

\$ 5

\*

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

*Date of decision: 30<sup>th</sup> November, 2012*

+ **MAC. APP. 904/2006**

NATIONAL INSURANCE CO. LTD. .... Appellant

Through: Mr. Pankaj Seth, Advocate.

Versus

SARITA & ORS. .... Respondents

Through: None

**CORAM:**

**HON'BLE MR. JUSTICE G.P.MITTAL**

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

**G. P. MITTAL, J. (ORAL)**

1. This Appeal is directed against a judgment dated 05.09.2006 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby a compensation of ₹2,02,000/- was awarded in favour of the First Respondent for having suffered injuries in a motor vehicle accident which occurred on 09.10.2005.
2. Since the finding on negligence is not challenged by the Appellant Insurance Company; the same has attained finality.
3. There is twin challenge to the impugned judgment. First, the compensation awarded is excessive and exorbitant, particularly a sum of ₹32,824/- was reimbursed by Chola Mandalam General Insurance Co.(Chola Mandalam) under the Group Health Insurance Scheme obtained by the First Respondent's employer. This amount was awarded in spite of the reimbursement by the (Chola Mandalam) which was duplication of the compensation. Second, the Appellant successfully

proved the breach of the terms and conditions of the policy, the Claims Tribunal erred in not even discussing the evidence produced in this regard.

4. Immediately after the accident, the Appellant was removed to Jaipur Golden Hospital. She was found to have suffered injuries on her face, that is, on forehead, right upper eyelid, outer zenthum right eye, right cheek, nose and lower lip area. She was admitted in the Hospital from 09.10.2004 to 13.10.2004 where debridement was done under local anesthesia. The First Respondent was again admitted in the hospital where elliptical linear excisions for scars forehead and right upper eyelid, right cheek, nose and lower lip was done under the local anesthesia. The First Respondent was to undergo a second surgery for further removal of scars as stated by Dr. Ashok Tandon(PW6), Plastic Surgeon from Jaipur Golden Hospital.
5. The Claims Tribunal awarded a compensation of ₹2,02,000/-, which is tabulated hereunder:

| <b>Sl. No.</b> | <b>Compensation under various heads</b>                                                  | <b>Awarded by the Claims Tribunal</b>                                                                                |
|----------------|------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------|
| 1.             | Pain & Suffering                                                                         | ₹35,000/-                                                                                                            |
| 2.             | Expenses on Medicines, Medical Treatment, Special Diet, Conveyance and Attendant Charges | ₹ 91,800/- rounded off ₹92,000/-<br>( ₹28,955.75 + ₹32,824=₹61,769.76 (rounded off ₹61,800/-) + ₹20,000/- + 10,000/- |
| 3.             | Loss of Income                                                                           | ₹ 45,000/-                                                                                                           |

|    |                                     |                     |
|----|-------------------------------------|---------------------|
| 4. | Loss of Amenity and General Damages | ₹ 30,000/-          |
|    | <b>Total</b>                        | <b>₹ 2,02,000/-</b> |

6. It may be noticed that First Respondent was working as an Executive Operations with Tecnova India Pvt. Ltd. and getting a salary of ₹9,746/- including a sum of ₹800/- towards conveyance allowance. Because of the injuries suffered, the First Respondent took five months leave which was duly proved. The compensation of ₹45,000/- on account of loss of wages cannot be faulted.
7. The First Respondent underwent two surgeries during the pendency of the Claim Petition. She was further to undergo one more surgery to remove scars as far as possible. The award of compensation of ₹35,000/- towards pain and suffering, in the circumstances, cannot be said to be excessive and exorbitant.
8. The Appellant suffered injuries on her face resulting in scars all around including on back scars of right of her cheek. The First Respondent was an unmarried girl. Award of compensation of ₹30,000/- towards disfigurement/loss of marriage prospects cannot be said to be unjust. Thus, the only bone of contention is the award of compensation of ₹32,824/- which had already been reimbursed by the Chola Mandalam. The question whether the First Respondent would be entitled to the award of compensation in spite of reimbursement of the expenditure towards treatment is no longer *res integra*.
9. This Court in *National Insurance Company Limited v. R.K.Jain & Ors.*, MAC APP.346/2010 decided by this Court on 02.07.2012 while relying on the reports of the Supreme Court in *Helen C. Rebello (Mrs.) & Ors. v.*

