

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

Date of decision: 29th November, 2012

+ **MAC.APP. 644/2005**

THE NEW INDIA ASSURANCE COMPANY LTD. Appellant

Through: Mr. Pankaj Seth, Adv.

versus

SMT. MADHUMALA JHA & ORS.

..... Respondents

Through: Nemo.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. This Appeal is directed against a judgment dated 16.04.2005 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of ₹5,49,500/- was awarded in favour of Respondents No.1 to 4 for the death of Bhogender Jha who died under mysterious circumstances between 25.05.2001 and 27.05.2001. The circumstances resulting in the deceased's death can be extracted from Para 2 of the impugned judgment which is extracted hereunder:-

“2. Brief facts giving rise to the claim petition are that on 25.05.2001 at about 12 p.m. , the owner of TATA Sumo sent the deceased with his vehicle for his business work to Hapur. The deceased left his house on 24.05.2001 and informed his wife that he was going to the residence of his employer as the employer had directed him to go to Hapur on 25.5.01. The deceased spent the night of 24.05.2001 at his employer's residence and after 2 days the wife of deceased enquired from his employer about her

husband who gave her assurance that her husband would return soon as he had sent him to Hapur for business work . On 27.05.2001, the nephew of employer namely Shanker Kumar and the owner went in search of the vehicle DL-3CQ-5937 and reached at Gajrola via Hapur and found that the vehicle was retained by the Gajrola police at Chokla crossing ,due to non-availability of original documents. At the time of seizure of vehicle DL-3CQ-5937 it was driven by one Ajay Singh . He was not having driving licence at the time of seizure of vehicle . When this fact came to the knowledge of owner of the vehicle , he reported the facts to the Gajrola police that the driver had taken the vehicle to see his brother at Sikandrabad. On the statement of owner of the vehicle F.I.R was lodged at P.S. Gajrola U/S 364 & 394 I.P.C vide F.I.R no. 144/01. On 27.05.2001, a news was published in Dainik Jagran that a dead body had been recovered by B.B.Nagar Police . On the basis of information submitted by one Sh. Vinod that some unknown person had thrown dead body of a person in his field. The name of deceased was tattooed on the hand of deceased . That fact came into the knowledge of family members of deceased and his employer .They enquired that fact from P.S. B.B.Nagar and Gajrola . The postmortem of deceased was conducted at Sadar Hospital, Bulandshahar. On the recommendation of B.B.Nagar police , The photographs and the articles of the dead body were identified by the family members of the deceased. The incident of killing and kidnapping of the driver Bhoginder Jha is accidental in nature as per provisions of the Motor Vehicle Act. The Gajrola police was informed by the family members of deceased regarding the mis reporting of actual facts by the owner of vehicle DL3CQ-5937.”

2. The Claims Tribunal relied on the judgment in *Rita Devi & Ors. v. New India Assurance Company Limited & Anr.* 2000 (5) SCC 113 and held that the death of deceased Bhogender Jha was accidental arising out of the use of motor vehicle. Thus, on the basis of the deceased's income the Claims Tribunal awarded a compensation of ₹5,40,000/- towards loss of dependency as per the second Schedule and ₹9,500/- towards non pecuniary damages.

3. The following contentions are raised on behalf of the Appellant:-
- (i) The Respondents failed to establish that Bhogender Jha's death was accidental thus the legal representatives of the deceased were not entitled to any compensation under the Motor Vehicles Act, 1988 (the Act) on the basis of insurance policy issued by the Appellant.
 - (ii) If the Appellant Insurance Company was liable to pay the compensation, its liability was limited to the one under the Workmen's Compensation Act and not under the Motor Vehicles Act, 1988.

