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

Decided on: 18th March, 2015

\+ **MAC.APP. 787/2012**

NEW INDIA ASSURANCE CO. LTD. ..... Appellant
Through: Mr.Pankaj Seth, Advocate

versus

SUNNY AND & ORS. ..... Respondents
Through: Ms. Surabhi Rai, Advocate for Respondents no.1 to 3.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. There is twin challenge to the judgment dated 26.04.2012 passed by the Motor Accident Claims Tribunal (the Claims

Tribunal) whereby compensation of Rs.4,74,580/- was awarded in favour of Respondents no.1 to 3 for the death of Banwari Lal who suffered fatal injuries in a motor vehicular accident which occurred on 25.09.2009 at 5:15 a.m. while the deceased was sleeping on a cot outside his *Jhuggi* at F-Block, New Power House, J.J. Colony, Bawana, Delhi.

2. It is urged by the learned counsel for the Appellant that the Claims Tribunal dealt with the aspect of negligence and simply awarded the compensation on the basis that a criminal case has been registered against the driver. It is also urged that the compensation towards non-pecuniary damages is on the higher side and that the counsel's fee and out of pocket expenses were not permissible.

3. The case set up by the claimants was that while the deceased was fast asleep, the driver of truck bearing no.HR-69-5966 unmindful of the fact that somebody was sleeping on a cot outside the *Jhuggi* reversed the truck in a rash and negligent manner and crushed the deceased.

NEGLIGENCE:

4. In para 9 of the petition the manner of accident was described by Respondents no.1 to 3. It was specifically stated that while the deceased was sleeping on a cot outside his *Jhuggi*, the truck bearing no.HR-69-5966 being driven in a rash and negligent manner by Respondent no.4 was reversed and ran over the deceased. In the Written Statement, these facts were not controverted by the driver and the owner. The Insurance Company also denied the averments for want of knowledge. There was implied admission on the part of the driver and the owner by not traversing the averments made in the claim petition. Otherwise also, the manner of accident sufficiently established negligence on the part of the driver, Respondent no.4.

COMPENSATION:

5. The Claims Tribunal awarded a sum of Rs.2,84,580/- towards loss of dependency on the basis of minimum wages of an unskilled worker and awarded a sum of Rs.1,90,000/- towards

pecuniary and non-pecuniary damages, in addition to a sum of Rs.25,000/- towards counsel's fee and Rs.5,000/- towards out of pocket expenses.

6. It is urged by the learned counsel for the Appellant that the compensation awarded towards non-pecuniary damages is on the higher side and the compensation awarded towards counsel's fee and out of pocket expenses is not in accordance with law and the Rules framed by the Delhi High Court.

7. On the other hand, the learned counsel for Respondents no.1 to 3 supports the impugned judgment. She submits that the compensation awarded is on the lower side. However, she agrees that the counsel's fee could not have been specified and that the award of Rs.5,000/- towards out of pocket expenses was illegal.

8. During inquiry before the Claims Tribunal, it was claimed that deceased Banwari Lal was working as a black smith. Averments in this regard were made in the claim petition and the income from the profession of black smith was stated to be

Rs.7,000/- per month. The deceased had left behind three minor children, two sons and a daughter. The claim petition was filed through their next friend Kallu. Sunny, one of the sons of the deceased who had attained the age of 18 years during the pendency of the claim petition, filed his Affidavit Ex.PW1/A in support of his father's profession and income. Sunny's testimony that his father was working as a black smith was not disputed in the cross-examination. Even a suggestion was not put to the witness. Thus, the Claims Tribunal ought to have accepted that the deceased was a self employed person working as a black smith. I will assess the earning of a black smith in the year 2009 when the accident took place to be Rs.5,000/- per month. In fact, the minimum wages of a skilled worker at that time were Rs.4,377/- per month. Wife of deceased Banwari Lal had already expired. Considering the number of dependants as three and taking the age of the deceased as per the post mortem examination to be 60 years, the loss of dependency would come to Rs.3,60,000/-(Rs.5,000/- x 12 x 2/3 x 9).

9. As far as award of non-pecuniary damages is concerned,

Respondents no.1 to 3 are entitled to a sum of Rs.1,00,000/- towards loss of love and affection, Rs.25,000/- towards funeral expenses and Rs.10,000/- towards loss to estate.

10. The overall compensation thus, comes to Rs.4,95,000/-.

<u>COUNSEL'S FEE</u>

11. As far as award of counsel's fee and out of pocket expenses is concerned, the matter was dealt with by this Court in *ICICI Lombard General Insurance Co. Ltd. v. Kanti Devi and Ors. MAC APP No. 645/ 2012 decided on 30.07.2012.* This Court had gone into the question of granting counsel's fee and concluded in Para 32 as under:

"32. To sum up, it is directed:-

(i) The Claims Tribunal is empowered to award costs in a Claim Petition in terms of Section 35 read with Order XXA of the Code.

(ii) The Claims Tribunal is entitled to award the Counsel's fee in accordance with Rule 1 read with Rule 1A and Rule 9 of Chapter 16 Volume I of the Rules extracted earlier.

(iii) In case of compromise/settlement of the claims, the Claims Tribunal is not entitled to go beyond the

settlement reached between the parties. If the settlement does not provide for payment of any Counsel's fee, it shall not be within the domain of the Claims Tribunal to award the Counsel's fee.

(iv) If the compensation is awarded on the basis of DAR in pursuance of the legal offer made by the Insurer, the Claims Tribunal is not empowered to award any costs unless it forms part of the legal offer.

(v) The counsel fee can be directly paid to the counsel only when a specific agreement is filed and the Claimant requires payment of fee directly to the counsel because only then the Claimant would be liable to reimburse the fee or part thereof in case the award is set aside or varied.''

12. It was thus, concluded that instead of awarding counsel's fee, the claim petition ought to be allowed with costs and counsel's fee be paid only in accordance with Rules 1, 1A and 9 of Chapter 16 Vol. I of the Delhi High Court Rules and Orders.

13. The compensation awarded by the Claims Tribunal to Respondents no.1 to 3 including the counsel's fee and out of pocket expenses was Rs.5,04,580/-. The impugned award is modified to the extent that Respondents no.1 to 3 would be entitled to an overall compensation of Rs.4,95,000/-.

14. By an order dated 27.07.2012, the Appellant was directed to deposit 75% of the award amount less counsel's fee. The balance compensation along with interest @ 9% per annum as awarded by the Claims Tribunal shall be deposited by the Appellant Insurance Company within six weeks

15. The appeal is disposed of in above terms.

16. Statutory amount, if any, deposited shall be refunded to the Appellant Insurance Company.

<u>CM.APPL.4810/2015 (for release of amount)</u>

17. The application has been moved for pre-matured withdrawal of the awarded amount on account of wedding of Rahul, Respondent no.3, one of the sons of deceased Banwari Lal.

18. Respondents no.1 to 3 shall appear before the court on 24.03.2015.

(G.P. MITTAL)
JUDGE

MARCH 18, 2015
pst