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

Date of Decision: 02nd March, 2016

+ **MAC.APP.528/2013**

ORIENTAL INSURANCE CO. LTD. Appellant

Through: Mr. Pradeep Gaur, Adv.

versus

HEMRAJ & ORS Respondents

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

+ **MAC.APP.536/2013**

ORIENTAL INSURANCE CO. LTD. Appellant

Through: Mr. Pradeep Gaur, Adv.

versus

TILAK SINGH & ORS Respondents

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

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Both these appeals arise out of the common judgment rendered by the motor accident claims tribunal (the tribunal) on 05.03.2013 deciding two claim cases registered under Sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) as suit Nos. 405/2011 (2009) and 392/2011 (2008) on account of injuries suffered by Hem Raj (first respondent in MAC Appeal No. 528/2013) and the death of Mohan Singh son of Tilak Singh @ Tilwa Karki and Dhana Karki (first and second respondents in MAC Appeal No.

536/2013). The injuries had been suffered by Hem Raj and Mohan Singh (who died as a result) in a motor vehicular accident that occurred in the morning of 23.5.2008 involving collision between Eicher Truck bearing DL 1M 1450 (“Eicher Truck”) and motor vehicle described as dumper bearing registration No. UP 17B 9596 (“dumper”), at a place near petrol pump, opposite Haldi Ram outlet on Mathura Road, New Delhi. It is now beyond dispute that Eicher truck was driven by deceased Mohan Singh with injured Hem Raj (deployed as cleaner on the said vehicle) travelling in it. The Dumper, on the other hand, was under the control of Mohd. Vakil (the driver), it being owned by Rambir Singh (the owner) who were impleaded as first and second respondents respectively in the claim petitions that were presented. The dumper concededly was insured against third party risk with the appellant insurance company for the period in question.

2. It was alleged by the claimants in the two petitions brought before the tribunal that the accident had occurred due to negligence on the part of the driver of the dumper as he had left it stationary in the middle of the road without any caution sign or use of dipper or any other means. The Eicher truck had admittedly hit against the dumper from behind.

3. The tribunal, upon inquiry, awarded compensation in the case of injuries suffered by Hem Raj in the sum of ₹ 67,45,640/- with interest @ 9 % per annum from the date of filing of the petition (10.12.008) till realization. On the other hand, in the case of death of Mohan Singh, compensation in the sum of ₹ 12,74,184/- was awarded with interest @ 9% per annum from the date of filing of the petition (4.7.2008) till realization.

4. The insurance company, feeling aggrieved, has come up by the appeals at hand mainly questioning the computation of compensation. It also raises the issue of breach of terms and conditions of the insurance policy seeking recovery rights on the ground that the dumper had entered Delhi without a valid permit. In the case of claim arising out of death of Mohan Singh, it pleads contributory negligence on the argument that the collision had occurred at 9.45 a.m. on 23.5.2008, and, therefore, the driver of the Eicher truck should also have been held accountable.

5. Taking up the case of claim on account of injuries suffered by Hem Raj first (which is subject matter of MAC Appeal No. 528/2013), the grievances of the insurer (the appellant) are basically threefold. It is argued that, in assessing the loss of income, element of future prospects has been wrongly added inasmuch as the notional income was assessed. It is argued that the tribunal wrongly assumed the functional disability to the extent of 100%, and, therefore, the calculation of future loss of income on that account is on the higher side. Further, the award of ₹50,20,928/- towards cost of limb is the bone of contention on the plea that the method of calculation was unjust and improper.

6. The claimant Hem Raj was admittedly working as a cleaner on the Eicher truck. He was unable to bring any strict proof of his income. In these circumstances, the tribunal rightly adopted the minimum wages of ₹ 3,633/- per month as paid to an unskilled worker during the relevant period as the benchmark. The tribunal, however, added the element of 30% increase in the income over the future for calculating the loss of income on account of disability in future. Noticeably, this element was not added while calculating the loss of income during the period of treatment.

7. In the case reported as *Sarla Verma & Ors. vs. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121, Supreme Court, *inter-alia*, ruled that the element of future prospects of increase in income will not be granted in cases where the deceased was “self employed” or was working on a “fixed salary”. Though this view was affirmed by a bench of three Hon’ble Judges in *Reshma Kumari & Ors. Vs. Madan Mohan & Anr.*, (2013) 9 SCC 65, on account of divergence of views, as arising from the ruling in *Rajesh & Ors. vs. Rajbir & Ors.*, (2013) 9 SCC 54, the issue was later referred to a larger bench, *inter-alia*, by order dated 02.07.2014 in *National Insurance Company Ltd. vs. Pushpa & Ors.*, (2015) 9 SCC166.

