

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

Reserved on: 14th February, 2012
Pronounced on: 16th February, 2012

+ **MAC.APP. 724/2011**

RAKESH KUMAR & ORS. Appellants
Through: Mr. S.N.Parashar, Advocate

versus

NATIONAL INSURANCE CO. LTD. Respondent
Through: Ms. Namita Sharma, Advocate
Ms. Preeti Bhardwaj, Advocate

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

J U D G M E N T

G. P. MITTAL, J.

1. These are Cross Objections to MAC APP. 301/2008 preferred by the National Insurance Company Limited against the Appellants herein and the owner and the driver of the TSR. MA APP. 301/2008 was dismissed as withdrawn by order dated 15.09.2010. The Cross Objections filed by CM APPL No.5436/2010 were registered as MAC APP.724/2011. Since the main Appeal has been dismissed as withdrawn, my task is to decide the Cross Appeal.
2. The Appellants who are the parents of deceased Kumari Heena @ Sweety, a minor child (aged about 5 years) seek

enhancement of compensation of ₹ 1,64,500/-.

3. The Claims Tribunal opined that the deceased father who was driving the two wheeler number DAA 6304 also contributed to the accident and, therefore, fasten liability to the extent of 75% only on the driver, owner and Insurer of TSR number DL-1RA-9850 which had caused the accident. The contention raised on behalf of the Appellants are:-

- (i) There was no contributory negligence, if three persons were riding on a two wheeler. Reliance is placed on *Babu Singh v. Mohd. Irfan & Ors., (IV) 2009 ACC 813 (DB)*.
- (ii) The compensation is too meager and low in view of the judgment of this Court in *National Insurance Company Limited v. Farzana & Ors., 2009 ACJ 2763*.

4. Per contra, it is submitted that the contributory negligence on the part of the deceased's father was writ large as one child was standing in front of the driver's seat whereas two children were riding on the pillion seat. It is submitted that in case of a child it is very difficult to assess the loss of dependency. The compensation awarded cannot be said to be inadequate.

NEGLIGENCE

5. The Tribunal dealt with the issue of negligence in Para 9 of the impugned judgment. The same is extracted hereunder:-

“9. PW-1 on this aspect deposed that her daughter Heena @ Sweety aged four and a half years died in road side accident on 13.03.1998. PW-2 on this aspect deposed that on 13.03.1998 at about 12 noon he was going on his scooter alongwith his children to the house of his brother-in-law (Sadu) and when he reached at Third Pushta, Usmanpur at about 12.45 P.M. an autorickshaw which was coming from opposite direction and trying to overtake the other vehicles lost its control and hit his scooter from front side due to which he and his children fell down. For few minutes he was in conscious condition but thereafter he became unconscious. He saw the number of autorickshaw as DL-1RA-9850. When he regained conscious he found himself in GTB Hospital. His daughter Heena @ Sweety died in that accident. In cross examination he admitted that at the time of driving of his scooter one of his kid was standing in front of him and two were riding on pillion seat. He denied the suggestion that he fell down as he was under the influence of liquor and there was a speed breaker on the way. On perusal of file I find that driving licence of Sh. Rakesh Kumar petitioner is on judicial file and it was valid for the period from 01.12.1986 to 30.11.2012 for driving light motor vehicles. Copy of charge sheet against respondent No. 1 has been filed and proved as Ex.R2W2/4, copy of driving licence of Salik Ram respondent No. 1 as Ex.R2W2/5 and copy of RC of offending vehicle as Ex.R2W2/6. The criminal court record also includes MLC of Sweety @ Heena, her postmortem report and copy of insurance policy. Charge sheet Ex.R2W2/4 implicated respondent No.1. The evidence on record and particularly discussed herein above has established that Heena @ Sweety sustained fatal injuries due to rash and negligent driving of offending vehicle by respondent No. 1. The evidence has also established that there was some contributory negligence on the part of Shri Rakesh Kumar as he was

riding his scooter with three children in violation of traffic rules.”

