

\$~R-64 & 65

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

Date of Decision: 04.05.2016

+ **MAC.APP. 500/2007**

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

versus

SHRI SUNIL KUMAR MEHTA AND ANR. Respondents
Through: None

+ **MAC.APP. 257/2011**

SHRI SUNIL KUMAR MEHTA AND ORS Appellants
Through: Mr. Pankaj Seth, Advocate

versus

THE NEW INDIA ASSURANCE CO. LTD. Respondent
Through: None

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Sunil Kumar Mehta (appellant in MACA No. 257/2011) was travelling in a tempo truck bearing registration no.DL-1LD-2637 (truck) on 29.09.2005 when it met with an accident and as a result he was injured, his right leg having been fractured and left leg below knee requiring

amputation. He (claimant) filed an accident claim case (suit no.178/2006) on 22.10.2005 before the Motor Accident Claims Tribunal (Tribunal) seeking compensation under Sections 166 and 140 of the Motor Vehicles Act, 1988 (M.V. Act). In the said claim case, Nand Kishore and Bhagat Ram were impleaded as first and second respondents on the averments that they were the driver and owner respectively of the truck, in addition to New India Assurance Company Ltd. (appellant in MAC 500/2007), it having admittedly issued an insurance policy covering third party risk in respect of the truck for the period in question.

2. In the claim case brought before the tribunal, the claimant described himself as self-employed labourer but also pleaded that he had loaded cargo on to the truck and was travelling in the vehicle with the specific assignment of loading and unloading it at the destination. In inquiry, the claimant appeared as his own witness (PW-2) with reliance also on the copy (Ex. PW3/A) of the first information report (FIR) that had been registered by the local police respectively. The material on record shows that when the truck had reached in the area of I.P. Estate flyover on ring road opposite Rajghat, the driver had lost control over it and the vehicle ended up hitting the road divider and an electric pole causing injuries to the claimant.

3. The tribunal, by judgment dated 11.04.2007, upheld the claimant's case that the accident had occurred due to negligent driving of the truck by its driver. The claimant had, *inter alia*, proved before the tribunal a disability certificate (Ex. PW2/28) issued by a board of doctors of Lok Nayak Hospital of the Government stating that he had been rendered permanently disabled on account of the amputation of left leg below knee, it

having been assessed to the extent of 40% in relation to the said part of the body. The tribunal noted the nature of avocation in which the claimant was engaged at the time of accident and assessed the functional disability resulting in loss of earning capacity to be to the extent of 80%. In absence of better proof in that regard, it adopted the minimum wages (₹3166/-) payable to an unskilled worker as the notional income and added the element of future prospects to infer the annual income at ₹56,988/-. The loss of future income was computed at ₹6,83,856/- by applying the multiplier of 15. It may be added here that in awarding the total compensation of ₹8,28,727/-, the tribunal also took into account ₹19,875/- towards medical expenditure, ₹50,000/- towards pain and suffering, ₹15,000/- for special diet, ₹6,000/- for conveyance, ₹20,000/- for loss of limb and physical disfigurement, ₹15,000/- towards loss of amenities and expectation in life, besides ₹18,996/- towards loss of income for six months which was the duration when he remained under treatment.

4. The insurance company, which has been called upon to satisfy the award with interest at the rate of 7% p.a. has come up in appeal (MACA 500/2007) challenging the finding on negligence and questioning the computation of compensation mainly taking exception to the addition of the element of future prospects also submitting that, given the disability certificate (Ex. PW2/28) showing the medical assessment to be to the extent of 40% only, the functional disability to the extent of 80% was not justified. It, at the same time, argued that since the claimant had averred that he was travelling in the truck as a self-employed person, he would either fall in the category of a gratuitous passenger or an employee in which case limitation

against the liability of the insurance company to indemnify under the Employees' Compensation Act, 1923 would apply.

5. The claimant by his appeal (MAC 257/2011) has submitted that the compensation awarded is inadequate. He refers in this context to the award of ₹15,000/- on account of loss of amenities and expectation of life, the meager award on account of medical expenditure and there being no provision made for expenditure to be incurred on artificial limb to be acquired.

