

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

Reserved on: 17th April, 2012

Pronounced on: 31st May, 2012

+ MAC.APP. 351/2010

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

versus

SUDESH & ORS Respondent
Through Nemo.

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

J U D G M E N T

G. P. MITTAL, J.

1. The Appellant Oriental Insurance Company Limited impugns a judgment dated 09.03.2010 whereby a compensation of ₹6,73,000/- was awarded for the death of Raj Karan, who while driving a Maruti Car No.DL-2CB-0973 belonging to the Tenth Respondent suffered fatal injuries on 16.04.1993.
2. A Claim Petition was filed by Respondents No.1 to 9 (the Claimants) alleging that on 16.04.1993 at about 4:00 P.M., the deceased was driving a car No.DL-2CB-0973 from Delhi to Gurgaon. When the car reached opposite Air force Museum, Palam Road, the steering of the car, on account of some

mechanical defect, got free. The Maruti car went out of control and struck on the sidewalls of the culvert. The deceased suffered injuries which proved to be fatal.

3. During inquiry before the Motor Accident Claims Tribunal (the Claims Tribunal), the Claimants stated that the deceased was working as a Property Dealer and was earning ₹4,000/- to ₹5,000/- per month. On appreciation of evidence, the Claims Tribunal found that the accident was caused on account of mechanical defect in the car. The Claims Tribunal held that the Claimants were not able to establish the deceased's income from his profession as a Property Dealer to be ₹4,000/- to ₹5,000/- per month, took the help of minimum wages of a Matriculate and on making addition towards the future prospects, assessed the deceased's income to be ₹2,900/- per month to compute the loss of dependency as ₹4,18,000/-. The Claims Tribunal awarded a sum of ₹2,25,000/- towards loss of love and affection and ₹10,000/- each towards loss of consortium, funeral expenses and loss to estate to compute the overall compensation as ₹6,73,000/-.
4. Following contentions are raised on behalf of the Appellant:-
 - (i) The deceased was not a paid driver; even otherwise the risk of paid driver was not covered by the Insurance Policy Ex.R2W1/1. The deceased was not a third party and no cogent evidence was produced to prove that the

accident was caused on account of mechanical defect, therefore, the Insurance Company was not liable to indemnify the insured; and

- (ii) The amount of compensation awarded towards the loss of dependency and loss of love and affection is excessive and exorbitant.

5. In *Ningamma & Anr. v. United India Insurance Company Limited*, (2009) 13 SCC 710, the Supreme Court held that a person driving a car on behalf of the owner of the vehicle would not be a third party and, therefore, unless risk of said person is covered under the contract of Insurance, the Insurance Company would not be liable to indemnify the insured. In para 18 and 19 of the report in *Ningamma (supra)* it was held as under:-

“18. However, in the facts of the present case, it was forcefully argued by the counsel appearing for the respondent that the claimants are not the “third party”, and therefore, they are not entitled to claim any benefit under Section 163-A of the MVA. In support of the said contention, the counsel relied on the decision of this Court in *Oriental Insurance Co. Ltd. v. Rajni Devi* (2008) 5 SCC 736 and *New India Assurance Co. Ltd. v. Sadanand Mukhi*, (2009) 2 SCC 417.

19. In *Oriental Insurance Co. Ltd. v. Rajni Devi (supra)* wherein one of us, namely, Hon'ble S.B. Sinha, J. was a party, it has been categorically held that in a case where third party is involved, the liability of the insurance company would be unlimited. It was also held in the said

decision that where, however, compensation is claimed for the death of the owner or another passenger of the vehicle, the contract of insurance being governed by the contract qua contract, the claim of the claimant against the insurance company would depend upon the terms thereof.”

