

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

Reserved on: 12th February, 2013
Pronounced on: 26th February, 2013

+ **MAC.APP. 180/2010**

ORIENTAL INSURANCE COMPANY LTD Appellant

Through: Ms.Manjusha Wadhwa, Advocate

versus

ANITA & ORS Respondents

Through: Mr.O.P.Mannie, Advocate

+ **MAC.APP. 181/2010**

ORIENTAL INSURANCE COMPANY LTD Appellant

Through: Ms.Manjusha Wadhwa, Advocate

versus

BABITA & ORS Respondent

Through: Mr.O.P.Mannie, Advocate

+ **MAC.APP. 193/2010**

BABITA & ORS Appellant

Through: Mr.O.P.Mannie, Advocate

versus

SURENDER & ANR Respondent

Through: Ms.Manjusha Wadhwa, Advocate for the
Respondent No.3 Insurance Company.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. These three Appeals arise out of a judgment dated 05.12.2009 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby two Claim Petitions, that is, MAC Suit No.176/2005 titled Babita & Ors. v. Surender & Ors., and MAC Suit No.183/2005 titled Anita v. Surender & Ors., were decided. A compensation of ₹13,63,500/- was awarded to the legal heirs of the deceased Pradeep Kumar in MAC Suit No.176/2005 and a compensation of ₹54,000/- was awarded in favour of Anita in MAC Suit No.183/2005 for having suffered injuries in the motor vehicle accident which occurred on 06.04.2005.
2. MAC.APP.180/2010 and MAC.APP.181/2010 have been preferred by the Oriental Insurance Co. Ltd. In MAC APP No.180/2010, the Insurance Company challenges the quantum of compensation, the finding of negligence as well as the liability, whereas in MAC APP 181/2010 only the liability is challenged. MAC APP 193/2010 is preferred by the legal heirs of deceased Pradeep Kumar whereby they seek enhancement of compensation awarded by the Claims Tribunal.
3. For the sake of convenience, the Appellant in MAC.APP.180/2010 and MAC.181/2010 shall be referred to as the Insurance Company, whereas the Appellants in MAC.APP.193/2010 shall be referred to as the Claimants.
4. First the facts. On 06.04.2005 at about 7:30 pm, deceased Pradeep Kumar, his wife Anita and others were travelling in a TSR bearing

No.DL-1RC-1672. Deceased Pradeep Kumar was sitting along with the driver of the TSR, whereas injured Anita and others were sitting on the rear seat. According to the Claimants, the TSR was being driven by its driver Surender in a rash and negligent zigzag manner. While so driving, the driver had dashed against a *buggi* (a cart driven by male buffalo) loaded with iron rods. As a result of the accident, the windscreen got broken and the iron rods caused injuries to Pradeep and Anita. The TSR driver was lucky to escape unhurt. He removed the injured to GTB Hospital where Pradeep was declared brought dead.

5. On appreciation of evidence, the Claims Tribunal found that the accident was caused on account of the rash and negligent driving of the TSR by Respondent Surender Kumar. The Claims Tribunal found that the multiple injuries suffered by Anita were grievous in nature and an overall compensation of ₹54,000/- was awarded.
6. With regard to the fatal injuries suffered by Pradeep, the Claims Tribunal found that the deceased was employed in Delhi Transport Corporation (DTC). The Claims Tribunal, therefore, made an addition of 50% on account of future prospects, deducted 1/4th towards personal and living expenses and applied a multiplier of 13, holding that the deceased was aged more than 23 years. The Claims Tribunal further awarded a sum of ₹10,000/- each towards loss to estate, funeral expenses and loss of consortium. A further sum of ₹1,00,000/- was awarded towards loss of love and affection and an overall compensation of ₹13,63,468/- (rounded off to ₹13,63,500/-) was granted.

7. The following contentions are raised on behalf of the Insurance Company:

- (i) The deceased was aged 34 years. The appropriate multiplier as per *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr*, (2009) 6 SCC 121 will be 16 as against 18 adopted by the Claims Tribunal.
- (ii) The compensation of ₹1,00,000/- awarded towards loss of love and affection is excessive and arbitrary.
- (iii) Deceased Pradeep Kumar was sitting along with the driver of the TSR (on driver's seat). Thus, he himself contributed to the accident. Since the tortfeasor was not liable to pay the entire compensation, the Insurance Company was not under an obligation to pay full compensation.
- (iv) In addition to an offence under Section 304A IPC for causing death by rash and negligent act, the driver was also challaned for driving the TSR without any driving licence. A notice under Order XII Rule 8 CPC was also issued to the owner and the driver of the TSR. The Claims Tribunal erred in fastening the liability on the Insurance Company.

