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

Date of Decision: 11th March, 2016

+ **MAC.APP. 353/2011 & CM No. 7846/2011**

IFFCO TOKIO GENERAL INSURANCE CO. LTD. Appellants

Through: Mr. Shoumik Mazumdar, Adv.

versus

ANANDI KUMAR & ANR. Respondents

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

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The first respondent (claimant) suffered injuries in a motor vehicular accident at about 8.30 a.m. on 07.07.2007 wherein the motorcycle bearing no.DL 8C AD 4836 (motorcycle), which he was riding was hit by a car bearing registration No. DL 9CJ 1428 (the offending vehicle) which was insured against third party risk with the appellant company (insurer). The insurer with the owner and driver of the offending vehicle were impleaded as party respondents in motor accident claim case under Sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) before the motor accident claims tribunal (tribunal) registered as MACT case No. 186/2010, decided by judgment dated 17.1.2011. The tribunal awarded ₹ 13,81,231/- as

compensation in favour of the claimant with interest from the date of filing of the petition till deposit, directing the insurance company to pay under the indemnity clause. The compensation, thus made payable, includes ₹11,62,350/- towards “disability”, ₹ 36,481/- towards “medical expenses”, ₹57,400/- towards loss on account of absence from duty, ₹ 25,000/- each towards special diet, conveyance and mental pain and agony and ₹ 50,000/- towards enjoyment of life and disfigurement.

2. The insurance company, in appeal questions the computation of the award under the head of disability, essentially towards loss of future income in the sum of ₹ 11,62,350/- on the ground that there was no loss of employment inasmuch the claimant had continued to serve in the same capacity (marketing executive) with the same employer over the period after the accident.

3. The tribunal, on the basis of evidence led, including the medical opinion of Dr. A.K. Singh (PW-3) and disability certificate (Ex.PW1/47) had assessed that the claimant had suffered permanent disability to the extent of 45% in relation to the whole body. It is noted that the claimant had suffered fractures in the left lower limb which have been found to be malunited. The tribunal noted the gross income of the claimant at the relevant point of time to be ₹ 15,750/-. In working out the loss as a result of the disabilities, which the tribunal describes as “dependency”, it deducted ₹ 1,400/- towards transportation. In opinion of this Court, this deduction was unfair as the transportation allowance was part of the earnings accruing to the claimant.

4. The tribunal assumed that the claimant had suffered loss of employment and, thus, on the basis of multiplier of 15, chosen on the basis

of his then age, it calculated the loss of income to be paid as compensation towards disability in the afore-stated manner.

5. This Court agrees with the submission of the insurance company that claimant would be expected to continue working till he attains the normal age (60) of superannuation. The learned counsel for the claimant also fairly conceded that the loss of future income is to be assessed on the multiplier of 9 rather than 15 adopted by the tribunal. The monthly loss on account of functional disability to extent of 45% comes to $(15,750 \times 45 / 100)$ ₹ 7,088. Thus, the total loss of future income on account of disability is calculated at $(7,088 \times 12 \times 9)$ ₹ 7,65,504/-.

6. In *Zakir Hussain vs. Sabir & Ors.* (2015) 7 SCC 252, the accident had occurred in November, 2008, which is closer home to the date of accident (07.07.2007) involving the case at hand. The claimant in the said case had also suffered permanent disability which was assessed to the extent of 55%. The Supreme Court awarded ₹1,50,000/- each towards loss of amenities of life and pain and agony besides ₹ 40,000/- towards attendant charges and ₹20,000/- towards special diet. Similar awards under the said non-pecuniary heads of damages deserve to be made in the case at hand, which would be besides ₹ 25,000/- granted by the tribunal towards conveyance allowance, ₹ 36,481/- towards medical expenses and ₹ 57,400/- towards loss of income due to leave, granted by the tribunal.

7. In the above circumstances, the total compensation payable in the case comes to $(7,65,504 + 1,50,000 + 1,50,000 + 40,000 + 20,000 + 25,000 + 36,481 + 57,400)$ 12,44 385/-, rounded off to ₹ 12,45,000/-. The award is reduced accordingly.

8. It is noted that the interest awarded at 8% per annum is on the lower

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

9. Before the tribunal, the insurance company had taken the plea that there had been breach of terms and conditions of the insurance policy since the driver of the offending vehicle (the third respondent) was not holding a valid or effective driving license. Noticeably, neither the owner (the second respondent) nor the driver (the third respondent) participated in the inquiry proceedings before the tribunal. In spite of notice, they chose to suffer the proceedings *ex-parte*.

10. During inquiry, the insurance company led evidence by examining (R2W1) Legal Executive, on the strength of her affidavit (Ex.R2W1/A). The said witness, *inter alia*, proved issuance of notice under Order 12 Rule 8 of the Code of Civil Procedure, 1908 (CPC) which had been sent by the insurance company to the owner/insured and the driver calling upon each of them to produce the driving license. It also proved that no response was received from them.

11. On the basis of this evidence, the insurance company prayed for an adverse inference to be drawn against the owner and driver and it to be granted recovery rights. The tribunal, however, rejected the plea on the ground that the evidence was vague and that the insurance company had failed to prove its averment. For taking this view, the tribunal examined the report under Section 173 of the Code of Criminal Procedure, 1973(Cr.P.C.) which had been submitted by the police before the criminal court on conclusion of investigation into the first information report (FIR) that had

been registered concerning the motor vehicular accident. It noted that in the said report under Section 173 Cr.P.C. there was no reference to the driver having been prosecuted for the offence under Section 3 read with Section 181 of MV Act for not holding a valid driving license at the relevant point of time.

12. In the opinion of this Court, neither the driver nor the owner have taken part in the proceedings arising out of the appeal at hand. The approach of the tribunal to the issue raised was improper. The insurance company had done what it could do. It had taken up the issue and called upon the insured to produce the driving license. The fact that the insured did not respond should lead to the adverse inference that the latter did not have a valid or effective driving license of the driver to show due diligence on his part. The omission on the part of police to prosecute the driver for the offence under Sections 3/181 of MV Act does not mean that the driver would have produced a driving licence during investigation. If there was one in existence, it would have been produced during inquiry before the tribunal or during hearing on appeal before this Court.

13. In above facts and circumstances, the contention of the insurance company is upheld. It is found that there is breach of terms and conditions of the insurance policy and, thus, it is granted recovery rights in respect of the compensation paid by it to the claimant in the case at hand. [*United India Insurance Company Ltd. V. Lehru & Ors.* (2003) 3 SCC 338 and *National Insurance Company V. Swaran Singh* (2004) 3 SCC 297]

14. By order dated 25.04.2011, the insurance company had been directed to deposit the entire awarded amount with upto date interest out of which 50% was allowed to be released to the claimant. The Registrar General shall

now calculate the amount payable to the claimant in terms of the award modified as above and release it to the claimant as per the tribunal's order. Should there be any shortfall, which is likely in view of the increase in the rate of interest, the insurance company shall be duty bound to deposit the balance with the tribunal within 30 days of this judgment, whereupon it shall be released to the claimant. Conversely, if the deposit is found to be in excess, the same with statutory deposit, if made, shall be refunded.

15. The appeal is disposed of in above terms.

MARCH 11, 2016

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**R.K. GAUBA
(JUDGE)**

