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

Date of Decision: 19th January, 2016

+ MACA 333/2011

ORIENTAL INSURANCE CO LTD ..... Appellant

Through: Mr. R. K. Tiwari, Adv.

versus

SWAMI NATH MISHRA DECD THR LRS & ORS ..... Respondents

Through: Mr.D.P.S. Dagar, Mr. R.P. Nafria & Mr. Sunil Tomer, Advs. for LR's of R-1 to 7.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The insurance company is in appeal against the award of compensation by judgment dated 06.01.2011 of the motor accident claims tribunal (hereinafter referred to as "the tribunal") on the petition submitted by Swami Nath Mishra under Section 166 read with Sections 140 of the Motor Vehicle Act, 1988 ("MV Act"), registered as suit no.139/2010/1995 for injuries suffered by him in a motor vehicular accident that occurred on 23.09.1994 involving a car bearing registration no.DIA-956, statedly owned by the ninth respondent herein and driven by eight respondent herein. The car admittedly was insured with the appellant company for the relevant period.

2. The grievances raised by the insurance company is to the effect that even though the evidence adduced on behalf of the claimant showed

that he had suffered 40% permanent disability, the assessment of loss of earnings has been made assuming disability to be to the extent of 75%.

3. It may be noted here that though the claim petition was filed by Swami Nath Mishra, he died during the pendency of the proceedings before the tribunal and was substituted by his legal heirs who prosecuted the claim petition to the logical end. Before his death, however, Swami Nath Mishra had appeared as PW1 in support of his claim petition and having been examined on 14.02.2000, was offered for cross-examination on 27.09.2000.

4. Indeed, the claimant relied upon certificate of disability (Ex.P-1) issued on 16.04.2001 by All India Institute of Medical Sciences affirming that he was a case of post traumatic deformity of right lower limb and his physically handicap was permanent in nature, assessed to be of 40% disability in relation to right lower limb. The claimant had pleaded in the claim petition that he was earning Rs.4500/- per month as a fruit-seller. In the course of his own statement as PW1, he was silent on the nature of avocation and only stated that he was earning Rs.150-200/- per day prior to the accident, without elaborating further. No further evidence as to the nature of avocation, or as to the manner in which it was run by the claimant, was adduced. Similar deficiency can be noted on perusal of affidavit sworn on 19.02.2004 by the claimant which was submitted as evidence. Noticeably, in the said affidavit, the claimant had indicated that he was going to the place of his work when the accident occurred thereby indicating his business to be run from a fixed place rather than as hawker who would move around with his wares from locality to locality.

5. Learned tribunal in para no.16 of the impugned judgment assessed the disability to the extent of 75% reasoning thus :-

> *"The petitioner has been examined qua his disability by the AIIMS and as per the original certificate on record, he underwent 40% disability in right lower limb. As has been detailed, the petitioner was a fruit seller which job of his would have required his frequent movement along with the rehri to sell fruits from one place to other. On account of his being suffering from 40% permanent disability with no chance of progression, the same is to be assessed at the rate of at least 75%, as the disability in his lower limb would have resulted in his being immobility and being confined to only one place for selling the fruits, reducing his chance of selling and curtailing his earning capacity predominantly".*

6. I agree with the submissions of the learned counsel for the appellant that in absence of any claim, pleadings or proof that the claimant was a hawker moving around from place to place, disability assessed by the medical board could not have been enhanced to the extent of 75% functional disability. In the given facts and circumstances, the disability could not have been assessed beyond 40% as opined by the medical authority.

7. Thus, the appeal is allowed. Having regard to the income assessed @ Rs.1806/- per month on the multiplier of eight adopted by the tribunal the loss of income on account of disability, when computed on the basis of 40% disability works out to Rs.69,350.40/-, rounded off to a sum of Rs.70,000/-. Adding the compensation awarded under the heads of the medical bills, loss of actual income, special diet and conveyance in the sums of Rs.7530/-, Rs.10836/-, Rs.10,000/- and Rs.10,000/-, the total compensation is calculated at Rs.1,08,366/-,

rounded off Rs.1,08,400/- (Rupees One Lac Eight Thousand Four Hundred).

8. In above view, the award of compensation is reduced from the amount of Rs.1,68,398/- as awarded by the tribunal to Rs.1,08,400/- (Rupees One Lac Eight Thousand Four Hundred), with interest as levied in the impugned award. The awarded amount, thus, modified will be apportioned in the manner directed by the tribunal.

9. The appeal is disposed of with above directions.

10. In terms of the order dated 20.04.2011, the appellant/insurance company had deposited the amount awarded by the tribunal with up-to-date interest and out of the said deposit 50% was released in favour of the claimants, the balance kept in fixed deposit account in the name of the Registrar General of this court with a nationalized bank. The Registrar General shall work out the balance to be paid to the claimants in terms of the modified award as above and release the same in terms of the above directions and refund the remaining to the appellant company.

11. The statutory deposit, if made, shall be refunded.

R.K. GAUBA
(JUDGE)

JANUARY 19 2016/ssc