6. It cannot be disputed that there is no statutory liability of the owner to take a wider coverage by including the risk of the driver/hirer or any other person driving the vehicle. There is no manner of doubt that the deceased was not a third party. The question for consideration is whether the deceased's risk being driver of the vehicle, even if not a paid employee, was covered under the policy taken by the Tenth Respondent. The Appellant's contention is that risk was not covered. It relies on a document Ex.R2W1/1 which is claimed to be an Insurance Policy.
7. According to the Appellant a notice under order XII Rule 8 CPC was served upon the Tenth Respondent to produce original Insurance Policy and the driving licence of the driver. A notice dated 12.05.2004 and a postal receipt is available on the trial Court record. The said notice, however, was not proved to have been sent or deliberated to the Tenth Respondent. In the circumstances, the Appellant was not entitled to lead secondary evidence to prove the insurance policy.
8. Even if, it is assumed that the notice was proved to have been delivered to the Tenth Respondent (the owner of the vehicle) and the Appellant Insurance Company was entitled to lead

secondary evidence, the Appellant examined R2W1 Ishwar Singh, its Assistant Manager in order to prove the policy.

9. R2W1 Ishwar Singh deposed that the policy Ex.R2W1/1 issued in respect of vehicle No.DL-2CB-0973 was valid for the period from 11.06.1992 to 10.06.1993. This witness was not produced for the purpose of cross-examination in terms of order dated 17.12.2009. The Appellant Insurance Company, therefore, produced R2W2 Ashok Khanna, Administrative Officer of the Appellant in his place. He testified that the copy of the policy Ex.R2W1/1 was already placed on record. He deposed that the record with respect to the policy was not traceable. It is apparent from the document Ex.R2W1/1 that it was only a renewal notice. The witness admitted that Ex.R2W1/1 was not signed by anybody on behalf of the Appellant Insurance Company. The Insurance Company has not produced any record on the basis of which Ex.R2W1/1 was prepared.
10. It is true that the Ex.R2W1/1 reveals that no extra premium was paid to cover the wider risk of any driver/hirer, yet in view of the fact that no record has been produced on the basis of which R2W1/1 was prepared (even if it is assumed that the notice under Order XII Rule 8 CPC was served upon the Tenth Respondent), it cannot be said that this document was the Insurance Policy issued to the Tenth Respondent in respect of the vehicle for the relevant period.

11. The Appellant having failed to prove the policy of insurance, it cannot be allowed to contend that the Tenth Respondent had not taken the policy to cover the risk of any driver/hirer. There are item IMT-29 and IMT-36 which cover the risk of driver/hirer.
12. In this view of the matter, the Appellant Insurance Company cannot avoid its liability to indemnify the insured.
13. It is urged by the learned counsel for the Appellant that the deceased who has driven the vehicle did not possess a valid driving licence and, therefore, the Insurance Company was entitled to recovery rights. Since this plea has not been taken in the grounds of Appeal, it is not permissible for the Appellant to raise this ground during the course of hearing. Otherwise also, as stated above, the notice under Order XII Rule 8 CPC was not proved to have been served upon the Tenth Respondent. Admittedly, no notice was served upon PW-6 Smt. Sudesh, the deceased's widow to produce the driving licence. When she entered the witness box as PW-6 she was not put any question whether the deceased possessed a driving licence to drive a motor car or not. Accordingly, the Insurance Company cannot avoid liability if it is otherwise found to be liable to pay the compensation.
14. It is urged by the learned counsel for the Appellant that the Claimants failed to prove that the accident occurred on account of mechanical defect and thus, the Appellant had no liability. In

this regard, it would be fruitful to refer to PW-3 Balwan Singh's testimony. He deposed that car No.DL-2CB-0973 was owned by Krishan Gupta. Krishan Gupta requested Raj Karan (the deceased) to drop him (PW-3) at Gurgaon in the said car. At about 4:00 P.M. when they reached Air Force Museum on Palam Airport road, Raj Karan shouted that the steering of the car had gone free. Immediately thereafter, the car struck against the culvert. He deposed that the car was being driven at the speed of 40 km/h. The front left portion of the car hit against the culvert and the windscreen of the car was broken. Raj Karan suffered injuries on his chest which proved to be fatal. In cross-examination of this witness, nothing could be brought to discredit his testimony that steering of the car got free while the same was being driven by the deceased.

15. The mechanical defect can occur in a vehicle at any time. On the basis of PW-3's testimony, it is established that the accident occurred on account of mechanical defect in the car.

