$~10, 11, 14 & 16

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

***Decided on: 04th September, 2017***

\+ MAC.APP. 740/2016 and CM 32856/2016

NATIONAL INSURANCE CO LTD ..... Appellant

Through: Mr. Amit Gaur for Mr. Pradeep Gaur, Advocate

versus

RAHUL SHARMA & ORS ..... Respondents

Through: Mr. Ashok Mahajan and Mr. Deepak Thukral, Adv. for R-1 & 2

Mr. Gaurav Singh, Mr. Pankaj Chauhan, Mr. D.K. Singh, Ms. Shanti Ranjan, Advocates for R-4

\+ MAC.APP. 741/2016

NATIONAL INSURANCE CO LTD ..... Appellant

Through: Mr. Amit Gaur for Mr. Pradeep Gaur, Advocate

versus

SATENDER MISHRA & ORS ..... Respondents

Through: Mr. Ashok Mahajan and Mr. Deepak Thukral, Adv. for R-1 to 3

Mr. Gaurav Singh, Mr. Pankaj Chauhan, Mr. D.K. Singh, Ms. Shanti Ranjan, Advocates for R-5

\+ MAC.APP. 743/2016

NATIONAL INSURANCE CO LTD ..... Appellant

Through: Mr. Amit Gaur for Mr. Pradeep Gaur, Advocate

versus

RAHUL SHARMA & ORS ..... Respondents

Through: Mr. Ashok Mahajan and Mr. Deepak Thukral, Adv. for R-1 to 3

Mr. Gaurav Singh, Mr. Pankaj Chauhan, Mr. D.K. Singh, Ms. Shanti Ranjan, Advocates for R-5

\+ MAC.APP. 219/2017

RAHUL SHARMA & ORS ..... Appellants

Through: Mr. Ashok Mahajan and Mr. Deepak Thukral, Advocate for cross-objectors

versus

MANOJ KUMAR & ORS ..... Respondents

Through: Mr. Gaurav Singh, Mr. Pankaj Chauhan, Mr. D.K. Singh, Ms. Shanti Ranjan, Advocates for R-2

Mr. Amit Gaur for Mr. Pradeep Gaur, Advocate for R-3

**CORAM:**
**HON'BLE MR. JUSTICE R.K.GAUBA**

## JUDGMENT (ORAL)

1. On 15.05.2010, a Tavera car bearing registration no.DL-4C-AD-6598 (car) being driven by Manoj Kumar, a respondent in these appeals from Katra (Jammu & Kashmir) to Delhi via Jalandhar (Punjab) carrying as passengers Sunil Babu Sharma, his wife Manisha Sharma, relatives Gulab Devi and Uma Devi Dubey besides others. At about 02.00 hours on the night intervening 18th and 19th May, 2010 in the area of District Kapurthala, Punjab, the car driver indulged in rash driving and in the process lost control over the vehicle, it hitting against a truck which was moving ahead. The collision that took place resulted in the above mentioned four persons suffering injuries, Sunil Babu Sharma, Manisha Sharma and Gulab Devi dying in the consequence. The incident eventually became subject matter of investigation by police through first information report no.76/2010 under Sections 279 / 304A / 427 of Indian Penal Code, 1860 registered by police station Sadar, Phagwara, Punjab.

2. Four accident claim cases were instituted, one (MACT 348/2010) by the members of the family dependent on Gulab Devi as claimants, they being the first to third respondents in MACA 741/2016; second, (MACT 349/2010) by members of the family dependent on Manisha Sharma, they being the first and second respondents in MACA 740/2016; third (MACT no.350/2010) by the members of the family dependent on Sunil Babu Sharma, they being the first to third respondents in MACA 743/2016, the appellants in

cross appeal (MACA 219/2017); and yet another (MACT 13/2011) for and on behalf of the injured Uma Devi Dubey.

3. The Motor Accident Claims Tribunal (Tribunal) clubbed all the four cases and held inquiry, deciding them by a common judgment dated 07.06.2016 upholding the case of the claimants that the accident had occurred due to negligent driving of the car by the said respondent / Manoj Kumar, holding him and Mukesh Narula (owner of Tavera car), also a respondent in these appeals jointly and severally liable to pay the compensation consequently awarded. The car was admittedly insured against third party risk with National Insurance Company Ltd. (insurer) which was also impleaded in the claim petitions and, thus, was called upon to indemnify the owner and pay the compensation.

4. It may be added here that one of the contentions raised by the insurer during the inquiry was that the car, registered and insured as a vehicle meant for private use had been given on hire for the journey in question. This, per the submissions of the insurer, being in breach of the terms and conditions of the insurance policy, it sought recovery rights, the said defence, however, having been repelled.