8. On the other hand, the learned counsel for the Claimants urges that the Claims Tribunal fell into error in taking the net income of the deceased instead of the entire income for the purpose of computation of loss of dependency. He, however, agrees that the multiplier at the age of 34 should be 16 as against 18 adopted by the Claims Tribunal. With regard

to the liability, it is urged that the Appellant Insurance Company failed to establish that there was a wilful and conscious breach of the terms and conditions of the policy. Thus, the Insurance Company was rightly fastened with the liability to indemnify the injured.

NEGLIGENCE:

9. It is not in dispute that the deceased Pradeep Kumar was travelling on the driver's seat of the TSR along with the driver. Referring to *Managing Director, A.P.S.R.T.C. v. M. Usha & Others*, (2009) 17 SCC 703, the learned counsel for the Insurance Company argues that in the circumstances the deceased would have contributed to the accident and the liability of the tortfeasor/Insurance Company cannot be more than 50%.
10. In *M. Usha*, the passenger travelled on the footboard without any permission of the driver or the conductor of the bus. In the instant case, Respondent Surender himself permitted the deceased to share his seat. It was the duty of the TSR driver to carry the passengers with adequate safety and thus the deceased who was permitted by the TSR driver to share the driver's cannot be said to be guilty of contributory negligence. Thus, the tortfeasor or, for that matter, the Insurance Company cannot escape liability on this count.

QUANTUM:

11. I have before me the Trial Court record. Admittedly, deceased Pradeep Kumar was employed as a sweeper in DTC. His gross salary including House Rent Allowance, City Compensatory Allowance and Washing

Allowance was ₹7,054/- per month. Washing Allowance of ₹30/- per month can be said to be personal to the deceased and incidental to his employment. Rest of the salary of ₹7,024/- was for the benefit of the deceased and his family. The deceased was contributing to the General Provident Fund(GPF) and was also repaying the amount withdrawn from his GPF. These deductions cannot be taken into consideration to reduce the deceased's income.

12. Admittedly, the deceased was 34 years. As stated by the learned counsel for the Claimants, the appropriate multiplier would be 16 as against 18. The loss of dependency comes to ₹15,17,184/- (₹7024/- + 50% x 3/4 x 12 x 16) as against ₹12,33,468/- granted by the Claims Tribunal.
13. The Claims Tribunal awarded a sum of ₹1,00,000/- towards loss of love and affection. 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 ₹ 25,000/- only (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.
14. The overall compensation thus comes to ₹15,72,216/-. The compensation is thus enhanced by ₹2,08,716/-.

LIABILITY:

15. It is urged by the learned counsel for the Insurance Company that since the driver did not possess a valid and effective driving licence, the Insurance Company was entitled to avoid liability under Section 149(2) of the Motor Vehicles Act, 1988 (the Act). While dealing with the issue of liability, the Claims Tribunal held that the notice under Order XII Rule 8 CPC was sent on 30.11.2009, that is, after the conclusion of all the evidence, particularly when this accident occurred in the year 2005, was of no consequence as the case was listed for the evidence of the Insurance Company on 03.12.2009. The finding on liability as given in para 35 of the impugned judgment is extracted hereunder:

“35. Although, the Insurance Company has tried to avoid liability on the ground of R1 not being in possession of driving licence, they have failed to make out the breach of conditions of the policy by R2. Firstly, R2 although ex parte in the claim, notice under Order 12 R.8 CPC could very well have been issued by the R3 calling upon him to produce the DL and also R3 could have summoned R2 to examine him as a witness in order to establish that R2 deliberately and knowingly allowed the TSR to be plied by a driver without a driving licence. In fact, even the notice alleged to have been issued to R1 was vehemently denied by him to have been received. Copy of the same is Ex.R3W1/3 is absolutely a doubtful document in so far as its dispatch is concerned and in fact it seems that this notice alleged to have been sent on 30.11.2009 was a much belated notice and a mere formality as more, notice under Order 12, Rule 8 CPC is to be sent within 15 days from the date of issue. This case four years old and it is surprising that insurance company never bothered to call upon the driver and the owner to produce the DL. As regards the owner, they failed to call upon him either way. Following the ratio in Swaran Singh case, the burden is squarely that of the Insurance Company to establish breach of the terms of policy. In this shoddy manner

of leading evidence, insurance company cannot expect to be absolved from the liability. Accordingly, the burden of compensation would be borne solely by the Insurance Company...”

