

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

Reserved on: 10th October, 2012
Pronounced on: 22nd November, 2012

+ **FAO.775/2003**

NATIONAL INSURANCE CO. LTD. Appellant
Through: Mr. Joy Basu with Ms. Ruchi B. Jain,
Advocates

Versus

SURESH KUMAR & ORS Respondents
Through: Mr.Navneet Goyal with Ms. Suman. N.
Rawat, Advocates for the Respondent
No.2.
Mr. Kamran Malik, Advocate for the
Respondent No.3.

+ **MAC.APP. 679/2011**

DELHI BISLERI CO. LTD. Appellant
Through Mr.Navneet Goyal with Ms. Suman N.
Rawat, Advocates, Advocate

versus

SURESH KUMAR & ORS Respondents
Through Mr. Joy Basu with Ms. Ruchi B. Jain,
Advocates for the Objector Insurance
Company.
Mr. Kamran Malik, Advocate for the
Respondent No.2.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. These two Appeals(FAO.775/2003 and MAC.APP.679/2011) arise out of a common judgment dated 12.09.2003 whereby a compensation of ₹5,25,000/- was awarded by the Motor Accident Claims Tribunal (Claims Tribunal) in favour of Mohd. Tahir (the Claimant) who suffered grievous injuries resulting in amputation of his left hand above elbow in a motor vehicle accident which occurred on 30.08.2001. By the impugned judgment while awarding the compensation, the Claims Tribunal held that the insured, that is, owner of the offending vehicle committed breach of the terms of the policy as the driver of the offending vehicle did not possess a valid and effective driving licence to drive the offending vehicle. Thus, the Insurance Company was made liable to pay the compensation, in the first instance, and was allowed to recover the aforesaid amount of compensation from the owner and driver of the offending vehicle.
2. FAO. 775/2003 is mainly on the ground that since the driver (Respondent No.1 Suresh Kumar) did not possess a valid driving licence to drive medium motor vehicle, the owner (Respondent No.2) Delhi Bisleri Co. Ltd. committed wilful breach of the terms of the policy and the Insurance Company should not have been made liable to pay the compensation at all. MAC. APP. 679/2011 which is by way of Cross-Objections is filed by Delhi Bisleri Co. Ltd. on the ground that as the driver possessed a valid driving licence to drive the offending vehicle, the Claims Tribunal, therefore, erred in making the owner liable to reimburse the amount of compensation paid by the Insurance Company. It is stated that the compensation awarded is also on the higher side.

3. For the sake of convenience, Appellant in FAO.775/2003 shall be referred to as the Insurance Company. Appellant in MAC.APP.679/2011 shall be referred to as the owner and the injured shall be referred to as the Claimant.
4. The finding on negligence is not challenged by the Appellant Insurance Company or the owner. Thus, the same has attained finality.
5. During evidence before the Claims Tribunal, it was claimed that the deceased was working as a painter and was earning ₹6,000/- per month. The Claims Tribunal, however, took the minimum wages into consideration to award 85% loss of earning capacity. The compensation awarded is tabulated hereunder:

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Medical Expenses	₹15,000/-
2.	Permanent Disability	₹ 4,10,000/-
3.	Pain & Suffering	₹ 1,00,000/-
	Total	₹ 5,25,000/-

6. First of all, I would deal with the quantum of compensation.

QUANTUM

7. I have before me the Trial Court record. In paras 4, 5 and 6 of the Claim Petition filed on 07.01.2001 it was stated that the Claimant was a self employed person working as a painter and was earning ₹6,000/- per month. He examined himself as PW3. He deposed that he was doing the work of painting buildings; sometimes on contract basis and sometimes

on daily basis. From the said work, he was earning ₹6,000/- per month. On account of amputation of his left arm, he was unable to carry out the said work and had become unemployed. In cross-examination, the Claimant denied the suggestion that he was not earning ₹6,000/- per month. However, no suggestion was given to the Claimant that he was not working as a painter. This accident took place on 30.08.2001. The minimum wages of a skilled worker at that time were ₹2,948/- per month. Since the Claimant's profession was not disputed, the Claims Tribunal should have taken into account at least minimum wages of a skilled worker to compute the loss of earning capacity.

