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

Date of decision: 28th May, 2015

+ **MAC.APP. 621/2012**

ORIENTAL INSURANCE CO. LTD. Appellant

Through: Mr. Tarkshwar Nath, Adv. with
Mr. Saurabh Kumar Tuteja, Adv.

versus

PARVATI DEVI & ORS. Respondents

Through: Mr. Rana Ranjit Singh, Adv. with
Mr. Basant Gupta, Adv. for R-1 to
R-6.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

G. P. MITTAL, J. (ORAL)

1. The appeal is directed against the judgment dated 25.02.2012 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of ₹7,02,000/- was awarded in favour of Respondents no.1 to 6 (the Claimants before the Claims Tribunal) for the death of Narender Kumar, who suffered fatal injuries in a motor vehicular accident which occurred on 25.08.2009 at 3:00/3:15 a.m.
2. On appreciation of evidence, the Claims Tribunal found that the accident was caused on account of rash and negligence act of the driver to the Tata Canter bearing registration no.HR-67-0588. It was claimed that the deceased was working as a supplier of gas cylinders.

The deceased's income was claimed to be ₹12,000/- per month. In the absence of any documentary evidence with regard to deceased's employment, the Claims Tribunal proceeded to award compensation on the basis of the minimum wages of an unskilled worker.

3. The following contentions are made by the learned counsel for the Appellant:-

(i) There was no negligence on the part of the driver of the Tata Canter bearing registration no.HR-67-0588. The accident was caused on account of negligence of deceased Narender Kumar himself. Thus, there was no liability on the part of the insurer to pay the compensation to the legal representatives of the deceased. Consequently, there was no liability on the Insurance Company; and

(ii) In the absence of any evidence with regard to future prospects, addition of 50% towards future prospects was not permissible.

4. On the other hand, learned counsel for Respondents no.1 to 6 states that the negligence on the part of Respondent Jeet, driver of the Tata Canter bearing registration no.HR-67-0588 was sufficiently established. The overall compensation awarded is just and reasonable.

NEGLIGENCE

5. While dealing with the issue of negligence, the Claims Tribunal held as under:-

“The onus to prove this issue was on the petitioners. Petitioners have not examined any eye witness of the accident. However, certified copy of FIR and Post mortem report are on record as Ex.PW1/2 and Ex.PW1/3. Certified copy of charge sheet filed under Section 283/337/304 A of IPC is also on record as Ex.PA/1 and site plan is Ex.PA/2. The fact that police after registration of FIR has investigated the matter and filed charge sheet against driver of the offending vehicle under Section 304 A of IPC besides other offences, prima facie shows that the Respondent no.1 was negligent in parking of offending vehicle in a dangerous manner on the High way in wee hours which resulted in fatal injuries to the deceased.

24. Respondent no.1 did not come in the witness box to prove his innocence. There is no evidence of any safety measures being taken by Respondent no.1 while parking his vehicle on the National High way.

25. It is settled law that in a Motor Accident Claim Petition, the test is not of beyond all reasonable doubts but of preponderance of probabilities. Therefore, this issue no.1 decided in favour of petitioners and against respondents.”

6. It is not in dispute that the accident occurred in the wee hours of 25.08.2009. No eye witness in respect of the accident has been produced by Respondents no.1 to 6. The driver of the Tata Canter also did not enter the witness box to give his version of the manner of the parking of the Tata Canter in the early hours of 25.08.2009. Therefore,

the Court has to form an opinion on the basis of the Site Plan Ex.PA/2 prepared by the IO as to the position of the vehicle and the information received at the time of the accident. As per the Site Plan, Tata Canter bearing registration no.HR-67-0588 was parked at Point A when the accident occurred. After the accident Tata Canter was thrown to Point B which is at a distance of about 40-50 paces from Point A where the Tata Canter was parked earlier. Since the driver of the Tata Canter has not been produced and in the absence of any version as to the accident from the driver of Tata Canter, it has to be inferred that there was no indication regarding parking of the Tara Canter at 3:00 a.m. in the early hours when there is complete darkness. Although, Smt. Usha Sabharwal, owner of the Canter has come forward to say that the driver informed her that the indicators were on at the time of the parking of the Canter but the same is inadmissible in evidence, being hearsay.