*Maharashtra State Road Transport Corporation and Anr.*, (1999)1 SCC 90; *Gobald Motor Service Ltd. & Anr. v. R.M.K. Veluswami & Ors.*, AIR 1962 SC 1; and a report of a Division Bench of the Madhya Pradesh High Court in *Jitendra v. Rahul*, 2008(5) MPHT 336, held that since the reimbursement made by the Claimant or Insurer was towards the amount spent on accidental injury, the same was liable to be deducted from the compensation payable to the Claimant. Following the same, I hold that the First Respondent would not be entitled to the said sum again as it would amount to double payment. Thus, the First Respondent was not entitled to a sum of ₹32,824/- as the same was reimbursed by Chola Mandalam.

10. The compensation in view of the above discussion stands reduced from ₹2,02,000/- to ₹1,69,176/-.
11. The compensation of ₹32,824/- along with proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.

**LIABILITY:**

12. The learned counsel for the Appellant has taken me through the evidence of Roop Chand(R3W1) and Ramji Rawat(R3W2). R3W1 testified that a notice under Order 12 Rule 8 CPC was served upon Respondents No.2 and 3(driver and owner of the offending truck No.HR-38A-9286) requiring the driver and the owner to produce the driving licence and the original insurance policy. The driver and the owner initially contested the Claim Petition by filing a written statement denying the negligence. They later chose to absent themselves and were proceeded ex parte( on 09.03.2005). The copy of the notice was proved as Ex.R3W1/1 and its

postal receipt as Exs.R3W1/2 and R3W1/3 and the copy of the insurance policy was proved as Ex.R3W1/4.

13. Similarly, R3W2 proved that on the strength of licence, copy of which was proved as R3W2/1, the holder was entitled to drive a LMV(private) and motor cycle from 30.12.97 to 19.05.2014. An endorsement to drive HTV was made w.e.f. 22.10.2004 to 19.10.2007. The witness testified that prior to 22.10.2004, the holder of the driving licence was not authorised to drive a heavy goods vehicle. Thus, the appellant Insurance Company did whatever was in its power to prove that the insured committed breach of the terms and conditions of the policy. As stated earlier, the insured did not come forward to prove that he took adequate steps to ensure that there was no breach of the terms and conditions of policy. The Appellant Insurance Company discharged initial onus placed on it to prove the breach of the terms and conditions of policy. I am supported by the judgment of a learned Single Judge of this Court in *New India Assurance Company Ltd. v. Sanjay Kumar & Ors.*, ILR (2007) 11 Delhi 733, wherein it is held as under:

*“23. Where the assured chooses to run away from the battle i.e. fails to defend the allegation of having breach the terms of the insurance policy by opting not to defend the proceedings, a presumption could be drawn that he has done so because of the fact that he has no case to defend. It is trite that a party in possession of best evidence, if he withholds the same, an adverse inference can be drawn against him that had the evidence been produced, the same would have been against said person. As knowledge is personal to the person possessed of the knowledge, his absence at the trial would entitle the insurance company to a presumption against the owner.*

*24. That apart, what more can the insurance company do other than to serve a notice under Order 12 Rule 8 of the*

*Code of Civil Procedure calling upon the owner as well as the driver to produce a valid driving licence. If during trial such a notice is served and proved to be served, non response by the owner and the driver would fortify the case of the insurance company.”*

14. Since the Appellant has successfully proved the breach of the terms and conditions of the policy, it is entitled to recovery rights against the Respondents No.2 the principal tortfeasor and the Respondent No.3, the insured in execution of this very judgment without having recourse to independent recovery proceedings.
15. The Appeal is allowed in above terms.
16. Statutory amount of ₹25,000/-, if any, shall be refunded to the Appellant Insurance Company.
17. Pending Applications stand disposed of.

**(G.P. MITTAL)**  
**JUDGE**

**NOVEMBER 30, 2012**  
pst