QUANTUM OF COMPENSATION:-

16. PW-6 Smt. Santosh, the deceased's widow deposed that her husband had passed Higher Secondary Examination (Certificate is Ex.PW-6/1). She testified that he (her husband) was working as a Property Dealer and was earning ₹4,000/- to ₹5,000/- per month. In cross-examination she admitted that she did not have any proof of her husband's income. She could not produce any

bank account, any cash book or ledger. At the same time, no suggestion was given to PW-6 that deceased Raj Karan was not engaged in the business of property dealing. PW-4 Kuldeep Solanki deposed that they were dealing in sale and purchase of property on commission basis in partnership during the year 1986-1992. In 1992, the partnership was dissolved and they started working independently. He testified that he used to earn ₹4,000/- to ₹5,000/- per month in the year 1992-93. The deceased was also having the similar income. This witness in cross-examination could not produce any document of his partnership with the deceased or its dissolution. Again no suggestion was given to this witness that the deceased was not in the business of sale and purchase of properties.

17. PW-5 Jaspal Singh corroborated Kuldeep Solanki's testimony. He deposed that he purchased one plot of land 300 sq. yds. In Bhagwati Garden through the deceased. He brought the Agreement to Sell and its copy was proved as Ex.PW-5/1. He deposed that he paid brokerage of ₹1,000/- to the deceased Raj Karan.
18. In view of PWs 4,5 and 6's testimonies, it can be inferred that the deceased was in the business of sale and purchase of properties. It is also proved that he had passed Higher Secondary Examination. The Claims Tribunal, therefore, instead of taking his income on the basis of minimum wages ought to have made an assessment of his income on the basis of

his business as a Property Dealer.

19. The deceased was aged 38 years. The Claims Tribunal followed wrong criteria to take the deceased income to be ₹2900/- per month. However, on the basis of fact that the deceased was a Property Dealer, I would accept his income (without giving any benefit of future prospects) to be ₹2900/- per month. The compensation of ₹4,18,000/- awarded on account of loss of dependency, therefore, cannot be faulted.
20. The Claims Tribunal awarded a compensation of ₹2,25,000/- towards loss of love and affection on the basis of the judgment of this Court in *Kailash Kaur v. New India Insurance Company Limited*, MAC APP.318/2008 decided on 24.03.2009.
21. Loss of love and affection can never be measured in terms of money. Thus, uniformity has to be adopted by the Courts while granting non-pecuniary damages. The Supreme Court in *Sunil Sharma v. Bachitar Singh (2011) 11 SCC 425* and in *Baby Radhika Gupta v. Oriental Insurance Company Limited (2009) 17 SCC 627* granted only ₹25,000/- (in total to all the claimants) under the head of loss of love and affection. Thus, I would reduce the compensation under this head to ₹25,000/- only.
22. The compensation of ₹10,000/- awarded towards loss of consortium, loss to estate and funeral expenses granted by the Claims Tribunal is not interfered with.

23. The overall compensation thus comes to ₹4,73,000/- (₹6,73,000/- minus ₹2,00,000/-).
24. Considering the fact that the Claim Petition was filed in the year 1993 when the interest rates were very high and it came to be decided in the year 2010, the award of interest @ 9% per annum cannot be faulted.
25. The operation of the impugned judgment was stayed by order dated 31.05.2010. The Appellant Insurance Company is directed to deposit the compensation of ₹4,73,000/- along with interest @ 9% per annum from the date of filing of the Petition till the date of award and then at the same rate from the date of award till the date of payment within a period of six weeks in UCO Bank, Delhi High Court New Delhi in the name of the Claimants.
26. Respondents No.2 to 7 must have attained the age of majority by now. A compensation of ₹25,000/- each along with proportionate interest shall be payable to Respondents No.2 to 9. Rest of the compensation along with proportionate interest shall be payable to the First Respondent.
27. The statutory amount of ₹25,000/- shall be refunded to the Appellant Insurance Company after report of the deposit of the compensation is filed by the Insurance Company within eight weeks.

28. The Appeal is allowed in above terms.

29. Pending applications also stand disposed of.

(G.P. MITTAL)
JUDGE

MAY 31, 2012

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