WHETHER DEATH WAS ACCIDENTAL ARISING OUT OF USE OF MOTOR VEHICLE

4. Madhdumala Jha, the First Respondent who is deceased's widow as PW-1 testified that on 24.05.2001 her husband left the residence at about 8:00 A.M. in the morning on 25.05.2001. He (the deceased) informed her that he was at the residence of his employer and was taking his employer to Hapur. This part of PW-1's testimony was not challenged in cross-examination. It was not even suggested that the deceased Bhogender Jha did not drive down the insured vehicle.
5. Learned counsel for the Appellant drew my attention to Chitra Mohan's (the insured) testimony who testified that the vehicle was taken by the deceased to Bulandshahar to meet his own brother. Even if, it was so, the deceased did not cease to be the insured's employee.
6. In *Rita Devi* one Dasarath Singh was the driver of an auto rickshaw owned by Lalit Singh. On 22.03.1995 some unknown passengers hired

the auto rickshaw from a rickshaw stand. The said auto rickshaw was stolen and dead body of driver Dasarath Singh was recovered by the Appellants on the next day. The auto rickshaw was never recovered. A Claim Petition was filed by the legal heirs of deceased Dasarath Singh for claim of compensation under the Motor Vehicles Act. The Claims Tribunal allowed the Claim Petition on the ground that there was an agreement between the owner of vehicle and the Insurance Company to compensate the employer of the vehicle. The statutory liability was fastened on the Respondent Insurance Company to pay the compensation.

7. On an Appeal, the Gauhati High Court (Kohima Bench) in M.A. (F) No. 8 (K) 96 took the view that there was no motor accident as contemplated under the Act. The High Court further held that it was a case of murder and not of an accident. The Appeal was accordingly allowed and the judgment and the award made by the Claims Tribunal was set aside. The legal representatives of the deceased auto rickshaw driver preferred an Appeal before the Supreme Court. The Supreme Court relying on *Challis v. London and South Western Railway Company* (1905) 2 KB 154 and *Nisbet v. Rayne & Burn*, (1910) 1 KB 689 drew distinction between the felonious act which accidentally results in death and a murder simpliciter. It was laid down that if the dominant intention of the felonious act is to kill any particular person then such killing is not accidental murder but a murder simpliciter. While if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder. Paras 10 and 14 of the report are extracted hereunder:-

“10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that “murder”, as it is understood,

in the common parlance is a felonious act where death is caused with intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a “murder” which is not an accident and a “murder” which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the Act of felony is to kill any particular person then such killing is not an accidental murder but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act then such murder is an accidental murder.

x x x x x x x x x

14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the autorickshaw, was duty bound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the autorickshaw and in the course of achieving the said object of stealing the autorickshaw, they had to eliminate the driver of the autorickshaw then it cannot but be said that the death so caused to the driver of the autorickshaw was an accidental murder. The stealing of the autorickshaw was the object of the felony and the murder that was caused in the said process of stealing the autorickshaw is only incidental to the act of stealing of the autorickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the autorickshaw.”

8. In the instant case, deceased Bhogender Jha left with vehicle No.DL-3CQ-5937 and his dead body was recovered from the fields of Gajrola in Bulandshahar on 26.05.2001 and an FIR under Section 364/394 IPC regarding robbery of the insured vehicle (Tata Sumo No.DL-3CQ-5937) and his (deceased) kidnapping was recorded in Police Station Gajrola on 27.05.2001 and the insured vehicle was recovered from Bulandshahar.

9. From R2W2's testimony, recovery of the dead body and registration of FIR, it can be inferred that the stealing of the Tata Sumo was the object of felony and the murder that was caused in the process of stealing Tata Sumo was accidental to the act of stealing. The case is squarely covered by *Rita Devi* and Bhogender Jha's death would be accidental for the purpose of Section 165 of the Act.

LIABILITY

10. It is urged by the learned counsel for the Appellant that the Appellant was liable to pay the compensation to the extent of its liability under the Act.
11. It is not in dispute that the vehicle No. DL-3CQ-5937 was insured for the period of one year from the date of delivery of the vehicle. The cover note was issued on 21.07.2000. The registration certificate shows that the vehicle was registered on 22.07.2000. This accident took place between 25.05.2001 to 26.05.2001. The Appellant Insurance Company has not produced the insurance policy to show the contract of insurance. It is proved that the deceased Bhogender Jha was working as a driver under the insured, owner of the Tata Sumo No.DL-3CQ-5937. In the absence of proof of insurance policy, it cannot be said as to what was the specific coverage under the policy. A perusal of IMT 28 of the Indian Motor Tariff issued under Section 7 of the Indian Motor Tariff covers legal liability to paid driver etc., which is extracted hereunder:-

“IMT. 28. LEGAL LIABILITY TO PAID DRIVER AND/OR CONDUCTOR AND/OR CLEANER EMPLOYED IN CONNECTION WITH THE OPERATION OF INSURED VEHICLE

(For all Classes of vehicles.)