7. From the manner of the accident it shall have to be inferred that Tata Canter was parked without any indication. At the same time, it is also evident that the Scorpio car bearing registration no.DL-3C-AS-1124 was also being driven at a very high speed, as the impact was so great that a big vehicle like Tata 407 was thrown to a distance of 40-50 paces. The actual distance may not be very relevant as the Tata Canter

was thrown off the road and it might have gone down of its own. The fact, however, remains that the impact of the Scorpio car driven by deceased Narender Kumar was great so as to throw the Tata Canter off the road.

8. In view of this, it cannot be said that the accident was caused only on account of the sole negligence of the driver of Tata Canter in wrongly parking the same on the road. The deceased Narender Kumar himself had also contributed to the accident by driving Scorpio car at a very high speed. Hence, I tend to assess contributory negligence on the part of the deceased Narender Kumar to the extent of 50%.

INCOME AND COMPENSATION

9. Income of the deceased Narender Kumar from employment in Bharat Gas Service as a cylinder supplier was claimed to be ₹12,000/- per month. The employer was not examined to prove the income. No documentary evidence was produced with regard to income of the deceased. The Claims Tribunal proceeded to grant compensation on assuming the income of the deceased on the basis of the minimum wages of an unskilled worker. It may be noted that the deceased himself was driving Scorpio car bearing registration no.DL-3C-AS-1124 at the time of the accident. The fact that the deceased was

employed with Bharat Gas Services, Milap Nagar, Uttam Nagar, Delhi were disclosed in the Claim Petition itself, the same could have been got verified by the Appellant Insurance Company and an Affidavit in support of the averments was also filed. The minimum wages of a skilled worker at the time of the accident were ₹4377/- per month. At the same time, I tend to believe the Affidavit of Respondent Parvati Devi that the deceased was employed as a sales man dealing with sales and supply of gas cylinders. Taking into consideration the fact that the deceased was expected to drive vehicle for supply of cylinders of Respondent no.1 as his job, I tend to accept his income to be about ₹6,000/- per month (even in the absence of any documentary evidence).

10. As far as grant of future prospects is concerned. Respondents no.1 to 6 did not produce any evidence with regard to deceased's better future prospects. The issue of grant of future prospects was dealt with by this Court at great length in *HDFC Ergo General Insurance Co. Ltd. v. Smt. Lalta Devi and Ors. MAC APP No. 189/ 2014* decided on 12.01.2015. Paras 8 to 21 of the report in *Lalta Devi (supra)* are extracted hereunder:

“8. It is no gainsaying that in appropriate cases some addition towards future prospects must be made in case of

death or injury of a person pursuing a professional course. At the same time, it cannot be laid down as a uniform principle that every person pursuing professional course will have a bright future. There may be a student pursuing engineering from the reputed engineering colleges like Indian Institute of Technology (IIT), Regional Engineering College or any other reputed college. At the same time, a number of engineering Colleges have mushroomed where an engineering graduate may find it difficult to secure a job of an engineer. In the instant case, deceased Aditya, as stated earlier was a student of an unknown engineering college, i.e. Echelon Institute of Technology, Faridabad which is claimed to be affiliated to Maharshi Dayanand University, Rohtak. The Claimants have placed on record result-cum-detailed marks card of First and Second Semester. It may be noted that the deceased had secured just ordinary marks in seven subjects and he had to re-appear in papers 1002 (Mathematical-I), 1006 (Foundation of Computer & Programming) and 1008 (Basics of Mechanical Engineering). Similarly, in the Second Semester the deceased was absent in one of the 12 papers and out of 11 subjects for which he had taken examination, he was to re-appear in four subjects. Thus, it will be difficult to say that the deceased was a brilliant student or that he was pursuing engineering from a well known or even mediocre college.

9. The learned counsel for the Claimants has referred to a three Judge Bench decision of the Supreme Court in Rajesh & Ors. v. Rajbir Singh & Ors., (2013) 9 SCC 54 to contend that the future prospects have to be added in all cases where a person is getting fixed wages or is a seasonal employee or is a student.

10. It is urged by the learned counsel for the Claimants that the law laid down in Sarla Verma (Smt.) & Ors. v.

Delhi Transport Corporation & Anr., (2009) 6 SCC 121 was extended in Rajesh & Ors. v. Rajbir Singh & Ors., (2013) 9 SCC 54 to hold that future prospects ought to be extended in all cases.

