
(2012) 09 DEL CK 0430
In the Delhi High Court
Case No : MAC. App. No. 187 of 2011

Oriental Insurance Co. Ltd.	Vs	APPELLANT
Sunil Kumar and Others		RESPONDENT

Date of Decision : 26-09-2012

Acts Referred:

Motor Vehicles Act, 1988 — Section 149(2), 149(2)(a)(i)(ii), 149(2)(a)(ii)

Citation : (2012) 09 DEL CK 0430

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Punit Vinay with Mr. Abhishek Kumar, for the Appellant; Usha Kaushik with Mr. Rajat Mittal, Advocates for the Respondent No. 3 and Ms. Shantha Devi Raman, Advocate for the Respondents No. 4 to 7 (Claimants), for the Respondent

Final Decision : Disposed Off

Judgement

G.P. Mittal, J.—The Appellant Oriental Insurance Co. Ltd. impugns a judgment dated 09.12.2010 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby while awarding a compensation of Rs. 27,48,755/- in favour of the Respondents No. 3 and 4, the Appellant Insurance Company was directed to satisfy the award and recover the compensation from the Respondent No. 1 owner of the offending vehicle No. DL-2CL-9190 involved in the accident. The finding on negligence is not challenged by the Appellant Insurance Company. The owner and the driver, that is, the Respondents No. 1 and 2 have not filed any Appeal to challenge the finding on negligence, quantum of compensation or even the recovery rights granted against the owner.

2. At the time of hearing, the following contentions are raised on behalf of the Appellant Insurance Company.

(i) The Claims Tribunal erred in taking the deceased income as Rs. 12,500/- per month; moreover, there was no justification for awarding addition of 50% towards future prospects.

(ii) Since the Appellant proved that the licence held by the Respondent No. 2 had expired before the date of the accident, the Appellant ought to have been exonerated instead of granting recovery rights against the Respondent No. 1.

3. On the other hand, it is urged by the Learned Counsel for the Respondents (Claimants) that the quantum of compensation awarded is just and reasonable and the Appellant was under obligation to perform its statutory liability to pay the compensation to the third party and was not entitled to be exonerated.

QUANTUM:

4. The Respondents No. 3 to 6 led evidence to prove that the deceased Gurbachan Singh was a qualified electrician having a diploma from ITI, Ghaziabad. Admittedly, evidence was led to prove that he worked with U.P. State Power Corporation Ltd. under the apprenticeship scheme from 15.07.2002 to 15.07.2003. It was also proved that he owned a PCO. The Claimants led oral evidence to prove that the deceased was running a small export unit by employing 20 persons. The Respondent No. 3 testified that the factory being run in the name and style of Pawar Export, Tunda Nagar was still being run by her with her relation Archana by employing 5-6 persons. On appreciation of evidence, the Claims Tribunal found that although the deceased's income was not proved, yet he was running multifarious commercial activities and was also running a telephone booth. Thus, the Claims Tribunal assessed his (the deceased's) income to be Rs. 12,500/-. It made an addition of 50% towards future prospects to compute the loss of dependency. The reasoning of the Claims Tribunal to compute the loss of dependency is extracted hereunder:

15. To prove this fact, the testimony of PW1 and Smt. Maheshwari Devi PW6 (mother of the deceased) is relevant. They both have deposed that petitioner no. 1 is wife and PW6 is mother of the deceased. The copy of ration card has already been filed on record. There is no rebuttal of these facts by the respondents either in their written statements or in cross examination. Even otherwise respondents have not led any evidence on this point and therefore, it is held that petitioners no. 1 and 2 are the only legal heirs of the deceased. As far as petitioner no. 3 to 5 are concerned, there are sisters of the deceased. They are not 1st class legal heirs of the deceased. Accordingly, it is held that the petitioner no. 1 and 2 are the legal heirs of the deceased. The court hereinabove has already held that Gurbachan Singh sustained fatal injuries due to rash and negligence driving of Maruti Van No. DL-2CL-9190 being driven by respondent no. 1 and now it has been held that petitioner no. 1 and 2 are legal heirs of the deceased, accordingly, the petitioner no. 1 and 2 are entitled for compensation. How much compensation they are entitled to, depends upon various aspects in terms of Sarla Verma's judgment i.e. the income of the deceased, his age as well as his contribution towards family.

16. Now coming to the multiplier aspect. The deceased in the petition stated to be 28 years of age. On his educational qualification certificates, his date of birth

is mentioned as 15.04.1978. The accident had happened on 31.08.2006 and as such the age of the deceased appears to be around 28 years and therefore, the relevant multiplier would be 17.

