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

*Date of decision: January 06, 2017*

(i) + **MAC.APP. 200/2011 & C.M.No.4693/2011**

ORIENTAL INSURANCE CO LTD ..... Appellant

Through: Mr. JPN Shahi, Advocate

versus

NIHAL CHAND & ORS ..... Respondents

Through: Mr. Rajnish K. Jha, Advocate for  
LRs of respondent No.1

(ii) + **MAC.APP. 115/2015**

NIHAL CHAND ..... Appellant

Through: Mr. Rajnish K. Jha, Advocate for  
LRs of appellant

versus

ORIENTAL INSURANCE CO LTD ..... Respondent

Through: Mr. JPN Shahi, Advocate for  
respondent No.3

**CORAM:**

**HON'BLE MR. JUSTICE SUNIL GAUR**

**JUDGMENT**

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**ORAL**

1. The above captioned second appeal is the cross-objections to the Award of 13<sup>th</sup> December, 2010 which is assailed in the above captioned first appeal. Since these two appeals arise out of common impugned Award, therefore, they are heard together and are being disposed of by

this common judgment.

2. On account of fracture of both the bends of the right forearm resulting in a restricted movement of wrist and an elbow joint with deranged hand function in a road accident on 17<sup>th</sup> February, 2010, injured-*Nihal Chand* has been granted compensation of ₹1,84,400/- with interest, which is under challenge in the above-captioned first appeal. The injured was hit by the vehicle in question while he was trying to cross the road on foot near Sai Baba Mandir, Old Rohtak Road, Azad Market, Delhi. Impugned Award assesses 40% temporary disability in regard to right upper limb.

3. During the pendency of the appeal, appellant-injured had died and his legal heirs have been brought on record as the copy of death certificate of the injured-*Nihal Singh* has been placed on record. The amended memo of parties of 17<sup>th</sup> March, 2016 is taken on record.

4. At the hearing, learned counsel for insurer submits that loss of earning for 8 months when injured was under treatment, has been erroneously assessed by the Tribunal as injured was a pensioner and was in any way getting the pension and so, grant of compensation of ₹32,000/- under the head of '*loss of earning*' is unjustified. It is submitted by learned counsel for insurer that the grant of lump sum compensation of ₹50,000/- under the Head of '*loss of future income*' is unjustified as there is no documentary proof to show that the injured was running a grocery shop and was earning ₹7,000/- per month. It is also submitted by learned counsel for insurer for grant of compensation of ₹75,000/- under the Head of '*pain and sufferings*' is on the higher side and needs to be suitably

reduced. It is further submitted that as per MLC of the injured, he was under influence of liquor and so, the compensation granted ought to be suitably reduced while taking into account the contributory negligence of appellant. Lastly, it is submitted that there is no substance in the cross-objections by the injured as 40% permanent disability would not justify enhancement of compensation granted to him, as it is already exorbitant.

5. On the other hand, learned counsel for injured submits that even if there is no documentary proof on record regarding the earning capacity, but still there is positive evidence on record to the effect that injured was hale and hearty and so, there is no reason to discard his oral evidence. To seek enhancement of compensation, in the cross-objections, learned counsel for injured submits that while taking into account the permanent disability of 40% and by applying the multiplier of 5, the compensation ought to be assessed and not on lump sum basis, as has been done by the Tribunal. It is submitted by learned counsel for injured that no case for reduction of compensation is made out and in fact, the compensation awarded deserves to be suitably enhanced.

6. Upon hearing and on perusal of impugned order and the evidence on record, I find that as per Section 185 of *the Motor Vehicle Act, 1988*, a person is considered to be drunken if the alcohol contents in his blood exceeds 30mg per 100 ml of blood, which is to be detected by a Breath Analyzer Test. Admittedly, no Breath Analyzer Test has been conducted in the instant case and so, there is no basis to conclude that the alcohol content in the blood of the injured was exceeding the limit as provided under Section 185 of *the Motor Vehicles Act, 1988*. So, it cannot be taken

that there was any contributory negligence on the part of injured.

7. Regarding the '*loss of earning*', the learned Tribunal has taken into account the pension amount and the period of 8 months during which injured had remained confined to bed on account of grievous injuries sustained. On the face of it, this finding is erroneous as injured was getting pension irrespective of his having met with an accident and so, award of compensation of ₹32,000/- under the Head of '*loss of earning*' is set aside. Since the injured had positively asserted in his evidence that he was of good health, therefore, there is no justification to presume that he was not working. In the absence of any documentary evidence, it is deemed appropriate to rely upon the minimum wages payable for the relevant period in a case of semi-skilled worker. In the instant case, the minimum wages, which the injured could have earned by working, comes to ₹6,000/- per month and by applying the multiplier of 5, the loss of earning is assessed at ₹72,000/-. As the injured was not in a permanent employment, therefore, no case for grant of compensation for loss of future income is made out and so, grant of lump sum of ₹50,000/- under the Head of '*loss of future income*' is disallowed.

8. Under the Head of '*pain and sufferings*', injured has been granted compensation of ₹75,000/-, which appears reasonable for the reason that he was under treatment for a period of 8 months. So, the compensation granted under this Head is maintained. Nothing substantial has been urged to increase the quantum of compensation granted. As far as the grant of compensation under the Head of '*loss of amenities of life and future enjoyment*' is concerned, I find that the compensation of ₹25,000/-

granted under this Head appears to be on the lesser side. The permanent disability is of 40%, but I find that the functional disability is of 20%. The compensation assessed under this Head is ₹35,000/-. Compensation of ₹2,400/- under the head of medical expenses, is however justified.

9. Consequentially, the modified Award of ₹1,84,400/- shall carry the interest @ 9% *per annum* as the interest @7.5% *per annum* granted by the learned Tribunal appears to be inadequate.

10. The awarded amount deposited by insurer be released in equal proportion directly into the bank account of legal heirs of injured, who had died during the pendency of this appeal. The amount of differential rate of interest be deposited by insurer with the Registrar General of this Court within four weeks from today. The statutory deposit be refunded to insurer.

11. With aforesaid directions, the above captioned two appeals and the application are disposed of.

(SUNIL GAUR)  
JUDGE

**JANUARY 06, 2017**

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