

**REPORTABLE/NON-REPORTABLE**  
**IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA**

**ON THE 29<sup>th</sup> DAY OF APRIL, 2022**

**BEFORE**

**HON'BLE MR. JUSTICE SATYEN VAIDYA.**

**FAO NO. 60 OF 2017 ALONGWITH FAO NO. 258 OF 2017**

**1. FAO No. 60 of 2017**

**Between:-**

**NEW INDIA ASSURANCE COMPANY LIMITED,  
DIVISIONAL OFFICE AT BLOCK NO. 7,  
3<sup>RD</sup> FLOOR, SDA COMPLEX,  
KASUMPTI, SHIMLA-171009 (HP)  
THROUGH ITS SENIOR DIVISIONAL MANAGER.  
...APPELLANT  
(BY SH. RAMAN SETHI, ADVOCATE)**

**AND**

**1. SMT. KANTA SINGHA W/O SH. RAJINDER SINGHA  
2. SH. RAJINDER SINGHA S/O LATE SH. PREM SINGHA  
BOTH RESPONDENTS NO.1 & 2 ARE  
R/O BHARDWAJ BUILDING, HOUSING BOARD  
COLONY, SANJAULI, SHIMLA-171006 (HP).  
...CLAIMANTS/RESPONDENTS**

**3. SH. GAURAV SHARMA S/O SH ARUN  
SHARMA, R/O KUBER BUILDING,  
DHINGU MANDIR ROAD, SANJAULI,  
SHIMLA-171006 (HP) OWNER OF  
VEHICLE NO. HP-63B-0540)  
.... OWNER/RESPONDENT.**

**(SH. J.L.BHARDWAJ, ADVOCATE, FOR R 1 & 2.)  
MS. SEEMA K. GULERIA, ADVOCATE, FOR R-3)**

**2. FAO NO. 258 OF 2017**

**BETWEEN**

1. SMT. KANTA SINGHA W/O SH. RAJINDER SINGHA
2. SH. RAJINDER SINGHA S/O LATE SH. PREM SINGHA  
BOTH RESIDENT OF MGI NO. 53,  
BHARDWAJ BUILDING, HOUSING BOARD  
COLONY, SANJAULI, SHIMLA-171006 (HP).

...APPELLANTS/PETITIONERS  
(BY SH. J.L. BHARDWAJ, ADVOCATE).

**AND**

1. SH. GAURAV SHARMA S/O SH ARUN  
SHARMA, RESIDENT OF KUBER BUILDING,  
DHINGU MANDIR ROAD, SANJAULI,  
SHIMLA-171006 (HP)

2. THE NEW INDIA ASSURANCE COMPANY LIMITED,  
THROUGH ITS DIVISIONAL MANAGER,  
OFFICE OF BHAGRA NIWAS, THE MALL,  
SHIMLA, H.P.
- ....RESPONDENTS

(MS. SEEMA K. GULERIA, ADVOCATE, FOR R-1.)

(MR. RAMAN SETHI, ADVOCATE, FOR R-2).

**RESERVED ON: 25.04.2022**  
**DECIDED ON: 29.04.2022.**

*These appeals coming on for pronouncement of  
judgment this day, the Court delivered the following:*

**J U D G M E N T**

Both these appeals are being decided by a common judgment, as these arise out of the same judgment and involve common question of facts and law.

2. Appellant in FAO No. 60 of 2017 (shall hereinafter be referred to as 'insurer'), respondents No. 1 and 2 as 'claimants' and respondent No.3 as 'insured' for the sake of convenience.

3. The claimants filed petition under Section 166 of the Motor Vehicles Act, 1988 before the Motor Accident Claims Tribunal (for short 'MACT'), Shimla vide case No.60-S/2 of 2014/12 inter alia claiming compensation to the tune of Rs.15,00,000/- alongwith interest at the rate of 18% per annum on account of death of their son Nikhil Singha (hereinafter referred to as 'deceased'), who died in the motor vehicle accident involving Mahindra Pick-up No. HP-63B-0540 at 3.00 A.M. during intervening night of 4/5.1.2012 in between Bhatta-kuffar and Sanjauli tunnel. The deceased was 24 years of old and was an occupant of aforesaid vehicle at the time of accident. Vinay Awasthi was driving the vehicle at the time of accident and cause of accident was stated to be rash and negligent driving of Vinay Awasthi. It was alleged that the deceased was an employee of Vinay Awasthi, who was providing DJ services

for consideration. The vehicle in question belonged to the insured and was under a contract of insurance with the insurer.

