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

% **Date of decision: 12th March, 2015**

+ **MAC. APP. No.1140/2011**

ICICI LOMBARD GENERAL INSURANCE COMPANY LTD ..... Appellant

Through: Ms. Neerja Sachdeva, Adv.

Versus

SMT. RENU AND ORS ..... Respondents

Through: Mr. S.N. Parashar, Adv. for R-1 to 7.

CORAM:-
HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Respondents no.8 and 9 have not been served. The counsel for the appellant states that they are not necessary parties and may be deleted from the array of respondents. Accordingly, respondents no.8 and 9 are deleted from the array of respondents without going into the aspect whether they are necessary parties and at the risk of the appellant.

2. The appeal impugns the award / judgment dated 7th October, 2011 of the MACT (South-01) in Suit No.957/2008 (Unique Case ID No.02403C0970712008) awarding a compensation of Rs.12,74,000/- (inclusive of interim award if any) to the claimants with interest @ 7.5% per annum from the date of filing of the petition i.e. 11th December, 2008 till its

realisation, against the appellant / insurer of the vehicle which caused the death.

3. Notice of the appeal was issued and subject to the deposit of the award amount with upto date interest with the Registrar General of this Court, the execution of the award was stayed. The counsel for the appellant states that the amount was so deposited. Vide order dated 30th April, 2012 in this appeal, 50% of the amount so deposited was ordered to be released in favour of the claimants (respondents no.1 to 7 herein) and Trial Court record was requisitioned and the appeal directed to be listed in the category of *'After Notice Miscellaneous Matters'* for final disposal. The counsel for the appellant and the counsel for the claimants have been heard.

4. One of the two contentions of the counsel for the appellant is that the Tribunal in the impugned order in para 10, has computed the compensation on the premise of the deceased earning wages of Rs.6,000/- per month. It is contended that there was no evidence whatsoever to establish that the deceased was earning wages of Rs.6,000/- per month and the only document produced in this regard was the daily sales report of the establishment, in

which the deceased was working, having signature of the deceased as Salesman.

5. The only other contention is that the Tribunal in the same paragraph 10 of the impugned order has computed the compensation construing a 50% monthly increase in the income of the deceased. Attention in this regard is invited to ground 'D' of the Grounds of Appeal where paragraph 24 of ***Sarla Verma Vs. D.T.C.*** (2009) 6 SCC 121 has been reproduced. On a reading of the said paragraph it is contended that an addition of 50% of the actual salary income of the deceased towards future prospects is permitted only where, (i) the deceased had a permanent job; and, (ii) the deceased was below 40 years of age. It is argued that though the deceased in the present case was 28 years of age but there is no evidence that he had a permanent job. The counsel contends that in such a situation, no increase on account of future prospects should have been considered in computing the compensation. It is further contended that the judgment in ***Sarla Verma*** of a Bench of two Judges has been re-affirmed by a three Judges Bench in ***Reshma Kumari Vs. Madan Mohan*** (2013) 9 SCC 65. However the counsel is not carrying copies of either of the two judgments.

6. The counsel for the claimants (respondents no.1 to 7) has per contra referred to ***Rajesh Vs. Rajbir Singh*** 2013 (6) SCALE 563 in para 11 of which the Supreme Court has held that in the case of self-employed or persons with fixed wages, in case the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects.

7. I have considered the rival contentions.

8. The Tribunal, in para 10 of the impugned award / judgment has recorded that according to the claimants the deceased used to work as salesman and was earning Rs.12,000/- per month and of which Rs.6,000/- per month was from Quick Eats at Plot No.13, PACC, City, Part No.1, Sector-37, Gurgaon, Haryana and the remaining Rs.6,000/- per month was from a Grocery Shop situated at 201, 30 foota road, Kamal Vihar, Karawal Nagar Delhi. However the Tribunal, on a scrutiny of the record found that the claimants had placed on record only daily sales report of Quick Eats having signatures of the deceased as salesman and there was no challenge by the appellant or by the owner or driver of the vehicle to the said sales report which had been proved as Ex.PW1/X and which was thus presumed to be correct. The Tribunal further held that since there was no documentary proof

of the deceased having additional income of Rs.6,000/- per month from the Grocery Shop, the income of the deceased could be accepted at Rs.6,000/- per month only.

