IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

Reserved on: 21.11.2024
Pronounced on: 29 .11.2024

1. MA 8/2018
THE NEW INDIA ASSURANCE CO.LTD. Vs ABDUL LATIEF AND ORS.

2**. MA 3/2018**
THE NEW INDIA ASSURANCE CO. LTD. Vs KHURSHEEDA BANU AND ORS.

3**. MA 9/2018**
THE NEW INDIA ASSURANCE CO.LTD. Vs RUBINA BANOO AND ORS.

4**. MA 10/2018**
THE NEW INDIA ASSURANCE CO.LTD. Vs ZULEKHA BANOO AND ORS.

5**. MA 12/2018**
THE NEW INDIA ASSURANCE CO.LTD. Vs SHABINA BANOO AND ORS.

6. **MA 16/2018**
THE NEW INDIA ASSURANCE CO.LTD. Vs FATIMA BANOO AND ORS.

7. **MA 91/2018** THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs RESHMA BANOO AND ORS

8**. MA 92/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER
H.S. DHALIWAL Vs GULSHAN BANO AND ORS

9. **MA 93/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER
H.S. DHALIWAL Vs MUZAFFER HUSSAIN AND ORS

10. **MA 94/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs SAPOORA BANOO AND ORS

11. **MA 95/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs MIR ALI AND ORS

12. **MA 96/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER
H.S. DHALIWAL Vs MOHD SADIQ AND ORS

13 **MA 97/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER
H.S. DHALIWAL Vs FATIMA BANOO AND ORS

14. **MA 98/2018**
NEW INDIA ASSURANCE CO. LTD. Vs MOHD.IQBAL AND ORS.

15 **MA 99/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs MOHD. ISAQ AND ORS

16 **MA 100/2018**
NEW INDIA ASSURANCE CO. LTD. Vs MUDASSIR AND ORS.

17 **MA 101/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs MUBINA BANOO AND ORS

18 **MA 102/2018**
NEW INDIA ASSURANCE CO. LTD. Vs MOHD.ASLAM AND ORS.

19. **MA 103/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs ASHIQ HUSSAIN AND ORS

20. **MA 104/2018**
TEW INDIA ASSURANCE CO. LTD. Vs YASIR HUSSAIN AND ORS.

21 MA 105/2018
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs ABDUL KARIM AND ORS

22 **MA 106/2018**
NEW INDIA ASSURANCE CO. LTD. Vs ZAREENA BANOO AND ORS.

23 **MA 107/2018**
THE NEW INDIA ASSURANCE CO.LTD. TH. ITS MANAGER H.S. DHALIWAL Vs MEHNAZA BANOO AND ORS

24 **MA 108/2018**
NEW INDIA ASSURANCE CO. LTD. Vs YASIR HUSSAIN AND ORS.

……appellants

Through: - Mr.Rupinder Singh Adv with
Mr. Damini Singh Advocate.

……**respondents**

Through: - Mr. Rahil Raja Advocate
Mr. Adarsh Bhutyal Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1 By this common judgment, the afore-titled twenty four (24) appeals which arise out of a common award passed by the learned Motor Accident Claims Tribunal, Doda, ('the Tribunal' for short) are proposed to be decided.

2 As many as twenty four (24) claim petitions arose out of a single road traffic accident involving vehicle (Mini Bus) bearing registration No. JK066-1588 (‘offending vehicle’ in short) which suffered accident while proceeding from Kahara towards Thathri in District Doda due to rash and negligent driving by its driver, respondent No.4. As a result of this accident, Miss Rozi Bano and Miss Bibi Hanief suffered fatal injuries leading to their death, whereas Mohd Iqbal, Reshma Banoo Fatima Banoo, Safoora Banoo, Yasir Hussain, Muzaffar Hussain, Mir Ali, Zulekha Banoo, Rubina Banoo, Gulshan Banoo, Mohd Isaq, Mehnaz Banoo, Mubina Banoo, Ashaq Hussain, Shabina Banoo, Fatima Banoo, Yasir Hussain, Mohd Aslam, Mohd Sadiq, Mudassir, Zareena Banoo and Khursheeda Banoo suffered grievous injuries. The offending vehicle was insured with the appellants-Insurance Company at the relevant time and it was owned by respondent No.3. The injured passengers of the vehicle and the dependants of the deceased filed (24) separate claim petitions before the learned Tribunal seeking compensation from the owner, driver and the insurer of the offending vehicle on account of death/injuries sustained due to the accident.

3 The appellant-Insurance Company, while admitting the currency of insurance policy of the offending vehicle at the time of the accident, besides disputing the quantum of compensation sought by the claimants, contended that it is not liable to indemnify the owner/insured as the driver of the offending vehicle was not holding a valid and effective driving licence. It was also claimed by the appellant-Insurance

Company that the offending vehicle was being plied in violation of terms and conditions of the Route permit as well as the policy of insurance.