4. On 04.01.2012 the vehicle was hired by Vinay Awasthi and the deceased for carrying their DJ equipment from Bhatta-kuffar store to hotel Wild Flower Hall, Chharabra and also for carrying such articles back after the programme. The insured had employed one Yash Pal as a driver to drive the vehicle. On 04.01.2012 also Yash Pal was the driver of the vehicle, who drove the vehicle with equipment to hotel Wild Flower Hall, Chharabra. Driver Yash Pal handed over the keys of the vehicle to Vinay Awasthi and went to his home at Baldeiyan. After conclusion of programme, the DJ equipment was loaded on the vehicle by Vinay Awasthi and the deceased. Vinay Awasthi drove the vehicle to Bhatta-Kuffar, where the equipment was unloaded and kept in store. Thereafter, Vinay Awasthi and the deceased boarded the vehicle and started towards Sanjauli and met with an accident on the

way. Both Vinay Awasthi and the deceased died on the spot.

5. FIR Ext. PW-1/A was lodged on 05.01.2012 at Police Station, Dhalli. During investigation, it was found that there was no article loaded in the vehicle at the time of accident.

6. The insured contested the petition. The factum of the vehicle hired by Vinay Awasthi on 04.01.2012 was admitted. It was also admitted that driver Yash Pal had handed over keys of the vehicle to Vinay Awasthi at hotel Wild Flower Hall, however, with the qualification that the keys were handed over only for the purpose of parking of the vehicle and loading it with DJ equipment. Authorization to drive the vehicle in favour of Vinay Awasthi was denied.

7. Insurer also contested the petition and denied its liability to indemnify the insured on the ground that the vehicle, at the time of accident, was being driven in violation of terms of insurance policy. It was alleged that the deceased as well as Vinay Awasthi were gratuitous

passengers. At the time of accident, nothing was loaded in the vehicle. The vehicle could not be said to have been hired at the time of accident. In any case, the authorization of Vinay Awasthi to drive the vehicle was also challenged.

8. On the pleadings of the parties, learned MACT, Shimla, framed the following issues:

1. *Whether deceased Nikhil died in motor accident on account of rash and negligent driving of driver of vehicle bearing No. HP-63B -0540, on dated 05.01.2012 at about 3 AM at place Bhattakufar bye pass road, Shimla, as alleged? ..OPP*
2. *If issue No. 1 is proved in affirmative, then what should be the quantum of compensation and from Whom?..OPP*
3. *Whether the petition is not maintainable in the present form, as alleged? OPR*
4. *Whether the petitioners have no cause of action to file the present petition? OPR*
5. *Whether the present petition is bad for non-joinder and mis-joinder of necessary parties? OPR*
6. *Whether the petitioners are estopped from filing the present petition as alleged? OPR*
7. *Whether the deceased was travelling as gratuitous passenger as alleged? OPR*

8. *Whether the driver of the vehicle has valid and effective driving licence as alleged? OPR.*
9. *Whether the vehicle was being driven in contravention of salient provision of Motor Vehicle Act? OPR*
10. *Whether the vehicle was being driven in violation of insurance policy as alleged? OPR*
11. *Relief.*

9. Issues No.1 and 2 were answered in affirmative, whereas, all other issues were answered in negative. The petition was accordingly allowed. A sum of Rs. 9,99,800/- was awarded as compensation alongwith interest at the rate of 9% per annum from the date of filing of the petition.