17. Now coming to the income/earning capacity aspect of the deceased. It is stated in the petition that the deceased had various qualifications and passed the Diploma in Electronic from IIT, Bulandshahar, U.P., and he worked under apprenticeship scheme in Electricity Distribution Division-II, Ghaziabad and he was appointed as electric technician in Govt. Department. It is further stated in the petition that he was earning Rs. 15,000/- per month. In her deposition PW1 wife of the deceased has deposed that her husband was running a factory for stitching clothes of export quality. He used to earn Rs. 25,000/- per month from this business. She and her family were totally dependent upon the income of her husband.

18. The testimony of PW3 Sh. Sher Singh to that effect is also relevant. He in his petition, has deposed that, he was working in the company of the deceased and the deceased used to give him Rs. 10,000/- per month and on the date of accident, he was going along with his employer Sh. Gurbachan Singh and his salary was Rs. 10,000/- per month. PW6 has also deposed in her affidavit that her son was earning Rs. 20,000/- per month. The petitioner no. 1 in cross examination by Id. Counsel for respondent no. 3 has deposed that she has gone through the contents of the petition where the income of the deceased is written as Rs. 15,000/- per month but she clarified that she has not read the petition regarding the income and therefore, it was mentioned as Rs. 15,000/- per month. She further deposed that he was running the factory in the name of Pawar Export at Tunda Nagar. The premises is still in their possession. She and her cousin Jethani Archana both are trying to run the factory. Her husband had employed 15-20 persons for stitching purposes. At present 5 or 6 person out of them are working with them. The rest of employees have left. She does not know that her husband was paying income tax or not. She denied the suggestion that her husband was unemployed and not earning any amount. She cannot tell the name and address of the parties to whom the goods were exported by her husband.

19. PW6 in cross examination on this aspect, has deposed that her son was earning about Rs. 20,000/- per month. She does not know whether her son was income tax assessee or not. Her son was B.A. Pass. She know Amit as he was working under her son's employment in export factory. PW3 Sh. Sher Singh @ Amit in cross examination has denied the suggestion that he was not an employee of Sh. Gurbachan Singh or that he was not getting the salary from Sh. Gurbachan Singh or that he was not getting Rs. 10,000/- per month. He also deposed that Sh. Gurbachan Singh was carrying the business in the name of Panwar Enterprises at Tunda Nagar, Jauhri Pur, Delhi and he was also running telecom centre in the name of Riya Telecom Centre. He was also having a general store shop. He was working with Panwar Enterprises. There were about

20 sewing machines and twenty tailors used to work with him and one helper was also there. He does not know whether his firm was registered or not. He was not having any ESI card. He never paid income tax.

20. From all these facts, the petitioners have tried to prove that the income of the deceased was Rs. 25,000/- per month. On the other hand, it is matter of record that the petitioners have not been able to file any document from the government record or income tax record which may suggest that the deceased was earning Rs. 20,000/- to Rs. 25,000/- per month. The firm is stated to have 20 employees but there is no record and not even a single employee has been examined. The books of account are not maintained and income tax is not being paid. No employees register has been filed on record.

21. However, certain facts have come on record i.e. the deceased was B.A. Pass and he was qualified technician. He was earlier appointed in U.P. Power Corporation Ltd. which had issued a letter of apprenticeship to the deceased. It has also come in evidence that he was running a factory. One bill has also been produced on record in the name of the deceased by which it is clear that he was running a PCO having telephone no. 22813519 which was in his name and which bill was of a PCO. He had been issued a certificate by Sanjay Engineers where the deceased worked as Electrician w.e.f. 1.8.1999 to 30.06.2002. The certificate issued by U.P. Power Corporation Ltd. in favour of the deceased where from he completed the course of Electrician and where he worked at 33/11 K.V. Sub Station, Balram Nagar, Loni, Ghaziabad, U.P. w.e.f. 15.07.2002 to 14.07.2003 is also not disputed. He has also filed a contract of apprenticeship for this period on court record. He was having his own telephone number and he was having motorcycle and he was a skilled worker.

22. However, Id. Counsel for respondent no. 3 has argued that in absence of specific evidence on court record that he assessed on the basis of salary of skilled labour under Minimum Wages Act.

