

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

Reserved on: 21st February, 2012

Pronounced on: 2nd July, 2012

+ **MAC APP. 367/2004**

NATIONAL INSURANCE CO. LTD. Appellant
Through: Mr. Pradeep Gaur, Advocate for
the Appellant Insurance
Company.
Mr. D.K. Nag with
Ms. Debopama Roy, Advocates
for IRDA.

versus

MANJU BANSAL & ORS. Respondents
Through: Mr. Navneet Goyal with
Ms. Suman N. Rawat,
Advocates for the Respondents
No.1 to 3/Claimants.

+ **WITH
MAC APP. 193/2012**

MANJU BANSAL & ORS. Appellants
Through: Mr. Navneet Goyal with
Ms. Suman N. Rawat,
Advocates.

versus

NATIONAL INSURANCE CO. LTD. Respondent
Through: Mr. Pradeep Gaur, Advocate for
the Respondent Insurance
Company.
Mr. D.K. Nag with Ms.
Debopama Roy, Advocates for
IRDA.

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

J U D G M E N T

G. P. MITTAL, J.

1. The Appellant National Insurance Co. Ltd. takes exception to the judgment dated 01.05.2004 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby while awarding a compensation of ₹2,45,000/- for the death of Sushil Kumar Bansal, the Appellant's plea of limited liability to the extent of ₹50,000/- in terms of contract of insurance between the Appellant and the insured i.e. Respondent No.5 owner of TSR No. DER 9685 was rejected. The Appellant Insurance Company was directed to pay the entire compensation of ₹2,45,000/- as awarded by the Claims Tribunal.
2. MAC. APP. No.193/2012 are the Cross-Objections filed by the Respondents No.1 to 3 for enhancement of compensation on the ground that the deceased's income was considered to be ₹1,200/- per month as against the claim of ₹2,000/- per month and appropriate future prospects were not granted. It was averred that the income should have been doubled considering the future prospects of the deceased who was a hard working young person aged 33 years.
3. On appreciation of evidence, the Claims Tribunal found that on 02.12.1985 at about 6:00 pm while the deceased was crossing the road from Bhagat Singh College Marg to DTC Depot Kalkaji, he was hit by a TSR No. DER 9685 which was driven by Gajender Singh (the Fourth Respondent) in a rash and

negligent manner. It was claimed that the deceased was employed in National Investment and Finance (Industrial and Financial weekly) on a monthly salary of ₹720/-. He had another income of about ₹1,200/- for his work as a Sub-Broker, dealing in stationery and as a part time typist. On appreciation of the evidence, the Claims Tribunal found that in addition to the salary of ₹720/- per month, the deceased had an income of ₹450/- to 500/- per month from his part time work of a share broker and dealing in stationery. Thus, the Claims Tribunal took the deceased's income to be ₹1,200/- per month, added 50% towards future prospects, deducted 1/3rd towards personal and living expenses, applied a multiplier of '17' to compute the loss of dependency. The Claims Tribunal added a sum of ₹15,000/- towards non-pecuniary damages to award an overall compensation of ₹2,45,000/-.

4. While dealing with the issue of limited liability raised by the Appellant, the Claims Tribunal held that the Appellant failed to prove that it was entitled to adduce secondary evidence and also the secondary evidence produced was not believable on account of discrepancy in the insurance policy. Thus, the Claims Tribunal held that the Insurance Company had unlimited liability to pay the compensation.
5. For the sake of convenience, National Insurance Co. Ltd. (Appellant in MAC. APP. No.367/2004) shall be referred to as the Appellant and Cross-Objectors as the Claimants.

LIABILITY:

6. In order to prove that the Appellant's liability was limited to ₹50,000/-, the Appellant examined RW1, its Administrative Officer to prove the carbon copy of the policy (Ex.RW1/1) and service of notice dated 31.10.2000 as Ex.RW1/2. The Claims Tribunal discussed in detail the evidence of RW1 and concluded as under:

“21. To sum up, the version of Respondent No. 3 Insurance Company that its liability was limited to ₹ 50,000/- only as per document Exhibit RW 1/1 is not acceptable for the following reasons:-

- (i) The author of the insurance policy has not been called into the witness box by the insurance company to prove copy Exhibit RW 1/1 nor any reason assigned as to why he was not called upon to prove a document prepared and signed by him.*
- (ii) Instead, RW-1, an Administrative Officer of the Insurance Company was examined who was not born into the service at the time of the execution of the document. Admittedly, he had joined in the year 1987, that is, two years later and that too in a different branch of the Insurance Company from the one which issued the policy. He has nowhere stated that he was in a position to identify the handwriting and signatures of the authors and executant of the policy Exhibit RW 1/1. On the other hand, he candidly admitted that he had never been posted in the same Branch as Shri S.N.Saxena who has prepared the policy nor he knew when the said Shri S.N.Saxena had retired.*
- (iii) Notice under Order XII Rule & CPC was admittedly given to the insured for production of policy No.*

3080, but carbon copy of the policy (Exhibit RW 1/1) bears No. 192 and not 3080 (which number has been struck off).