10. The break-up of the heads under which the compensation was awarded is as under:

1.	<i>Loss of dependency come out i.e.4050/- monthly income <math>4050 \times 18 \times 12</math></i>	<i>Rs. 8,74,800/-</i>
2.	<i>Loss of love and affection</i>	<i>Rs. 1,00,000/-</i>
3.	<i>Funeral Charges</i>	<i>Rs. 25,000/-</i>
4.	<i>Total Compensation</i>	<b><i>Rs. 9,99,800/-</i></b>

11. The insurer by way of FAO No. 60 of 2017 has assailed the impugned award on the grounds firstly, that

the deceased was a gratuitous passenger and hence, the insurer was not liable to indemnify the insured and, secondly, that the quantum of compensation assessed by learned MACT, Shimla was in excess. As regards the first ground, it has been contended that the vehicle was hired for carrying the articles, whereas at the time of accident, no article was found in the vehicle. It is further submitted that Vinay Awasthi could not drive the vehicle, without authorization from the owner. The vehicle, therefore, at the time of accident was being driven in violation of terms and conditions of the insurance policy. The second ground of challenge regarding quantum on behalf of the insurer is based on the contention that learned Tribunal has wrongly held the monthly income of deceased at Rs.5400/-. It is submitted that there was no evidence on record regarding the income of the deceased and as such, learned Tribunal at the most could have taken the minimum daily wages payable to a workman in the State of H.P. at the relevant time. It is contended that in the year 2012, the minimum wages fixed by the Government of Himachal Pradesh was



at Rs.120/- per day. The award on account of future prospects quantified at the rate of 50% of the monthly income is also stated to be in excess.

12. The claimants on the other hand by way of appeal being FAO No. 258 of 2017, has sought enhancement of compensation on the ground that capping of monthly income of deceased at Rs.5400/- was on lesser side and without any basis. It is contended that the deceased was proved to be working as a DJ professional. It was also proved that on the night of 4/5.1.2012 Vinay Awasthi and deceased were paid Rs.6,000/- for the event. By such standards, the monthly income of the deceased could not be considered to be less than Rs.15000/- even by conservative approximation. Additionally, the filial consortium has also been claimed, besides the compensation on account of loss of estate as also funeral charges.

13. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

14. The moot question in the case is, whether the deceased was travelling as a gratuitous passenger in the vehicle at the time of accident? Learned MACT, Shimla has answered issue No.7 in negative by holding that no evidence had been led by the insurer in this regard. Learned Tribunal has further taken into consideration the pleadings of the claimants to the effect that deceased was travelling alongwith his employer Vinay Awasthi in the vehicle from hotel Wild Flower Hall to Bhatta-kuffar after holding programme at said venue. This fact is held to have remained unrebutted. However, while deciding issue No.1, learned Tribunal has held as under:

*“38. On the pleadings of the parties, oral as well as documentary evidence adduced by the parties there emerges no denying of the fact that at the relevant time deceased Nikhil Singha was travelling in Mahindra pick up bearing No. HP-63B-0540 from Hotel Wilf Flower Hall Kufri to Bhattakuffar. The vehicle in question was being driven by Vinay Awasthi, who had hired the vehicle from its owner i.e. respondent No. 1 to carry the DJ and music system to Wilf Flower Hall hotel Kufri for performing programme there. It has also come on record that Sh. Yash Pal, driver of the vehicle took the same to Wilf Flower Hall Hotel Kufri for unloading the DJ and music system, who*

*was holding a valid and effective driving licence and after unloading the articles at Wilf Flower Hall Hotel Kufri he handed over the keys to Vinay Awasthi and went to his village at Baldeyan. It is also there in record that Vinay Awasthi was also possessing a valid and effective driving license to drive L.T.V. who used to hire the vehicle from its owner earlier. Though it has been pleaded by the respondent No. 1 in his reply that his driver Yash Pal handed over the keys to deceased, Vinay Awasthi without his permission and consent. However, respondent No. 1 while stepping into the witness box as RW-3 has categorically admitted that keys were handed over to deceased Vinay Awasthi with his consent, who used to hire the vehicle for taking his DJ and music system to various places to perform functions. In view of such circumstances, the plea of the respondent No. 1 that Sh. Vinay Awasthi was driving the vehicle at the time of accident without his consent and permission cannot be accepted.*