8. Against the above backdrop, by judgment dated 22.01.2016 passed in MAC Appeal No. 956/2012 (*Sunil Kumar v. Pyar Mohd.*), this Court has found it proper to follow the view taken earlier by a learned single judge in MAC Appeal No. 189/2014 (*HDFC Ergo General Insurance Co. Ltd. v. Smt. Lalta Devi & Ors.*) decided on 12.1.2015, presently taking the decision in *Reshma Kumari (Supra)* as the binding precedent, till such time the law on the subject of future prospects for those who are “self-employed” or engaged in gainful employment at a “fixed salary” is clarified by a larger bench of the Supreme Court. This applies to the matter at hand because the claimant here pleaded about gainful employment at a fixed salary and has not led any evidence showing the salary was subject to any periodic increase.

9. In above view, the loss of future income has to be calculated without addition of the effect of future prospects.

10. The claimant Hem Raj proved disability certificate indicating he having suffered permanent disability to the extent of 85% in relation to the right lower limb. It may be mentioned that his right lower limb had to be amputated on account of injuries suffered. The tribunal was of the view that having regard to the nature of job in which he was engaged, functional disability would be 100%. This view has been taken with reference to the law laid down in *Raj Kumar vs. Ajay Kumar & Anr. (2011) 1 SCC 343*.

11. The Employees Compensation Act, 1923 gives some guidance to the percentage of loss of earning capacity in amputation cases as per its first schedule. It is noticed that while amputation at hip is shown to be resulting in loss of earning capacity to the extent of 90%, amputation below hip with stump not exceeding 12.70 cms. in length is shown to be resulting in 80% of earning capacity. In these circumstances, this Court agrees that the disability certified at 85% by the board of doctors should have been accepted as the functional disability in relation to the whole body rather than it being assumed to the extent of 100%.

12. The tribunal noted that Hem Raj was 25 years old when he suffered the injuries. Thus, the future loss of income due to disability has been rightly held to be assessable with the multiplier of 18.

13. For the foregoing reasons, the loss of future income due to disability is assessed afresh. It being to the extent of 85%, the monthly loss of future income would be to the extent of $(3,633 \times 85/100)$ ₹3,088. On the multiplier of 18, the total loss of future earnings due to disability comes to $(3,088 \times 12 \times 18)$ ₹6,67,008/-.

14. The tribunal accepted the evidence of Kaushal Kishore (PW-2), Prothetist Orthotist, Outlook Health Care India Pvt. Ltd. who had informed that the cost of artificial limb in the present is ₹5,70,560/-, its life being in the region of 8 to 10 years. The tribunal assumed that the claimant Hem Raj would need 5 replacements of the artificial limb during his lifetime in the future and on that basis calculated ₹45,64,480/- as the cost at which 5 artificial limbs would be procured. She added ₹4,56,448/- as the cost at which such replacements would need be arranged and, thus, arrived at the figure of ₹50,20,928/- under the said head.

15. The insurance company argues that this assessment is wholly wrong as the entire cost for future prospects of artificial limb could not have been worked out in lumpsum. *Per contra*, the counsel for the claimant argued that the method adopted by the tribunal is correct and there is no need for interference.

16. This Court finds substance in the plea of the insurance company. A corpus was intended to be created to take care of the needs of the claimant Hem Raj for procurement and replacement of artificial limb during his future life. This may be ensured by multiplying the present cost by a figure of three as the amount required eventually is to be put in a fixed deposit receipt so that it can come handy to him for withdrawal of the necessary finance in future whenever the occasions for replacement(s) arise. In this view, in the opinion of this Court, the amount of (5,70,560/- X 3) ₹17,11,680/-, rounded off to ₹17,20,000/- (for adding the element of expenses required for procurement) seems to be just and proper on this account.

17. The tribunal had granted ₹ 2,720/- towards treatment expenses, ₹50,000/- towards pain & suffering, ₹15,000/- each towards diet and conveyance, ₹21,798/- on account of attendant charges, ₹ 43,956/- towards loss of income during treatment, and ₹1,00,000/- towards loss of amenities/enjoyment of life & disfigurement. All these components put together amount to ₹2,48,474/-. Adding the portion of the compensation towards expenses of artificial limb and loss of future earnings, the total compensation payable to Hem Raj is calculated as (2,48,474 + 17,20,000 + 6,67,008) ₹26,35,482/- rounded off to ₹26,36,000/-.

18. The compensation in the case of injuries to Hem Raj is reduced accordingly to ₹ 26,36,000/-.

19. Coming to the case of claim on account of death of Mohan Singh, the contentions of the insurance company are that the element of future prospects was wrongly added over and above the income notionally assessed on the basis of minimum wages payable to a skilled worker at ₹ 4,075/- per month and that the age of the deceased has been taken as the basis of the choice of multiplier of 18 which was incorrect. It is further argued that the loss of dependency has been wrongly calculated without deduction on account of personal and living expenses.

