$~R-362 & R-363

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

Decided on: 25th October, 2017

\+ MAC APPEAL No. 573/2011

IFFCO TOKIO GEN. INSURNACE CO. LTD. ..... Appellant
Through: Mr. Pankaj Gupta for Ms. Suman Bagga, Adv.

versus

ISHLAMUDDIN & ORS. ..... Respondents
Through: None.

\+ MAC APPEAL No. 746/2012

ISHLAMUDDIN & ORS. ..... Appellants
Through: None.

versus

IFFCO TOKIO GEN. INSURNACE CO. LTD ..... Respondents
Through: Mr. Pankaj Gupta for Ms. Suman Bagga, Adv. for R-3.

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

<u>JUDGMENT (ORAL)</u>

1. Ishlamuddin (the claimant) had instituted accident claim case (MAC Petition no. 70/2009) on 03.02.2009 seeking compensation for the injuries suffered by him in motor vehicular accident that occurred on 21.12.2008 due to negligent driving of motor vehicle described as Tata 709 bearing registration no. DL 1LC 2827, admittedly insured

against third party risk with IFFCO Tokio General Insurance Company Ltd. (insurer) for the period in question. On the basis of inquiry held, the tribunal, by judgment dated 24.03.2011, accepted the case that the accident had occurred due to negligent driving of the said vehicle by the driver Lakhi Singh (a respondent in these appeals). The tribunal found that the claimant had suffered permanent disability to the extent of 50% with respect to his whole body, his right leg below knee having been amputated. It awarded compensation in the total sum of Rs. 12,77,709/-, the liability having been fastened on the insurer to pay the same with interest @ 7.5% per annum, the said amount inclusive of Rs. 6,65,388/- towards loss of earning due to permanent disability besides Rs. 2,50,000/- added on account of expenditure expected to be incurred for procurement of artificial limb.

2. The insurer by its appeal (MAC Appeal no. 573/2011), questions the addition of future prospects of increase over and above the income notionally assessed with the help of minimum wages as being inappropriate. The claimant, on the other hand, by his cross-appeal (MAC Appeal no. 746/2012), has sought enhancement of compensation, *inter alia,* on the ground that the award towards procurement of artificial limb was inadequate. With the permission obtained, he has led additional evidence by examining Rajeev Kumar (AW-1) Prosthetist & Orthotist and working with Otto Bock Health Care India, a private entity arranging prosthetic limbs.

3. The appeals were put in the category of 'regulars' as per order dated 20th January, 2016. When they are taken up, there is no appearance on behalf of the claimant.

4. At the time of hearing on an earlier date (20th January, 2016), it had been submitted on behalf of the claimant that his functional disability should have been treated as 100% because the machine on which he was expected to operate required use of lower limb, the evidence showing that he was working for gains by doing embroidery work. It is noted that a board of doctors of Guru Teg Bahadur Hospital had examined him and issued certificate dated 04.08.2009 (Ex.PW-1/13) affirming that he is a case of locomotor disability, the impairment being 80% in relation to the right lower limb. In the course of his testimony, the claimant (PW-1) had proved, on the strength of his affidavit (Ex.P1), that his right leg above knee had been amputated. His photograph is available at page 83 of the tribunal's record which confirms the said conditions. In these circumstances, the tribunal appears to have fallen in error by treating his case as one of the functional disability of 50%. While contention that he has been rendered totally disabled to the extent of 100% cannot be accepted, following the view taken in similarly placed other cases and in view of the prescription in the Employees' Compensation Act, 1923, he is treated as a case of functional disability to the extent of 80% [See *National Insurance Company Vs. Preeti* in MACA 1068/16 decided on 24.08.2017].

5. 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.

6. 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 12.01.2015, 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.

7. Since there was no clear proof of any regular employment much less of any progressive rise in future, the element of future prospects is kept out. On the notional income of Rs. 4107/- by the tribunal the loss of future income due to disability to the extent of 80% is re-calculated with the multiplier of 18 as (4107 x 80 ÷100 x 12 x 18) Rs, 7,09,689.60, rounded off to Rs. 7,09,690/-. The award under this head, thus, will need to be increased by Rs. (7,09,690 – 6,65,388) Rs. 44,302/-.

8. The additional evidence led during the pendency of MAC Appeal No. 746/2012, establishes that artificial limb that can be

arranged to rehabilitate the claimant to the extent possible would need replacement after four-five months though, if maintained properly, it might last longer. From the quotation (Ex.PW-1/A) which was proved by the said witness Rajiv Kumar (AW-1) it is clear that the cost of procurement of such artificial limb would have gone up over the years. But, since the award is to be made with reference to the date of the claim and the element of inflation can be taken care of by adding the element of interest, it would be proper to go by the assessment in this regard made by the tribunal. Taking it to be a case where the claimant would need minimum two replacements of the artificial limb, the award is liable to be increased by Rs. 5,00,000/- on that account.

9. The compensation, thus, is increased to (12,77,709 + 44,302 + 5,00,000) Rs. 18,22,011/-, rounded off to Rs. 18,23,000/- (Rupees eighteen lacs and twenty three thousand only).

10. Following the consistent view taken by this Court, it is directed that the award shall carry interest @ 9% (nine per cent) per annum 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.

11. By order dated 04.07.2011 in MAC Appeal No. 573/2011, the insurance company had been directed to deposit the entire awarded amount with upto date interest and in terms of orders dated 14.09.2011 and 11.01.2012, 25% of the said amount was permitted to be released. Further, by order dated 20.01.2016, additional 25% was allowed to be released to the claimant. The balance is lying in fixed deposit. Since the award has been increased, it is directed that the entire balance

already lying in deposit shall be released in terms of the impugned judgment.

12. The insurance company is directed to satisfy the enhanced award by requisite deposit with the tribunal within thirty days. The amount which the insurance company is expected to further deposit shall be released to the claimant in the form of interest bearing fixed deposit receipt taken out from a nationalized bank initially for a period of five years with provision for auto renewal. The said amount shall be held as corpus for being availed of by the claimant as and when he requires replacement or maintenance of the artificial limb. For such purposes, he shall have to move before the tribunal an application duly supported by appropriate medical advice.

13. The statutory deposit of the insurance company shall be refunded after proof of the award having been satisfied.

14. The appeals stand disposed of in above terms.

R.K.GAUBA, J.

OCTOBER 25, 2017
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