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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 27th November, 2012

+ **MAC. APP. 1129/2011**

ICICI LOMBARD GENERAL INSURANCE CO. LTD. Appellant

Through: Ms. Suman Bagga, Advocate.

Versus

SARITA & ORS.

..... Respondents

Through: Mr. Suresh Sisodia, Advocate for the
Respondents No.1 to 4.

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 16.09.2011 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby a compensation of ₹34,35,000/- was awarded in favour of the Respondents No.1 to 4.
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 exorbitant and excessive inasmuch as the number of dependents in the case were only three. Thus, there should have been a deduction of 1/3rd towards personal and living expenses. No deduction was made towards liability of Income Tax. The compensation of ₹1,00,000/- towards loss of love and affection is on the higher side.

Second, Respondent No.5 Surender Kumar did not possess a valid driving licence as on the date of the accident, that is, 28.05.2007, Thus, the Appellant was not under obligation to satisfy the award in favour of the Claimants.

4. On the other hand, the learned counsel for the Respondents No.1 to 4 urges that the compensation awarded is just and reasonable and that the Insurance Company has failed to prove any breach of the terms and conditions of the policy.

QUANTUM:

5. The Claim Petition was filed by the five Petitioners which were the wife, son, parents and the younger brother of the deceased. Respondent Radha Devi entered the witness box as PW4. In her affidavit Ex.PW4/A, she was completely silent if her husband Prem Shankar Chauhan (who was alive at the time of the accident and was one of the Petitioners) was dependent on his deceased son Mukesh. In cross-examination, she deposed that she had four sons and one daughter. She testified that there was a son elder to deceased Mukesh. Her other son Mukesh was aged 28 years on the date of recording the statement. Age of Respondent No.4 (Nitesh Chauhan) has not come on record. From the ages of the deceased and other brothers, it can be inferred that Nitesh Chauhan may be 24-26 years on the date of the accident. No evidence was led that Nitesh Chauhan was dependent on deceased Mukesh. In *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121, it was laid down that unless there is evidence to the contrary, father is not to be considered as a dependent. In this case, no evidence was produced that the father was dependent on deceased Mukesh. In this view of the matter, there were just three dependents, that is, Respondents No.1, 2 and 3. The

deduction towards personal and living expenses would accordingly be $\frac{1}{3}^{\text{rd}}$ as against $\frac{1}{4}^{\text{th}}$ deducted by the Claims Tribunal (*Sarla Verma (supra)*). Further, there would be liability of income Tax of ₹3,000/- on an income of ₹15,300/- per month taken by the Claims Tribunal. The loss of dependency in view of the above discussion comes to ₹28,89,600/- ($\text{₹}15300/- \times 12 = \text{₹}1,83,600/- - \text{₹}3,000/- (\text{Income Tax}) + 50\% \times \frac{2}{3} \times 16$).

6. The Claims Tribunal relying on the Judgment of this Court in *Kailash Kaur and Another v. New India Assurance Company Limited*, MAC. APP.318/2008 granted ₹ 25,000/- each (₹1,00,000/- in total) to the Respondent (Claimants) under the head of ‘Loss of Love and Affection’. I may mention here that, where the Claimants are entitled to loss of dependency on actual basis, normally a nominal sum is awarded under the head of loss of love and affection. Loss of love and affection can never be measured in terms of money. Thus, uniformity has to be adopted by the Courts while granting non-pecuniary damages. The Supreme Court in *Sunil Sharma v. Bachitar Singh (2011) 11 SCC 425* and in *Baby Radhika Gupta v. Oriental Insurance Company Limited (2009) 17 SCC 627* granted ₹ 25,000/- (in total to all the claimants) under the head of loss of love and affection. Thus, I would reduce the compensation under this head to ₹ 25,000/- only.

7. The compensation awarded is tabulated hereunder:

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal	Awarded by this Court
1.	Loss of Dependency	₹33,05,000/-	₹28,89,600/-
2.	Loss of Love and Affection	₹ 1,00,000/-	₹ 25,000/-

3.	Loss of Consortium	₹ 10,000/-	₹ 10,000/-
4.	Funeral Expenses	₹ 10,000/-	₹ 10,000/-
5.	Loss to Estate	₹ 10,000/-	₹ 10,000/-
	Total	₹ 34,35,000/-	₹ 29,44,600/-

LIABILITY:

8. It is urged by the learned counsel for the Appellant that the Appellant examined Gaurab Gauba(R3W1) who testified that driver Surender Kumar possessed valid driving licence from 31.05.2007 to 11.01.2010. The learned counsel further relies on the document Ex.R3W1/1 to press her point that the driver did not possess a valid driving licence on the date of the accident.
9. I have perused the Trial Court record. R3W2 Babu Lal merely proved the document Ex.R3W1/1. This document simply shows that a licence No.C09111999145952 was issued only in the name of Surender Kumar on 09.02.1988 which was valid to drive motor cycle and heavy transport vehicle on 09.02.1988. It further shows that licence was last valid upto 11.01.2010 and that it was cancelled on 12.07.2007. It was only the Appellant's Investigator who had mentioned in his application that the licence is valid from 31.05.2007 to 01.01.2010. It was nowhere stated by the witness from the Transport Authority that the licence was valid from 31.05.2007 only. Admittedly, no notice under Order 12 Rule 8 CPC was issued to the driver and owner to produce the driving licence possessed by the driver on the date of the accident. Moreover, an insurer can provide a wider coverage than under the Act. Section 149(2)(a) of the Act simply provides that an insurer can provide one of the conditions as

laid down in Section 149(2)(a) and (b) while entering into a contract of insurance. In the instant case, no notice was issued to the insured to produce the original insurance policy. The Appellant Insurance Company was precluded to produce secondary evidence to prove the insurance policy without first laying foundation that the primary evidence was not forthcoming. Thus, the Appellant Insurance Company is not entitled to avoid its liability under the insurance policy.

10. Thus, the Appellant Insurance Company failed to prove any conscious and wilful breach of the terms and conditions of the policy. It was, therefore, not entitled to avoid the liability.
11. In view of above, the compensation is reduced from ₹34,35,000/- to ₹29,44,600/-.
12. The excess amount of ₹4,90,400/- along with proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to the Appellant Insurance Company.
13. The balance amount of compensation payable shall be disbursed in favour of the Respondents (Claimants) in term of the orders passed by the Claims Tribunal.
14. The Appeal is allowed in above terms.
15. Statutory amount of ₹25,000/-, if any, shall be refunded to the Appellant Insurance Company.
16. Pending Applications stand disposed of.

(G.P. MITTAL)
JUDGE

NOVEMBER 27, 2012

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