6. A reference may be made to a judgment of this Court in *Pushpa Rani v. Anokha Singh Etc.* 1976 RLR 52, where one child was sitting on the front seat and another child was sitting on the pillion seat of the motor cycle which met with an accident. A contention was raised that carrying two children on the motor cycle was in violation of Section 85 of the Motor Vehicle Act. This Court held that although the deceased could carry one person on the pillion seat and taking another child on the front seat was not permissible. But, this breach of law did not contribute to the accident and thus the plea of contributory negligence was negated.
7. It is true that the three children were riding on the two wheeler along with their father, the First Appellant. Yet, no inference of negligence/contributory negligence can be drawn simply on the ground that three children (two of whom were sitting on the pillion seat and one was standing in the front) were riding on a two wheeler along with the driver. In *Babu Singh (supra)* a contention raised that there were more than one pillion rider riding on the two wheeler in violation of Section 128 of the Motor Vehicles Act (the Act) would be sufficient to draw an inference of the negligence on the part of the two wheeler driver was negated by Madhya Pradesh High Court while relying on a Full Bench decision in *Devi Singh v. Vikram Singh & Ors.*

(IV) 2008 ACC 114 (FB). The deceased's father who was driving the two wheeler entered the witness box as PW-2. He was categorical that while he reached at Third Pusta Usmanpur an auto rickshaw (TSR) came from the opposite direction and tried to overtake other vehicle. It (the TSR) lost control and hit his scooter on the front side on account of which he and the children fell down. He deposed that he became unconscious and regained consciousness only after sometime and noticed the number of TSR. This part of PW-2's testimony remained unchallenged and unrebutted in the absence of examination of Salik Ram, the driver of the TSR. In the circumstances, there was no material to dispute the manner of accident as stated by PW-2. Simply because the three children were riding on a two wheeler along with their father, the First Appellant, it cannot be said that there was contributory negligence on the part of Rakesh Kumar.

8. Otherwise also, it was not a case of contributory negligence as the deceased child himself was not driving a two wheeler. Even if, version of National Insurance Company Limited is accepted (though not proved) it was a case of composite negligence and the victims / their legal representatives were at liberty to sue any/either of the tortfeasors.

COMPENSATION

9. As far as the quantum of compensation is concerned, this case is

covered by the judgment of this Court in *Farzana & Ors.(supra)*, 2009 ACJ 2763, where after considering the judgments of the Supreme Court, a compensation of ₹3,75,000/- was awarded. I extract para 4 to 8 of the judgment as under:-

“4. In the case of Manju Devi Vs. Musafir Paswan, VII (2005) SLT 257, the Hon’ble Supreme Court awarded compensation of Rs.2,25,000/- in respect of death of a 13-years old boy by applying the multiplier of 15 and taking the notional income of Rs.15,000/- as per the Second Schedule of the Motor Vehicles Act. The relevant portion of the said judgment is reproduced hereunder:-

“As set out in the Second Schedule to the Motor Vehicles Act, 1988, for a boy of 13 years of age, a multiplier of 15 would have to be applied. As per the Second Schedule, he being a non-earning person, a sum of Rs.15,000/- must be taken as the income. Thus, the compensation comes to Rs.2,25,000/-

5. The case of Sobhagya Devi & Ors. Vs. Sukhvir Singh & Ors., II (2006) ACC 1997 relates to the death of a 12-year old boy. Following the decision of the Apex Court in Manju Devi’s case (supra), the Rajasthan High Court awarded Rs.2,25,000/- by applying the Second Schedule of the Motor Vehicles Act.

