

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

Reserved on: 15th February, 2012
Pronounced on: 24th February, 2012

+ **MAC. APP. No.228/2010**

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

Versus

USHA & ORS Respondents
Through: Mr. Anshuman Bal, Advocate
for the Respondents No.1 to 7

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This Appeal arises out of a claim Petition MACT Suit No.121/2009 preferred under Section 163-A of the Motor Vehicles Act which was allowed by a judgment dated 11.01.2010. A compensation of ₹8,10,400/- along with interest @ 7.5% was awarded for the death of one Anil Kumar Mishra who was aged 38 years at the time of the accident.
2. The contentions raised on behalf of the Appellant Oriental Insurance Co. Ltd. are as under:
 - i) Since the Petition was filed under Section 163-A of the Motor Vehicles Act, the compensation should have been awarded in accordance with Second Schedule to the

Motor Vehicles Act, 1988; no future prospects could have been granted on the income of the deceased. The compensation towards non-pecuniary heads should have been awarded only in accordance with the Second Schedule. Deduction towards personal and living expenses was also required to be 1/3rd as against 1/5th made by the Claims Tribunal;

- ii) The driver of the offending vehicle did not possess a valid driving licence. The Appellant Insurance Company could avoid liability for breach of condition under Section 149(2)(a)(2) of the Act;
- iii) The order of imposing cost of ₹20,000/- to be recoverable from the Officers of the Insurance Company was arbitrary and illegal.

3. In MAC APP. No.472/2010 titled Bajaj Allianz General Insurance Co. Ltd. v. Lilawati & Ors., decided on 14th February, 2012, this Court while dealing with Section 163-A of the Motor Vehicles Act has held as under:

“3. The question whether the compensation in a Petition under Section 163-A of the Motor Vehicles Act (the Act) can be claimed and awarded strictly in accordance with the structured formula given in the Second Schedule has vexed the Courts in the country. The High Courts and the Supreme Court have been requesting the legislature to

come out with an amendment to the Second Schedule which was incorporated way back in the year 1994 so that adequate and 'just compensation' may be awarded to the persons in the lower income bracket.

4. In Oriental Insurance Company Limited v. Smt. Pataso & Ors., MAC APP.962/2005 decided on 01.09.2008, it was held that considering the inflation and depreciation in the value of the rupee, there was no justification to restrict the award of general damages to the Second Schedule under Section 163-A of the Act.

5. In Oriental Insurance Company Limited v. Om Prakash & Ors., 1 (2009) ACC 148, ₹ 50,000/- was awarded as compensation on account of loss of child and pain and suffering, which was beyond the limits prescribed under Section 163-A of the Act.

6. There are later judgments of this Court in Jagdish & Anr. v. Madhav Raj Mishra and Anr. MAC APP.190/2011 decided on 19.04.2011; and Oriental Insurance Company Limited v. Anita Devi & Ors., 2011 (5) AD (Delhi) 138, decided on 10.05.2011 which have adopted the line that when the Claimants approach the Court under Section 163-A of the Act, the compensation is to be restricted as per the structured formula.

7. The Supreme Court in some of its reports lamented

the inaction on the part of the Central Govt. in not carrying out amendment in the Second Schedule to the Act, but have held that under Section 163-A of the Act, the compensation can be granted only as per the structured formula. The first such judgment is Oriental Insurance Company v. Hansrajbhai v. Kodala, (2001) 5 SCC 175, where it was held that the benefit of filing a petition on no-fault liability can be claimed on the basis of income with a cap of ₹40,000/-. It was the highest slab in the Second Schedule. It was observed that others have to approach the Court under Section 166 of the Act. Para 15 of the report is extracted hereunder:-