*39. Though it has been contended by the Ld. Counsel for respondent No.2 that the vehicle in question was found empty at the relevant time of accident and was not loaded with the DJ and music system of deceased Vinay Awasthi as alleged by the petitioner. It is to be noted that the respondent No.2 has not pleaded the aforesaid contention in his written reply. Though, he has examined Sh. Kamal as RW-1 who has also asserted in his statement that the vehicle in question was found empty. RW-5 S. I. Sewa Singh who conducted investigation in this case has also mentioned in his statement that the vehicle was found empty at the time of accident. However, it has come in the*

*evidence of RW-3 Sh. Gaurav Sharma that Vinay Awasthi after unloading the article in his store at Bhattakuffar was driving the vehicle to his place at Dhingru Mandir for being parked there. Even in such circumstances, if it is proved on record that Sh. Vinay Awasthi after unloading the articles at his store at Bhattakuffar was taking empty vehicle to park at the place near Dhingru Mandir where the respondent No.1 is residing and on the way it met with an accident. However, keeping in view the settled law that provisions of pleading as applicable in the CPC are not required to be strictly proved in M.V. Act cases and as such, the same shall not disentitle the petitioners from claiming the compensation on account of death of their son which occurred in an motor vehicular accident on the relevant date, time and place due to the rash and negligent driving of deceased Vinay Awasthi. Accordingly, issue No. 1 is decided in favour of the petitioners and against the respondents.”*

15. The findings recorded by learned Tribunal in paragraphs 38 & 39 of the impugned award, as noticed above, in considered opinion of this Court are also relevant for deciding issue No.7. To that extent, learned Tribunal has erred in not considering the relevant material and rather has held that no evidence was led on the issue.

16. The findings recorded by learned Tribunal in paragraphs 38 and 39 (supra) cannot be faulted with, as such findings are borne from the material on record.

17. The fact that the vehicle at the time of accident was being driven by Vinay Awasthi has not been disputed from either side. As regards the accident being result of rash and negligent driving of Vinay Awasthi, the principle of *res ipsa loquitur* can be conveniently applied in the facts and circumstances of the case. The vehicle went off the road abruptly on an urban road with sufficient width. Though the reliance has also been placed on the contents of FIR Ext.PW-1/A, which inter alia states the version of complainant, who allegedly witnessed the accident. The complainant has not been examined as a witness in the case, therefore, the FIR by itself not being a substantive piece of evidence cannot be relied upon as evidence in proof of allegation of rash and negligence of the driver of the vehicle.

18. It has also not been disputed between the parties that the vehicle had been hired on 4.1.2012 by Vinay

Awasthi to carry to and fro the DJ equipment from Bhattakuffar to hotel Wild Flower Hall, Chharabra. The dispute is only with respect to the fact that in what capacity the vehicle was being driven by Vinay Awasthi and occupied by deceased at the time of accident. The insured has appeared as a witness (RW-3). In his cross-examination, he admitted that on the night intervening 4/5.1.2012, the driver of vehicle had handed over keys to Vinay Awasthi and had thereafter left for his home at Baldeiyan. He further admitted that the driver had handed over keys to Vinay Awasthi with the consent of insured. However, he volunteered that the key was handed over for the purpose of loading and unloading. The driver Yash Pal has appeared as a witness (RW-4). He deposed that he had handed over the keys of the vehicle to Vinay Awasthi for the purpose of loading. The stand of insured and his driver RW-4 that the keys were handed over to Vinay Awasthi only for loading and unloading appears to be coined. It is not the case of insured that the carrier of the vehicle was enclosed and could be approached from the main door of the vehicle. It

is not understandable as to why the key was required to be handed over to Vinay Awasthi for loading purpose, which in any case could have been done without the keys. The insured is also conspicuously silent as to what steps did he take on having attained the knowledge that his vehicle was unauthorisedly driven by Vinay Awasthi. From the aforesaid material, an inference can clearly be drawn that the vehicle was driven by Vinay Awasthi with the consent of the insured as also his driver (RW-4).