6. The case of Syam Narayan Vs. Kitty Tours & Travels, 2006 ACJ 320 relates to the death of a child aged 5 years. This Court relying on the judgment of the Apex Court in Manju Devi’s case (supra) awarded compensation to the parents by applying the notional income of Rs.15,000/- and multiplier of 15 as per the Second Schedule and further awarded Rs.50,000/- for loss of company of the child as also pain and suffering by

them. The relevant portion of the said judgment is reproduced hereunder:-

“3. By and under the award dated 5.12.2003, a sum of Rs.1,00,000/- has been awarded to the appellants. While awarding sum of Rs.1,00,000/- to appellants, learned M.A.C.T. has held that the income of the deceased child was incapable of assessment or estimation. Recognising that every parent has a reasonable expectation of financial and moral support from his child, in the absence of any evidence led, learned M.A.C.T. opined that the interest of justice requires that appellants are compensated with the sum of Rs.1,00,000/-.

4. Had the Tribunal peeped into the Second Schedule, as per section 163-A of Motor Vehicles Act, 1988, it would have dawned on the Tribunal that vide serial No.6, notional income for compensation in case of fatal accidents has been stipulated at Rs.15,000/- per annum.

5. In the decision reported as Manju Devi V. Musafir Paswan, 2005 ACJ 99 (SC), dealing with the accidental death of 13 years old boy, while awarding compensation under the Motor Vehicles Act, 1988, Apex Court took into account the notional income stipulated in the Second Schedule being Rs.15,000/- per annum.

6. In the instant case, baby Chanda was aged 5 years. Age of the appellants as on date of accident was 28 years and 26 years respectively as recorded in the impugned award. Applying a multiplier of 15 as set out in Second Schedule which refers to the said multiplier, where age of the victim is upto 15 years, compensation

determinable comes to Rs.15,000 x 15 = Rs.2,25,000/-.

7. The learned Tribunal has awarded Rs.1,00,000/- towards loss of expectation of financial and moral support as also loss of company of the child, mental agony, etc. I have found that the parents are entitled to compensation in the sum of Rs.2,25,000/- on account of loss of financial support from the deceased child. I award a sum of Rs.50,000/- on account of loss of company of the child as also pain and suffering suffered by them as a result of the untimely death of baby Chanda. Appeal accordingly stands disposed of enhancing the compensation to Rs.2,75,000/-.

7. In the case of R.K. Malik vs. Kiran Pal, III (2006) ACC 261, 22 children died in an accident of a school bus which fell in river Yamuna. This Court held the Second Schedule of the Motor Vehicles Act to be the appropriate method for computing the compensation. With respect to the non-pecuniary damages, the Court observed that loss of dependency of life and pain and suffering on that account, generally speaking is same and uniform to all regardless of status unless there is a specific case made out for deviation. This Court awarded Rs.75,000/- towards non-pecuniary compensation.

8. The aforesaid judgment of this Court was challenged before the Hon'ble Supreme Court and which has been decided recently on 15th May, 2009 and is reported as R.K. Malik vs. Kiran Pal, 2009(8) Scale 451. The Hon'ble Supreme Court held that the claimants are also entitled to compensation towards future prospects. The Hon'ble Supreme Court held that the claimants are entitled to compensate towards future prospects and granted further compensation of Rs.75,000/- towards future prospects of the children.....”

10. Considering the latest judgment of the Supreme Court in *R.K. Malik v. Kiran Pal*, 2009 (8) Scale 451, the Appellants are entitled to compensation of ₹ 3,75,000/- i.e. ₹2,25,000/- on account of loss of dependency, ₹75,000/- towards future prospects and ₹ 75,000/- towards non pecuniary damages.
11. The overall compensation is enhanced from ₹1,64,500/- to ₹ 3,75,000/- which shall carry interest @ 7.5% per annum from the date of filing of the petition till the date of payment.
12. First Respondent National Insurance Company Limited is directed to deposit the enhanced amount alongwith interest with the Registrar General of this Court within four weeks.
13. The amount so deposited shall be held/released in favour of the Appellants as per the order of the Claims Tribunal except that the FDR is to be made in UCO Bank, Delhi High Court Branch, New Delhi.
14. The Appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

FEBRUARY 16, 2012

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