

**(2016) 03 DEL CK 0111**

**In the Delhi High Court**

**Case No :** Mac. App. 332/2011, CM No. 7455/2011 and Mac. App. 956/2015

Oriental Insurance Co. Ltd. and Others

APPELLANT

Vs

Babita and Others

RESPONDENT

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**Date of Decision :** 17-03-2016

**Acts Referred:**

Motor Vehicles Act, 1988 — Section 140, Section 166

**Citation :** (2016) 03 DEL CK 0111

**Hon'ble Judges :** R.K. Gauba, J.

**Bench :** Single Bench

**Advocate :** A.K. Soni, Advocate, for the Appellant; G.P. Thareja and Satyam Thareja, Advocates, for the Respondent

**Final Decision :** Disposed off

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## **Judgement**

R.K. Gauba, J.—1. Vijay Kumar, then aged 26 years, a self-employed person engaged as a contractor with New Delhi Municipal Council (NDMC) died as a result of injuries suffered in a motor vehicular accident that occurred on 17.10.2005 involving motor vehicle described as UP 12K 1397 (the offending vehicle), admittedly insured against third party risk for the period in question with Oriental Insurance Company Ltd. (appellant in connected MAC Appeal No. 956/2015). His widow Babita and minor daughter Shruti (first and second respondents in MAC Appeal No. 332/2011) preferred a claim petition under Sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) before the motor accident claims tribunal (the tribunal) whereupon it was registered as MACT No. 278/2010. Besides the insurer (appellant in MAC Appeal No. 332/2011), Rajpal Singh and UP Transport Corporation, the driver and owner respectively of the offending vehicle were impleaded as parties. It may be added, per pleadings of the claimants, the dependants of Vijay Kumar who were entitled to seek compensation included his parents Tej Singh and Chander Kali who were shown in array of parties in the claim petition as fourth and fifth respondents.

2. The tribunal, after notice, held inquiry and by judgment dated 20.12.2010

awarded compensation in the total sum of Rs. 10,13,763/- with interest @ 8 % per annum from the date of filing of the petition till realization. The said amount included Rs. 8,41,500/- calculated as the loss of dependency and Rs. 1,72,263/- which had been proved to be expenditure incurred for treatment of Vijay Kumar after the injuries had been suffered.

3. It may be added here that during the inquiry, the insurer had inter alia taken the defence that there has been a violation of terms and conditions of the insurance policy inasmuch as, in spite of notice under Order 12 Rule 8 of the Code of Civil Procedure, 1908 (CPC), the owner/fourth respondent in MAC Appeal No. 332/2011 had failed to respond or produce the documents required to be shown which included the permit of the offending vehicle. The insurer led evidence in support of the said contention by examining its official Vikram Singh (R3W1). Noticeably, neither the driver nor the owner participated after having filed a common written statement. No evidence was led on their behalf.

4. The insurance company by its appeal has questioned the method of calculation of the loss of dependency stating that the tribunal has proceeded on conjectures and surmises to arrive at the notional income of Rs. 66,000/- per annum. It is argued that the income tax return (ITR) for the assessment year 2005-2006 which had been submitted in evidence showed that in the preceding year, the deceased was in the receipt of income only to the extent of Rs. 16,283/-. The other grievance of the insurance company is that though evidence had been led to show that there had been breach of terms and conditions of the insurance policy, the tribunal did not consider or address the said issue in the impugned judgment, thereby denying the recovery rights to which the insurance company is entitled.

5. The claimants, by their independent appeal, which was initially filed as cross objections, have submitted that the tribunal fell into error by not factoring in the future prospects of increase in the income and further that no award has been made under the non-pecuniary heads of damages, namely, loss of consortium, loss of love & affection, funeral expenses and loss to estate.

6. The tribunal considered the evidence with regard to the earnings of the deceased to reach the conclusion that the income is to be assumed notionally at Rs. 66,000/- per annum in the following manner:-

"Now, coming to the income aspect of the deceased. It is stated by the petitioner no.1 that the deceased was earning Rs. 7000/- p.m as he was NDMC contractor. There is no other evidence on record to prove this fact. However, petitioner has filed certificate issued by NDMC i.e. certificate of Enlistment of the deceased as one of the contractor in which it is mentioned that the deceased Vijav Kumar, sole proprietor of VK Constructions has been enlisted as a contractor for NDMC for a period of 3years from the date of issue. This certificate was issued on 14.12.04. Apart from this, the petitioner has also filed formno.16 A Ex.P2 in the name of the V. K" Constructions, 128, Baldev Park, Krishna Nagar, Delhi showing

the total payment made to the deceased in the year 2005 & as per this certificate, an amount of Rs. 3,26,354/- has been paid by the NDMC to the deceased and the TDS to the extent of Rs. 7322/-has been deducted while making this payment. It is argued by the Ld. Counsel for the petitioner that the income of the deceased was quite high but he has only these documents. This is otherwise opposed by the Ld. Counsel for the respondent and it is argued that the income shown in the document is not income rather it is only a total receipt as the deceased might have received this amount from the NDMC.