11. On the other hand, the learned counsel for the Insurance Company refers to a three Judge Bench decision of the Supreme Court in *Reshma Kumari & Ors. v. Madan Mohan & Anr., (2013) 9 SCC 65* wherein while approving the ratio with regard to future prospects in *Sarla Verma (Smt.) & Ors. (supra)* and relying on *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas (Mrs.) and Ors. (1994) 2 SCC 176; Sarla Dixit v. Balwant Yadav, (1996) 3 SCC 179* and *Abati Bezbaruah v. Dy. Director General, Geological Survey of India & Anr., 2003 (3) SCC 148*, the Supreme Court held as under:-

“38. With regard to the addition to income for future prospects, in *Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002]*, this Court has noted the earlier decisions in *Susamma Thomas [Kerala SRTC v. Susamma Thomas, (1994) 2 SCC 176 : 1994 SCC (Cri) 335]*, *Sarla Dixit [(1996) 3 SCC 179]* and *Abati Bezbaruah [Abati Bezbaruah v. Geological Survey of India, (2003) 3 SCC 148 : 2003 SCC (Cri) 746]* and in para 24 of the Report held as under: (*Sarla Verma case [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002]* , SCC p. 134):

“24. ... In view of the imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words ‘actual salary’ should be read as ‘actual salary

less tax'). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of the deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardise the addition to avoid different yardsticks being applied or different methods of calculation being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments, etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

39. The standardization of addition to income for future prospects shall help in achieving certainty in arriving at appropriate compensation. We approve the method that an addition of 50% of actual salary be made to the actual salary income of the deceased towards future prospects where the deceased had a permanent job and was below 40 years and the addition should be only 30% if the age of the deceased was 40 to 50 years and no addition should be made where the age of the deceased is more than 50 years. Where the annual income is in the taxable range, the actual salary shall mean actual salary less tax. In the cases where the deceased was self-employed or was on a fixed salary without provision for annual increments, the actual income at the time of death without any addition to income for future prospects will be appropriate. A departure from the above principle can only be justified in extraordinary circumstances and very exceptional cases."

12. The learned counsel for the Insurance Company relies upon a Constitutional Bench judgment of the Supreme Court in Central Board of Dawoodi Bohra Community & Anr. v. State of Maharashtra & Anr., (2005) 2 SCC 673; Safiya Bee v. Mohd. Vajahath Hussain @ Fasi, (2011) 2 SCC 94; and Union of India & Ors. v.

S.K. Kapoor, (2011) 4 SCC 589 to contend that in case of divergence of opinion in judgments of benches of co-equal strength, earlier judgment will be taken as a binding precedent.

13. *It may be noted that in Reshma Kumari & Ors. v. Madan Mohan & Anr., (2013) 9 SCC 65; the three Judge Bench was dealing with a reference made by a two Judge Bench (S.B. Sinha and Cyriac Joseph, J.J.). The two Hon'ble Judges wanted an authoritative pronouncement from a Larger Bench on the question of applicability of the multiplier and whether the inflation was built in the multiplier. The three Judge Bench approved the two Judge Bench decision of the Supreme Court in Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr., (2009) 6 SCC 121 with regard to the selection of multiplier. It further laid down that addition towards future prospects to the extent of 50% of the actual salary shall be made towards future prospects when the deceased had a permanent job and was below 40 years and addition of 30% should be made if the age of the deceased was between 40-50 years. No addition towards future prospects shall be made where the deceased was self-employed or was getting a fixed salary without any provision of annual increment.*

14. *Of course, three Judge Bench of the Supreme Court in its later judgment in Rajesh relying on Santosh Devi v. National Insurance Company Ltd. & Ors., 2012 (6) SCC 421 observed that there would be addition of 30% and 50%, depending upon the age of the deceased, towards future prospects even in the case of self-employed persons. It may, however, be noted that in Rajesh, the three Judge Bench decision in Reshma Kumari (supra) was not brought to the notice of their Lordships.*

15. *The divergence of opinion was noted by another three Judge Bench of the Supreme Court in Sanjay Verma*

v. Haryana Roadways, (2014) 3 SCC 210. In paras 14 and 15, the Supreme Court observed as under:-

“14. Certain parallel developments will now have to be taken note of. In Reshma Kumari v. Madan Mohan [(2009) 13 SCC 422 : (2009) 5 SCC (Civ) 143 : (2010) 1 SCC (Cri) 1044], a two-Judge Bench of this Court while considering the following questions took the view that the issue(s) needed resolution by a larger Bench: (SCC p. 425, para 10)

“(1) Whether the multiplier specified in the Second Schedule appended to the Act should be scrupulously applied in all the cases?

