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

Date of Decision: 24th May, 2016

+ MAC.APP.910/2013

IFFCO TOKIO GENERAL INSURANCE COMPANY LTD.

.....Appellant

Through: Mr. Pankaj Seth, Adv.

versus

SHAMA PARVEEN & ORS.

..... Respondents

Through: Mr. S.N. Parashar, Adv.

AND

+ MAC.APP.88/2014

SHAMA PARVEEN

..... Appellant

Through: Mr. S.N. Parashar, Adv.

Versus

SHRI NARESH KUMAR & ORS.

..... Respondents

Through: Mr. Pankaj Seth, Adv.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Shama Parveen (appellant in MAC Appeal No. 88/2014), aged about 26 years, was travelling in three wheeler scooter (TSR) with certain other passengers when on account of negligent driving an accident occurred at about 3 p.m. resulting in she sustaining injuries. It may be mentioned here

that she (claimant) had the medical condition of stiffness with deformity in cervical spine since the age of 8. In the motor vehicular accident, which is the subject matter of the present proceedings, she suffered injuries in the right hand resulting in post traumatic amputation of the right index and middle fingers at PIP joint level and right ring finger at DIP joint level. A board of doctors of Deen Dayal Upadhyay Hospital eventually assessed (Ex.PW2/1) her to be a case of permanent disability, the extent thereof having been found to be 19% in relation to the right upper limb.

2. On her claim petition (Case No. 57/2011), instituted on 28.04.2006, on the basis of accident information report (AIR) submitted by the investigating police sharing the evidence gathered during the investigation of the corresponding criminal case registered by it, the tribunal held inquiry and, by judgment dated 02.05.2013 (which also governed another similarly placed case) upheld the case of injuries having been sustained due to negligent driving of the TSR. The said finding has since attained finality as it was not challenged any further. The tribunal, by the said judgment, awarded compensation in the sum of ₹ 7,57,812/- with interest @ 7.5% per annum in her favour, having calculated it thus:-

<i>Sr. No.</i>	<i>Compensation under various heads</i>	<i>Awarded by this Court</i>
1.	<i>Loss of Earning Capacity (Rs.6448 p. x 12 x 18 x 40/100)</i>	<i>Rs.5,57,107/-</i>
2.	<i>Compensation towards medical expenses</i>	<i>Rs. 27,107/-</i>
3.	<i>Pain and suffering</i>	<i>Rs. 25,000/-</i>

4.	<i>Special diet and conveyance</i>	<i>Rs.10,000/-</i>
5.	<i>Compensation towards loss income during treatment period</i>	<i>Rs.38,688/-</i>
6.	<i>Loss of matrimonial prospect</i>	<i>Rs.50,000/-</i>
7.	<i>Compensation towards disfigurement</i>	<i>Rs.25,000/-</i>
8.	<i>Compensation towards loss of amenities of life</i>	<i>Rs. 25,000/-</i>
	Total	Rs.7,57,812/-

3. The insurance company (appellant in MAC Appeal No. 910/2013), having been fastened with the liability, it having admittedly issued the third party insurance policy in respect of the TSR for the period in question, challenges the finding recorded by the tribunal holding the claimant to be disabled to the extent of 40% for calculating the loss of earning capacity in future. *Per contra*, the claimant, by her appeal (MAC Appeal No. 88/2014), submits that the awards under the non-pecuniary heads of damages of pain & suffering, loss of marriage prospects and compensation towards disfigurement, as indeed the rate of interest, are on the lower side.

4. The tribunal assessed the disability to the extent of 40 % of working capacity in the face of medical opinion to the effect that the disability on account of amputation of the three fingers of the right hand was to the extent of 19% in relation to the upper right limb. This assessment is based on unguided estimates. The proper course instead would have been to seek guidance from the first schedule of the Employees' Compensation Act,

1923. The entries at serial No. 27, 32 and 35 of the second part of the said schedule apply. Thus calculated, the percentage of loss of earning capacity in the case is found to be 30%.

5. The tribunal had notionally assessed the income of the claimant at ₹ 6,448/- per month, it being the rate of minimum wages prevalent at that point of time and applied the multiplier of 18. Since the claimant was 26 years old, the multiplier of 17 would be more appropriate. Therefore, the loss of future income on account of disability is calculated as $(6448 \times 12 \times 17 \times 30 \div 100)$ ₹ 3,94,618/-.

6. Given the nature of injuries suffered, and their effect on the future of the claimant, awards under the heads of pain & suffering, loss of marriage prospects and compensation towards disfigurement are increased to ₹ 50,000/-, ₹ 1,00,000/- and ₹ 50,000/- respectively. Thus, the total compensation in the case comes to $(3,94,618 + 27,017 + 50,000 + 10,000 + 38,688 + 1,00,000 + 50,000 + 25,000)$ ₹ 6,95,323/- rounded off to ₹ 6,96,000/-.

7. Following the consistent view taken by this Court [see judgment dated 22.02.2016 in MAC.APP. 165/2011 *Oriental Insurance Co Ltd v. Sangeeta Devi & Ors.*], the rate of interest is increased to 9% per annum from the date of filing of the petition till realization.

8. The award is modified accordingly.

9. By order dated 09.10.2013 (in MAC Appeal No. 910/2013), the insurance company had been directed to deposit the entire awarded amount with upto date interest with the Registrar General and out of the same 70%

was released. The balance kept in fixed deposit receipt with UCO Bank, Delhi High Court Branch for a period of six months to be renewed periodically.

10. The Registrar General is directed to calculate the amount payable to the claimants in terms of the modified award and release the same from out of the deposit thus held. If excess has been deposited or released, the same shall be refunded and if there is any short fall, the same shall be deposited by the insurance company with the Registrar General within 30 days of today, making it available to be released to the claimants.

11. The learned counsel for the insurance company submits that though defence had been taken with respect to the absence of the driving license and consequent breach of terms and conditions of the insurance policy, in support of which evidence was also led by examining Ravi Kumar, Manager of the insurance company (R3W1), the tribunal did not address the said issue. The insurance company pleads that it was entitled to avoid the liability and having deposited the compensation substantially under the interim order, part of which has also been released to the third party (claimant), it may be granted recovery rights.

12. It is noted that the driver and owner of the offending TSR (second and third respondents in MAC Appeal No. 910/2013) had not put in any contest before the tribunal inspite of notice and opportunity. The said parties (driver and owner) were called by notices even on the appeal and yet they have chosen to suffer the proceedings *ex-parte*.

13. R3W1 had testified before the tribunal on the basis of his affidavit (Ex.R3W1/A), *inter alia*, proving copy of insurance policy (Ex.R3W1/4)

and also deposing that a notice under Order 12 Rule 8 of the Code of Civil Procedure, 1908 (CPC) had been issued to the insured (third respondent) vide Ex. R3W1/1, which was sent as per postal receipt (Ex.R3W1/2) calling upon the said party to produce the copy of the driving license of the TSR driver (second respondent). He also testified that inspite of service of notice, no driving license was produced by the noticee/insured. This evidence was not contested by the driver or owner (second and third respondents in MAC Appeal No. 910/2013). No evidence was led to prove that the driver was holding a valid or effective driving license at the relevant point of time.

14. In above facts and circumstances, the prayer of the insurance company for breach of terms and conditions of the insurance policy is upheld. It is granted recovery rights against the owner and driver of the offending vehicle for which it can initiate appropriate proceedings before the tribunal.

15. The statutory deposit, if made, shall be refunded after it is confirmed that the award has been satisfied.

16. Both appeals are disposed of in above terms.

(R.K. GAUBA)
JUDGE

MAY 24, 2016

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