8. The Appellant examined Dr. B.P. Barwal, Staff Physician, GTB Hospital, Shahdara as PW4 to prove the disability certificate as Ex.P2/A. It is amply proved that the Claimant suffered disability to the extent of 85% in respect of his left upper limb on account of the amputation of right arm above elbow. In cross-examination, the Doctor stated that the disability in relation to the functioning of the body would be less than 85%, at the same time the extent of the loss of earning capacity with respect to the whole body was not given by the Doctor.
9. In *Raj Kumar v. Ajay Kumar & Anr.*, 2011 (1) SCC 343, the Supreme Court brought out the difference between permanent disability and functional disability resulting in the loss of earning capacity. It was laid down that the compensation on account of loss of earning capacity has to be granted in accordance to the nature of job undertaken by the victim of motor accident. Paras 11 and 14 of the report are extracted hereunder:

“11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in

terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Co. Ltd. 2010 (10) SCC 254 and Yadava Kumar v. D.M., National Insurance Co. Ltd. 2010 (10) SCC 341.

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14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

10. Thus, the functional disability has to be assessed with regard to the victim's profession. In the instant case, the Claimant, as stated earlier, was working as a painter. For carrying the work, he has to climb and stand on a ladder and also on various other articles. Functioning of the left hand is very essential in performance of his duties. Thus, there would be substantial decrease in the Claimant's earning capacity. The Claimant admitted that he was a right hander. In the circumstances, the loss of earning capacity can be taken to be only 50%.
11. The Claimant would be entitled to an addition of 30% in the loss of earning capacity on the basis of the report of the Supreme Court in *Santosh Devi v. National Insurance Company Ltd. & Ors.*, 2012 (4) SCALE 559. The Claimant was aged 36 years on the date of the accident as is evident from the MLC and the admission record. The loss of earning capacity thus comes to ₹3,44,916/- (₹2,948/- + 30% x 12 x 15 x 50%) as against an award of ₹4,10,000/- passed by the Claims Tribunal.

LOSS OF INCOME:

12. The Claims Tribunal did not award any amount towards loss of income for the period of recovery. The Claimant's case is that he was unable to carry out any work at all after the amputation of his arm. His testimony that after discharge from GTB Hospital, he remained as an outdoor patient in Prakash Hospital for 7-8 months was not challenged in cross-examination. In the circumstances and keeping in view the nature of the injuries and PW3's testimony, I hold that the Claimant would not have attended to his work for a period of about six months. He is, therefore, entitled to a compensation of ₹17,688/- (₹2,948/- x 6).

PAIN AND SUFFERING:

13. The Claims Tribunal awarded a sum of ₹1,00,000/- towards pain and suffering. The owner says that it is exorbitant and excessive. In *Govind Yadav v. New India Insurance Co. Ltd. (2011) 10 SCC 683*, in case of amputation of one leg above knee of a victim aged 24 years in an accident which took place in the year 2004, the Supreme Court granted a compensation of ₹1,50,000/- towards pain and suffering. Considering the period of hospitalization, treatment and the fact that the Claimant lost one limb, a compensation of ₹1,00,000/- towards pain and suffering cannot be said to be exorbitant and excessive.

LOSS OF AMENITIES AND DISFIGUREMENT:

14. No compensation was awarded towards loss of amenities and disfigurement to the Claimant. In the case of *Govind Yadav*, a compensation of ₹1,50,000/- was awarded towards loss of amenities, disfigurement and loss of marriage prospects. It is not the Claimant's case that he was unmarried. This accident took place in the year 2001. Keeping in view the fact that the loss of earning capacity to the extent of 50% has been awarded, I would make a provision of ₹50,000/- towards loss of amenities and disfigurement.

MEDICAL EXPENSES:

15. It is urged by the learned counsel for the owner that the award of ₹15,000/- towards medical expenses is on the higher side. The Claimant was able to prove cash memos issued by various medical stores and Prakash Hospital which totalled up to ₹6,445/-. It is not the Claimant's case that he lost the other bills. Main treatment was in GTB Hospital which was entirely free. In the circumstances, the Claimant was entitled to a sum of ₹7,000/- only towards purchase of medicines and medical

treatment. Rest of the amount of ₹8,000/- is treated as an award towards special diet and conveyance charges.