(2) Whether for determination of the multiplicand, the Act provides for any criterion, particularly as regards determination of future prospects?”

15. Answering the above reference a three-Judge Bench of this Court in Reshma Kumari v. Madan Mohan [(2013) 9 SCC 65 : (2013) 4 SCC (Civ) 191 : (2013) 3 SCC (Cri) 826] (SCC p. 88, para 36) reiterated the view taken in Sarla Verma [Sarla Verma v. DTC, (2009) 6 SCC 121 : (2009) 2 SCC (Civ) 770 : (2009) 2 SCC (Cri) 1002] to the effect that in respect of a person who was on a fixed salary without provision for annual increments or who was self-employed the actual income at the time of death should be taken into account for determining the loss of income unless there are extraordinary and exceptional circumstances. Though the expression “exceptional and extraordinary circumstances” is not capable of any precise definition, in Shakti Devi v. New India Insurance Co. Ltd. [(2010) 14 SCC 575 : (2012) 1 SCC (Civ) 766 : (2011) 3 SCC (Cri) 848] there is a practical application of the aforesaid principle. The near certainty of the regular employment of the deceased in a government department following the retirement of his father was held to be a

valid ground to compute the loss of income by taking into account the possible future earnings. The said loss of income, accordingly, was quantified at double the amount that the deceased was earning at the time of his death.”

16. Further, the divergence of opinion in Reshma Kumari & Ors. v. Madan Mohan & Anr., (2013) 9 SCC 65 and Rajesh & Ors. v. Rajbir Singh & Ors., (2013) 9 SCC 54 was noticed by the Supreme Court in another latest judgment in National Insurance Company Ltd. v. Pushpa & Ors., CC No.8058/2014, decided on 02.07.2014 and in concluding paragraph while making reference to the Larger Bench, the Supreme Court held as under:-

“Be it noted, though the decision in Reshma (supra) was rendered at earlier point of time, as is clear, the same has not been noticed in Rajesh (supra) and that is why divergent opinions have been expressed. We are of the considered opinion that as regards the manner of addition of income of future prospects there should be an authoritative pronouncement. Therefore, we think it appropriate to refer the matter to a larger Bench.”

17. Now, the question is which of the judgments ought to be followed awaiting answer to the reference made by the Supreme Court in Pushpa & Ors. (supra).

18. In Central Board of Dawoodi Bohra Community & Anr. v. State of Maharashtra & Anr., (2005) 2 SCC 673 in para 12, the Supreme Court observed as under:-

“12. Having carefully considered the submissions made by the learned Senior Counsel for the parties and having examined the law laid down by the Constitution Benches in the abovesaid decisions, we would like to sum up the legal position in the following terms:

(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.

(2) [Ed.: Para 12(2) corrected vide Official Corrigendum No. F.3/Ed.B.J./21/2005 dated 3-3-2005.] A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted.

(3) [Ed.: Para 12(3) corrected vide Official Corrigendum No. F.3/Ed.B.J./7/2005 dated 17-1-2005.] The above rules are subject to two exceptions: (i) the abovesaid rules do not bind the discretion of the Chief Justice in whom vests the power of framing the roster and who can direct any particular matter to be placed for hearing before any particular Bench of any strength; and (ii) in spite of the rules laid down hereinabove, if the matter has already come up for hearing before a Bench of larger quorum and that Bench itself feels that the view of the law taken by a Bench of lesser quorum, which view is in doubt, needs correction or reconsideration then by way of exception (and not as a rule) and for reasons given by it, it may proceed to hear the case and examine the correctness of the previous decision in question dispensing with the need of a specific reference or the order of the Chief Justice constituting the Bench and such listing. Such was the

situation in Raghubir Singh [(1989) 2 SCC 754] and Hansoli Devi [(2002) 7 SCC 273].”

19. Similarly, in *Safiya Bee v. Mohd. Vajahath Hussain @ Fasi*, (2011) 2 SCC 94 in para 27, the Supreme Court observed as under:-

“27. However, even assuming that the decision in WP No. 35561 of 1998 did not operate as res judicata, we are constrained to observe that even if the learned Judges who decided WP No. 304 of 2001 did not agree with the view taken by a coordinate Bench of equal strength in the earlier WP No. 35561 of 1998 regarding the interpretation of Section 2(c) of the Act and its application to the petition schedule property, judicial discipline and practice required them to refer the issue to a larger Bench. The learned Judges were not right in overruling the statement of the law by a coordinate Bench of equal strength. It is an accepted rule or principle that the statement of the law by a Bench is considered binding on a Bench of the same or lesser number of Judges. In case of doubt or disagreement about the decision of the earlier Bench, the well-accepted and desirable practice is that the later Bench would refer the case to a larger Bench.”

