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

Date of Decision: 4th March, 2016

+ **MAC.APP. 1159/2012**

ICICI LOMBARD GENERAL INSURANCE CO LTD

..... Appellant
Through Ms. Suman Bagga and Mr. Pankaj
Gupta, Advs.

versus

DEVI & ORS Respondent
Through Mr. Shashank Singh and Mr. F K Jha,
Advs. for R-7

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. Zile Singh suffered death at the age of 45 years due to injuries sustained in a motor vehicular accident that occurred at 10.50 PM on 19.10.2009 when the cycle cart taken out on public road by him was hit by a truck bearing No.HR 38J 5989 (the offending vehicle) in the area of Shiv Mandir, Village Hamidpur, Delhi. His widow, children and mother, first to fifth respondents (collectively, the claimants) brought a claim petition under Sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) on 18.11.2009 before the Motor Accident Claims Tribunal which registered it as MACT case No.528/11(2009). In the claim case, the appellant insurance company was impleaded as third party respondent - it concededly being the insurer against third party risk for the period in question - in addition to Sanjeev Kumar Sharma (seventh respondent) and Gopi Chand Thakur (sixth

respondent), they being the owner (insured) and the driver respectively of the offending vehicle.

2. It is noted from the Tribunal's record that all parties appeared before the Tribunal in response to the notices issued and filed their respective written statements. In the course of the inquiry, however, the owner and driver stopped appearing. This prompted the insurance company to move an application seeking permission to raise other defences under Section 170 of MV Act which request was allowed by the Tribunal by order dated 13.04.2011. It may further be added that the driver and owner would appear in the subsequent proceedings once again on 21.03.2012, this at the stage when the insurance company examined one of its witnesses (R3W1) on 11.01.2012. They were again present on 04.05.2012 when the insurance company examined its second witness (R3W2), for whose cross-examination the opportunity was availed by them. Neither the owner nor the driver, however, offered any evidence from their side.

3. The Tribunal, by judgment dated 18.07.2012, while directing payment of counsel's fee (₹50,000/-) and out of pocket expenses (₹5,000/-) to the advocate representing the claimant, granted compensation in the sum of ₹11,97,544/- with interest at 12% per annum, calculating the compensation under the following heads :

1) Loss of dependency=====	Rs.6,47,544/-
2). Funeral-charges =====	Rs.25,000/-
3). Loss of estate=====	Rs.1,25,000/-
4). Loss of consortium=====	Rs.50,000/-
5). Loss of love &affection & company etc.=====	Rs.2,50,000/-
6). Initial loss of notional services =====	Rs.1,00,000/-

Total	Rs.11,97,544/-

4. The plea of the insurance company about the breach of terms and conditions of the insurance policy on the ground that the driving licence (mark X), as had been presented by the driver to the investigating police as the document confirming he was holding a proper authorization to drive on the relevant date, had been found upon verification to be fake was, however, rejected, *inter alia*, with the observations that notice under Order 12 Rule 8 of the Code of Civil Procedure, 1908 (CPC) issued on 06.01.2011 was not proper as it instead should have been given under Order 11 Rule 12 CPC and further on the ground that mere allegation that the driver did not have a license was not enough to absolve the insurer of its liability because it (the insurer) was also obliged to prove that the driver “*never had license or was disqualified from holding a license*” referring in this context to decision rendered by a learned single judge of this Court reported as *Oriental Insurance Company Ltd. v. Sonia* 2009 (3) TAC 166 (Del).

5. By the appeal at hand, the insurance company questions the award under the non-pecuniary heads of loss of estate, loss of love & affection and additionally for initial loss of notional services as noted above, as also the rate of interest levied stating that the directions on all these scores were unduly high. It also raises the plea that there was a breach of terms and conditions of the policy as the owner (insured) had not shown that the driver was holding a valid driving license referring in this context to the total lack of contest against the evidence of the two witnesses examined by the insurance company.

6. *Per contra*, the learned counsel for the seventh respondent (the owner/insured of the offending vehicle) made an attempt to defend the findings recorded by the Tribunal to deny the insurance company’s plea to be

absolved. At the hearing, in spite of notice no one has appeared on behalf of the claimants or the driver.

