

\$~20 & R-323

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

Decided on: 27th October, 2017

+ MAC.APP. 349/2011 & CM No. 7819/2011

NEW INDIA ASSURANCE CO LTD Appellant

Through: Mr. Pankaj Seth, Adv.

versus

MADHU & ORS Respondents

Through: None.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The first respondent (the claimant) had instituted accident case (suit no. 125/10/09) on 03.11.2009 seeking compensation for injuries suffered in motor vehicular accident that had occurred, on 16.09.2009 at about 8:30 p.m. statedly due to the negligence on the part of the driver of bus bearing registration no. DL 1PA 7988 admittedly insured against the third party risk for the period in question with the appellant (the insurer). Besides the insurer (the appellant), the driver and the owner respectively of the bus were impleaded as parties to the accident claim case, they being second and third respondents in the appeal. The tribunal held inquiry and, by judgment dated 13.01.2011, accepted the case that the accident had occurred due to the negligence on the part of the bus driver, and awarded compensation in total sum

of Rs.16,55,429 directing the insurer to pay the same with interest, there being no case of breach of terms and conditions of the insurance policy, the amount having being calculated thus:-

1.	Compensation for the expenses incurred on medical treatment	Rs. 20,000/-
2.	Compensation for special diet, conveyance and attendant charges	Rs. 35,000/-
3.	Compensation for loss of income	Rs. 19,765/-
4.	Compensation for pain and suffering	Rs. 1,00,000/-
5.	Compensation for loss of amenities of life	Rs. 1,00,000/-
6.	Compensation for loss of earning capacity	Rs. 12,80,664/-
7.	Compensation for physical disfigurement due to permanent disability	Rs. 1,00,000/-
	Total	Rs. 16,55,429/-

2. By the present appeal the insurer questions the above said award *inter alia* taking exception to the finding returned by the tribunal that the claimant had suffered functional disability to the extent of ninety per cent (90%).

3. After notice had been served on the claimants, the matter was put in the category of regular matters to be taken up on its own turn. It came up for hearing on 12.10.2017, when there was no appearance on behalf of the claimant, and the following order was passed by this Court:

“The prime contention raised at the hearing on the appeal by the insurance company is that there is no evidence bringing out correlation between the loss of hearing, the prime reason for the condition leading to the assessment of disability to the extent of 90% and the injuries suffered in the lower limb in the accident.

Having heard the learned counsel for the insurance company, it appears necessary to issue court notice to the first respondent as she would need to be examined by the Court”.

Issue court notice to the first respondent and to her counsel for 26.10.2017”

4. The Court notice has been duly served on the claimant but she would not appear on the date fixed i.e. 26.10.2017. No adverse order was passed on the said date and the matter was adjourned for today for the appeal to be taken up on merits. The situation remains the same. The claimant inspite of notice has failed to appear to assist.

5. Having heard the learned counsel for the insurer and on perusal of tribunal's record, the grievance in the appeal is found to be correct. Pertinent to note that in the claim petition, the claimants had pleaded that she had fallen down from the bus on account of negligent driving, and that her right leg had come under the wheels of the vehicle (para 9 of claim petition). This is what was reiterated by her in the pleadings in para 27(i) of claim petition where it was added that as a

consequence she had received crush injuries. This is what she affirmed on oath appearing as her own witness (PW1), on the strength of her affidavit (Ex. PW1/A) wherein she would add that for treatment of crush injuries, skin drafting was done, her knees and ankle in the right lower limb having become stiff, rendering her unable to walk. At the same time, however, she also stated that due to the grievous injuries received by her, she had *“lost her hearing capacity of both the ears”* and had become deaf.

6. The claimant referred to the treatment record (Ex. PW-1/2 coll.). It, however, does not seem to indicate any medical notes concerning effect of the injuries suffered on the hearing of the victim. She also relied upon disability certificate (Ex.PW-2/A) issued by a board of doctors of Baba Saheb Ambedkar hospital of the Government of NCT of Delhi on 12.11.2010 whereby she had been evaluated to be physically disabled on account of severe hearing loss and post traumatic stiffness in knee and ankle of the right lower limb, the disability being to the extent of 90 per cent.

7. The claimant examined as a witness Dr. Deepika Sethi (PW2), one of the members of the medical board, she being an ENT specialist. Undoubtedly, the evidence of PW2 does indicate that the claimant suffers from total hearing loss in both the ears. There is nothing in her testimony, however, so as to connect the said hearing disability with the injuries suffered in the accident in question.

8. Crucially, the claimant also examined Dr. G.C Verma, specialist orthopedic surgeon as PW3 who was also a member of the aforesaid medical board. PW3 in the course of his deposition stated that the

physical disability due to the crush injury in the right leg was to the extent of 46% (temporary). He added that the impact of such physical disability was also included in the total disability assessed by the board to be ninety per cent (90%). During cross-examination, he stated that since the disability due to hearing had been determined as ninety per cent (90%), there was “*nil effect*” of the disability because of the injury in the right leg.

9. In the above facts and circumstances, there is absolutely no evidence adduced on record to draw a connection between the loss of hearing power and the injuries suffered in the accident. The crush injury did not result in some disability, the evaluation by the board of doctors as noted above, however, indicating it to be only a temporary assessment.

10. In the above noted circumstances, it appears that the tribunal jumped to the conclusion that the disability to the extent of ninety per cent (90%), primarily for reasons of loss of hearing power, was on account of the accident. This conclusion cannot be sustained unless the claimant proves necessary facts.

11. In above scenario, the proper course would be to remand the case back to the tribunal for further inquiry so that the claimant may be called upon to lead additional evidence in above light with similar opportunity to the contesting parties to prove facts to the contrary by evidence in rebuttal, if any. The tribunal needs to be reminded that it is part of its judicial obligation to reach out to the truth and facts in entirety and, for such purposes, rather than treating the proceedings

merely adversarial, it must be more proactive and, call for such further evidence as may be deemed necessary on its own motion.

12. The impugned judgment is, thus, set aside with directions to above effect issued. The parties are directed to appear before the tribunal for further proceedings on 27.11.2017. Since the claimant has chosen not to appear inspite of the notice in the appeal duly served on her, once for 21.08.2014 and then again for 26.10.2017, it will be just and proper that the tribunal issues fresh court notice to her in the event of she not appearing on her own on the date fixed by this Court.

13. In case of continued default, however, the tribunal will pass the appropriate order in accordance with law.

14. The learned counsel for the insurance company submits that on account of attachment order issued by the tribunal, the entire amount awarded by the impugned judgment stood recovered and released by the tribunal to the claimant. The amount already paid to the claimant will be subject to fresh decision of the tribunal on the claim petition. It is possible that some of the amount may still be lying in the fixed deposit receipts in terms of directions in the impugned judgment. The tribunal shall issue necessary directions to the concerned bank to stop further release of any money to the claimant from out of such fixed deposit accounts.

15. The statutory amount shall be refunded to the appellant.

16. The appeal is disposed of in above terms.

R.K.GAUBA, J.

OCTOBER 27, 2017/ umang