20. In *Union of India & Ors. v. S.K. Kapoor*, (2011) 4 SCC 589 while holding that the decision of the Co-ordinate Bench is binding on the subsequent Bench of equal strength, held that the Bench of Co-ordinate strength can only make a reference to a larger Bench. In para 9 of the report, the Supreme Court held as under:-

“9. It may be noted that the decision in S.N. Narula case [(2011) 4 SCC 591] was prior to the decision in T.V. Patel case [(2007) 4 SCC 785 : (2007) 2 SCC (L&S) 98]. It is well settled that if a subsequent coordinate Bench of equal strength wants to take a different view, it can only refer the matter to a larger Bench, otherwise the prior

decision of a coordinate Bench is binding on the subsequent Bench of equal strength. Since, the decision in S.N. Narula case [(2011) 4 SCC 591] was not noticed in T.V. Patel case [(2007) 4 SCC 785 : (2007) 2 SCC (L&S) 98] , the latter decision is a judgment per incuriam. The decision in S.N. Narula case [(2011) 4 SCC 591] was binding on the subsequent Bench of equal strength and hence, it could not take a contrary view, as is settled by a series of judgments of this Court.”

21. This Court in New India Assurance Co. Ltd. v. Harpal Singh & Ors., MAC APP.138/2011, decided on 06.09.2013, went into this question and held that in view of the report in S.K. Kapoor (supra), the three Judge Bench decision in Reshma Kumari & Ors. (supra) shall be taken as a binding precedent.”

11. Thus, in the absence of any evidence of good future prospects, no addition towards future prospects ought to have been made by the Claims Tribunal.
12. The loss of dependency on making deduction of 1/4 towards personal and living expenses (taking the number of dependants as 5) and adopting a multiplier of 13 (as per the age of the deceased 38 years), the loss of dependency will come to ₹7,02,000/- (6000/-x 12 x 3/4 x 13).
13. As far as award towards non-pecuniary damages is concerned, in view of the three Judge Bench decision of the Supreme Court in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54, it is now settled that the

legal representatives are entitled to a sum of ₹1,00,000/- each towards loss of love and affection and loss of consortium, ₹25,000/- towards funeral expenses and ₹10,000/- towards loss to estate.

14. The overall compensation thus, comes to ₹9,37,000/-.
15. Since I have already held the deceased to have contributed the accident to the extent of 50%, the insurer was liable to pay the compensation only to the extent of 50%. Consequently, the liability of the insurer was limited to indemnify the insured. Thus, Respondents no.1 to 6 are entitled to a compensation of ₹4,68,500/-.
16. The compensation is accordingly reduced from ₹7,37,000/- to ₹4,68,500/- which shall carry interest @ 7.5% per annum as awarded by the Claims Tribunal.
17. By an order dated 30.05.2012, the execution of the award was stayed subject to deposit of the entire awarded amount with upto date interest in UCO Bank, Delhi High Court Branch. The compensation of ₹4,68,500/- along with upto date interest shall be payable to Respondents no.1 to 6. Excess compensation along with proportionate interest shall be refunded to the Appellant.
18. No amount has since been released in favour of Respondents no.1 to 6

as the question of liability was disputed by the Appellant. The accident took place in the year 2009, 10% of the compensation awarded shall be payable to each of the Respondents no.2 to 6. Rest 50% shall be payable to Respondent no.1 (deceased's widow).

19. The compensation payable to Respondents no.5 and 6 shall be released forthwith. The compensation payable to Respondents no.2 to 4 shall be held in Fixed Deposit till they attain the age of 18 years and shall be paid to them immediately on attaining the age of majority. Respondent no.1 shall be entitled to premature withdrawal of the amount in case the amount is needed for higher education of Respondents no.2 to 4.
20. Out of the compensation awarded to Respondent no.1, 50% shall be held in Fixed Deposit for a period of two years on which she shall be entitled to quarterly interest. Rest shall be released to her forthwith.
21. The appeal is disposed of in above terms.
22. Statutory amount shall also be refunded to the Appellant.

(G.P. MITTAL)
JUDGE

MAY 28, 2015
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