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

Date of Decision: 21st January, 2016

+ **MAC.APP. 214/2010**

JAGMAL SINGH YADAV Appellant

Through: None.

versus

THE ORIENTAL INSURANCE CO. LTD. & ORS.

..... Respondents

Through: Mr. Shantha Devi Raman & Mr.
Arbaaz Hussain, Advs. for R-2 to
4.

AND

+ **MAC.APP. 804/2011**

S.K. GULATI & ORS. Appellants

Through: Mr. Shantha Devi Raman & Mr.
Arbaaz Hussain, Advs.

versus

JAGMAL SINGH YADAV & ORS. Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Both these appeals under Section 173 of the Motor Vehicles Act, 1988 ("the M V Act") arise out of judgment dated 31.10.2009 of the motor accident claims tribunal ("the tribunal") passed in claim petition under Section 166 read with Section 140 of the MV Act presented by

the legal heirs of Aasha Gulati who had died as a result of the injuries suffered in a motor vehicular accident that occurred at 10:30 AM on 01.10.2005 at the junction of the roads known as Faiz Road and, DBG Road, Karol Bagh, Delhi involving bus bearing registration no.DL-1PA-6854 (“the offending vehicle”).

2. The offending vehicle at the time of the accident was statedly driven by Achche Lal (“the driver”) in a rash/negligent manner. It was registered in the name of Jagmal Singh Yadav (“the owner”) who admittedly had taken out an insurance policy against third party risk for the period in question from Oriental Insurance Company Ltd. (“the insurer”).

3. The tribunal, by the impugned judgment, awarded compensation in the sum of Rs.10,10,800/- with interest payable at 7.5% per annum from the date of filing of the petition (07.12.2005) till realization, apportioning it amongst the various legal heirs and making arrangement for due protection of the amounts thus granted.

4. The tribunal upheld the contention of the insurer that the driver of the offending vehicle was not holding a valid driving license and, thus, the insurance company was not liable to pay compensation. Absolving the insurance company of any responsibility, the tribunal nonetheless directed it to pay compensation to the claimants within the period specified, also according to it the recovery rights against the owner.

5. The owner of the offending vehicle, feeling aggrieved, preferred appeal (MACA no.214/10) impleading the insurer as the first respondent and the claimants as second to fourth respondents, in addition to the

driver as fifth respondent, questioning not only the recovery rights granted to the insurer contending that no case for such liberty had been made out, but also the computation of compensation stating, *inter-alia*, that the evidence adduced on record did not justify the income of the deceased to have been worked out in the sum of Rs.14,700/- per month.

6. The claimants submitted cross-objections in the appeal taken out by the owner of the offending vehicle. The said cross-objections were submitted with application (CM No.15846/11) seeking condonation of delay. The said cross objections have since been registered as independent appeal (MACA no.804/11). For reasons set out in the aforesaid application, the delay is condoned.

7. In spite of wait, and the matters having been passed over several times today, none has appeared on behalf of the owner (appellant in MACA no.214/10). It is noted that this was the state of affairs even on the last date of hearing. By order dated 29.09.2015, opportunity had been given to the parties to submit brief synopsis. No written synopsis of arguments have been submitted by any of the parties including the owner (appellant in MACA no.214/10). Given the old pendency of these matters, there is no reason to adjourn once again. Thus, arguments have been heard on behalf of the claimant and the insurer who are present through their respective counsel.

8. Since the owner as well as the claimants have questioned the computation of the compensation by the tribunal through the impugned award, the said question needs to be considered first. The deceased Asha Gulati was stated to have been employed as an administrative officer with a private entity doing business in the name and style of

Ridhav Creations. It was claimed that she was earning salary of Rs.10,200/- per month including conveyance, medical and other allowances. Salary certificate (Ex.PW1/2) in this regard was brought in evidence through Rajul Chawla (PW3) who initially claimed it to be his proprietary concern. In addition to this, the claimants relied upon the evidence of Kapil Kashyap (PW2) and Paramjit Singh (PW4) to prove that the deceased was also engaged in taking private tuitions and earning Rs.4500/- per month. Accepting the said evidence, learned tribunal concluded (at page 24) in the impugned judgment that the deceased was in receipt of income to the extent of Rs.14,700/- per month on which basis the loss of dependency was worked out.

9. The owner in his appeal has raised several issues as to the veracity of the evidence led by the claimants in above regard. On careful reading of the evidence led, this court finds the criticism directed against the said evidence to be justified.

