$~R-136

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

Decided on: 23rd August, 2017

\+ MAC APPEAL No. 563/2009

ORIENTAL INSURANCE CO. LTD. ..... Appellant
Through: Mr. Pankaj Seth, Adv.

versus

SMT. SUSHILA & ORS. ..... Respondents
Through: Mr. Yash Pal Laroya, Adv. for R-1.

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

JUDGMENT (ORAL)

1. The first respondent (the claimant), describing herself as a housewife, though an earning hand from stitching and sewing jobs, suffered injuries in a motor vehicular accident that occurred on 07.07.2001 due to negligent driving of a three wheeler scooter bearing no. DL 1RE 3314 (TSR), admittedly insured against third party risk with the appellant insurance company (insurer). She filed accident claim case (suit no. 721/2008) seeking compensation on 10.09.2001. The tribunal held inquiry and, by judgment dated 10.08.2009, upheld her case for compensation on account of negligent driving of the TSR by Nek Mohammad, second respondent in the appeal (driver).

2. It is stated that the TSR was owned by third respondent (owner of the TSR) at whose instance insurance policy was taken. The tribunal awarded compensation in the sum of Rs.8,78,538/- and

directed the insurance company to pay the same with interest @ seven and half per cent (7.5%) per annum. The plea of the insurance company about breach of terms and conditions of the insurance policy on the ground that the licence held by the driver of TSR was fake was rejected.

3. By the appeal at hand the insurer has questioned the computation by submitting that there was no proof of income and that the permanent disability has been over-assessed, the compensation awarded being excessive. It also reiterates its claim for recovery rights on the ground that it had led evidence to prove that the driver was not holding a valid or effective driving licence.

4. The claimant, on the other hand, filed cross-objections invoking Order 41 Rule 22 of the Code of Civil Procedure, 1908 (CPC), (CM No. 1635/2010) seeking enhancement. At the hearing, there is no appearance on behalf of the driver or owner of the TSR.

5. The learned counsel for the insurance and claimant have been heard and the record has been perused.

6. The tribunal computed the compensation as under:-

1.Compensation for incurred medical expenses	Rs. 2,888/-
2. Compensation for conveyance	Rs. 4,250/-
3. Compensation for special diet expenses	Rs. 5,000/-
4. Compensation for attendant charges	Rs. 5,000/-
5. Compensation for loss of income	Rs. 18,000/-
6. Compensation for loss of earning capacity	Rs. 5,18,400/-
7. Compensation for future expenses for change of artificial leg	Rs. 1,00,000/-

8. compensation for pain & suffering	Rs. 80,000/-
9. Compensation for loss of amenities of life	Rs. 1,00,000/-
10. Compensation for physical disfigurement Due to permanent disability	Rs. 70,000/-
	Rs. 9,03,538/-
Less interim compensation paid	
Balance	Rs. 25,000/-
	Rs. 8,78,538/-

7. It is noted that claimant had suffered amputation of left leg below knee. This fact was proved on the basis of treatment records (Ex.PW-6/1) proved by Desh Raj (PW-6) record clerk of the concerned hospital. The claimant also relied on disability certificate (Ex.PW-1/1) proved by Dr. S.K. Sharma, certifying her permanent disability in relation to the left lower limb to the extent of 70%. The tribunal went by the nature of job by which the claimant earned her livelihood and assessed the functional disability to the extent of 60%. It is the submission of the claimant at the hearing that this assessment was inadequate. Reliance is placed on *Lal Singh Marabi vs. National Insurance Co. Ltd. 2017 ACJ 1362*. On perusal, it is noted that the claimant in the said case was a driver by profession and there had been presumably total amputation of his left leg. It is the said condition of the claimant which led to the assessment of functional disability at a higher rate. The tribunal has given sound reasons to assess the disability to the extent of 60%. There is no good reason for interference on this account. The conclusions reached by the tribunal being appropriate, there is no case for any enhancement.

8. Having regard to the nature of injuries and the permanent handicap suffered, the award under the other heads as noted above cannot be said to be excessive. The objections raised by the insurance company by its appeal to the award of compensation are, thus, repelled.

9. There is, however, substance in the grievance about the breach of terms and conditions of the insurance policy. The insurance company had examined Anand Kumar (R3W1), its administrative officer, who not only proved the registration certificate (Ex.R3W1/A) and the insurance policy (Ex.R3W1/B) but also notice under Order 12 Rule 8 CPC (Ex.R3W1/C) sent to the driver and owner by post vide (Ex.R3W1/D and E) duly served, as per acknowledgement cards (Ex.R3W/F and G), to which there was no response. It appears the driver had relied upon certain document purporting to be a licence issued by Licensing Authority, Bullundshahar, UP, which upon being verified was found by report (Ex. R3W1/J) to be fake. The tribunal did not take into account the conduct of the driver and owner of the vehicle as they never produced a valid or effective driving licence. In fact, Nek Mohammad, the driver of the TSR appeared in the witness box as R3W2 and conceded that he had not brought his driving licence. There being no claim by the registered owner (third respondent) that the driver actually had a valid or effective driving licence or about any due diligence exercised by him at the time of the driver being engaged. a case of breach of terms and conditions of the insurance policy had been, *prima facie,* made out of which benefit to the insurance company could have been considered. In all fairness, the

registered owner (third respondent herein) would deserve to be granted one more opportunity to prove facts to the contrary.

10. Therefore, an inquiry into the claim for recovery rights is remitted to the tribunal. The tribunal shall take into consideration the evidence already led by the insurance company in the earlier proceedings as also further evidence, if any, which it may seek to adduce. For such short inquiry, it may issue fresh notice to the registered owner to secure his presence, giving opportunity to him to lead evidence in rebuttal and, thereafter, take a fresh decision.

11. The parties shall appear before the tribunal for such purposes on 22nd September, 2017.

12. The insurance company had been directed to deposit the entire awarded amount with interest in terms of order dated 19.11.2009 with directions for release of part amount into the savings bank account of the claimant, the balance through fixed deposit receipt were issued by order dated 23.12.2009. The said amount would be now released accordingly to the claimant.

13. The statutory amount shall be refunded.

R.K.GAUBA, J.

AUGUST 23, 2017
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