9. I may record that the counsel for the appellant has not challenged the finding of the Tribunal to the extent that the deceased was employed with Quick Eats. The only question which remains is as to what were the wages of the deceased. I have enquired from the counsel for the appellant whether the appellant had cross examined the claimants on the aspect of the deceased earning Rs.6,000/- per month from M/s. Quick Eats.

10. The counsel for the appellant states that she has not examined the record of the MACT in this regard.

11. I have perused the grounds of appeal taken by the appellant in the Memorandum of Appeal. I do not find the appellant to have therein also taken a ground that the evidence of the claimants of the deceased earning Rs.6,000/- per month from M/s. Quick Eats was challenged by the appellant in cross examination of the claimants. In the absence of the appellant having cross examined the claimant on the said part of cross examination of the

claimants and without taking a ground to this effect in the Memorandum of Appeal it is not open to the appellant to urge the said argument in appeal.

12. I have further enquired from the counsel for the appellant whether the appellant had made any enquiry as to the wages being earned by the deceased and given any evidence on this aspect. Though the counsel for the appellant does not reply to the said question but contends that the onus was on the claimants and upon the claimants not discharging the said onus the compensation has to be computed on the basis of minimum wages.

13. However the counsel is unable to tell the minimum wages also of the relevant time nor is any such ground taken in the Memorandum of Appeal.

14. I am in the circumstances not inclined to interfere with the finding of the Tribunal, before which evidence was recorded, assessing the compensation on the premise that the deceased was earning wages of Rs.6,000/- per month. The appellant cannot, after the conclusion of trial rely only on the doctrine of onus to defeat a claim of compensation. A perusal of the Trial Court record requisitioned in this Court shows the claimants to have in Para No.23(vii) of the claim petition itself having pleaded that the deceased was working as salesperson and also running a grocery shop and

was earning Rs.6,000/- per month from each job every month. The appellant in its written statement to the said claim petition though had taken preliminary objections but not with respect to the income of the deceased and in the corresponding para No.23 is not found to have specifically denied the plea in para No.23(vii) that the deceased was so earning Rs.12,000/- per month. The appellant in the written statement, after specifically denying the averments in some of the other sub-paragraphs of para No.23 of the claim petition, stated "rest of the para is wrong and denied and the petitioner be put to strict proof of each and every averments therein." In my opinion, when specific pleadings as to employment and earnings are made in a claim petition, it was incumbent upon the appellant (who was defending the said claim petition) to make inquiries and if found the averments to be false, specifically deny the same. Without the defendant in a claim petition doing so and inspite of contesting the claim petition, the Tribunal was justified in drawing an inference that the appellant had not challenged the income of the deceased specifically pleaded in the claim petition, unless there was anything to prevent the Tribunal from drawing such an inference. In fact, a perusal of the Trial Court file also reveals that though the widow aged 23 years of the deceased in her examination-in-chief had again given specific particulars with respect to the employment of the deceased, in the cross examination, save for the suggestion that what she had deposed was wrong, nothing further was controverted. It is further found that the appellant did not even choose to lead any evidence of its own. In these circumstances, there was no impediment to the Tribunal drawing the inference as aforesaid.

15. There is another aspect of the matter. It is also the pleading and in evidence of the claimants that the deceased was supporting a family of father aged 55 years, mother aged 53 years, widow aged 23 years, a minor son aged 1½ years and three minor brothers aged 16, 14 and 12 years. It is also not in dispute that the deceased possessed a licence for driving a motorcycle and light motor vehicles and at the time of the accident was driving on his motorcycle. All these facts are also indicative of the income of the deceased being not less than Rs.6,000/- per month.