- (iv) *Apart from Exhibit RW1/1, there is another copy of the policy on record. The signatures on the said policy are quite clearly altogether different from the signatures affixed on Exhibit RW1/1. The said carbon copy was filed alongwith the written statement of the insurance company in the year 1986 while Exhibit RW1/1 was filed at the stage of evidence in the year 2001.*
- (v) *Respondent No. 3 alongwith its written statement had also filed a certificate of insurance purporting to be "Duplicate" which bears No. Ze104921. In its written statement, however, it has not denied the assertion of the petitioners that the offending vehicle was insured vide certificate of Insurance No. 28831.*
- (vi) *The Insurance Company was served on 28.7.1986 with the notice of the filing of the petition, yet the premium record of the policy has not been produced by it to show that no additional premium has been received by it. Carbon copy of the policy Exhibit RW1/1 (single sheet) was filed but the terms and conditions of the policy have been withheld by the Insurance Company.*
- (vii) *The proposal form of the policy Exhibit RW1/1 was also not produced by the Insurance Company despite being called upon to do so. The proposal form would have pale matter beyond the pale of controversy, being the basic document relevant to the context.*
- (viii) *The Tariff Schedule was also not filed by the Insurance Company. At the state of arguments on the insistence of this Court, Respondent No. 3 produced the Tariff Schedule. Learned counsel for the petitioner thereupon pointed out that the Tariff Schedule*

produced by the Insurance Company itself shows that the liability of the company was not a limited one as contended by it. It was further pointed out that where the cubic capacity of the vehicle did not exceed 350 C.C., the premium payable for unlimited liability to public risk was ₹ 48/-, but in the case of Act only policy it was ₹ 40/-. In the instant case the tariff paid for liability to public risk as per document Exhibit RW1/1 was ₹48/- and this clearly showed that the liability of the Respondent No. 3 Insurance Company was not a limited one.

22 *In the above circumstances, I am constrained to hold that the Respondent No. 3 Insurance company has miserably failed to prove that document Exhibit RW1/1 was a carbon copy of the original policy and must be held liable for the entire amount. It is settled law that where the insurance company either does not produce the policy of insurance to show that its liability was a limited one or fails to prove the same on record, its liability cannot be held to be a limited one. Section 95 of the Motor Vehicles Act, 1939 lays down the statutory requirement about the policy, but it clearly does not prohibit covering to risk of higher amount. In view of the fact that there has been an admission in the written statement that the policy of insurance was a comprehensive policy of insurance, Respondent No. 3 must be held bound by that admission. The petitioners who are the claimants are strangers to the policy. The original policy is in the possession of the owner of the vehicle, who has chosen to absent himself from the proceedings. He has been noticed to prove the original policy but has not cared to do so, possibly taking shelter of the fact that he has been asked to produce an original policy of a number with which he is unfamiliar and that too after sixteen years of the institution of the claim petition. There is also no manner of doubt that a comprehensive policy such as the one in the instant*

case takes care of the liability to pay compensation to the owner or to a passenger or to a third party. It is the extent of this third party liability which is in dispute. It was for the Insurance Company to have produced and proved the terms and condition of the policy if the same was in any way helpful to the company. That not having been done, the obvious result is that that liability of the insurance company cannot be held to be a limited one. It cannot be also lost sight of that the insurance company being "the State" within the meaning of Article 12 of the Constitution of India was under a moral obligation to produce all the records before the Court including the contract of insurance, the premium receipts, the proposal form, etc. and non-production thereof would give rise to the drawing of an adverse inference against it. (Krishan Gupta v. Madan Lal 1 (2002) ACC 640 (Delhi) (D.B.)"