“15. In this context if we refer to the Review Committee's Report, the reason for enacting Section 163-A is to give earliest relief to the victims of the motor vehicle accidents. The Committee observed that determination of cases takes a long time and, therefore, under a system of structural compensation, the compensation that is payable for different classes of cases depending upon the age of the deceased, the monthly income at the time of death, the earning potential in the case of a minor, loss of income on account of loss of limb etc. can be notified and the affected party can then have option of their accepting 'lump sum' compensation under the Scheme of structural compensation or of pursuing his claim through the normal channels. The Report of the Review Committee was considered by the State Governments and comments were notified. Thereafter, the Transport Development Council made suggestions for providing adequate compensation to victims of road accidents without going into long drawn procedure. As per the objects and reasons, it is a new pre-determined formula for payment

of compensation to road accidents victims on the basis of age/income, which is more liberal and rational. On the basis of the said recommendation after considering the Report of the Transport Development Council, the Bill was introduced with 'a new pre-determined formula for payment of compensation to road accident victims on the basis of age/income, which is more liberal and rational', i.e. Section 163-A. It is also apparent that compensation payable under Section 163-A is almost based on relevant criteria for determining the compensation such as annual income, age of the victim and multiplier to be applied. In addition to the figure which is arrived at on the basis of said criteria, the Schedule also provides that amount of compensation shall not be less than Rs.50,000/-. It provides for fixed amount of general damage in case of death such as (1) Rs.2000/- for funeral expenses (2) Rs.5000/- for loss of consortium, if beneficiary is the spouse (3) Rs.2400/- for loss of estate (4) for medical expenses supported by the bills, voucher not exceeding Rs.15000/-. Similarly, for disability in a non-fatal accident Para 5 of the Schedule provides for determination of compensation on the basis of permanent disability. Para 6 provides for notional income for those who had no income prior to an accident at Rs.15000/- per annum. There is also provision for reduction of 1/3rd amount of compensation on the assumption that the victim would have incurred the said amount towards maintaining himself had he been alive. The purpose of this Section and the Second Schedule is to avoid long drawn litigation and delay in payment of compensation to the victims or his heirs who are in dire need of relief. If such affected claimant opts for accepting the lump-sum compensation based on structured formula, he would get relief at the earliest. It also gives vital advantage of not pleading or establishing any wrongful act or neglect or default of the owner of the offending vehicle or vehicles. This no-fault liability appears to have been introduced on the basis of the suggestion of the Law Commission to the

effect that 'the expanding notions of social security and social justice envisage that liability to pay compensation must be "no-fault liability" and as observed by this Court in Ramanbhai's case (Supra), "in order to meet to some extent the responsibility of the society to the deaths and injuries caused in road accidents." However, this benefit can be availed of by the claimant only by restricting his claim on the basis of income at a slab of Rs.40,000/- which is the highest slab in the Second Schedule which indicates that the legislature wanted to give benefit of no-fault liability to a certain limit. This would clearly indicate that the Scheme is in alternative to the determination of compensation on fault basis under the Act. The object underlining the said amendment is to pay compensation without there being any long drawn litigation on an predetermined formula, which is known as 'structured formula' basis which itself is based on relevant criteria for determining compensation and the procedure of paying compensation after determining the fault is done away. Compensation amount is paid without pleading or proof of fault, on the principle of social justice as a social security measure because of ever increasing motor vehicles accidents in a 'fast moving' society. Further, the law before insertion of Section 163-A was giving limited benefit to the extent provided under Section 140 for no-fault liability and determination of compensation amount on fault liability was taking a long time. That mischief is sought to be remedied by introducing Section 163-A and the disease of delay is sought to be cured to a large extent by affording benefit to the victims on 'structured formula' basis. Further, if the question of determining compensation on fault liability is kept alive it would result in additional litigation and complications in case claimants fail to establish liability of the owner of the defaulting vehicles."

8. In Deepal Girishbhai Soni v. United India Insurance Company Limited, (2004) 5 SCC 385; the observations of

the Supreme Court in Para 67 it was stated that “we do not agree with the findings in Kodala (supra) that if a person invokes provisions of Section 163-A of the Act, the annual income of ₹ 40,000/- per annum shall be treated as a cap”. The Hon’ble Supreme Court hastened to add that the proceedings under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto ₹ 40,000/- can take the benefits thereof. All other claims have to be determined under Chapter XII of the Act.