6. When the appeals were called out for hearing, none would appear for the claimant. This was the position on the last two dates of hearing. Given the old pendency of these appeals, there is no reason why the matter should be deferred yet again.

7. Arguments of the counsel for the insurer have been heard. The record perused.

8. The contention of the insurance company about negligence must be rejected. The evidence of the claimant has virtually gone unchallenged. The fact that the truck had collided against the road divider and an electric pole, the burden of explaining as to why it so happened, was squarely on the driver of the truck, who was not examined at his own instance or by the owner or the insurer. In these circumstances, there is no case made out for any interference with the finding on negligence.

9. The claimant's case from the beginning was very clear. He had been engaged as a labourer to load the cargo. He was travelling in the vehicle to offload the said very cargo at the point of its destination. It is inherent in

these facts that he had been deployed by the owner of the goods who had engaged the truck for purposes of carrying the cargo.

10. The claimant's case that he was earning his livelihood as a manual labourer has gone unchallenged. Though the medical opinion is that amputation of left leg below knee had resulted in 40% disability in relation to that part of the body, given the nature of avocation, the tribunal has taken an appropriate view in assessing the functional disability to the extent of 80%. There is, however, an error committed by the tribunal in not only adding the element of future prospects but also choosing the multiplier of 15 for calculating the loss of future income.

11. 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 SCC 166.

12. 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. Lalita 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.

13. There being no formal proof of regular income or progressive rise, the element of future prospects has to be kept out. Since the age of the claimant was 30 years on the date of the accident, the multiplier of 17 would apply. In these circumstances, the loss of future earnings on account of disability is calculated as $(₹3166 \times 80 / 100 \times 12 \times 17)$ ₹5,16,691/-, rounded off to ₹5,17,000/-.

14. In the considered view of this court, the grievance of the claimant as to the inadequacy of the awards under certain heads of non-pecuniary damages is correct. He was a manual labourer making two ends meet with meagre resources. As a result of the amputation of the left leg below knee, he has been rendered in a helpless state. In absence of any proof of that effect, it has to be assumed that he is not equipped to switch to any other kind of manual job. In a similarly placed case of amputation of lower limb above knee where the functional disability was assessed to be to the extent of 70%, in an accident that had occurred on 28.09.2005, reported as *Sanjay Kumar vs. Ashok Kumar & Ors.*, (2014) 5 SCC 330, the Supreme Court had awarded ₹1,00,000/- towards loss of amenities of life, and ₹1,50,000/- towards pain and agony. There is no reason why similar awards should not be made in the case at hand. Thus, awards under the said two heads are increased correspondingly.

15. There is merit in the contention raised in his appeal by the claimant that given the amputation of part of the lower limb, he requires provision of finance for artificial limb to be procured. Though he has not led any formal evidence in this regard, given the date of accident, an amount of ₹50,000/- under the said head should suffice. Adding the other components of awards made by the tribunal, the total compensation in the case comes to (₹5,17,000/- + ₹19,875/- + ₹15,000/- + ₹6,000/- + ₹20,000/- + ₹1,00,000/- + ₹1,50,000/- + ₹50,000/-) ₹8,77,875/-, rounded off to ₹8,80,000/-.

16. Following the consistent view taken by this court, the rate of interest is increased to 9% p.a. 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.*]. The award is modified accordingly.

17. Coming to the contention of the insurance company as to the limitation of its liability under the first clause of the proviso to Section 147 (1) of the M.V. Act, the tribunal has given sound reasons in (paragraph 15 of) the impugned judgment to reject the same pointing out the deficiency in proof as to the employer-employee relationship between the claimant and the owner of the offending vehicle. For the said reason, the contention is repelled.

18. The insurance company had been directed by order dated 20.08.2007 (in MACA 500/2007) to deposit the awarded amount inclusive of interest, whereupon 75% was allowed to be released to the claimant. The balance shall also now be released. Since the award has been modified, the insurance company shall be liable to pay further amount which it must do by

appropriate deposit with the tribunal within 30 days, making it available for it to be released to the claimants.

19. Statutory deposit, if made, by the insurance company shall be refunded.

20. Both appeals are disposed of in above terms.

MAY 04, 2016
yg

R.K. GAUBA
(JUDGE)