10. Rajul Chawla (PW3), as noted above, affirmed on oath that the deceased was working as administrative officer in his proprietary concern. Yet, during his cross-examination, he conceded that he was not the proprietor of the firm. He claimed that his wife had started the firm in April, 2005 and he had taken franchise of Fucon Technologies Pvt. Ltd. in the month of May, 2005, the business of the company essentially being to sell membership of car brake down Helpline (Fastrack) to the public. The proprietor of the company, wife of PW3, was not examined. There is no document authenticated by the proprietor of the firm proved on record. PW3 was not authorized by the firm to depose on its behalf. He conceded during his cross-examination

that no record of salary paid to the employees or receipts of the salary thus paid or, for that matter, even the attendance register are maintained by the firm. He would not know even the individual salary paid to the employees nor produced any other records of the firm where the deceased was stated to be thus employed. During his continued cross-examination, he referred to ESI card (Ex.PW2/D-4) purportedly in the name of the deceased, but then conceded that ESI would not apply to the concern where the deceased was statedly working.

11. In the above facts and circumstances, the evidence of PW3 could not have been relied upon to return the finding that the deceased was earning an amount of Rs.10,200/- per month from the private employment.

12. This court finds the evidence of PW2 and PW4 about the earnings from tuitions also to be not worthy of belief. They are statements just in the air without any corroborative proof in support. The deceased, it appears, was not even a graduate and it is unbelievable that in absence of any qualification to such effect, she would have been engaged in the business of earning livelihood from private tuitions.

13. In above facts and circumstances, the tribunal seems to have fallen in serious error by holding that the deceased was earning to the extent of Rs.14,700/- per month. In this view of the matter, the only appropriate method would have been to go by the minimum wages payable to a matriculate as prevalent during the relevant period which is Rs.3613.90, per month rounded off to Rs.3614/- per month.

14. The tribunal worked out the loss of dependency without factoring in the possibility of future prospects. In the case reported as *Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121, Supreme Court, inter-alia, ruled that the element of future prospects of increase in income will not be granted in cases where the deceased was “self employed” or was working on a “fixed salary”. Though this view was affirmed by a bench of three Hon’ble Judges in *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.*, (2013) 9 SCC 65, on account of divergence of views, as arising from the ruling in *Rajesh & Ors. vs. Rajbir & Ors.*, (2013) 9 SCC 54, the issue was later referred to a larger bench, inter-alia, by order dated 02.07.2014 in *National Insurance Company Ltd. vs. Pushpa & Ors.*, (2015) 9 SCC 166.

15. In this view of the matter, since the earnings have been worked out on the basis of minimum wages in absence of any cogent proof that the status of the deceased was anything but self employed, there is no scope for the element of future prospects to be added.

16. It, however, does appear that the tribunal improperly adopted the multiplier of eight. The deceased was born on 15.01.1960. She had, thus, completed the age of 45 years when she met with an accident on 01.10.2005. Going by the dictum in *Sarla Verma* (supra), multiplier of 14 would have been appropriate. Having regard to the number of the dependents (three), the loss of dependency will have to be calculated after deducting one third on account of personal and living expenses, which calculates at Rs.2,410/-. Thus, the total loss of dependency is computed at (2410x12x14) Rs.4,04,880/-.

17. The tribunal awarded Rs.50,000/-, Rs.10,000/-, Rs.5,000/- and Rs.5,000/- under the non-pecuniary heads of loss of love and affection, loss of consortium, funeral expenses and loss of estate. Going by the amounts granted in judgment in *Rajesh and ors. Vs. Rajbir Singh and ors*, (2013) 9 SCC 54, the compensation under the said heads deserves to be increased to Rs.1,00,000/-, Rs.1,00,000/-, Rs.25,000/- and Rs.10,000/- respectively. The total compensation payable in favour of the claimants, thus worked out, is computed at Rs.6,39,880/- rounded off to Rs.6,40,000/- (Rupees Six Lac Forty Thousand only).

18. The compensation awarded by the tribunal through the impugned judgment is modified accordingly.

19. The claimants before the tribunal included the husband (S. K. Gulati) and minor sons (Gaurav Gulati and Rahul Gulati). The petition was presented on 07.12.2005. It is stated at bar by the learned counsel for the claimants that at the time of death of their mother the elder son (Gaurav Gulati) was 18 years old while the younger son (Master Rahul Gulati) was 16 years old. Apparently, both would have turned major during the pendency of the proceedings before the tribunal. Unfortunately, the elder son (Gaurav Gulati) died on 15.12.2010, during the pendency of these appeals. He is survived by his widow (Neha Gulati) and minor daughter (Miss Gaurika Gulati). The said legal heirs of Gaurav Gulati were substituted during the pendency of these appeals.