9. Para 67 in Deepal Girishbhai Soni (supra) is extracted hereunder:-

“67. We, therefore, are of the opinion that Kodala (supra) has correctly been decided. However, we do not agree with the findings in Kodala (supra) that if a person invokes provisions of Section 163-A, the annual income of Rs.40,000/- per annual shall be treated as a cap. In our opinion, the proceeding under Section 163-A being a social security provision, providing for a distinct scheme, only those whose annual income is upto Rs. 40,000/- can take the benefit thereof. All other claims are required to be determined in terms of Chapter XII of the Act.”

10. The observations of the Supreme Court in Para 72 of the report in Deepal Girishbahi Soni (supra) further clarifies the position that the Supreme Court expected the Central Govt. to bestow serious

consideration to carry out an amendment in the Second Schedule from time to time to obviate the difficulty faced by the victims belonging to the lower income group.

11. *Deepal Girishbahi Soni (supra) was relied in two decisions of this Court in (i) Oriental Insurance Company Limited v. Anita Devi & Ors. (supra) and (ii) Jagdish & Anr. v. Madhav Raj Mishra and Anr. where it was held that:-*

“...the Claimants approaching the Court under Section 163-A of the Act can be awarded compensation only on the basis of the structured formula given in the Second Schedule.”

12. *In Anita Devi & Ors. (supra), a compensation of ₹10,000/- towards loss of estate, ₹10,000/- towards funeral expenses, ₹10,000/- towards loss of consortium and ₹1,00,000/- towards the loss of love and affection awarded by the Claims Tribunal was reduced to ₹2,000/- for funeral expenses, ₹5,000/- towards loss of consortium (where the beneficiary is the spouse) and ₹2,500/- towards the loss of estate (as per the structured formula). The overall compensation of ₹8,13,639/- was reduced to ₹4,39,940/- which was in accordance with the Second Schedule.*

13. *In the later judgment of the Supreme Court in Oriental Insurance Company Limited v. Meena Variyal*

(2007) 5 SCC 428 while referring to Minu B. Mehta v. Balkrishna Ramchandra Nayan & Anr., (1977) 2 SCC 441, it was held that a person can apply to the Tribunal to claim compensation in terms of the Schedule without proving the negligence or default on the part of the driver/owner of the offending vehicle and in other cases, the Claimants had to approach the Court under Section 166 of the Act and was necessarily under an obligation to prove the negligence. Para 27 of the report is extracted hereunder:-

“27. We think that the law laid down in Minu B. Mehta and Anr. v. Balkrishna Ramchandra Nayan and Anr. (supra) was accepted by the legislature while enacting the Motor Vehicles Act, 1988 by introducing Section 163-A of the Act providing for payment of compensation notwithstanding anything contained in the Act or in any other law for the time being in force that the owner of a motor vehicle or the authorized insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of the motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be, and in a claim made under Sub-section (1) of Section 163-A of the Act, the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle concerned. Therefore, the victim of an accident or his dependants have an option either to proceed under Section 166 of the Act or under Section 163-A of the Act. Once they approach the Tribunal under Section

166 of the Act, they have necessarily to take upon themselves the burden of establishing the negligence of the driver or owner of the vehicle concerned. But if they proceed under Section 163-A of the Act, the compensation will be awarded in terms of the Schedule without calling upon the victim or his dependants to establish any negligence or default on the part of the owner of the vehicle or the driver of the vehicle.”

14. In view of the judgments of the Supreme Court in Kodala (supra), Deepal Girishbhai Soni and Meena Variyal (supra), the judgments of this Court in Smt. Pataso & Ors. (supra) and Om Prakash & Ors. (supra) cannot be taken as precedent.