16. The overall compensation is thus computed as under:

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Earning Capacity	₹4,10,000/-	₹3,44,916/-
2.	Loss to Income (₹2,948/- x 6)	-	₹17,688/-
3.	Pain & Suffering	₹ 1,00,000/-	₹ 1,00,000/-
4.	Loss of Amenities & Disfigurement	-	₹ 50,000/-
5.	Medical Expenses	₹ 15,000/-	₹ 7,000/-
6.	Special Diet & Conveyance	-	₹ 8,000/-
	Total	₹ 5,25,000/-	₹ 5,27,604/-

17. Thus the compensation awarded cannot be said to be excessive. Rather, the overall compensation is just and reasonable.

LIABILITY:

18. It is not in dispute that the Respondent Suresh Kumar, driver of the offending vehicle possessed a driving licence to drive only a light motor vehicle LMV (Commercial) on the date of the accident. A report Ex.R3W1/A is proved on record by the Appellant Insurance Company which is not disputed.
19. At this juncture, it would be fruitful to refer to Suresh Kumar's testimony (the driver) who examined himself as R1W1. In his examination-in-

chief, he disputed that the accident was not on account of his negligence. As stated earlier, the finding on negligence has attained finality. In cross-examination on behalf of the Appellant Insurance Company, Suresh Kumar(the Driver) admitted that he possessed a driving licence to drive only a light motor vehicle (LMV). He admitted that he was not authorised to drive a medium motor vehicle. At the same time, he stated that the vehicle involved in the accident, that is, Tata 909 No.DL-1M-0692 was a medium motor vehicle (MMV) and not a light motor vehicle (LMV).

20. The Transport Manager of the owner also entered the witness box as R2W1. He deposed that the driver Suresh Kumar possessed a driving licence to drive LMV. He was silent that on the strength of this licence, he could drive an MMV.
21. The learned counsel for the owner heavily relies on Suresh Chand's testimony LDC, Transport Authority (R3W1). He (R3W1) also stated that the driving licence possessed by Suresh Kumar Babu was valid only for light motor vehicle(commercial). He stated that he was not entitled to drive any HMTV on the basis of this licence. In cross-examination, the witness stated that upto the year 1998, they used to issue a separate licence for medium motor vehicles. He stated that medium motor vehicle is also covered by LMV(commercial).
22. The learned counsel for the owner heavily relies on the testimony of this witness to contend that on the basis of licence for LMV(commercial), driver Suresh Kumar was entitled to drive the vehicle involved in the accident. At this stage, it would be relevant to refer to the registration certificate Ex.R2W1/B of the offending vehicle. The unladen weight of

this vehicle is shown as 9000 kgs. The insurance cover note Ex.R3W2/A corroborates the registration certificate that the unladen weight of the vehicle is 9000 kgs. Section 2(21) defines a light motor vehicle, Section 2(23) defines a medium goods vehicle and Section 2(16) defines heavy goods vehicle. It would be apposite to extract these sub-sections hereunder for ready reference.

“Section 2(21). “light motor vehicle” means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed [7,500] kilograms;

Section 2(23) “medium goods vehicle” means any goods carriage other than a light motor vehicle or a heavy goods vehicle;

Section 2(16) “heavy goods vehicle” means any goods carriage the gross vehicle weight of which, or a tractor or a road-roller the unladen weight of either of which, exceeds 12,000 kilograms;”

23. A perusal of the above definitions makes it clear that any vehicle whose unladen weight does not exceed 7500 kgs is a light motor vehicle, and a vehicle whose unladen weight exceeds 12000 kgs is a heavy motor vehicle. Thus, any vehicle which does not fall in the category of a light motor vehicle and heavy goods vehicle is a medium goods vehicle. In another words, if the unladen weight exceeds 7500 kgs and is upto 12000 kgs, is a medium goods vehicle. Thus, there is no manner of doubt that the vehicle involved in the accident was a medium goods vehicle as its unladen weight was 9000 kgs.
24. Thus, it is clear that on the strength of a licence to drive LMV (commercial), a driver is not competent to drive a medium motor vehicle. Of course, R3W1 testified that a separate licence for medium motor

vehicles was issued only upto 1998. This, however, is only an opinion of a witness who was expected to depose only on factual position. His evidence is not an expert's evidence. The same is not binding on the Court. I have hereinabove extracted Form IV. There was an amendment in Form IV w.e.f. 28.03.2001 whereby the categories of transport authority vehicle was substituted in place of medium motor vehicle and heavy motor vehicle. Thus, after the amendment in Form IV prescribed under Rule 2(e) of the Central Motor vehicles Rules, 1989, a person needed a licence to drive a transport vehicle if he wanted to drive any transport vehicle (including a medium goods vehicle). As per the definition of transport vehicle given in Section 2(47) every public service vehicle, a goods carriage, or an educational institution bus or a private service vehicle is a transport vehicle. Thus, every commercial vehicle is a transport vehicle.