4 On the basis of the pleadings of the parties, the learned Tribunal framed the separate issues in the claim petitions filed by the dependants of the deceased and the claim petitions filed by the injured.

Issues framed in the petition filed by the dependants of the deceased:

"(i) Whether on 24.08.2009, the deceased was travelling in vehicle bearing No. JK06-1588 from Kahara to Bhathri and while reaching at Kancha Nalla near Kahara the vehicle met with an accident due to rash and negligent driving of the driver due to which the deceased died? OPP

(ii) If issue No.1 is proved in affirmative, what amount of compensation the petitioner is entitled to and from whom? OPP

(iii) whether the driver of the offending vehicle was not holding a valid driving licence at the time of accident, if so , what is its effect on the claim petition ? OPR1

(iv)Whether the offending vehicle was being driven in violation of terms and conditions of Route permit as well as poicy of insurance, if so, what is its effect on the claim petition ? OPR-1

(v) Relief. Onus on parties

Issues framed in the claim petitions filed by the injured.

"(i) Whether on 24.08.2009, the petitioner was travelling in vehicle bearing No. JK06-1588 from Kahara to Bhathri and while reaching at Kancha Nalla near Kahara the vehicle met with an accident due to rash and negligent driving of the driver due to which the petitioner received permanent disablement? OPP

(ii) If issue No.1 is proved in affirmative, what amount of compensation the petitioner is entitled to and from whom? OPP

(iiii)Whether the offending vehicle was being driven in violation of terms and conditions of Route permit as well as policy of insurance as the driving was not holding a valid driving licence at the time of accident, if so, what is its effect on the claim petition ? OPR-1

(v) Relief. Onus on parties"

An additional issue to the following effect was also framed:

"Whether the offending vehicle was overloaded at the time of accident, if so what is its effect on the claim petitions".

5 On the basis of evidence led by the parties, the learned Tribunal came to the conclusion that the vehicle in question was being driven, rashly and negligently by its driver, respondent No.4 at the relevant time which resulted in the accident. It was also concluded by the learned Tribunal that the driver of the offending vehicle was holding a valid and effective driving licence at the relevant time. However, it was found that as many as (31) passengers were travelling in the offending vehicle at the time of the accident, though the seating capacity of the said vehicle was only 15+1. The learned Tribunal, relying upon the ratio laid down by the Supreme Court in the case of **United India Insurance Co. Ltd vs K.M.Poonam and others, (2015) 15 SCC 297** directed that the appellant-Insurance Company shall satisfy the highest of the claims to the extent of seating capacity of the offending vehicle and the rest of the claims would be satisfied by the appellant-Insurance Company with a right to recover the amount from the owner of the offending vehicle.

6 While assessing the compensation, the learned Tribunal, in relation to the cases pertaining to death of Miss Bibi Hanief and Miss Rozi Bano, took the notional income of the deceased, who were non-earning persons aged 15/16 years, as Rs.36000/- *per annum* and awarded total compensation in the amount of Rs. 5,62,000/- (loss of dependence= Rs.4,32,000/-, funeral expenses = Rs.25000/-, loss of love and affection to parents= Rs.1,00,000/- and loss of Estate=Rs.5000/-) in favour of dependants of each of the afore-named two deceased, along with interest @ 7% *per annum*. In the cases of other (22) claim petitions which related to the injury cases of non-earning students who were proved to be travelling in the offending vehicle, the learned Tribunal, after taking the notional income of the injured at Rs.36000/ per annum, assessed the loss of earning capacity on the basis of disability certificates issued by a single Doctor, namely Dr. N.D.Dar after scaling down the percentage of disability in each case by 10% and awarded the compensation in the following manner:

(i) In the claim petition filed by the injured Mohd Iqbal, the disability assessed by Dr. N.D.Dar is 35%, but the Tribunal has scaled it down to 25% and assessed the total compensation of Rs.2,57,000/-.

(ii) In the claim petition filed by the injured Reshma Banoo, the disability assessed by Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.2,24,600.

(iii) In the claim petition filed by the injured Fatima Banoo, the disability assessed by Dr. N.D.Dar is 45%, but the Tribunal has scaled it down to 35% and assessed the total compensation of Rs.2,89,400/-.

(iv) In the claim petitions filed by the injured Sapoora Banoo, the disability assessed by the Dr. N.D.Dar is 45%, but

the Tribunal has scaled it down to 35% and assessed the total compensation of Rs.3,21,000.

(v) In the claim petition filed by the injured Yasir Hussain, the disability assessed by Dr. N.D.Dar is 40%, but the Tribunal has scaled it down to 30% and assessed the total compensation of Rs.289400.