7. Admittedly, the original insurance policy is not on record. Normally, the same would be in possession of the insured (the owner of the vehicle). A notice Ex.RW1/2 was issued to the owner (Hari Ram) to produce the Policy No.3080/6301990/63/113/85. In the Claim Petition, the number of insurance policy was mentioned as 192/630/1990/E-63/113/85. The Appellant in reply to the averments made in para 16 of the Claim Petition did not dispute the number and validity of the insurance policy during the period of the accident. Thus, there is discrepancy with regard to the number of the insurance policy as mentioned in the Claim Petition and as admitted by the Appellant and also in the insurance policy

which was sought to be produced through notice Ex.RW1/2. Obviously, if the number of the policy was as mentioned in the Claim Petition, the same could have been produced by the owner of the vehicle. Along with the written statement, a carbon copy of the insurance policy was placed on record. There were cuttings in mentioning the number of the policy at two places.

8. It is well settled that a party to litigation must produce the best evidence. If an adversary is in possession of the best evidence, the party interested in producing that evidence must seek the same from the said person or give proper explanation of its absence. Secondary evidence is admissible only in the absence of primary evidence. Section 65 of the Indian Evidence Act, 1872 (the Evidence Act) entitles a party to lead secondary evidence in respect of a document on satisfying certain conditions. Section 65 of the Evidence Act is extracted hereunder:-

65. Cases in which secondary evidence relating to documents may be given -

Secondary evidence may be given of the existence, condition; or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after

the notice mentioned in Section 66, such person does not produce it;

(b) When the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;

(c) When the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) When the original is of such a nature as not to be easily movable;

(e) When the original is a public document within the meaning of Section 74;

(f) When the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India to be given in evidence;

(g) When the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.”

9. As per the Appellant, the original policy was in possession or power of Hari Ram (the Respondent No.5 herein) and thus the Appellant was entitled to produce secondary evidence in respect of the insurance policy only after requiring the Respondent No.5 to produce the original policy in the Court by a notice mentioned in Section 66 of the Indian Evidence Act. As stated hereinabove, the correct policy was not sought from the Respondent No.5. Thus, the requirement under Section 65 of the Evidence Act which could have enabled the Appellant to adduce secondary evidence having not been fulfilled, it was not entitled to lead any secondary evidence.
10. While dealing with the carbon copy of the policy (Ex.RW1/1), the Claims Tribunal noticed the cutting therein. It was observed that RW1 V.K. Gupta was not posted in the concerned branch at the time of issuing of the policy. He did not depose that he ever worked with Mr. S.N. Saxena who had issued the insurance policy or that he was conversant with his signatures. On this count also, the Claims Tribunal declined to rely on the secondary evidence. In my view, the conclusions reached by the Claims Tribunal are well-reasoned and does not call for any interference. Since the Appellant was not entitled to lead secondary evidence, the copy of the insurance policy has to be excluded from consideration. (*J. Yashoda v. K. Shobha Rani*, (2007) 5 SCC 730).

11. In the absence of proof of insurance policy, the Appellant has failed to prove that its liability was limited to ₹50,000/-. Therefore, I hold that the Appellant's liability was unlimited. I am supported in this view by the report of the Supreme Court in *Tejinder Singh Gujral v. Inderjit Singh & Anr.*, (2007) 1 SCC 508. Relevant para of the report is extracted hereunder:-

“13. The learned Tribunal, however, committed an error in opining that the insurance policy was not required to be proved. Learned Single Judge of the High Court, in our opinion, rightly held that the insurance policy having not brought on records, a presumption would arise that the liability of the insurer was unlimited.....”

12. In *Chandro Devi & Ors. v. Jit Singh & Ors.*, 1989 ACJ 41, this court held that in the absence of proof of the insurance policy by the insurance company it shall be presumed that the liability of the insurance company is unlimited. Relevant para of the report says:-

“The insurance company must prove that the policy in question is the ‘Act only’ policy. The amount mentioned by the statute is the minimum amount. But the policy can always cover higher risk to third party by taking additional premium. It is obligatory on the part of the insurance company to prove the insurance policy and its terms and conditions. In a number of decisions by this court, it has been held that where the insurance company has to produce the insurance policy or prove the same in accordance with law, then, it shall be presumed that the liability of the insurance company is unlimited. As I have already held that the insurance company has failed to prove the insurance policy in accordance with law, so I

hold that the liability of the insurance company is unlimited in the present case.”