I have given my thoughtful consideration to the rival contentions. One fact is clear from the evidence that the deceased was the official Contractor with NDMC but the fact as to what he was doing for NDMC as contractor is not specific i.e..whether he was taking the amount in totality from the NDMC or was paying salary to the labour, or whether he himself was purchasing the material for NDMC & then was collecting it or whether it was his pure income. All such facts have not been clarified. No bill supporting this payment has been placed on record. Therefore, the court is of the opinion that the amount shown in the certificate only denotes gross receipt by the deceased and not the gross income. As far as the other document which is filed by the petitioner on record is Income Tax of the deceased for the year 2005-06 & it only shows a total income of the deceased to the extent of Rs. 16,283/-. Therefore, if a person was having total income of Rs. 16,283/- for the year 2005-06, it cannot be presumed that his Income would have been increased upto Rs. 3,26,354/- for the next year nor it can be presumed that a person who is government contractor might have been earning Rs. 16,283/- p.a. only i.e. in the entire period of one year but in absence of any other evidence, court is unable to accept this version and particularly in the circumstances when the petitioners claim that the deceased was earning Rs. 7000/-p.m. Since there is no other record and since it is the duty of the court to come to the conclusion with respect to just compensation" to the family of the deceased, court is presuming that the deceased would have been saving about 20% of amount on his gross receipt after paying and after meeting out all such other expenses like payment to labour, payment towards material, towards transport etc. There is no other evidence and 20% has been calculated only on the basis of deceased being government contractor. It bring the income of the deceased to the extent of " 65271/- approximately p.a. It is further observed that if "the deceased has not filed any ITR, one fact is clear that neither he had paid more tax than Rs. 7322/- p.a. nor he has claimed the return of such tax by giving exact calculation as to v/hat exactly he had to pay more or less than this amount of Rs. 7322/-p.a. which has been deducted at source by NDMC and if this is presumed to be the tax on his income, then the court can presume that a person who is paying tax to the extent of Rs. 7,322/-p.a in the considered opinion of the court would have been earning at least Rs. 73,220/-p.a. and then only he would be able to pay Rs. 7,322/-p.a as tax i.e. minimum slab provided in the income tax. In-any case, income of the deceased comes in between Rs. 65,000/-p.a. to Rs. 73,200/-p.a. Therefore, in such cases where the exact

income, is not on the court file, and the status of a person is such that he even cannot be equated with a person who is assessed on the basis of income of an unskilled labour under Minimum Wages Act, the duty of the court is bit more difficult to assess the income of such person so that the family may get "Just Compensation". Accordingly, keeping in view all these facts, the income of the deceased is taken to be " 66,000/-p.a. Since the deceased was married &he has left behind the, wife, daughter and parents, he would have been spending 1/4th salary on himself which comes to Rs. 16,500/- and the amount which deceased would have been saving towards dependency allowance payable to petitioners & respondent no.4 &5 would come to Rs. 49,500/- p.a. and the total dependency allowance would come to Rs. 49,500 x 17 " " 8,41,500/- p.a."

7. This Court finds the reasons set out by the tribunal to be logical. Sitting in appeal it will not be proper for this Court to interfere with the view taken by the tribunal on the available material. Of course, the claim that the deceased was earning Rs. 7,000/- per month could not have been blindly accepted but the tribunal has taken pains to analyse the available material including the certification by NDMC that the deceased was an enlisted contractor and also the proof of payments made to him on such account in the year 2005. The assessment made by the tribunal is fair and for reasons well founded in the material on record and do not merit being tinkered with.

8. 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 SCC166.

9. 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 12.1.2015, 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. Since the deceased was self-employed, given the present state of law, as mentioned law, the plea of the claimants for future prospects to be added cannot be accepted.

10. There is merit in the grievance of the claimants that they also deserved non-pecuniary damages. Following the view taken in Rajesh & Ors. v. Rajbir Singh & Ors., , (2013) 9 SCC 54 and Shashikala V. Gangalakshamma , (2015) 9 SCC

150, compensation in the sum of "1 lakh each under the heads loss of love and affection and loss of consortium and "25,000/- each under the heads of loss to estate and funeral expense are added.

11. It is noted that the tribunal awarded interest at 8% per annum. Following the consistent view taken by this Court, the rate of interest is increased to 9% per annum from the date of filing of the petition till realization of the compensation awarded.

12. Thus, the impugned judgment is increased by Rs. 2,50,000/- with the element of increased rate of interest to be paid from date of filing of the petition till realization. Given the amounts already apportioned in favour of the claimants, it is directed that the amount payable in terms of the above modifications, shall be payable only to the first claimant (widow).

13. The contention of the insurance company with regard to non- consideration of its plea of breach of terms and conditions of the insurance policy is found to be correct. The tribunal should have returned a clear finding in that regard. Ideally, the insurance company should have gone back with an application for review and prayed for a finding to be returned.

14. In the facts and circumstances, the proper course is that the matter limited to that extent be remitted to the tribunal for adjudication. Needless to add, the insurance company will be obliged to pay the compensation to the claimants in terms of the award modified as above, by depositing the amount now required to be paid as a result of increases, with the tribunal within 30 days. It may, however, press the issue about breach of terms and conditions of the policy against both the owner and driver or against one of them, as the case may be, before the tribunal.

15. The parties required for such further inquiry and adjudication shall appear before the tribunal for further proceedings in accordance with law on 27th April, 2017.

16. By order dated 19.04.2011, the insurance company had been directed to deposit the entire awarded amount with upto date interest in terms of the impugned award with the Registrar General whereupon the execution was stayed. Out of such deposit, 75% was allowed to be released to the claimants before the tribunal. The balance was kept in fixed deposit receipt initially for a period of one year subject to automatic renewal. The balance shall now also be released to the claimants which include the parents.

17. The statutory deposit, if made, by the insurance company shall be refunded.

18. Both appeals are disposed of in above terms.