(vi) In the claim petition filed by the injured Muzaffar Hussain, the disability assessed by Dr. N.D.Dar is 40%, but the Tribunal has scaled it down to 30% and assessed the total compensation of Rs.289400.

(vii) In the claim petition filed by the injured Mir Ali, the disability assessed by Dr. N.D.Dar is 45%, but the Tribunal has scaled it down to 35% and assessed the total compensation of Rs.321000.

(viii) In the claim petition filed by the injured Zulekha Banoo, the disability assessed by Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20 % and assessed the total compensation of Rs.2,03,000.

(ix) In the claim petition filed by the injured Rubina Banoo, the disability assessed by Dr. N.D.Dar is 35%, but the Tribunal has scaled it down to 25% and assessed the total compensation of Rs.257000.

(x) In the claim petition filed by the injured Gulshan Banoo, the disability assessed by Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.224600.

(xi) In the claim petition filed by the injured Mohd Isaq, the disability assessed by the Dr. N.D.Dar is 40%, but the Tribunal has scaled it down to 30% and assessed the total compensation of Rs.289400.

(xii) In the claim petition filed by the injured Mehnaza Banoo, the disability assessed by the Dr. N.D.Dar is 40%, but the Tribunal has scaled it down to 30% and assessed the total compensation of Rs.289400.

(xiii) In the claim petition filed by the injured Mubina Banoo, the disability assessed by the Dr. N.D.Dar is 35%, but the Tribunal has scaled it down to 25% and assessed the total compensation of Rs.257000.

(xiv) In the claim petition filed by the injured Ashiq Hussain, the disability assessed by the Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.224600.

(xv) In the claim petition filed by the injured Shabina Banoo, the disability assessed by the Dr. N.D.Dar is 45%, but the Tribunal has scaled it down to 35% and assessed the total compensation of Rs.321000.

(xvi) In the claim petition filed by the injured Fatima Banoo, the disability assessed by the Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.224600.

(xvii) In the claim petition filed by the injured Yasir Hussain, the disability assessed by the Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.224600.

(xviii) In the claim petition filed by the injured Mohd Aslam, the disability assessed by Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.224600.

(xix) In the claim petition filed by the injured Mohd Sadiq, the disability assessed by Dr. N.D.Dar is 35%, but the Tribunal has scaled it down to 25% and assessed the total compensation of Rs.257000.

(xx) In the claim petition filed by the injured Mudassir, the disability assessed by Dr. N.D.Dar is 40%, but the Tribunal has scaled it down to 30% and assessed the total compensation of Rs.289400.

(xxi) In the claim petition filed by the injured Zareena Banoo, the disability assessed by the Dr. N.D.Dar is 35%, but the Tribunal has scaled it down to 25% and assessed the total compensation of Rs.257000.

(xxii) In the claim petition filed by the injured Khursheeda Banu, the disability assessed by Dr. N.D.Dar is 30%, but the Tribunal has scaled it down to 20% and assessed the total compensation of Rs.2,24,6000.

7 The appellant-Insurance Company has challenged the impugned award on the ground that the income of non-earning deceased and the injured could not have been taken as Rs.36000/- per annum. It has been contended that the compensation was required to be assessed on the basis of income of a non-earning person as specified in Second Schedule to the M.V. Act, which is Rs.15000 per annum. It has

been further contended that the vehicle in question was being driven by a minor student, namely Irshad Ahmed, who was allowed by the licensed driver, namely Mohd Rafiq to do so which resulted in the accident, as such, the appellant-Insurance Company has to be exonerated from its liability to satisfy the award. It has been also contended that the disability certificates issued in favour of the injured/claimants are by a single Doctor who is not an Orthopedician, as such, the same could not have been relied upon by the Tribunal for assessing the loss of earning capacity of the injured/ claimants. It has been contended that the concerned Doctor is notorious for issuing ready to use disability certificates and this Court has already in one of the cases directed holding of an enquiry against the said Doctor. In such a scenario, the Tribunal should not have accepted the certificates of disability issued by the said Doctor..

8 I have heard learned counsels for the parties and I have also gone through the grounds of challenge raised in the memo of appeals, the record of the Tribunal and the impugned award.

9 The first contention raised by the appellant-Insurance Company is with regard to assessment of compensation made by the Tribunal by taking the income of the injured/deceased, who were non-earning minor students, as Rs.36000/- per annum. As already noted, according to the learned counsel for the appellant, the income of a non-earning person while assessing the compensation, has to be guided by the Second Schedule to the Motor Vehicles Act ('MV Act'

for short) according to which, the same is to be taken as Rs.15000 /-per annum.