20. Having heard both sides, this Court finds merit in all the above noted contentions of the insurance company. For reasons stated in the context of Hem Raj, the element of future prospects cannot be factored in even in the case at hand.

21. It is well settled that the multiplier has to be adopted according to the age of the deceased or the dependent whichever is higher. [*G.M. Kerela*

SRTC vs Susamma Thomas (1994) 2 SCC 176; *U.P.S.R.T.C. vs Trilok Chandra* (1996) 4 SCC 362; *New India Assurance Co. Ltd. vs Charlie* AIR 2005 SC 2157; *New India Assurance Co. Ltd. vs Shanti Pathak (Smt.) & Ors.*, (2007) 10 SCC 1; *Ramesh Singh & Anr. vs Satbir Singh & Anr.* (2008) 2 SCC 667; *National Insurance Company Ltd. vs Shyam Singh & Ors.* (2011) 7 SCC 65; *Ashwinbhai Jayantilal Modi vs Ramkaran Ramchandra Sharma & Anr.* (2015) 2 SCC 180]. The claimants themselves had indicated in the claim petition that the age of the father at the relevant time was 55 years and that of the mother was 50 years. The average age being 56 years, the multiplier of 9 would be appropriate one for calculating the loss of dependency.

22. The method of calculation of loss of dependency as commended in the case of *Sarla Verma (supra)* includes deduction towards personal and living expenses. Since the deceased Mohan Singh was a bachelor aged 23 years, the deduction will have to be to the extent of 50% on this account. Therefore, the loss of dependency is re-calculated on the minimum wages of ₹4,057/-, the monthly loss comes to ₹2,029/-each per month. In this view, the total loss of dependency is calculated at (2,029 X 12 X 9) ₹2,19,132.

23. The tribunal awarded non-pecuniary damages of ₹1,00,000/- towards loss of love & affection, ₹ 25,000/- towards funeral expenses and ₹20,000/- towards loss of estate. Adding these components, the total compensation payable on account of death of Mohan Singh is calculated as ₹3,54,132 rounded off to ₹ 3,55,000/-.

24. In view of the above, the compensation awarded in the case of death of Mohan Singh is reduced to ₹3,55,000/-.

25. It is matter of regret that the insurance company has raised the argument of contributory negligence on the part of Mohan Singh (driver of dumper) based on wrong facts. This conduct is wholly unacceptable. The record of the tribunal clearly shows that the accident had occurred at 5.30 a.m. in the morning and not at 9.45 a.m. as was submitted. In this view, the plea of contributory negligence based on the claim that the accident had occurred in broad daylight must be rejected.

26. The plea of breach of terms and conditions of the policy on account of absence of a valid permit was considered by the tribunal but rejected, and rightly so. The only fact that needs to be re-noticed in this judgment is that the owner had produced a valid permit for perusal of the tribunal and the insurance company made no efforts refute the same.

27. The tribunal had distributed the compensation amongst the claimants in the case on account of death of Mohan Singh by specifying the amounts that will fall to their respective shares. The insurance company had been directed by order dated 31.5.2013 (in MAC Appeal No. 536/2013) to deposit the entire deposited amount with upto date interest within the period specified and out of the said deposit 60% was allowed to be released in terms of the award. The Registrar General shall calculate the amounts now payable to the claimants in the said case and arrange for release to the claimants what is balance and due or refund the excess (if any) to the insurance company. Should there be any liability outstanding against either side, the concerned party will be at liberty to take out appropriate proceedings before the Tribunal.

28. In the case of claim arising out of injuries of Hem Raj, the tribunal had directed ₹ 60,00,000/- to be put in a fixed deposit receipt in six equal

portions in State Bank of India, for the same to be made available for being drawn in future for taking care of his needs for artificial limb. Since the amount of compensation has been reduced, it is directed that instead of the amount directed by the tribunal, ₹17,20,000/- shall be put in a fixed deposit interest bearing receipt in the name of Hem Raj initially for a period of 10 years with auto renewal periodically in a nationalized bank of his choice. Hem Raj will be entitled to draw, from the said fixed deposit receipt, the amounts required by him for replacement of the artificial limb, upon advice to this effect being received and under directions of the tribunal from time to time.

29. By order dated 31.5.2013 (in MAC Appeal No. 528/2013), the insurance company had been directed to deposit the entire awarded amount with upto date interest with the Registrar General within the specified period, and 40% was allowed to be released to the claimant. The Registrar General shall calculate the amount now payable to the claimant in terms of the modified award as above, from out of the balance deposit, releasing the excess to the insurance company. Should there be any excess amount paid to the claimant, the same shall be liable to be immediately refunded or recoverable by the Tribunal.

30. The statutory amount, if deposited, shall be refunded.

31. The appeals are disposed of in above terms.

R.K. GAUBA
(JUDGE)

MARCH 02, 2016

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