

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU
CIMA No.346/2012**

Date of Decision: 19/07/2013

**Oriental Insurance Company Limited
Vs.
Gulnaz Begum and ors.**

Coram:

Hon'ble Mr. Justice Bansilal Bhat, Judge

Appearing Counsel:

For the Petitioner(s) : Mr. D.S. Chouhan, Advocate
For the respondent(s) : Mr. R. Koul, Advocate.

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| 1. Whether approved for reporting in law journals? : | Yes/No |
| 2. Whether approved for publishing in Press/Media? : | Yes/No/Optional |
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1. This Civil Ist Miscellaneous Appeal is directed against the award dated 31st May, 2012 passed by learned Presiding Officer, Motor Accident Claims Tribunal, Kishtwar in File No.101/Claim titled ***“Gulnaz Begum and ors. Vs. Oriental Insurance Company Limited and ors”*** in terms whereof the Tribunal has awarded total compensation of Rs.9,51,600/- (Rupees Nine Lacs Fifty One Thousand and six hundred only) in favour of petitioners on account of death of Khair Mohammad. The award has been assailed on the ground that the Tribunal has drawn

erroneous conclusions and the findings are perverse; that the facts and law have not been appreciated in the right perspective; that in absence of proof of definite income of deceased, fixing of his monthly income at Rs.6,000/- is based on no evidence and that the Multiplier of '16' adopted is inappropriate in the facts of the case.

2. Heard the rival sides and perused the Record of learned Tribunal.
3. Briefly put, the facts of the case are that one Khair Mohammad, aged 34 years, was hit by a Matador bearing registration No.JK06-1956 at Shopan Pul Gawari while being driven by its driver rashly and negligently from Gandoh to Gawari in consequence whereof *Khair Mohammad* received multiple injuries on his body and died enroute to hospital on the same day. It happened on 17.12.2009. In the claim petition filed by the widow, three minor daughters, a son and parents of deceased, claiming to be dependent upon the earnings of deceased, it was claimed that the

deceased was a tailor by profession besides managing a dairy farm deriving a total monthly income of Rs.18,000/-. The offending vehicle belonging to respondent no. 8 - herein and plied by respondent no.9-herein was said to be insured with the appellant Insurance Company. Thus, it is on account of vicarious liability of the owner of offending vehicle arising out of rash and negligent driving of the offending vehicle at the hands of its driver during the course of his employment causing fatal accident and the factum of offending vehicle being insured with the appellant Insurance Company that the owner was sought to be held liable for paying compensation to the widow, minor children and parents of the deceased arrayed as respondent nos.1 to 7 in this appeal (hereinafter referred to as claimants) and the appellant Insurance Company liable to indemnify the insurer.

4. The owner and the driver of offending vehicle appeared before the Tribunal and filed written objections admitting the factum of offending

vehicle being insured with the appellant Insurance Company. The appellant Insurance Company contested the claim petition seeking to evade its liability on the ground that the driver of offending vehicle was plying the vehicle in violation of the terms and conditions of Insurance Policy and Route Permit. The claim petition was also contested on the ground that the driver was not holding a valid and effective driving license.

5. Parties joined the following issues:-

- a) *Whether deceased Khair Mohd. Butt S/o Mohd. Din Butt was hit by the offending vehicle (Matador) bearing registration No.JK06-1956 belonging to respondent No.2, at Shopan Pul near Gawari on 17.12.2009, due to rash and negligent driving of driver of the vehicle (respondent No.3) and he sustained multiple injuries on his body and died enroute Hospital? OPP.*
- b) *If issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled, and from whom? OPP*
- c) *Whether deceased Khair Mohd Butt was hit by an offending vehicle belonging to respondent No.2, not entitled to any compensation, if so, what is its effect on the claim petition? OPR-1*

d) *Whether the offending vehicle was being driven by its driver without holding a valid driving license, if so what is its effect on the claim petition OPR-1.*

6. On consideration of evidence, oral and documentary, the Tribunal passed the impugned award assailed in this appeal.
7. It is contended on behalf of appellant Insurance Company that the claimants have not been able to prove the avocation and income of deceased and no reliable evidence has been brought on record to establish that the deceased was earning Rs.6,000/- per month. Learned counsel for appellant Insurance Company further contended that the finding in this regard could not be placed on the bald statement of widow of deceased. It is further contended that '16' was not the appropriate multiplier as uncertainties of life have not been taken into account. *Per contra*, it is contended on behalf of claimants that the Tribunal has adopted a very conservative approach in assessing monthly income of deceased at Rs.6,000/- per month and the

multiplier adopted was appropriate to the age of deceased.