10 In the above context, it is to be noted that in the case of a non-earning person, like a student, only the notional income including the future prospects has to be the taken as the basis for calculating the 'loss of dependency' or 'loss of future income' as the case may be. It is true, that in the Second Schedule to the M.V. Act, the notional income of a non-earning person has been specified as Rs.15000 per annum, but it has to be borne in mind that the said Schedule was incorporated in the M.V.Act in the year 1994. The accident, which is subject matter of the present claim petitions, has taken place on 24.08.2009 i.e after more than 15 years of incorporation of the Second Schedule. The income of a non-earning person as specified in the Second Schedule was taken by the Legislature keeping in mind the factors that were prevailing at the relevant time. With the passage of time, there has been increase in inflation and devaluation of the rupee with the increase in cost of living. The value of the rupee has drastically come down since the year 1994 when the notional income of Rs.15000 was fixed in the Second Schedule to the M.V. Act, as such, while considering the notional income of a non-earning person after 15 years of incorporation of Second Schedule, upward revision of the same is required to be considered for arriving at the figure of just compensation.

11 The Supreme Court in the case of **Kishan Gopal & anr vs Lala,** 2014 (1) SCC 244 calculated the compensation by treating

Rs.36000/- as notional income including future prospects in place of Rs.15000/- as specified in Second Schedule to the M.V Act. Similarly, in **M.S.Grewal and ors vs Deep Chand Sood and ors, (2001) 8 SCC 151,** (14) school students had died due to drowning in a river. The Supreme Court, after noticing that the students came from an upper middle class background, awarded the compensation of Rs.5.00 lacs. There is a long series of judgments of the Supreme Court which provide that the notional income of a non-earning person, having regard to his/her background, the passage of time since the incorporation of Second Schedule to the M.V. Act in the year 1994, as well as the factors like inflation and the devaluation of the rupee, can certainly be taken into account while taking the income of a non-earning person for the purpose of assessing just compensation.

12 Learned counsel for the appellant-Insurance Company has relied upon the judgment of this Court in the case of **Bajaj Allianz General Insurance Co. Ltd vs. Sajid Khan and others, (2019) 3 JKJ [HC] 397** wherein it has been held that the notional income of a non-earning person has to be taken as Rs.25000 per annum and not Rs.36000 per annum. The ratio laid down in the said judgment cannot be applied to the present case, for the reason that it was in the facts and circumstances of that case, that this Court came to the conclusion that instead of Rs.36000 per annum, the income of the claimant therein should be taken as Rs.25000 per annum. But, even in that case, this Court has confirmed the principle that it is open to a Tribunal to take

the income of a non-earning claimant at a higher rate than specified in the Second Schedule to the M.V.Act.

13 The learned Tribunal in the present case, on the basis of the evidence on record, and in the light of the fact that most of the injured/deceased were grown up students at the verge of attaining majority, has correctly assessed the notional income of the deceased/injured at the rate of ₹36,000 per annum, as such, no fault can be found in the said assessment. It would not be open to this Court while exercising its appellate jurisdiction to interfere with the said finding of the Tribunal which, as already stated, is based upon plausible logic and reasons.

14 It has been contended by the learned counsel for the appellant-Insurance Company that it was not open to the Tribunal to award compensation to the dependents of the deceased in two death cases under the head 'loss of love and affection' to parents of the deceased as the law does not provide for the same. According to the learned counsel, as per the law laid down by the Supreme Court in **National Insurance Company ltd vs. Pranay Sethi and others, (2017) 16 SCC 680**, the compensation under the conventional heads of loss of estate, loss of consortium, and funeral expenses only is permissible in death cases.

15 It is correct that as per the law laid down by the Supreme Court in **Pranay Sethi'** case (supra), the compensation under the conventional head 'loss of consortium' is permissible and there is no

separate head for 'loss of love and affection' to parents provided in the said judgment, but the question whether the parents of a deceased child would be entitled to compensation under the head 'loss of consortium' has been answered by the Supreme Court in the later judgment of **Magma General Insurance Co. Ltd vs. Nanu Ram alias Chuhru Ram and others, vs. Nanu, (2018) 18 SCC 130.** In the said case, the Supreme Court, while answering the aforesaid question, has observed as under:

> *"8.7 A Constitution Bench of this Court in Pranay Sethi (supra) dealt with the various heads under which compensation is to be awarded in a death case. One of these heads is Loss of Consortium. In legal parlance, "consortium" is a compendious term which encompasses 'spousal consortium', 'parental consortium',and 'filial consortium'. The right to consortium would include the company, care, help, comfort, guidance, solace and affection of the deceased, which is a loss to his family. With respect to a spouse, it would include sexual relations with the deceased spouse. Spousal consortium is generally defined as rights pertaining to the relationship of a husband-wife which allows compensation to the surviving spouse for loss of "company, society, cooperation, affection, and aid of the other in every conjugal relation." Parental consortium is granted to the child upon the premature death of a parent, for loss of "parental aid, protection, affection, society, discipline, guidance and training.". Filial consortium is the right of the parents to compensation in the case of an accidental death of a child. An accident leading to the death of a child causes great shock and agony to the parents and family of the deceased. The greatest agony for a parent is to lose their child during their lifetime. Children are valued for their love, affection, companionship and their role in the family unit.Consortium is a special prism reflecting changing norms about the status and worth of actual relationships. Modern jurisdictions world over have recognized that the value of a child's consortium far exceeds the economic value of the compensation awarded in the case of the death of a child. Most jurisdictions therefore permit parents to be awarded compensation under loss of consortium on the death of a child. The amount awarded to the*