13. In view of the forgoing discussion, the Appeal (MAC. APP. No.367/2004) must fail; the same is accordingly dismissed.

MAC APP. No.193/2012

QUANTUM OF COMPENSATION:

14. While dealing with the quantum of compensation, the Claims Tribunal analysed the testimony of PW9 Smt. Manju Bansal wife of the deceased and opined that the deceased had an average income of ₹1,200/- per month. Following *Kerala State Road Transport, v. Susamma Thomas*, (1994) 2 SCC 176 and *Sarla Dixit v. Balwant Yadav*, (1996) 3 SCC 179, the Claims Tribunal made an addition of 50% towards future prospects, deducted 1/3rd towards the personal and living expenses and applied a multiplier of ‘17’ to compute the loss of dependency as ₹2,45,000/-. The Claims Tribunal further awarded a sum of ₹10,000/- towards loss to estate, loss of consortium and loss of love and affection and a sum of ₹5,000/- for the last rites of the deceased. It would be appropriate to extract Paras 35 to 39 of the impugned judgment hereunder:

“35. This brings me to the aspect of quantum of compensation which would be deemed “just” to the petitioner”. The petitioners in the claim petition have raised a tall claim in the sum of ₹ 12,60,000/- with costs and interest on the premise that late Shri Sushil Bansal who was employed with M/s National

Investment & Finance, 14 DSIDC Okhla Complex, Phase II Scheme, New Delhi, was earning a sum of ₹ 720/- per month from the said concern, that he was also dealing in shares earning therefrom ₹200/- to ₹ 300/- per month, that he used to supply stationary to various parties from who he was obtaining printing orders earning thereby ₹400/- per month, and was also engaged in typing work (mostly typing the thesis of students of Jawahar Lal Nehru University) and was earning ₹ 400/- per month from the said typing work. Thus, according to the petitioners, all told he was earning a sum of ₹ 2,000/- per month. His matriculation certificate has been filed by the petitioners as Exhibit PW9/1, which bears his date of birth as 21st June, 1952. His salary certificate issued by the M/s National Investment and Finance showing his salary to be in the sum of ₹ 720/- per month has been filed as Exhibit PW 9/2 which bears the signatures of the Proprietor Shri. S. Kapoor. Exhibit PW 9/3 to Exhibit PW9/13, all office copies of the bills for supply of stationary addressed to Bal Bharti Public School and DCM Data Products signed by the deceased have also been placed on record. Mark A which is an order received by the deceased from DCM Data Products, and Mark B which is the appointment letter of M/s Nand Lal & Co. regarding allotment of sub-broker's code to the deceased too have been placed on record.

36. In the above context, PW-9 Smt. Manju Bansal, wife of Shri Sushil Kumar Bansal in the course of her evidence, reiterated that her husband at the time of his death was aged bout 33 years and was earning from all the sources aforementioned, thereby contribution ₹ 2,000/- per month to the family .She further testified that her husband had a saving bank account No. 9890 at the Punjab National Bank, R.K.Puram. New Delhi. Photocopy

of his passport was also placed by her on record. As per her, he was holding a driving license for driving a motor cycle which also filed by her. She reiterated that he was working in M/s National Investment & Finance when she got married to him in the year 1981 as a typist-cum-salesman. In the course of her cross-examination, she clarified that the only firm which had appointed her husband as sub-broker was M/s Nand Lal & Co. and none else, that her husband had stated the business of stationary in the year 1982, and that she had no other bills in her possession except those filed by her nor she had any books, etc. She, however, vehemently denied the suggestion put her suggesting that her husband was not having any other income except as an employee of M/s National Investment & Finance.

37. The testimony of PW-9 Mrs. Manju Bansal is corroborated by that of the mother of Shri Sushil Kumar Bansal with regard to the income of the deceased. As per her, the deceased was earning ₹ 2,000/- to ₹ 2,500/- per month from his job in a company at Okhla and from his business of supplying stationary at different places including Bal Bharti School and DCM Data Products. Apart from this, she stated, he (the deceased) was doing the work of typing for the students of Jawahar Lal Nehru University. In her cross-examination, however, she candidly admitted that she did not know the names of the students for whom he was doing the typing working or the rates charged by him. She was subjected to extensive cross-examination by learned counsel for Respondent No. 3 as well as Respondent No. 1, but to no avail.