23. I have perused the record. There is no specific documentary evidence on record which may show that he was earning Rs. 20,000/- to Rs. 25,000/- per month. Of course, he was involved in multifarious commercial activities like running a factory and running telephone booth etc. The income of such person even if taken into account by taking expenses and salary which he has been paying to the staff or the supervisor, the expenses which he would have been incurring towards electricity and towards telephone charges etc., he would have been earning sufficient amount and his income can be assessed by keeping in view the surroundings and circumstantial evidence, which have come on record. The fact that the injured Amit @ Sher Singh was working with him has not been disputed. Even if the said injured would not have been getting Rs. 10,000/- per month as salary, he would definitely be getting salary equal to the wages payable to an unskilled labour and under Minimum Wages Act, which is around Rs. 3,500/- per month at the relevant time and even if the court presumes that in 20 persons at least few persons must have been employed by the deceased but

since there is no evidence on record even that would be vague assertion. It is observed that when the petitioners had sufficient evidence with them and they have failed to prove such evidence on record. The reason may be their enmity but the court in any case is of the considered opinion that it cannot be held that the deceased would have been earning Rs. 25,000/- per month. Simultaneously, the court is of the opinion that such a multifaceted person should not be assessed on the basis of salary equal to salary of skilled person under Minimum Wages Act as one injured i.e. Amit has been proved on record to be his employee and to whom he would have been paying salary equal to the salary of unskilled labour under Minimum Wages Act. It has also come in evidence that he had been having a PCO and motorcycle. The court has also taking a thread from the judgment of the Hon"ble Supreme Court in "Oriental Insurance Company Ltd. v. Deo Patodi & Ors., in which case, the deceased was 22 years of age and he was a brilliant student of Business Administration Course in U.K. He was doing a part time job with World Bank on a monthly salary of Rs. 80,000/- and he was offered employment in a company registered in U.S.A. at an annual remuneration of Rs. 18 lacs per annum approximately but he in fact had left the services with World Bank and had not joined the company registered in U.S.A. and at the time of accident, he was not earning. The Tribunal took the income of the deceased as Rs. 18,000/- per month and the matter went up to the Hon"ble Supreme Court and the Supreme Court held that fair amount of compensation should have been calculated on the basis of notional income of Rs. 25,000/- i.e. paying the amount equal to 1/3rd of the amount which the deceased was receiving in U.K. Therefore, keeping in all the facts and circumstances, the court in the present case is also taken the notional income of the deceased for the purpose of calculating the dependency allowance and the same is taken to Rs. 12,500/- per month. The court is assessing the income of the deceased on lower side keeping in view the fact that the deceased was not paying the income tax and the family members have not been able to prove any document that the deceased was having 20 employees. Since the deceased was having all such technical knowledge, he was a qualified person and was a qualified electrician, the court is of the opinion that such a person is definitely entitled for future benefits in terms of settled principle of law which becomes double within the period of 10 years in terms of judgment in Vidhya Vati's case, and therefore, he is entitled to have 50% enhancement towards future benefit which comes to Rs. 6,250/- (12500/- x 50%) per month and his total salary comes to Rs. 18,750/- (12500/- + 6250/-) per month. Further, the deceased was having wife and mother. Number of dependents upon him remains 2 and as such he would have been incurring 1/3rd of his income upon himself which comes to Rs. 6,250/- (18750/- 1/3) and therefore, monthly dependency allowance would remain as Rs. 12,500/- (18,750/- - 6,250/-) and his annual dependency allowance would be Rs. 1,50,000/- (12500/- x 12) and since the multiplier is 17, his total compensation would be Rs. 25,50,000/- (1,50,000/- x 17).....

5. Thus, the Claims Tribunal has given detailed reasons to make an assessment

of the deceased's income to be Rs. 12,500/-. I do not find any reason to disagree with the view taken by the Claims Tribunal. There was no evidence with regard to the future prospects. However, this Court in *Rakhi v. Satish Kumar & Ors.* (MAC. APP. 390/2011) decided on 16.07.2012, referred to the reports of the Supreme Court in *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others*, , *Smt. Sarla Dixit and another Vs. Balwant Yadav and others*, , *Bijoy Kumar Dugar Vs. Bidyadhar Dutta and Others*, , *Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another*, and *Santosh Devi Vs. National Insurance Company Ltd. and Others*, and held that as per Santosh Devi even in the absence of any evidence as to future prospects an increase of 30% in the income has to be provided where the victim had fixed income or was a self employed person. Relevant portion of Santosh Devi is extracted hereunder:-

14. ...In our view, it will be naive to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self- employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lac. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an

absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation.