5. The appeals at hand include three (MACA nos.740/2016, 741/2016 and 743/2016) by the insurance company reiterating its plea for recovery rights in the claim cases on account of deaths of Manisha Sharma, Gulab Devi and Sunil Babu Sharma respectively. The insurer also questions the calculation of the compensation in cases relating to deaths of Manisha Sharma and Sunil Babu Sharma assailing the computation on account of loss of dependency and further submitting

that the awards under the non-pecuniary heads of damages are unduly high.

6. By cross appeal (MACA 219/2017), the claimants in the case relating to death of Sunil Babu Sharma have sought enhancement of the compensation on the ground the loss of dependency was inadequately worked out as the element of future prospects has not been factored in.

7. For the completion of narrative, it may be added that the insurer does not question the computation of compensation in the case (MACT 741/2016) on account of death of Gulab Devi.

8. Taking up the case for compensation on account of death of Sunil Babu Sharma first, it is noted that he was 45 years old on the relevant date and, thus, the multiplier of 14 was properly adopted. The claim is for and on behalf of three members of the family dependent on him, they including two sons and the father and, consequently, the deduction on account of one-third towards personal and living expenses was appropriate. The claimants had led evidence to show that the deceased was working as a driver with a private entity M/s. Earthtech Enterprises Ltd. A witness Rajesh Gulati (PW-4) appeared on behalf of the employer and proved the salary certificate (Ex. PW1/10) establishing that the deceased had been in such employment since 15.12.2009, his salary at the relevant point of time being Rs.12,000/- p.m. The Tribunal did not add any element of future prospects of increase. The claimants, by their appeal, seek addition of the said factor and consequent re-computation of the loss of dependency. The tribunal has added Rs.2,00,000/- towards loss of

love and affection, Rs.1,00,000/- towards loss of estate and Rs.25,000/- towards funeral expenses. In the submission of the insurer, these awards are excessive.

9. It may be that the deceased was in a private employment but then having regard to the fact that the job was regular, it is inherent in the terms and conditions of such engagement that there would be periodic rise in the wages. In these circumstances, the element of future prospects was required to be added. Thus, the calculation is made afresh. The loss of dependency is worked out at [Rs.12,000/- x 130/100 x 2/3 x 12 x 14) Rs.17,47,200/-, rounded off to Rs.17,48,000/-.

10. Having regard to the date of the accident, following the view taken in the case of *Shriram General Insurance Co Ltd v. Usha, MACA No.160/2015*, decided on 05.05.2016, the non-pecuniary damages of Rs.1,50,000/- towards loss of love and affection and Rs.50,000/- each towards loss of estate and funeral expenses are added.

11. Thus, the total compensation on account of the death of Sunil Babu Sharma is computed as [Rs.17,48,000/- + Rs.1,50,000/- + Rs.50,000/- + Rs.50,000/-] Rs.19,98,000/-. (Rupees Nineteen Lakh and Ninety eight thousand only). The apportionment directed by the tribunal shall remain undisturbed.

12. Coming to the claim for compensation on account of death of Manisha Sharma, it is noted that, as per the evidence, she was 37 years old on the relevant date and, therefore, the multiplier of 15 was correctly chosen. The claim being on account of two sons, one of

whom had already turned major, deduction to the extent of 50% towards personal and living expenses was also correctly applied. The claimants had submitted that the deceased was self-employed and earning Rs.25,000/- p.m. from tuition and stitching work. No educational qualifications, however, were proved. The evidence of Sunita Chauhan (PW-4) presented as parent of one of the students taking tuitions from the deceased cannot be accepted as good proof. However, the claimant also relied on income tax returns (ITRs) for the assessment year 2009-2010 and 2010-2011, both submitted prior to the date of accident / death. These returns do show the income to the tune of Rs.1,80,790/- and Rs.2,55,349/- in the said assessment years. The evidence, however, does not clearly reveal the nature of business from which the income so declared was accruing. The tribunal accepted the income for the assessment year preceding the date of death i.e. Rs.2,55,349/- as the benchmark and added the element of future prospects of increase to the extent of 50%. It is this factor to which exception is taken by the insurance company in appeal. It also questions the inclusion of the non-pecuniary damages on the same lines as in the case of Sunil Babu Sharma.

*13.* 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.

