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

Reserved on: 17th September, 2012
Pronounced on: 28th September, 2012

+ MAC.APP. 368/2004

JHAMMU RAM & ANR. ..... Appellants
Through: Mr. Adarsh Ganesh, Advocate

versus

SHAMSHER SINGH & ORS. ..... Respondents
Through: Mr.R.B. Shami, Adv. for R-3.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. The Appellants who are the legal representatives of the deceased Madan impugn a judgment dated 14.01.2004 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby it was held that the deceased himself contributed to the accident by his negligence to the extent of 70% and thus, made the Respondents liable to pay the compensation of ₹80,312.40P instead of ₹2,67,708/-.

2. The Claims Tribunal further held that the Insured (Respondent No.2) failed to produce a valid and effective driving licence of its driver Respondent No.1 inspite of service of notice under Order XII Rule 8 CPC (Ex.R3W2/2) and it was proved that the licence placed on record of the Claims Tribunal was fake. The Claims Tribunal made the Insurance Company liable to perform its statutory liability but was silent with regard to the recovery rights.

3. No Appeal has been filed by the driver, owner or the Insurer.

4. The only ground raised by the Appellants (the Claimants) is that while the deceased Madan was crossing the road, he was ran over by a speeding bus No.DL-1PA-3133 which was being driven in a rash and negligent manner by the First Respondent at the time of the accident. The Claims Tribunal without any evidence on record erred in holding that the deceased was in fact travelling in the offending bus and was ran over while he was alighting from the moving bus at the intersection.

5. It is true that in the written statement filed by Respondent No.2, the owner of the offending bus, a plea was taken that the deceased was alighting from the moving bus while it was taking a turn towards Ashok Vihar. Yet, this defence was not pursued by Respondent No.2 and he was ordered to be proceeded ex-parte. Respondent No.1 Shamsher Singh, the driver of the offending bus preferred not to contest the proceedings inspite of service, he was, therefore, also proceeded ex-parte.

6. The Appellant examined Inder Singh, an eye witness who deposed that on 08.12.1998 he was proceeding to Andha Mugal Partap Nagar on his cycle. When he reached the traffic signal of Pitampura TV tower, a bus No.DL-1PA-3133 came from TV tower side and ran over deceased Madan, who was crossing the road.

7. The Respondent Insurance Company took over the defence of the owner as he had been proceeded ex-parte. No suggestion was given to this witness that the deceased was travelling in the bus and that he fell down while he was trying to get down from the moving bus. There was no material with the Claims Tribunal to have disbelieved Inder Singh's testimony with regard to the manner of the accident.

8. In *Bimla Devi and Ors. v. Himachal Road Transport Corporation and Ors., (2009) 13 SC 530,* while holding that in a petition under Section 166 of the Act for award of compensation, the negligence has to be proved on the touchstone of preponderance of probability, in para 15, it was observed as under:-

> *"15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties.*"

9. The observations of the Supreme Court in *Bimla Devi* were referred with approval in a later judgment in *Parmeshwari Devi v. Amir Chand and Ors., (2011) 11 SCC 635.*

10. Thus, it is established that the fatal injuries were caused to the deceased Madan while he was crossing the road on account of bus No.DL-1PA-3133 being driven in a rash and negligent manner which collided against him.

11. The Claims Tribunal awarded an overall compensation of ₹2,67,708/-. The quantum of compensation is not disputed by the Appellants or even by the Respondent Insurance Company.

12. Although, I do not approve of the split multiplier and different dependency taken for five years and then for subsequent 11 years by the Claims Tribunal, yet the overall compensation is just and reasonable in view of the fact that if the compensation is computed following the principles laid down in *Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr., (2009) 6 SCC*

121 and after making an addition of 30% towards inflation on the basis of *Santosh Devi v. National Insurance Company Ltd. & Ors., 2012 (4) SCALE 559*; the loss of dependency comes to ₹ 2,26,629/- (1937/- + 30% x 1/2 12 x 15).

13. On adding a sum of ₹25,000/- towards loss of love and affection and ₹10,000/- each towards loss to estate and funeral expenses, the overall compensation would come ₹2,71,629/-, which is almost the same as awarded by the Claims Tribunal.

14. Thus, the compensation awarded does not call for any interference.

15. On liability, the Claims Tribunal held that the Insured committed breach of the terms of the policy and at one place it also observed that the Insurance Company must pay and then recover, but was silent on granting recovery rights against the driver and the owner. Paras 17 and 18 of the impugned judgment are extracted hereunder:-

> *"17. The Insurance Company has summoned the relevant witness from the Motor Licensing Authority who has duly proved that R-1 was not carrying any valid licence issued from the Licensing Authority. Besides, the Insurance Company has also examined their Senior Assistant to prove the notice Under Order 12 rule 8 CPC issued to the driver/Respondent No.1 to produce any other licence original as well as photo copy which may have been held by him on the date of the accident but he has failed to produce the same. The said notice has been duly received by respondent no.1 vide the AD card proved as Ex.R3W2/4.*
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> *18. In case titled United India Insurance Co. Ltd. v. Lehru and Others reported in (2003) 3 Supreme Court Cases 338, it has been held that:*
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> > *"Under Section 149 (1), Motor Vehicles Act, 1988 the insurance company must pay to the persons entitled to the benefit of the decree, notwithstanding that it has become "entitled to avoid or cancel or may have avoided or cancelled the policy", the words "subject to the provisions of this*

section" mean that the Insurance Company can get out of the liability only on grounds set out in Section 149. Section 149 (7) does not state anything more or give any higher right to the Insurance Company. On the contrary, the wording of that provision viz. "no insurer… shall be entitled to avoid his liability" indicates that the legislature wanted to clearly indicate that Insurance Companies must pay unless they are absolved of liability on a ground specified in Section 149 (2). This is further clear from Section 149 (4), Section 149(5) also shows that the Insurance Company must first pay, then it can recover."

16. Thus it is apparent that the Insured failed to produce any other licence despite service of notice. The licence produced before the Claims Tribunal was found to be fake.

17. Thus, the Respondent Insurance Company proved willful breach of the terms and conditions of policy, it would be entitled to recover the compensation paid from Respondents No.1 and 2 in execution of this very judgment without having recourse to separate civil proceedings.

18. The Appellants shall be entitled to interest @ 7.5 % per annum on the balance amount of ₹1,87,395.60P from the date of filing of the Petition till its payment.

19. Respondent No.3 National Insurance Company Limited is directed to deposit the balance compensation along with interest with the Claims Tribunal within six weeks.

20. The compensation shall be apportioned in favour of the Appellants in equal proportion.

21. Seventy five percent of the amount shall be held in fixed deposit for a period of two years in favour of the Appellants in equal proportion and rest shall be released to them on deposit.

22. The Appeal is allowed in above terms.

23. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

SEPTEMBER 28, 2012
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