38. From the above oral and documentary evidence on record, I have no hesitation in holding that the deceased was earning a sum or ₹ 720/- per

month as an employee of M/s National Investment & Finance, an Industrial and Financial Weekly, as certified by its Proprietor Shri. S.Kapoor. He had cleared his higher secondary examination for the Central Board of Secondary Examinations, Delhi in April, 1973 (Exhibit PW 9/1). Though it is not clear from the record when precisely he stated working with M/s National Investment & Finance, I see no reason to disbelieve the statement made on oath by PW-1 Smt. Manju Bansal that he was working in the said concern in the year 1981 when she got married to him. He appears to have been a hard working person from all standards judging from the documentary evidence placed on record, in –as-much as he had been allotted a sub-broker’s code in the year 1985 and was evidently dabbling in shares as well as supply of stationary. That he was supplying stationary to Bal Bharti Public School and DCM Data Products is clear from documents Exhibit PW9/3 to Exhibit PW9/11, all of which pertain to the year 1985. There is no documentary proof on record to show that he had any substantial income from typing work obtained from students. But presumably he may have doing some typing work on and off for the students of Jawahar Lal Nehru University

39. True, there is hardly any data on record to enable me to arrive any conclusive finding as regards his income from all the above mentioned sources, but on the assumption that the full time job in which he was employed by M/s National Investment and Finance must be keeping him engaged from at least 9.00A.M. to 5.00 P.M, more or less on a daily basis (barring holidays), it may safely be presumed that he could not have been earning more than a sum of ₹ 450-500 (approximately) from working over time in his various capacities viz. share broker, stationary

vendor and typist (part time). Thus, it would not be erroneous on my part of conclude that the average monthly income of the deceased must have been in the range of ₹ 1,200/- per month.”

15. The Claimant's case that the deceased was employed with M/s. National Investment and Finance, (Industrial and Financial Weekly) and was getting a salary of ₹720/- per month was believed by the Claims Tribunal. In view of the documents Exs.PW9/3 to PW9/11, the Claims Tribunal further believed that the deceased used to supply stationery items to certain institutions on part time basis. The Claims Tribunal also accepted that the deceased was dealing in stocks and shares on part time basis as he had been allotted Sub-Broker Code in the year 1985. The Claims Tribunal, however, in the absence of any document did not accept the Claimant's case that the deceased was also doing typing work off and on for the students of Jawaharlal Nehru University. The Claims Tribunal logically concluded that the deceased was working on full time basis from 9:00 am to 5:00 pm and was earning ₹720/- per month; he must be having an income of ₹450/- to 500/- per month for working over time in his capacity as a Share Broker or stationery vender. The Claims Tribunal thus accepted an annual income of ₹14,400/- in the year 1985. Any income beyond ₹15,000/- was taxable in the A.Y. 1985-86. Admittedly, the deceased was not being assessed to Income Tax. The Claims Tribunal, in the circumstances, made a fair estimate of the deceased's monthly income to be ₹1,200/- per month, added

50% towards future prospects on the basis of *Susamma Thomas* (supra) and *Sarla Dixit* (supra). The same is also in consonance with the latest judgment of the Supreme Court in *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121. The deceased had three dependents (excluding the father). Deduction of 1/3rd towards the personal and living expenses was also in consonance with *Sarla Verma* (supra). As per *Sarla Verma* (supra), the appropriate multiplier at the age of 33 was 16 as against this the Claims Tribunal adopted a multiplier of '17'. Thus, an award of ₹2,45,000/- towards loss of dependency and ₹15,000/- towards non-pecuniary damages considering that the accident occurred in the year 1985 cannot be said to be on the lower side. The compensation awarded, in my view, is just and reasonable.

16. It is urged by the learned counsel for the Claimants that the award of interest @ 9% is on the lower side. I would not agree. The interest is normally awarded as per the interest given by the nationalized banks on long terms deposits. The interest rates in the year 1980's and 1990's were on the higher side. It was much lower than 9% in the year 2000 onward. It may also be noticed that the Claim Petition was instituted in the year 1986. The issues were framed on 20.04.1987. The Claimants evidence was closed on 18.01.1999. Thus, the Claimants took more than eleven years to conclude their evidence. The Claims Tribunal in spite of all this awarded interest for the full period

during the pendency of the Appeal. The award of interest @ 9%, in the circumstances, was just and reasonable and does not call for any interference.

17. In view of the forgoing discussion, the MAC. APP. No.193/2012 is devoid of any merit; the same is accordingly dismissed.
18. Out of the compensation deposited in this Court, ₹50,000/- was ordered to be released during the pendency of the Appeal. Rest of the compensation shall be released in favour of the Respondents No.1 to 3(Claimants) in terms of order passed by the Claims Tribunal.
19. The statutory amount of ₹25,000/- shall be refunded to the Appellant Insurance Company.
20. All pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

JULY 02, 2012
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