19. Learned Tribunal has also returned the findings that Vinay Awasthi, at the time of accident, was possessing a valid driving licence to drive light transport vehicle, which was also the category of the vehicle involved in the accident. No challenge has been laid to such findings returned by the learned Tribunal.

20. Sh. Raman Sethi, learned counsel for the insurer has contended with vehemence that even if Vinay Awasthi had brought his articles from hotel Wild Flower Hall, Chharabra to Bhatta-kuffar, the accident had taken thereafter when there was no article carried in the vehicle.

In view of this fact, according to learned counsel for the insurer, the deceased was a gratuitous passenger. The arguments so raised in my considered view deserves to be rejected. Once it is held that Vinay Awasthi was holding a valid driving licence to drive the vehicle in question and the insured had consented for his vehicle to be driven by Vinay Awasthi for carriage of his articles, it will be unrealistic to hold that such authority ceased immediately on unloading of the articles in the store and would not extend till the vehicle was parked at safe place.

21. In ***M/s Vishal Enterprises and another vs. Smt. Lajja Devi and others 2016 (3) Him.L.R. 1549***, a Co-ordinate Bench of this Court has held as under:

*“20. This Court in a case titled as National Insurance Co. Ltd. Versus Kamla and others, reported in 2011 ACJ 1550, has also discussed the same issue while referring to the judgment of the Apex Court in National Insurance Co. Ltd. Versus Cholleti Bharatamma, reported in 2008 ACJ 268 (SC) and held that the person, who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorized/gratuitous passenger.”*



22. The insured has also placed on record an order dated 22.12.2014 in Complaint No.248/2012, Ex. RW-2/A, passed by District Consumer Disputes Redressal Forum, Shimla, whereby the complaint of insured against insurer assailing repudiation of his own damage claim was decided. The contention of insurer that there was violation of terms of policy since the gratuitous passengers were being carried at the time of accident in the vehicle was negated. It was held that the driving licence of Vinay Awasthi was valid and effective to drive L.T.V. and stood verified by the insurer. The own damage claim of the insured was thus allowed. The order passed by the District Consumer Disputes Redressal Forum, Shimla is stated to have been upheld even by the National Consumer Disputes Redressal Commission. That being so, the said order having been pronounced by a Forum having competent jurisdiction to decide the issue will operate as res judicata against the insurer.

23. Sh. Raman Sethi, learned counsel for the insurer has placed reliance on the judgments, **National Insurance**

***Company Ltd. Vs. Cholleti Bharatamma & others, 2008 ACJ 268 (SC), National Insurance Company Ltd. Vs. Kaushalaya Devi and others, 2008 ACJ 2144 (SC), National Insurance Company Ltd. Vs. Maghi Ram and others, 2010 ACJ 2096 (HP) and New India Assurance Company Ltd. Vs. S. Mohammed Ali and others, 2014 ACJ 2632 (Kerala).*** The ratio of the judgments relied upon by learned counsel for the insurer will not be applicable to the facts of the instant case as the deceased as well as Vinay Awasthi have not been held to be gratuitous passengers.

24. As regards the quantum of compensation, it can be seen that there was no definitive evidence on record to prove the income of deceased. Though, it was alleged by the claimants that besides working as DJ, the deceased also held landed property and earned from agricultural and horticultural pursuits, but no tangible material has been placed on record. Learned Tribunal assessed the income of deceased at Rs.5400/- per month. As per Sh. Raman Sethi, learned counsel for the insurer, in absence of any definitive

evidence the minimum wages fixed by the State Government could be applied and in the year 2012, such rate was Rs.120/- per day i.e. Rs.3600/- per month. I am not inclined to agree to such proposition for the reasons that it cannot be a thumb rule that in each and every case the minimum wages notified by the State Government have to be applied, where there is no direct evidence regarding actual income of the deceased.