> *parents is a compensation for loss of the love, affection, care and companionship of the deceased child.. The Motor Vehicles Act is a beneficial legislation aimed at providing relief to the victims or their families, in cases of genuine claims. In case where a parent has lost their minor child, or unmarried son or daughter, the parents are entitled to be awarded loss of consortium under the head of Filial Consortium. Parental Consortium is awarded to children who lose their parents in motor vehicle accidents under the Act. A few High Courts have awarded compensation on this count. However, there was no clarity with respect to the principles on which compensation could be awarded on loss of Filial Consortium. The amount of compensation to be awarded as consortium will be governed by the principles of awarding compensation under 'Loss of Consortium' as laid down in Pranay Sethi (supra)"*

16 From the foregoing analysis of law on the subject, it is clear that the compensation permissible under the head 'loss of consortium' is also available to parents of a deceased child which can be termed as 'parental consortium' or 'filial consortium'. The same has to be awarded at the rate as provided in Pranay Sethi's case (supra).

17 Thus, the parents of the deceased in both the death cases would be entitled to compensation under the head 'loss of filial consortium' at the rate of Rs.40000 to each parent. The same would come to Rs.80,000/-. Therefore, an excess amount of Rs.20,000/- has been awarded by the Tribunal to the parents of the deceased under this head. Although, the Tribunal has awarded Rs.25000/- under the head 'Funeral expenses' which is also on higher side, yet the Tribunal has award only Rs.5000/- as 'loss of Estate' which is definitely on a lower side. As per the ratio laid down by the Supreme Court in Pranay Sethi's case (supra), in a death case, funeral expenses of Rs.15000 and loss of estate of Rs.15000 is admissible. In the present case, when we reduce

the funeral expense and increase the loss of estate to bring it at par with what has been provided in Pranay Sethi's case (supra), it evens out. However, the compensation awarded to the claimants in the two death cases under the head 'loss of consortium' upon its reduction by Rs.20000/- would bring down the total compensation admissible to the claimants in these two cases to Rs.5,42,000/- from Rs.5,62,000/-.

18 That takes us to the contention of the appellant that the vehicle in question was being driven by a minor student and not by its driver at the relevant time which resulted in the accident which, according to the appellant, constitutes a violation of terms of insurance policy entitling the insurer to avoid its liability to satisfy the award. It has been contended that in the Challan relating to the accident, it has been specifically stated that the vehicle in question was being driven by a minor student, namely Irshad Ahmed who was allowed to do so by the driver Mohd Rafiq. According to the learned counsel for the appellant-Insurance Company, since the claimants have relied upon the challan filed by the police to prove the accident, therefore, the finding in the challan that the vehicle in question was being driven a minor student at the relevant time is binding upon them. In this regard, the learned counsel has relied upon the judgment of Supreme Court in the case of **Oriental Insurance Co. Ltd vs. Premlata Shukla and others, (2007) 13 SCC 476** and the Judgment of this Court in the case of **United India Insurance Co. vs. Amina Begum and others (CIMA No. 217 of 2008**, decided on 15.12.2011).

19 In the above context, it is to be noted that there is no dispute to the fact that in the challan in respect of the FIR relating to the accident which is subject matter of claim petitions, not only the driver Mohd Rafiq has been made as an accused, the minor student Irshad Ahmed has also been made as an accused on the basis of the allegation that the driver Mohd Rafiq had allowed the minor student Irshad Ahmed to drive the vehicle in question which resulted in the accident. The question arises as to whether the said finding in the Challan is binding upon the claimants.

20 Along with the claim petitions filed by the claimants, they have only annexed a copy of the FIR relating to the accident. As per the FIR, the accident had occurred on account of rashness and negligence on the part of an unknown driver. So, in the FIR, there is no allegation that the vehicle in question was being driven by a minor student at the time of the accident. The claimants have not annexed copy of the Challan in any of the claim petitions. It is the appellant-insurer who has produced copy of Challan before the Tribunal. In **Prem Lata Shukla's** case (supra) and in **Amina Begum's** case (supra), the claimants had sought to rely upon the FIR/Challan for the purpose of proving the accident, but turned around and contended that the other contents contained in rest part of the FIR/Challan should not be read against them. It is in those circumstances that the Supreme Court and this Court held that the same is not permissible in law. So, the ratio laid down in Prem Lata Shukla's case (supra) and in Amina Begum's case (supra) cannot be made applicable to the present case as the facts are

clearly distinguishable. It is open to the claimants in the present case to plead and prove that the vehicle in question was being driven by the driver Mohd Rafiq and that it is on account his negligence that the accident had taken place.