20. It appears that the learned tribunal divided the compensation evenly amongst the first three original claimants, after deducting the amount of Rs.50,000/- which had been earlier paid on account no fault liability. It will not be proper to disturb the said distribution now. In

order to avoid any confusion, it is directed that the compensation now awarded by this court in appeal, shall be payable, after deducting the amount on account of no fault liability, in equal proportion amongst the husband (S.K. Gulati), son (Rahul Gulati) and the legal heirs of the deceased son (Gaurav Gulati) with proportionate interest, the amount payable in favour of the legal heirs of Gaurav Gulati being evenly divided amongst the widow and minor daughter, the share of the latter (minor daughter of Gaurav Gulati) to be put in fixed deposit receipt in interest bearing account in a nationalized bank in her name till she attains majority.

21. The owner, as noted above, by his independent appeal had also raised grievance about the insurance company having been given the recovery rights on the ground that the driver did not hold a valid license at the time of the accident. The reasons leading to the said direction are set out in impugned judgment of the tribunal in the following words:-

“Ld.counsel for Insurance Company stated that the driver of the offending vehicle was not holding valid driving licence as on the date of accident, therefore, they are not liable to pay compensation.

Ld.counsel for respondent no.2 stated that though endorsement was not made on the driving licence regarding renewal on 20/09/2005 but as per the testimony of R3W2 Sh.S.R.Singhal in his cross examination, he has admitted that an application for renewal of the licence and re-test had been accepted by the MLO on 20/09/2005 itself which meant that the driver of the offending vehicle had passed re-test for renewal of the licence and therefore, it should be presumed that the driving licence was renewed on the said date. I, however, do not agree with this contention and am of the opinion that it may be true that respondent no.2 had passed the re-test for renewal of the driving

licence. However, it was his mistake and unfortunate that without getting it endorsed and without getting the driving licence renewed in the record of Regional Transport Office and without getting the renewed driving licence issued, he kept on driving the vehicle without being in possession of a valid driving licence. Ld.counsel for respondent no.2 could not bring anything on record whether in the form of case law or evidence to prove that the driving licence is considered renewed from the date of moving of application for renewal. Therefore, the fact still remained that the driver of the offending vehicle though had moved an application for renewal of the driving licence much before the accident and had even passed the re-test for renewal which had been accepted by the MLO, neither the renewed licence had been issued nor he was carrying renewed driving licence which could have been considered valid. Ld.counsel for respondent no.2 has cited before me Judgement titled as New India Assurance Co. Ltd. Vs. Purna Hazarika & Ors. etc, AIR 2009 Gauhati 84. However, the same is different on facts and law and therefore is of no help to Id.counsel for respondent no.2.

Ld.counsel for respondent no.2 has stated that as per Swaran Singh's Judgement, even if the insurer is able to prove breach on the part of the insured, concerning the policy condition regarding the holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards the insured unless the said breach or breaches on the condition of driving licence are so fundamental as are found to have contributed to the cause of accident. The Tribunals in interpreting the policy conditions have to apply the main purpose and the concept of fundamental breach to allow defences available to the insurer under the Act. In the present case, though it is proved that there was no endorsement on the driving licence of respondent no.2 regarding his having passed the re-test which made him eligible for renewal of the driving licence. It has not come on record as to whether the owner of the vehicle had taken care that the driver of the vehicle had obtained endorsement of validity on the driving licence. However, in my opinion, the fact that the driving licence of the driver of the offending vehicle had expired on 02/01/2003 and for this period to 01/10/2005 i.e. date of accident, the driver

had not got it revalidated or renewed shows clearly that the reasonable care had not been taken by the owner to check that the driver of the offending vehicle was holding a valid driving licence at the time of his employment or accident. I am, therefore, inclined to grant recovery rights to the Insurance Company.”

22. In above context, law laid down by the Supreme Court in the case *National Insurance Company vs. Swaran Singh*, (2004) 3 SCC 297, particularly the findings in para 110 (vi) need to be quoted:-

“Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under section 149(2) of the Act.”

23. In the case at hand, the insurance company did not lead any evidence to show that there was any fundamental breach on account of driving license of the driver not having been renewed within the permitted period or it having contributed to the negligence leading to the accident.

24. In above view of the matter, the appeal of the owner objecting to the recovery rights granted to the insurance company must be allowed. The direction to this effect in the impugned judgment is consequently set aside. It is held that insurance company is liable to pay the awarded compensation.

25. Since the compensation has been enhanced, the liability fastened on the insurance company, it is liable to discharge its obligation within 30 days of this judgment by depositing the awarded amount with up-to-date interest with the tribunal, to be disbursed in accordance with directions. In case of default, the claimant will be entitled to take out appropriate execution proceedings before the tribunal.

26. Both the appeals stand disposed of in above terms.

27. The trial court record be returned with a copy of this judgment.

R.K. GAUBA
(JUDGE)

JANUARY 21, 2016/ssc