25. In ***Chandra alias Chandraram and another vs. Mukesh Kumar Yadav and others (2022) 1 SCC 198***, the Hon'ble Supreme Court has held as under:

*“9. It is the specific case of the claimants that the deceased was possessing heavy vehicle driving licence and was earning Rs.15000/ per month. Possessing such licence and driving of heavy vehicle on the date of accident is proved from the evidence on record. Though the wife of the deceased has categorically deposed as AW1 that her husband Shiwpal was earning Rs.15000/ per month, same was not considered only on the ground that salary certificate was not filed. The Tribunal has fixed the monthly income of the deceased by adopting minimum wage notified for the skilled labour in the year 2016. In absence of salary certificate, the minimum wage notification can be a yardstick but at the same time cannot*

*be an absolute one to fix the income of the deceased. In absence of documentary evidence on record some amount of guesswork is required to be done. But at the same time the guesswork for assessing the income of the deceased should not be totally detached from reality. Merely because claimants were unable to produce documentary evidence to show the monthly income of Shivpal, same does not justify adoption of lowest tier of minimum wage while computing the income. There is no reason to discard the oral evidence of the wife of the deceased who has deposed that late Shivpal was earning around Rs.15000/ per month.”*

26. Taking into view the aforesaid exposition, it cannot be ignored that the occupation of deceased as DJ was proved on record, though, he was still under employment of deceased Vinay Awasthi. It was also proved on record that Vinay Awasthi had been paid Rs. 6,000/- for the event held on the night of 4.1.2022. The method to guess income of a person, for assessment of compensation, cannot be put in straitjacket formula, reason being that with the advent of new areas of avocation, the conservative factors of assessment have to give way. The present day generation, instead of adopting traditional services for avocation, feel happy and satisfied in new ventures and

avocations like DJ (Disc Jockey) and RJ (Radio Jockey). For estimation help can be taken from the fact that for one event, Vinay Awasthi was paid Rs.6000/-. As, the deceased was working as a DJ with Vinay Awasthi, it can safely be presumed that he would be paid atleast 10% of the amount received by the employer. That being so, it can be inferred that the deceased was earning atleast Rs.300/- per day taking into consideration the fact that he would be getting the work atleast for 15 days a month on an average.

27. Thus, the income of deceased assessed by learned Tribunal at the rate of Rs.5400/- per month is definitely on lesser side since the deceased was 24 years of age at the time of death, learned Tribunal has rightly applied the multiplier of 18. Accordingly, the dependency can be assessed at Rs.19,44,000/- (Rs.9,000 x 12 x 18). The deceased was a bachelor and hence the aforesaid amount would be liable to be reduced by 50%, thereby keeping the dependency at Rs.9,72,000/-. A further sum of Rs.3,88,800/- will be added to the aforesaid amount of Rs.9,72,000/- on account of future prospects of the

deceased at the rate of 40% of the assessed dependency. The claimants will also be entitled to Rs.40,000/- each as filial consortium in terms of the law laid down by the Hon'ble Supreme Court in ***Magma General Insurance Company Limited vs. Nanu Ram alias Chuhru Ram and others (2018) 18 SCC 130*** and ***United India Insurance Company Limited vs. Satinder Kaur @ Satwinder Kaur and others 2021 (1) Him.L.R. (SC) 478***. Lastly, the claimants will also be entitled to a sum of Rs. 15,000/- as funeral expenses. Thus, the claimants are entitled to the following amounts:

1.	<i>Dependency</i>	<i>Rs. 9,72,000/-</i>
2.	<i>Future prospects @ 40%</i>	<i>Rs. 3,88,800/-</i>
3.	<i>Filial consortium</i>	<i>Rs. 80,000/-</i>
4.	<i>Funeral expenses</i>	<i>Rs. 15,000/-</i>
	<i>Total Compensation</i>	<b><i>Rs. 14,55,800/-</i></b>

The afore-mentioned amount shall carry interest @ 9% per annum from the date of filing of petition.

28. In light of the above discussion, FAO No. 60 of 2017 is dismissed and FAO No. 258 of 2017 is allowed and the award is modified to the extent as detailed above.

29. Both the appeals are disposed of, so also the pending application(s) if any.

**29<sup>th</sup> April, 2022**  
(GR)

**(Satyen Vaidya)**  
**Judge**