In consideration of an additional premium of Rs. 25/- notwithstanding anything to the contrary contained in the policy it is hereby understood and agreed that the insurer shall indemnify the insured against the insured's legal liability under the Workmen's Compensation Act, 1923, the Fatal Accidents Act, 1855 or at Common Law and subsequent amendments of these Acts prior to the date of this Endorsement in respect of personal injury to any paid driver and/or conductor and/or cleaner whilst engaged in the service of the insured in such occupation in connection with the vehicle insured herein and will in addition be responsible for all costs and expenses incurred with its written consent.

Provided always that

(1) this Endorsement does not indemnify the insured in respect of any liability in cases where the insured holds or subsequently effects with any insurer or group of insurers a Policy of Insurance in respect of liability as herein defined for insured's general employees;

(2) the insured shall take reasonable precautions to prevent accidents and shall comply with all statutory obligations;

**(3) the insured shall keep record of the name of each paid driver conductor cleaner or persons employed in loading and/or unloading and the amount of wages and salaries and other earnings paid to such employees and shall at all times allow the insurer to inspect such records on demand.*

(4) in the event of the Policy being cancelled at the request of the insured no refund of the premium paid in respect of this Endorsement will be allowed.

Subject otherwise to the terms conditions limitations and exceptions of the Policy except so far as necessary to meet the requirements of the Motor Vehicles Act, 1988.

**In case of Private cars/ motorised two wheelers (not used for hire or reward) delete this para."*

12. Thus, the Appellant Insurance Company covered the legal liability not only under the Workmen's Compensation Act, 1923 but also under

common law.

QUANTUM

13. As far as quantum of compensation is concerned, in a Petition under Section 163-A of the Act, the compensation has to be awarded strictly accordingly to the Second Schedule. This question was dealt with in great detail in a judgment of this Court in *NEW INDIA ASSURANCE CO. LTD. v. PITAMBER & ORS.*, MAC.APP. 304/2009 decided on 23.01.2012. This Court referred to the decision in *Oriental Insurance Company Limited v. Smt. Pataso & Ors.*, MAC APP.962/2005 decided on 01.09.2008; *Oriental Insurance Company Limited v. Om Prakash & Ors.*, 1 (2009) ACC 148; *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.*, 20011 (5) AD (Delhi) 138, decided on 10.05.2011; *Oriental Insurance Company v. Hansrajbhai v. Kodala*, (2001) 5 SCC 175; and *Deepal Girishbhai Soni v. United India Insurance Company Limited*, (2004) 5 SCC 385; and held that in a Petition under Section 163-A of the Act there is a cap of ₹40,000/- on the annual income and the compensation including non-pecuniary damages have to be awarded as per the Second Schedule.
14. While awarding compensation under Section 163-A of the Act, the Claims Tribunal erred in awarding compensation of ₹5,40,000/- towards loss of dependency.
15. Deceased Bhogender Jha's income was proved to be ₹3,000/- per month. At the age of the 36 years, the appropriate multiplier as per the second Schedule is 16, the loss of dependency thus comes to ₹3,84,000/- (3,000/-

x 12 x 2/3 x 16).

16. In addition, the Respondents No.1 to 4 are entitled to a compensation of ₹9,500/- towards non pecuniary damages as awarded by the Claims Tribunal.
17. The overall compensation thus comes to ₹3,93,500/- which shall carry interest @ 7% per annum as awarded by the Claims Tribunal.
18. The excess amount of ₹1,56,000/- along with proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.
19. The compensation awarded in favour of Respondents No.1 to 4 shall be disbursed/held in fixed deposit in terms of the order passed by the Claims Tribunal.
20. The statutory deposit of ₹25,000/- be refunded to the Appellant Insurance Company.
21. The Appeal is allowed in above terms.
22. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

NOVEMBER 29, 2012

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