21 In the above context, a look at the evidence on record shows that the witnesses produced by the claimants have categorically and in one voice stated that the vehicle in question was being driven by the driver Mohd Rafiq at the time of the accident. In fact, suggestions were put by the learned counsel for the insurer to these witnesses that it was Irshad Ahmed who was driving the vehicle, but the same was denied by the witnesses. In fact, all the witness have stated that Irshad was not travelling in the vehicle in question. As against this, the appellant has led no evidence, except placing on record a copy of the challan to prove that the vehicle in question was being driven by Irshad Ahmed and not by the Driver Mohd Rafiq. Even the Investigating Officer has not been produced by the insurer to prove the contents of the Challan. In the face of this position, the assertion of the appellant that the vehicle in question was being driven by Irshad Ahmed, a minor student and not by the driver Mohd Rafiq, the licensed driver, is not established from the evidence on record.

22 Even if, it is assumed for the sake of argument that respondent- driver, who was admittedly duly licensed, had allowed a minor student Irshad Ahmed to drive the vehicle which resulted in the accident, still then, the appellant cannot escape its liability to indemnify

the insured in the facts and circumstances of the present case. The law on the subject is well settled that if owner of a vehicle hands over the charge of the vehicle to a duly licensed driver, who without the knowledge of the owner, allows an unlicensed person to fiddle with the vehicle, it cannot be termed as 'violation of the conditions of the policy of insurance'.

23 The question, as to whether the insurance company can escape its liability to pay the compensation in respect of the accident by a vehicle only by showing that at the relevant time, it was being driven by a person having no licence, was considered by the Supreme Court in the case of **Skandia Insurance Co. Ltd vs. Kokilaben Chandravadan and others, (1987) 2 SCC 654.** Para (12) of the said judgment is relevant to the context and the same is reproduced as under:

> *"12.The defence built on the exclusion clause cannot succeed for three reasons, viz:*
>
> *1. On a true interpretation of the relevant clause which interpretation is at peace with the conscience of Section 96, the condition excluding driving by a person not duly licensed is not absolute and the promisor is absolved once it is shown that he has done everything in his power to keep, honour, and fulfil the promise and he himself is not guilty of a deliberate breach.*
>
> *2. Even if it is treated as an absolute promise, there is substantial compliance therewith upon an express or implied mandate being given to the licensed driver not to allow the vehicle to be left unattended so that it happens to be driven by an unlicensed driver.*
>
> *3. The exclusion clause has to be 'read down' in order that it is not at war with the 'main purpose' of the provisions*

enacted for the protection of victims of accidents so that the promisor is exculpated when he does everything in his power to keep the promise".

24 Again, in the case of **Kashiram Yadav & anr vs Oriental Fire & Gen. Insurance Co. & ors, (1989) 4 SCC 128,** the Supreme Court reiterated the views expressed in **Skandia Insurance Co's** case (supra) and while referring to the said judgment, the Supreme Court observed as under:

"5. Counsel for the appellants however, submitted that insurer alone would be liable to pay the award amount even though the tractor was not driven by a licensed driver. In support of the contention, he placed reliance on the decision of this Court in Skandia Insurance Co. Ltd. v. Kokilaben Chandravadan and Ors. We do not think that that decision has any relevance to the present case. There the facts found were quite different. The. vehicle concerned in that case was undisputedly entrusted to the driver who had a valid licence. In transit the driver stopped the vehicle and went to fetch some snacks from the opposite shop leaving the engine on. The ignition key was at the ignition lock and not in the cabin of the truck. The driver has asked the cleaner to take care of the truck. In fact the driver had left the truck in the care of the clean- er. The cleaner meddled with the vehicle and caused the accident. The question arose whether the insured (owner) had committed a breach of the condition incorporated in the certificate of insurance since the cleaner operated the vehicle on the fatal occasion without driving licence. This Court expressed the view that it is only when the insured himself .entrusted the vehicle to a person who does not hold a driving licence, he could be said to have committed preach of the condition of the policy. It must be established by the Insurance Company that the breach is on the part of the insured. Unless the insured is at fault and is guilty of a breach of the condition, the insurer cannot escape from the obligation to indemnify the insured. It was also observed that when the insured has done everything within his power in as much as he has engaged the licensed driver

and has placed the vehicle in his charge with the express or implied mandate to drive himself, it cannot be said that the insured is guilty of any breach.