15. The judgment of this Court in Anita Devi & Ors.(supra) which is in consonance with the law laid down in Kodala (supra), Deepal Girishbhai Soni (supra) and Meena Variyal (supra) shall be taken as a binding precedent.”

4. The deceased's income was accepted as ₹3,300/- after deducting 1/3rd towards the personal living expenses and applying the multiplier of 16 according to the deceased's age, loss of dependency comes to ₹4,22,400/-. The Respondents No.1 to 7 were entitled to a sum of ₹9,500/- towards non-pecuniary damages as per the Second Schedule. The Tribunal fell into error in adding future prospects and awarding compensation beyond the Second Schedule under non-pecuniary heads.

5. The overall compensation awarded is re-assessed as under:-

	Head of Compensation	Granted by the Tribunal	Granted by this Court
1.	Loss of Dependency	₹ 7,60,320/-	₹4,22,400/-
2.	Loss of Consortium	₹ 10,000/-	₹ 5,000/-
3.	Funeral Expenses	₹ 10,000/-	₹ 2,000/-
4.	Loss to Estate	₹ 10,000/-	₹ 2,500/-
5.	Love and Affection	₹ 50,000/-	--
	TOTAL	₹ 8,10,320/- (Rounded of to ₹8,10,400/-)	₹ 4,31,900/-

6. The overall compensation is thus reduced from ₹8,10,400/- to ₹ 4,31,900/-.
7. On the question of the liability, the Claims Tribunal held that the notice Ex.R3W2/C was claimed to have been served upon the owner Mohan Lal. The postal receipt Ex.R3W2/B was rejected on the ground that the complete address of 9th Respondent was not mentioned on the postal receipt. The Claims Tribunal observed that since the AD card has not been returned back, no presumption of service could be drawn against the owner and driver to produce the licence. The Claims Tribunal thus held that the Appellant failed to prove

that there was any breach of the terms of the policy by the insured.

8. The Eighth and the Ninth Respondent (who were Respondents No.1 & 2 before the Claims Tribunal), avoided appearance in the Court. They were served by publication and proceeded ex parte by an order dated 29.08.2007. The notice requiring the owner to produce the driving licence of his driver(the 8th Respondent) was proved as Ex.R3W2/C. Complete address of the 9th Respondent i.e. the insured as per the insurance policy Ex.R3W2/A was mentioned in the notice. It is true that in the postal receipt Ex.R3W2/B, the address of the owner is mentioned as Mohan Lal, Sonia Vihar, New Delhi. It is important to note that the address on the postal receipts are typed by the computer which has limited space as is evident from Ex.R3W2/B. If the complete address was not mentioned on the postal receipt, it cannot be inferred that the notice was not delivered to the addressee in the ordinary course of business. The postman is not concerned with the postal receipt but is to deliver the postal envelop as per the address mentioned therein. The address on the notice as stated earlier is complete and, therefore, a presumption could be raised under Section 114 (f) of the Evidence Act. It is well settled that the onus to prove that there is willful breach on the part of the insured is on the insurer. (*United India Insurance Company Ltd. v. Lehru & Ors*, (2003) 3 SCC 338 and *National Insurance*

Company Limited v. Swaran Singh & Ors, (2004) 3 SCC 297). Yet, where the driver and the owner failed to contest and appear in a Claim Petition despite service of notice and are proceeded ex parte and they also fail to produce the driving licence, the initial onus placed on the Insurance Company is discharged and onus shifts on the insured to prove that he did whatever was in his power to ensure that the terms of the contract of insurance are not violated. A certified copy of the report under Section 173 Cr.P.C. in FIR No.380/06 P.S. New Usmanpur shows that the driver was challaned under Section 3 read with Section 181 of the Motor Vehicles Act for driving the vehicle without a driving licence. It is true that the prosecution of the driver under Section 3 of the Motor Vehicles Act and of the owner under Section 5 of the Motor Vehicles Act by itself was not sufficient to prove that the driver was driving the offending vehicle without a licence, yet the factum of non-production of the driving licence as deposed by R3W2 Ashok Khanna in spite of service of the notice Ex.R3W2/C would lead to an inference that the driver did not possess the driving licence at the time of the accident. In this connection, reliance is placed on a report of this Court in *New India Assurance Co. Ltd. v. Sanjay Kumar and Ors., ILR 2007(II) Delhi 733*, wherein it was held as under:

“22. Thus, where the insurance company alleges that the term of the policy of not entrusting the vehicle to a person other than one possessing a

valid driving licence has been violated, initial onus is on the insurance company to prove that the licence concerned was a fake licence or was not a valid driving licence. This onus is capable of being easily discharged by summoning the record of the Licencing Authority and in relation thereto proving whether at all the licence was issued by the authority concerned with reference to the licence produced by the driver. Once this is established, the onus shifts on to the assured i.e. the owner of the vehicle who must then step into the witness box and prove the circumstances under which he acted; circumstances being of proof that he acted bona fide and exercised due diligence and care. It would be enough for the owner to establish that he saw the driving licence of the driver when vehicle was entrusted to him and that the same appeared to be a genuine licence. It would be enough for the owner, to discharge the onus which has shifted on to his shoulders, to establish that he tested the driving skill of the driver and satisfied himself that the driver was fit to drive the vehicle. Law does not require the owner to personally go and verify the genuineness of the licence produced by the driver.

23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breached the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.

24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the Code of Civil Procedure calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.”

9. In the circumstances, inference of a willful breach of the terms of the policy can be drawn against the 9th Respondent and the Insurance Company was entitled to avoid the contract of insurance, but for, the statutory liability under Section 149 (4) of the Act. The compensation of ₹ 4,31,900/- along with interest @7.5% per annum, if not already released, shall be released in favour of the Respondents (Claimants) in the proportion as directed by the Claims Tribunal. Since the compensation has been deposited in UCO Bank, Delhi High Court Branch, the deposits in the name of various Respondents for the period as directed by the Claims Tribunal shall be held in UCO Bank, Delhi High Court Branch.
10. The excess amount of ₹ 3,78,500/- along with the proportionate interest and the interest accrued thereon during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.
11. The Claims Tribunal imposed a cost of ₹20,000/- on the Appellant Insurance Company to be recovered from the salary of Divisional Manager and Regional Manager concerned on the

ground that some witnesses were summoned by the Appellant Insurance Company without any requirement. There is nothing on the record that the Divisional Manager or the Regional Manager were giving day to day instructions to the counsel for the Appellant. If there was any misconduct, it was not on the part of any individual officer but on the part of the Appellant. The Claims Tribunal, therefore, was not justified in imposing any cost on the officers in their personal capacity. Otherwise also, I do not see sufficient reason to burden the Appellant Insurance Company with the cost. The order imposing cost is set aside.

12. Before parting with the judgment, I would like to mention some observations about the conduct of the inquiry under Section 163-A by the Claims Tribunal. It may be noticed that the Respondents No.8 and 9 (Respondents No.1 & 2 before the Claims Tribunal) were proceeded ex parte by an order dated 21.05.2008. A perusal of the various order sheets reveal that they never appeared before the Claims Tribunal, yet while recording the statement of R3W2 on 29.05.2009 and 24.10.2009 and of R3W4 on 20.11.2009, it has been mentioned that the cross-examination on behalf of the 8th and 9th Respondents was “nil” in spite of the “opportunity given” to them. Obviously, this is contrary to the record. Such conduct of the cases leads to confusion as the successor Presiding Officer or an Appellate Court may assume that the

Respondents were present and had not cross-examined the witness despite of opportunity. It is expected of the Claims Tribunal to record presence of the parties correctly and opportunity to cross-examine a witness is recorded only with regard to the party contesting the case.

13. The Appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

FEBRUARY 24, 2012
pst