16. An attested copy of the report under Section 173 Cr.P.C. Ex.R3W1/4 was placed on record by the Insurance Company to show that apart from the offences under Sections 279/338/304A IPC, the driver was also prosecuted under Section 3 read with Section 181 of the Act. The driver was also examined under Section 164 of the Evidence Act by the Claims Tribunal wherein he stated that he possessed a driving licence to drive a TSR and that his driving licence was seized by the IO at the time of the accident. The driver was cross-examined by the counsel for the Insurance Company. The driver admitted that he never lodged any complaint against the police official for not issuing him any receipt or for not returning his DL to him. He denied the suggestion that he did not possess any driving licence to drive a TSR. He stated that he went to Loni Transport Authority to get a duplicate DL but he was not issued the duplicate DL as he did not have its number.
17. The Insurance Company also examined R3W1 Naval Singh, Assistant Manager who testified that a notice under Order XII Rule 8 dated 30.11.2009 was dispatched to the owner and as also the driver by speed post.
18. As stated earlier, the accident occurred on 06.04.2005. The Claim Petition was presented before the Claims Tribunal by the Claimants on 26.04.2005. A reference to the written statement filed by the Appellant Insurance Company on 14.02.2006 would reveal that only a general and

vague defence was taken that if the driver was not holding any driving licence or was driving the said vehicle without holding an effective and proper valid driving licence as required under the Act, the Insurance Company would not be liable to indemnify the insured. No specific plea was taken that the driver did not possess any driving licence or that he was challaned for driving the TSR without a driving licence.

19. Admittedly, no evidence was led by the Insurance Company to show that the driver was convicted for driving the TSR without a driving licence. Mere prosecution of the driver for offence under Sections 3/181 of the Act is not sufficient to draw a conclusion that the driver did not possess a driving licence and the owner intentionally committed breach of the terms of policy. In this connection, a reference may be made to the judgment of a Co-ordinate Bench of this Court in *Oriental Insurance Company Ltd. v. Sonia*, 158(2009) DLT.
20. A similar view was taken by this Court in *Oriental Insurance Company Ltd. v. Shanti & Ors.*, (MAC.APP.343/2009) decided on 02.07.2012.
21. Now is the time to turn to the notice under Order XII Rule 8 dated 30.11.2009 Ex.R3W1/2 sent to the owner and the driver. As per the postal receipt Ex.R3W1/3, the notice was dispatched only on 01.12.2009. I have already stated above that the Claim Petition was instituted on 26.04.2005 and the written statement was filed by the Appellant Insurance Company on 14.02.2006. No specific plea was taken by the Appellant Insurance Company that the driver did not possess a valid driving licence at the time of the accident. The notice dated 30.11.2009 was dispatched to the owner only on 01.12.2009. The driver in his

statement under Section 165 Cr.P.C. on 03.12.2009 did state that he possessed a driving licence. Mere delay in serving a notice under Order XII Rule 8 CPC requiring the owner or the driver to produce the driving licence may not be sufficient to defeat the claim of the Insurance Company that it is entitled to avoid its liability on account of breach of the terms and conditions of the policy. But, in case of a long delay particularly when the notice is served on 01.12.2009 and the evidence is closed on 03.12.2009 and the case is decided on 05.12.2009 would make such a notice to be first a formality and bereft any value. It is well settled that in order to avoid the contract of insurance, the insurer must prove that there is wilful and conscious breach of the terms of the policy. The insured in the instant case was issued notice only on 01.12.2009 not only after 5½ years of filing of the Claim Petition but also only after the conclusion of the enquiry by Claims Tribunal. Thus, the Insurance Company, in my considered opinion, failed to prove that there was a wilful breach of the terms and conditions of the policy on the part of the insured. The Claims Tribunal rightly held that such a notice under Order XII Rule 8 CPC was of no consequence. The Claims Tribunal's finding on this count, therefore, cannot be faulted.

22. In view of the above discussion, MAC.APP.180/2010 and MAC.APP.181/2010 are hereby dismissed.
23. The enhanced compensation of ₹2,08,716/- along with interest @ 7.5% per annum shall be deposited with the Claims Tribunal within six weeks and shall enure for the benefit of the Claimant Babita. Since this accident took place in the year 2005, 50% of the enhanced compensation shall be

released in favour of the First Claimant on deposit; rest 50% shall be held in fixed deposit in a nationalized bank for a period of three years, four years, and five years in equal proportion with the condition that the First Claimant shall be entitled to quarterly interest.

24. Statutory amount of ₹25,000/- in each case, if any, shall be refunded to the Appellant Insurance Company.
25. MAC.APP.193/2010 is allowed in above terms.
26. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

FEBRUARY 26, 2013

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