6.We affirm and reiterate the statement of law laid down in the above case. We may also state that without the knowledge of the insured, if by driver's acts or omission others meddle with the vehicle and cause an accident, the insurer would be liable to indemnify the insured. The insurer in such a case cannot take the defence of a breach of the condition in the certificate of insurance"

25 To examine the correctness of the views expressed in Skandia Insurance Company's case (supra), the matter was referred to a three Judge Bench in the case **of Sohan Lal Passi vs P. Sesh Reddy & Ors, (1996) 5 SCC 21.** While examining the same, the Supreme Court expressed its agreement with the view taken in the case of Skandia Insurance Company's case (supra). The Court went on to observe as under:

"12……
……..
To examine the correctness of the aforesaid view this appeal was referred to a three Judges' Bench, because on behalf of the insurance company, a stand was taken that when 'Section 96(2)(b)(ii) has provided that the insurer shall be entitled to defend the action on the ground that there has been breach of a specified condition to the policy i.e. the vehicle should not be driven by a person who is 'not' duly licensed, then the insurance company cannot be held to be liable to indemnify the owner of the vehicle. In other words, once there has been a contravention of the condition prescribed in sub-section (2)(b)(ii) of Section 96, the person insured shall not be entitled to the benefit of subsection (1) of Section 96. According to us, Section 96(2)(b)(ii) should not be interpreted in a technical manner. Sub-section (2) of Section 96 only enables the insurance company to defend itself in respect of the liability to pay compensation on any of the grounds mentioned in sub-section (2) including that there has been a

contravention of the condition excluding the vehicle being driven by any person who is not duly licensed. This bar on face of it operates on the person insured. If the person who has got the vehicle insured has allowed the vehicle to be driven by a person who is not duly licensed then only that clause shall be attracted. In a case where the person who has not insured the vehicle with the insurance company, has appointed a duly licensed driver and if the accident takes place when the vehicle is being driven by a person not duly licensed on the basis of the authority of the driver duly authorised to drive the vehicle whether the insurance company in that event shall be absolved from its liability? The expression "breach" occurring in Section 96(2)(b) means infringement or violation of a promise or obligation. As such the insurance company will have to establish that the insured was guilty of an infringement or violation of a promise. The insurer has also to satisfy the Tribunal or the Court that such violation or infringement on the part of the insured was willful, It the insured has taken all precautions by appointing a duly licensed driver to drive the vehicle in question and it has not been established that lt was the insured who allowed the vehicle to be driven by a person not duly licensed, then the insurance company cannot repudiate its statutory liability under sub-section (1) of Section 96. In the present case far from establishing that it was the appellant who had allowed Rajinder Pal Singh to drive the vehicle when the accident took place, there is not even any allegation that it was the appellant who was guilty of violating the condition that the vehicle shall not be driven by a person not duly licensed. From the facts of the case, it appears that the appellant had done everything within his power inasmuch as he has engaged a licensed driver Gurubachan Singh and had placed the vehicle in his charge. While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had willfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub- section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of

> *getting the Vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realization of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known"*

26 From the foregoing analysis of law on the subject, it is clear that merely because a licensed driver has allowed another unlicensed person to drive the vehicle, the Insurance Company cannot escape its liability to indemnify the insured, unless it is shown that the aforesaid act of the licensed driver was in the knowledge of the insured. Once owner of a vehicle has given the charge of a vehicle to a duly licensed driver who, in turn, allows it to be fiddled with by an unauthorized person without the knowledge of the owner, it cannot be a case of willful violation of the terms and condition of the Insurance policy on the part of the insured so as to constitute a ground for exoneration of the insurer from its liability to indemnify the insured.

27 In the instant case, it is not even the contention of the appellant that the owner of the offending vehicle knew that the respondent-driver had allowed the offending vehicle to be driven by a minor student. It is an admitted case of the parties that the respondent-driver was holding a valid and effective driving licence at the relevant time, as such, the owner of the vehicle by handing over the same to a duly licensed driver, had done whatever was within his competence. If the driver has breached that trust and has allowed an unauthorized

person, a minor student, to ply the vehicle, then it would constitute a negligence on the part of the driver and the owner becomes vicarious liable for his negligence. Since there is no willful default in breaching the conditions of the insurance policy on the part of the owner in this case, as such, the appellant-Insurance Company is liable to indemnify the insured.

28 The last argument that has been vehemently urged by learned counsel for the appellant is with regard to reliability of the disability certificates issued by Dr. N.D.Dar. According to the learned counsel, Dr. N.D.Dar is a physician and not an orthopadecian and the disability certificates have been issued by a single Doctor and not by a Medical Board, as such, the same could not have been relied upon by the Tribunal. The learned Tribunal has referred to the judgment of this Court in the case of **Oriental Insurance Co. Ltd vs. Gh. Qadir and another** (MA No. 464, decided on 24.09.2021 and connected matters decided on 21.02.2023) wherein serious strictures have been passed against the same Doctor by this Court. In the said judgment, this Court has come down heavily on the aforesaid Doctor and observed that the said Doctor, while issuing the disability certificates, has committed grave professional misconduct.