7. Indeed, there is a substance in the grievances of the insurance company about the awards under non-pecuniary heads. Such awards are not to be made on mere whims or fancies. A certain consistency requires to be maintained. Following the view taken in *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54 and *Shashikala V. Gangalakshamma* (2015) 9 SCC 150, it is held that the awards on account of loss of consortium and loss of love & affection would be in the sum of ₹1 lakh each while awards on account of loss of estate and funeral expenses would be ₹25,000/- each. With such awards having been granted, there is no justification for any additional award under the head “initial loss of notional services” mentioned in the impugned judgment.

8. In above view the total compensation payable in the case is calculated as (6,47,544 + 1,00,000 + 1,00,000 + 25,000 + 25,000) 8,97,544/- rounded off to ₹8,98,000/- (Rupees Eight Lakhs Ninety Eight Thousand only). The compensation is reduced accordingly.

9. There is no justification given in the impugned judgment as to why the tribunal considered it necessary to levy the interest at the rate of 12% per annum higher than ordinary. Following the consistent view taken by this Court [see judgment dated 22.02.2016 in MAC.APP. 165/2011 *Oriental Insurance Co Ltd v. Sangeeta Devi & Ors.*], the rate of interest is reduced to 9% per annum from the date of filing of the petition till realization. Needless to add the amount paid as interim compensation shall have to be adjusted. The award is modified as above.

10. There is no justification for direction as to counsel's fee and out of pocket expenses. The said directions are set aside.

11. During the inquiry into the claim case before the Tribunal the insurance company had taken the plea with regard to the driving license within the knowledge of the owner (seventh respondent). It had proved through R3W2 that the driving license (mark X), as had been presented by the driver, was a fabricated document. The only contest put up was in the form of a vague suggestion that the said document was issued by the authority it purported to have issued. Since the forgery of the said document was proved by an official of the concerned authority, the burden stood shifted to the owner (insured) and the driver to show facts to the contrary. No positive evidence was led in such regard.

12. The observations of the Tribunal that instead of notice under Order 12 Rule 8 CPC, the proper course for the insurance company would have been to give a notice under Order 11 Rule 12 CPC cannot be appreciated. Both tools are available in law for the truth of the matter to be brought out. The object to be served by a notice of discovery under Order 11 Rule 12 CPC would have been the same as was of the notice issued and served under Order 12 Rule 8 CPC requiring the owner and the driver to produce the valid and effective driving license.

13. The owner and driver were duty bound to respond to the notice under Order 12 Rule 8 CPC. Failure to respond coupled with the fact that there was no evidence led in rebuttal to the evidence of the two witnesses examined by the insurer at the inquiry, only shows that the owner and driver are not in a position to prove that the driver was holding a valid or effective

license. The observation that the insurer should have proved that the driver had “never” held a valid driving license is asking for impossible to be achieved. In such fact situation, the tribunal should have called for and accepted positive evidence to be furnished rather than finding the insurer at fault for not bringing any further negative evidence.

14. Thus, the finding on the plea of the insurance company about the breach of terms and conditions of the insurance policy as rendered by the Tribunal is set aside. It is held that the driver had presented a fake driving license. Because in spite of due notice of this plea the owner (the insured) and the driver did not come up with any evidence in rebuttal to show that a valid and effective driving license actually existed and with no effort by the insured to show that he had exercised due diligence while engaging the driver of the offending vehicle, the insurance company is held entitled to recover the amount paid by it under the insurance policy to the claimants in this case from the owner/insured.

15. By order dated 05.11.2012, the insurance company had been directed to deposit 60% of the awarded amount with interest at 9% per annum with UCO Bank, Delhi High Court Branch and the same was directed to be held in fixed deposit for a period of one year. By order dated 29.01.2014, Rs.3 lakhs were allowed to be released from out of the said deposit to the first respondent/claimant. The Registrar General shall now calculate the amounts payable to the claimants in terms of the award modified as above and release the balance from out of the aforesaid deposit to each of them. The insurance company shall be obliged to deposit the balance of its liability (if any) under this modified award with the Tribunal within 30 days of this judgment, whereupon the same shall also be released. Conversely, if the deposit made

by the insurance company is found to be in excess, the same shall be refunded along with the statutory deposit, if made.

16. The appeal is disposed of in above terms.

R.K. GAUBA
(JUDGE)

MARCH 04, 2016
VLD