8. After having scanned through the record and giving anxious consideration to the arguments advanced at the Bar, I find that in view of the oral and documentary evidence brought on record, findings returned on issues 1, 3 and 4 are perfectly justified and no exception can be taken to the same. Learned counsel for the appellant Insurance Company has fairly conceded that the findings on these issues are justified. In so far as findings on Issue Nos.2 and 5 are concerned, the same relate to quantum of compensation and extent of liability of the Insurer. In view of the contract of Insurance/Policy Bond subsisting *inter se* the appellant Insurance Company and respondent no.8 on the date of fatal accident, the liability of insurer to indemnify respondent no.8 for compensation determined and payable to claimants is indisputably made out and the same has in fact not been agitated as a ground of challenge in the instant appeal. Consequently,

the only question for determination in the instant appeal is the quantum of compensation which is directly and proximately relatable to the earnings of deceased.

9. Scanning through un-rebutted evidence brought on record by claimants during inquiry before the Tribunal, it appears that the widow of deceased – *Gulnaz Begum* has deposed that the deceased was earning Rs.10,000/- to Rs.12,000/- per month from dairy farm and Rs.6,000/- to Rs.7,000/- per month from tailoring work. She claimed that the deceased had 5/6 cows and was running dairy farm with loan raised from the Government. However, no documentary evidence appears to have been adduced before the Tribunal to establish raising of loan and setting up of a dairy farm. Other witnesses examined by the claimants have given a rough estimate of the earnings of deceased between Rs.15,000/- to Rs.18,000/- without being possessed of any source of knowledge to ascertain such income. On cumulative evaluation of the evidence tendered

by the claimants, the Tribunal observed that there was uncertainty in the monthly income of deceased. It held that there was no definite proof of income and the oral evidence adduced by the claimants was not consistent. The Tribunal, after attempting to strike a balance between incomes projected by the claimants and the witnesses and by applying the guess work fixed the monthly income of deceased at Rs.6,000/- to determine loss of dependency of claimants.

10. The assessment of income of deceased by the Tribunal appears to be slightly inflated. Perhaps the element of guess work has played a dominant role in arriving at the conclusion. It is well settled that the onus of proof in regard to question of earnings of deceased heavily lies upon the claimants and such onus can be discharged by leading reliable and cogent evidence before the Tribunal. A bare assertion in the claim petition or bald statement before the Tribunal would not be enough to discharge such onus. It is well settled that in absence of definite material about income

of a victim, his monthly income has to be fixed at Rs.3,000/- per month. This figure can be taken as the minimum income where the definite proof is lacking. In the case in hand there is some evidence on record and though such evidence stands un-rebutted, in absence of any documentary proof, it is difficult to attach much significance to the oral account of widow of deceased and other witnesses of claimants that the deceased was simultaneously running a tailoring shop and also managing a dairy farm, both avocations requiring whole time attention. It is true that the element of guess work does play some role in assessing whether a particular figure given as income could be probable but such guess work cannot be the main factor in drawing the conclusions. Admittedly, deceased was providing support to claimants including his wife, minor children and parents. The family, including the deceased, comprised of eight members. It is, therefore, inconceivable that the family comprising of eight members would have been surviving at a meagre income of Rs.3,000/-.

Being realistic and taking the contradictions in evidence on the aspect of income of deceased into consideration, it appears reasonable to fix the monthly income of deceased, at the time of fatal accident, at Rs.5,000/- per month for determining the multiplicand. Looking to the strength of the family, $1/5^{\text{th}}$ would be the appropriate standard deduction towards personal and living expenses of the deceased. The component of earnings of deceased per month for support of claimants is accordingly worked out at Rs.5,000 minus $1/5^{\text{th}}$ = Rs.4,000/-. The annual dependency is accordingly assessed at Rs.4,000 x 12 = Rs.48,000/-. The deceased was 34 years old at the time of accident. Based on the date of birth of deceased recorded in his school diploma and oral evidence brought on record during inquiry, the Tribunal fixed the age of deceased as 36 years. Multiplier appropriate to the age group of 36 to 40 years would be '15' in terms of the judgment of Hon'ble Apex Court in ***"Sarla Verma Vs. DTC"*** reported in (2009) 6 SCC 127. Multiplier of '16' adopted by the

Tribunal cannot be supported. '15' being the appropriate multiplier, the claimants would be entitled to compensation as under;

- i) For loss of dependency = Rs.48,000 x 15 = Rs.7,20,000/-
- ii) For funeral expenses = Rs.2,000/-
- iii) For loss of consortium to widow = Rs.5,000/-

Total = Rs.7,27,000/-

- 11. The Impugned Award is accordingly modified.
Other terms of the Award regarding Interest and Apportionment shall remain intact.
- 12. Appeal is accordingly **disposed of**.

(Bansi Lal Bhat)
Judge

Jammu
19/07/2013
Varun Bedi