the father of the deceased was 52 years of age on the date of the accidental death of his son. Thus, in my view, the appropriate multiplier in consonance with the tabulated multipliers laid down in the case of

Sarla Verma (supra) would be the multiplier of 11. In this manner, the total loss of dependency of the respondents No. 1 and 2 works out to ₹ 63,03,000/-. Adding ₹ 25,000/- to the aforesaid sum of money as awarded by the learned Tribunal towards loss of love and affection of the deceased and funeral expenses, the total amount payable to the parents of the deceased comes to ₹ 63,28,000/-. The award amount is modified accordingly.

14. In view of the aforesaid, the sum of ₹ 63,28,000/- is adjudged to be the fair and just compensation payable to the legal representatives of the deceased in the instant case alongwith interest thereon at the rate of 7% per annum as awarded by the learned Tribunal from the date of the filing of the petition till the date of realisation. In view of the fact that the amount of the award, in accordance with the judgment of the learned Tribunal, is lying deposited with the Registrar General of this Court in the form of an FDR, the Registrar General shall release to the legal representatives of the deceased the amount of ₹ 63,28,000/- alongwith interest thereon at the rate of 7% per annum from the date of the filing of the

petition till payment. The balance amount, if any, shall be returned to the appellant-Insurance Company.

15. Resultantly, the appeal of the Insurance Company is partly allowed and the appeal of the claimants is dismissed as being devoid of merit. There will be no order as to costs.

16. Records of the learned Tribunal be sent back forthwith.

**REVA KHETRAPAL
(JUDGE)**

September 13, 2011
km