*14.* Against the above backdrop, by judgment dated 22.01.2016 passed in MAC Appeal No. 956/2012 (*Sunil Kumar v. Pyar Mohd.*), this Court has found it proper to follow the view taken earlier by a learned single judge in MAC Appeal No. 189/2014 (*HDFC Ergo General Insurance Co. Ltd. v. Smt. Lalta Devi & Ors.)* decided on 12.01.2015, presently taking the decision in *Reshma Kumari (Supra)* as the binding precedent, till such time the law on the subject of future prospects for those who are "self-employed" or engaged in gainful employment at a "fixed salary" is clarified by a larger bench of the Supreme Court.

15. The nature of business in which the deceased was engaged not having been proved, and there being no clear proof of periodic rise in income from such business the addition of the element of future prospects in this case will not be appropriate. Therefore, the calculation has to be made without such element. The loss of dependency is, thus, recomputed as [Rs.2,55,349 /2 x 15] Rs.19,15,117.5 rounded off to Rs.19,16,000/-.

16. The non-pecuniary damages in terms of the ruling in *Shriram General Insurance Co Ltd* (supra) being added, the total compensation payable on account of death of Manisha Sharma is computed as [Rs.19,16,000/- + Rs.1,50,000/- + Rs.50,000/- + Rs.50,000/-] Rs.21,66,000/- (Rupees Twenty one lakh and sixty six thousand only).

The award in the case of death of Manisha Sharma is modified accordingly.

17. Needless to add, the awards in the claim cases on account of death of Sunil Babu Sharma and Manisha Sharma, which have been modified above, shall also carry interest as levied by the tribunal.

18. The question of breach of the terms and conditions of the insurance policy has been considered in the impugned judgment and the plea of the insurer rejected by the tribunal for the reasons set out as under :-

> *"...Ld. Counsel for insurance co. has argued that offending vehicle was used by respondent no.2 for commercial purpose and was given on hiring basis to the occupants of the car for going to pilgrimage to Vaishno Devi at Jammu Kashmir. In this connection, he has relied upon the statement made by the driver to IO after the accident in which driver has stated that vehicle was booked by the owner of the vehicle for going to Vaishno Devi. As discussed in issue no.1, evidentiary value of statement made by driver to IO after accident cannot be more than the evidentiary value of statement made by witness before the tribunal on oath. Statement of driver was not on oath nor the same has been put to petitioner as well as respondent no.2 for cross-examination. Witness examined by the tribunal has clearly stated that there was friendly relationship between respondent no.2 and deceased Sunil Babu Sharma and that Sunil Babu Sharma has taken vehicle from respondent no.2 for going to Vaishno Devi. Witness has clearly denied the suggestion that the vehicle has been hired on payment basis. There is nothing on record to suggest that respondent no.2 was running any business of Tour and Travels or had given vehicle to deceased Sunil Babu Sharma for going to Vaishno Devi on payment of certain amount. Even the amount which the respondent no.2 was supposed to be*

*charging has not been stated by driver to the IO. In fact in the statement made by respondent no.1 to the IO he has only stated that the vehicle was booked for going to Vaishno Devi. He has not stated that vehicle was booked on payment or on any monetary consideration for going to Vaishno Devi. Mere usage of the word "Booked" does not mean that same was booked against any pecuniary consideration. Nothing has come on record to suggest that the vehicle was taken by the deceased Sunil Babu Sharma from its owner for going to Vaishno Devi on payment of any monetary consideration. As no violation of the terms and conditions of the policy are proved on record, hence, I am of the opinion that respondent no.3 being insurance company is liable to pay the compensation on behalf of respondent no.1 and 2…"*

19. In the considered view of this court, the tribunal has correctly appreciated the facts. There was actually no evidence brought before the tribunal from which it could be inferred that the car had been allowed to be used for commercial purposes. The plea of the insurance company having been rightly rejected, there is no ground made out for the said finding to be disturbed.

20. By orders dated 07.09.2016 in MACA 740/2016 and 741/2016, the operation of the impugned judgment of the tribunal was stayed subject to the insurance company depositing the awarded amount with the tribunal. Similar order was passed on 09.09.2016 in MACA 743/2016. By identical orders dated 20.03.2017, 50% of the said awarded amount, thus deposited, was allowed to be released to the respective claimants in the cases on account of deaths of Sunil Babu Sharma, Manisha Sharma and Gulab Devi. The balance payable to the claimants in these cases in terms of the modification ordered above

shall now be released from out of the deposits, the excess to be refunded to the insurance company with corresponding interest. If there is any excess amount released, the same shall be liable to be refunded by the claimants to the insurance company. Conversely, if there is any deficiency, the insurance company would be obliged to pay the same by requisite deposits with the tribunals.

21. The statutory deposits made by the insurance company shall be refunded.

22. The appeals and the pending applications are disposed of in above terms.

**R.K.GAUBA, J.**

**SEPTEMBER 04, 2017**
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