16. As far as the second contention of the counsel for the appellant is concerned, I find that Supreme Court in ***Sarla Verma*** (supra) was concerned about different Courts in different judgments adopting different percentages of increase in income towards future prospects and held that, as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects should be made for computing

compensation on account of future prospects where the deceased had a permanent job and was below 40 years of age. The addition, when the deceased was 40 to 50 years of age was prescribed as of 30% and no addition was prescribed where the deceased was more than 50 years of age. It was further held that where the deceased was self-employed, the Courts will usually take only the actual income at the time of death. In ***Santosh Devi Vs. National Insurance Company Ltd.*** (2012) 6 SCC 421, the Supreme Court found it difficult to fathom any rationale for the observation in ***Sarla Verma*** that where the deceased was self-employed or on a fixed salary without provision for annual increments etc., the Courts will usually take only the actual income at the time of death and held that it cannot be said that the wages or total emoluments / income of a person who is self-employed or is employed on a fixed salary without provision for annual increment etc. would remain the same throughout his life. Judicial notice was taken of the fact that salaries of those employed in private sector had also increased manifold and it was held that ***Sarla Verma*** could not be held as laying down that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Thereafter, in ***Rajesh*** (supra), ***Santosh Devi*** (supra) was held to have made ***Sarla Verma*** applicable also to self-employed persons or to persons employed on a fixed wages and it was further held that in case of self-employed or persons with fixed wages, in case the deceased was below 40 years, there must be an addition of 50% of the actual income of the deceased while computing future prospects.

17. When I analyse the facts of the present case in the light of the aforesaid law laid down by the Supreme Court, even if the wages of the deceased of Rs.6,000/- per month were to be fixed wages, without any provision for yearly increment, the deceased being less than 40 years of age, addition of 50% to the actual wages for computing future prospects will have to be made.

18. The counsel for the appellant has also contended that the deceased could not be said to be having a permanent job and for this reason compensation towards future prospects ought not to have been computed on the basis of 50% increase in income. I have wondered as to what can be construed as 'permanent employment'. In common parlance it is only employment with the government or with the public sector which is understood as permanent. However in legal terms, there is no permanency in employment in the government also. Employment even in the government can be brought to an end by the government on account of

misconduct, closure of department etc. The same is the position in most of the private sector also. In fact, as has been wisely said, it is only the change which is permanent / constant, else nothing is permanent or constant in this world. I am also unable to take a view that the Supreme Court, by use of the expression "permanent job" in ***Sarla Verma*** (supra) while laying down the thumb rule for the increase in income to be taken into account for computing compensation on account of future prospects, intended to create two classes of victims of fatal accidents, one government employees and the other private employees. Such a classification would have no rationale / nexus whatsoever to the computation payable on account of a motor accident. Experience of life also shows that often the increases in wages are much higher in the private sector than in the government. The purport of the provisions of the Motor Vehicles Act, 1988 is to provide just compensation and I am of the opinion that in computing such just compensation no classification as aforesaid can be introduced.

19. I therefore do not find any merit in the second contention also of the counsel for the appellant.

20. The counsel for the claimants / respondents No.1 to 7 has sought to urge that non-pecuniary compensation under the heads of 'loss of

consortium' and on account of love and affection of Rs.10,000/- and Rs.30,000/- respectively awarded under the impugned award / judgment is insufficient and should be enhanced.

21. The counsel for the claimants on enquiry states that though the claimants have not preferred any appeal seeking enhancement or have not filed any cross objections in this appeal but this Court is empowered to enhance the compensation.

22. Undoubtedly so, but there must be at least something by which the appellant should have notice that the claimants, at the time of hearing of the appeal, intend to also seek enhancement; without the same, the appellant cannot be taken by surprise.

23. Even in the facts and circumstances, I do not find any case for this Court to *suo motu* exercise the power of enhancement.

24. The appeal is accordingly dismissed. The amount deposited by the appellant in this Court and remaining after release of 50% thereof to the claimants and together with further interest accrued thereon be released in favour of the claimants in accordance with the award / judgment of the Tribunal.

25. The counsel for the appellant states that the statutory amount of Rs.25,000/- deposited in this Court at the time of filing of the appeal be ordered to be refunded to the appellant.

26. The counsel for the claimants has no objection.

27. On enquiry it is told that the said amount does not earn any interest as the same is kept in the CCD account.

28. I *prima facie* do not find any reason for the said statutory amounts to be kept in the CCD account which is non-interest bearing. The worthy Registrar of this Court to consider, whether the said statutory amounts can be kept in interest bearing accounts / FDR rather than CCD account. A decision in this regard be taken within a period of three months from today. A copy of this order be forwarded to the Registrar General for compliance.

29. The amount of Rs.25,000/- be refunded to the appellant.

No costs.

RAJIV SAHAI ENDLAW, J.

MARCH 12, 2015
pp/gsr