29 Learned counsel appearing for the injured/claimants has contended that the disability certificates have been proved in the present case and, in fact, it is the appellant-Insurance Company who has examined Dr. N.D.Dar as its witness and from his statement, the

disability certificates have been proved. It has been contended that, in this scenario, it is not open to the appellant to deny authenticity of the disability certificates. It has also been contended that in India, there is no rule of practice that if a witness has been dubbed as unreliable in one case, his testimony cannot be relied in any other case. It has been submitted that each case has to be judged on the basis of the quality of the testimony given by a witness and not on the basis as to what was said about the said witness in some other case.

30 As has already been noted, the learned Tribunal while placing reliance upon the disability certificates issued by Dr. N.D.Dar in favour of the injured/claimants has observed in each of the cases that the physical appearance of the injured does not match with the percentage of disability recorded in the disability certificates. On this basis, the percentage of disability has been scaled down by the Tribunal by 10% in each of the cases, meaning thereby that the Tribunal was not satisfied about the manner in which the percentage of disability was assessed by the Doctor. In fact, this Court, upon perusal of the record of the Tribunal, could not find the corresponding medical record in respect of the injuries suffered by the injured/claimants in most of the cases. The fact, that even the Tribunal has expressed its reservations about the authenticity and reliability of the percentage of disability mentioned by the Doctor in the certificates issued by him, coupled with the fact that the record of the Tribunal does not contain the medical record corresponding to the injuries suffered by the injured/claimants/ it would

be highly unsafe to rely upon the disability certificates issued by Doctor N.D.Dar.

31 The learned Tribunal has, after noticing the unreliability of the certificates of disability, made a guess work on the basis of personal opinion of the Presiding Officer, who is definitely not an expert. The approach adopted by the learned Tribunal is not proper. Instead of relying upon his personal expertise, the Presiding Officer of the Tribunal should have taken guidance from the principles laid down by the Supreme Court in the case of **Raj Kumar vs Ajay Kumar and another**, (2011) 11 SCC 243, for assessing the actual loss of earning capacity of the injured/claimants. Para (12) of the said judgment is relevant to the context and the same is reproduced as under:

> "*12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give `ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross- examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with*

reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability".

32 Form the foregoing analysis of law on the subject, it is clear that, in order to ascertain the nature of disability of an injured/claimant and its effect upon his earning capacity, the Tribunal has to make every effort to record the evidence of the Doctor who has treated the injured or who has assessed his permanent disability. It is also incumbent upon the Tribunal to constitute a Medical Board and refer the claimant to such Medical Board for assessment of his/her disability in case the Tribunal is not satisfied with the medical evidence produced by the claimant.

33 In the instant case, as already stated hereinbefore, the Tribunal itself was not satisfied with the accuracy of the percentage of disability mentioned by Doctor N.D Dar in the certificates issued in favour of the injured/claimants. In such a scenario, instead of trusting his own expertise, the learned Presiding Officer of the Tribunal should have referred the claimants/injured to a standing Medical Board for assessment of their disability.

34 The contention of the learned counsel for the claimants/injured that Dr. N.D Dar is a witness who has been produced by the appellant before the Tribunal, as such, his statement is binding upon the appellant, is not tenable, for the reason that the Tribunal, while assessing the compensation under the MV Act is not bound by the rules of evidence, but it is expected to make an enquiry and collect

the material on its own, so as to arrive at the figure of just compensation. In this direction, once the Tribunal had come to a conclusion that the disability certificates issued by the Doctor were not accurate and reliable, the only option available with the Tribunal was to refer the injured/claimants to a Medical Board for assessing their disability.

35 For what has been discussed hereinbefore, the aforetitled appeals are disposed of in the following manner:

(i) The amount of compensation awarded by the Tribunal vide the impugned award in the claim petitions No. 24 and 93 relating to death of Miss Rozi Bano and Ms Bibi Hanief is reduced from Rs.5,62,000/- to Rs.5,42,000/- along with interest as awarded by the Tribunal; and,

(ii) The other appeals pertaining to injury cases are allowed and the award passed by the Tribunal to the extent of quantum of compensation is set aside and the cases are remanded to the Tribunal with a direction to refer the injured/claimants to a Medical Board for assessment of their disability and, thereafter, pass fresh awards in accordance with the law. The learned Tribunal shall do well to decide the remanded cases within a period of six months from the date a copy of this judgment is made available to it.

36 The record along with a copy of this judgment be sent back.

(Sanjay Dhar)
Judge

Jammu
29 .11.2024
"Sanjeev, "

Whether the order is speaking: ***Yes***
Whether the order is reportable: ***Yes***