25. In the instant case, the accident took place in the year 2001. There was separate category for light motor vehicle, medium goods vehicle and heavy goods vehicle in form IV. Separate licences were required for each of the category as on the date of the accident. Thus, it was proved that the Respondent Suresh Kumar, the driver of the offending vehicle did not possess a valid and effective driving licence to drive the same.
26. It is not the owner's case that it had seen a valid driving licence at the time of engaging the driver. Rather, the owner tried to build a case that on the strength of an LMV (Commercial) licence, a medium motor vehicle could be driven by a driver which contention has been rejected earlier. Thus, it is established that there was a wilful breach of the terms of the policy by the owner(that is, the insured).

27. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by three Judge Bench report in *Sohan Lal Passi v. P. Sesh Reddy*, (1996) 5 SCC 21. As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned under Section 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in *Skandia Insurance Company Limited v. Kokilaben Chandravadan*, (1987) 2 SCC 654 where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in *Sohan Lal Passi* analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in *Skandia*. In *New India Assurance Co., Shimla v. Kamla and Ors.*, (2001) 4 SCC 342, the Supreme Court referred to the decision of the two Judge Bench in *Skandia*, the three Judge Bench decision in *Sohan Lal Passi* and held that the insurer who has been made liable to pay the

compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

“21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22.To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23.It is advantageous to refer to a two-Judge Bench of this Court in Skandia Insurance Company Limited v. Kokilaben Chandravadan, (1987) 2 SCC 654. Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such

protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the raison d'être for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in Sohan Lal Passi v. P. Sesh Reddy, (1996) 5 SCC 21.

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence.....”

28. Again in *United India Insurance Company Ltd. v. Lehu & Ors.*, (2003) 3 SCC 338, in para 18 of the report the Supreme Court referred to the decision in *Skandia, Sohan Lal Passi* and *Kamla* and held that even where it is proved that there was a conscious or willful breach as provided under Section 149(2)(a) (ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

“18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a “breach”. As held in Skandia and Sohan Lal Passi cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by

the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic “No”. To hold otherwise would be to negate the very purpose of compulsory insurance.....”

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20.....If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view.”

29. The three Judge Bench of the Supreme Court in *National Insurance Company Limited v. Swaran Singh & Ors.*, (2004) 3 SCC 297 again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in *Sohan Lal Passi*, *Kamla* and *Lehru*. Paras 73 and 105 of the report are extracted hereunder:

“73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

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105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis persuades us not to deviate from the said principle.”

30. This Court in *Oriental Insurance Company Limited v. Rakesh Kumar and Others*, 2012 ACJ 1268 and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in *National Insurance Company Limited v. Kusum Rai & Ors.*, (2006) 4 SCC 250, *National Insurance Company Limited v. Vidhyadhar Mahariwala & Ors.*, (2008) 12 SCC 701; *Ishwar Chandra & Ors. v. The Oriental Insurance Company Limited & Ors.*, (2007) 10 SCC 650 and *Premkumari & Ors. v. Prahalad Dev & Ors.*, (2008) 3 SCC 193 and held that in view of the three Judge Bench decision in *Sohan Lal Passi*(*supra*) and *Swaran Singh*, the liability of the Insurance Company vis-à-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.
31. Thus, the Appellant Insurance Company was rightly made liable to pay the compensation with a right to recover the same from the Respondents Suresh Kumar and M/s. Delhi Bisleri Co. Ltd., the driver and the owner of the offending vehicle respectively.
32. By an order dated 17.11.2003 on deposit of the award amount, the Claimant was permitted to withdraw the compensation amount deposited by the Appellant. If any amount of compensation is still lying deposited it shall be released in favour of the Claimant.
33. The statutory amount deposited by the Appellant Insurance Company shall be refunded to it.
34. If any statutory amount has been deposited by the owner, Delhi Bisleri Co. Ltd., the same shall be released in favour of the Appellant National Insurance Company Ltd.

35. Both the Appeals are disposed of in above terms.
36. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

NOVEMBER 22, 2012
pst