6. Thus, instead of addition of 50%, the Claimants were entitled to an addition of 30% only towards inflation. The loss of dependency thus comes to Rs. 22,10,000/- (Rs. 12,500/- + 30% x 2/3 x 12 x 17). The Claimants are further entitled to a sum of Rs. 1,58,755/- towards the expenses incurred on the deceased's treatment till he succumbed to the injuries and a sum of Rs. 25,000/- towards loss of love and affection and Rs. 10,000/- each towards loss of consortium, loss to estate and funeral expenses. The overall compensation comes to Rs. 24,23,755/- as against a compensation of Rs. 27,48,755/- awarded by the Claims Tribunal.

LIABILITY:

7. As stated above, the owner and the driver have not challenged the Claims Tribunal's finding that there was a wilful breach of the terms of the policy on the part of the insured. The Appellant Insurance Company seeks exoneration.

8. The issue of satisfying the third party liability even in case of breach of the terms of insurance policy is settled by a three Judge Bench report in Sohan Lal Passi Vs. P. Sesh Reddy and others, . As per Section 149(2) of the Motor Vehicles Act (the Act), an insurer is entitled to defend the action on the grounds as mentioned u/s 149(2)(a)(i)(ii) of the Act. Thus, the onus is on the insurer to prove that there is breach of the condition of the policy. It is well settled that the breach must be conscious and willful. Even if a conscious breach on the part of the insured is established, still the insurer has a statutory liability to pay the compensation to the third party and will simply have the right to recover the same from the insured/tortfeasor either in the same proceedings or by independent proceedings as the case may be, as ordered by the Claims Tribunal or the Court. The question of statutory liability to pay the compensation was discussed in detail by a two Judge Bench of the Supreme Court in Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others, where it was held that exclusion clause in the contract of Insurance must be read down being in conflict with the main statutory provision enacted for protection of victim of accidents. It was laid down that the victim would be entitled to recover the compensation from the insurer irrespective of the breach of the condition of policy. The three Judge Bench of the Supreme Court in Sohan Lal Passi analyzed the corresponding provisions under the Motor Vehicles Act, 1939 and the Motor Vehicles Act, 1988 and approved the decision in Skandia. In New India Assurance Co., Shimla Vs. Kamla and Others etc. etc., , the Supreme Court referred to the decision of the two Judge Bench in Skandia, the three Judge Bench decision in Sohan Lal Passi and held that the insurer who has been made liable to pay the

compensation to third parties on account of issuance of certificate of insurance, shall be entitled to recover the same if there was any breach of the policy condition on account of the vehicle being driven without a valid driving licence. The relevant portion of the report is extracted hereunder:

21. A reading of the proviso to sub-section (4) as well as the language employed in sub-section (5) would indicate that they are intended to safeguard the interest of an insurer who otherwise has no liability to pay any amount to the insured but for the provisions contained in Chapter XI of the Act. This means, the insurer has to pay to the third parties only on account of the fact that a policy of insurance has been issued in respect of the vehicle, but the insurer is entitled to recover any such sum from the insured if the insurer were not otherwise liable to pay such sum to the insured by virtue of the conditions of the contract of insurance indicated by the policy.

22. To repeat, the effect of the above provisions is this: when a valid insurance policy has been issued in respect of a vehicle as evidenced by a certificate of insurance the burden is on the insurer to pay to the third parties, whether or not there has been any breach or violation of the policy conditions. But the amount so paid by the insurer to third parties can be allowed to be recovered from the insured if as per the policy conditions the insurer had no liability to pay such sum to the insured.

23. It is advantageous to refer to a two-Judge Bench of this Court in *Skandia Insurance Co. Ltd. Vs. Kokilaben Chandravadan and Others*, . Though the said decision related to the corresponding provisions of the predecessor Act (Motor Vehicles Act, 1939) the observations made in the judgment are quite germane now as the corresponding provisions are materially the same as in the Act. Learned Judge pointed out that the insistence of the legislature that a motor vehicle can be used in a public place only if that vehicle is covered by a policy of insurance is not for the purpose of promoting the business of the insurance company but to protect the members of the community who become suffers on account of accidents arising from the use of motor vehicles. It is pointed out in the decision that such protection would have remained only a paper protection if the compensation awarded by the courts were not recoverable by the victims (or dependants of the victims) of the accident. This is the *raison d'être* for the legislature making it prohibitory for motor vehicles being used in public places without covering third-party risks by a policy of insurance.

24. The principle laid down in the said decision has been followed by a three-Judge Bench of this Court with approval in *Sohan Lal Passi Vs. P. Sesh Reddy and others*, .

25. The position can be summed up thus:

The insurer and the insured are bound by the conditions enumerated in the policy and the insurer is not liable to the insured if there is violation of any policy condition. But the insurer who is made statutorily liable to pay compensation to

third parties on account of the certificate of insurance issued shall be entitled to recover from the insured the amount paid to the third parties, if there was any breach of policy conditions on account of the vehicle being driven without a valid driving licence....

9. Again in United India Insurance Company Ltd. Vs. Leheru and Others, , in para 18 of the report the Supreme Court referred to the decision in Skandia, Sohan Lal Passi and Kamla and held that even where it is proved that there was a conscious or willful breach as provided u/s 149(2)(a)(ii) of the Motor Vehicle Act, the Insurance Company would still remain liable to the innocent third party but may recover the compensation paid from the insured. The relevant portion of the report is extracted hereunder:

18. Now let us consider Section 149(2). Reliance has been placed on Section 149(2)(a)(ii). As seen, in order to avoid liability under this provision it must be shown that there is a "breach". As held in Skandia and Sohan Lal Passi cases the breach must be on the part of the insured. We are in full agreement with that. To hold otherwise would lead to absurd results. Just to take an example, suppose a vehicle is stolen. Whilst it is being driven by the thief there is an accident. The thief is caught and it is ascertained that he had no licence. Can the insurance company disown liability? The answer has to be an emphatic "No". To hold otherwise would be to negate the very purpose of compulsory insurance....

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20. ...If it ultimately turns out that the licence was fake, the insurance company would continue to remain liable unless they prove that the owner/insured was aware or had noticed that the licence was fake and still permitted that person to drive. More importantly, even in such a case the insurance company would remain liable to the innocent third party, but it may be able to recover from the insured. This is the law which has been laid down in Skandia, Sohan Lal Passi and Kamla cases. We are in full agreement with the views expressed therein and see no reason to take a different view.

10. The three Judge Bench of the Supreme Court in National Insurance Co. Ltd. Vs. Swaran Singh and Others, again emphasized that the liability of the insurer to satisfy the decree passed in favour of the third party was statutory. It approved the decision in Sohan Lal Passi, Kamla and Leheru. Paras 73 and 105 of the report are extracted hereunder:

73. The liability of the insurer is a statutory one. The liability of the insurer to satisfy the decree passed in favour of a third party is also statutory.

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105. Apart from the reasons stated hereinbefore, the doctrine of stare decisis

persuades us not to deviate from the said principle.

11. this Court in MAC APP. No. 329/2010 Oriental Insurance Company Limited v. Rakesh Kumar and Others and other Appeals decided by a common judgment dated 29.02.2012, noticed some divergence of opinion in National Insurance Co. Ltd. Vs. Kusum Rai and Others, , National Insurance Co. Ltd. Vs. Vidhyadhar Mahariwala and Others, ; Ishwar Chandra and Others Vs. The Oriental Insurance Co. Ltd. and Others, and Premkumari and Others Vs. Prahlad Dev and Others, and held that in view of the three Judge Bench decision in Sohan Lal Passi(supra) and Swaran Singh, the liability of the Insurance Company vis-?-vis the third party is statutory. If the Insurance Company successfully proves the conscious breach of the terms of the policy, then it would be entitled to recovery rights against the owner or driver, as the case may be.

12. In the circumstances, I am of the view that the liability of the Insurance Company to satisfy the award in the first instance is statutory. The Claims Tribunal granted recovery rights only against the owner of the offending vehicle. Respondent No. 2(Rajpal) who was driving the offending vehicle was primarily liable as the principal tortfeasor. The Appellant Insurance Company would be entitled to recover the amount of compensation paid from the Respondents No. 1 and 2 in execution of this very judgment without having recourse to independent civil proceedings.

13. The Respondent No. 4, the deceased's mother, died during the proceedings. Respondents No. 5, 6 and 7, the deceased's unmarried sisters were already on record. Thus, 50% of the compensation awarded along with proportionate interest shall be payable to the Respondent No. 3. Rest 50% shall be equally apportioned amongst Respondents No. 5 to 7.

14. The excess amount of Rs. 3,25,000/- along with proportionate interest and the interest, if any, accrued thereon during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

15. The Appeal is disposed of in above terms.

16. Statutory amount of Rs. 25,000/-, if any deposited, shall be refunded to the Appellant Insurance Company. Pending Applications stand disposed of.