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

Decided on: 9th October, 2017

\+ MAC.APP. 23/2008

THE ORIENTAL INSURANCE CO. LTD. ..... Appellant

Through: Mr. P.K. Seth, Adv.

versus

USHA BHAGCHANDANI & ORS. ..... Respondents

Through: Mr. Rohan Thawani & Ms. Gunjan Ahuja, Advs. for R-1 with respondent no. 1 in person.

\+ MAC.APP. 1030/2015

USHA BHAGCHANDANI ..... Appellant

Through: Mr. Rohan Thawani & Ms. Gunjan Ahuja, Advs. with appellant in person.

versus

THE ORIENTAL INSURANCE CO LTD & ORS ..... Respondents

Through: Mr. P.K. Seth, Adv. for R-1.

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

<u>JUDGMENT (ORAL)</u>

1. The issues that arise in these two connected appeals and the background facts were captured, in the order dated 11.09.2017 which reads thus:-

“1.Usha Bhagchandani, appellant in MAC Appeal No. 1030/2015 and first respondent in MAC Appeal No. 23/2008, suffered injuries in motor vehicular accident that occurred on 21.06.2006 at about 04:00 hours in the area of Haridwar in the State of Uttarakhand while travelling in tourist taxi bearing registration no. HR 38FT 7712, admittedly insured against third party risk with Oriental Insurance Company Ltd. (appellant in MAC Appeal No. 23/2008), it being the respondent in MAC Appeal No. 1030/2015. On her claim petition (327/2007), the tribunal held inquiry and, by judgment dated 06.10.2007, it accepted the case for compensation on the ground that the accident in which injuries were sustained occurred due to negligence on the part of the taxi driver, he being Harvinder Singh, impleaded as respondent in both these appeals. It is noted that both the said driver Harvinder Singh and Charanjit Kaur, registered owner of the taxi, though served with notices had opted to suffer the proceedings ex-parte.

2. The Tribunal awarded compensation in the total sum of Rs. 65,09,000/, this inclusive of, besides compensation under various other heads, Rs. 50,78,592/- towards loss of future income, Rs.8,41,492/- as actual medical expenses and Rs. 2,30,000/- towards estimated future medical expenses.

3. It is noted that on the basis of evidence led, particularly the testimony of Dr. Vibhore Singhal (PW-1), the tribunal accepted the claim to the effect that the claimant had been rendered permanently disabled to the extent of 100%, making the calculation of loss of future earnings accordingly, the assumption being that she had lost her job due to paraplegic stage to which she had been reduced and that she would not be gainfully employed for the remainder of her life.

4. The insurance company on which the liability to pay the compensation was fastened, preferred appeal (MAC Appeal No. 23/2008) raising the contentions that the negligence on the part of the taxi driver had not been properly proved since the claimant in the course of her deposition (as PW-3) had *conceded at one stage that she was sleeping during the travel which, in the submission of the insurance company, would show that she was not in a position to narrate the sequence of events leading to the occurrence so as to pin down the responsibility on the taxi driver for the collision which involved a stationary truck. The insurance company by its appeal has also questioned the computation of compensation.*

5. During the course of consideration of the appeal of the insurer, the claimant filed cross-objections (CM No. 4993/2013) after a delay of 1864 days, the delay having been condoned and the cross-objections having been treated as independent appeal (MAC Appeal No. 1030/2015) pursuant to directions in the order dated 16.12.2015 passed by another single judge then in sesin of the matter. By her cross appeal the claimant has claimed that her treatment has continued and she has been constrained to incur further medical expenditure which is much beyond what was taken care of under the head of estimated future medical expenditure in the impugned award. On her application she was granted opportunity, which she has availed, to bring on record the additional evidence.

6. What is, however, pointed out by the insurer at the hearing is the submissions in the cross-appeal, particularly, in para 2(j) to the effect that the claimant has been working for gain though as a temporary employee, in the capacity of Programme Support Officer with M/s M.S. Enterprises office since 01.10.2009 at a gross salary of Rs. 29,353/-, her said then current employment likely to terminate on 31.03.2013. This averment of the claimant itself puts a question mark on the conclusion reached by the tribunal holding that she had been rendered disabled to the extent of 100% affecting her functional ability to be gainfully employed.

7. It is noted that though claiming that the claimant had been rendered paraplegic, she has been appearing in person not only during the inquiry before the tribunal but even during the proceedings in these appeals. It is directed that she shall remain present in person on the next date.

8. The matter being old, no adjournment shall be granted.

9. Be listed on 18th September, 2017".

2. On 18.09.2017, the date appointed by the afore-quoted order dated 11.09.2017, the claimant had appeared in person and during the course of hearing, it was fairly conceded by her that she has continued to be gainfully employed, now as an appointee of the Federation of Indian Chambers of Commerce and Industry (FICCI), in the capacity of Assistant Director to which post she was recently promoted, her employment being regular, the gross emoluments being Rs. 41,000/- approximately. She confirmed that she has been working since 01.10.2009 without let. Against the backdrop of these submissions, she was directed, by order dated 18.09.2017, to discover on oath, the detailed facts about her employment and the terms on which she has been engaged supported by all the requisite documents also stating her claim about functional disability.

3. In compliance with the afore-mentioned directions in the order dated 18.09.2017, the claimant submitted affidavit sworn on 26.09.2017, with copies of all relevant documents. A copy of the affidavit along with supported documents has been served on the counsel for insurance company who does not wish to cross-examine her in such context.

4. The submissions on both sides have been heard in the presence of the claimant who has appeared in person at the final hearing. The record has been perused.

5. The tribunal had calculated the compensation by the impugned judgment as under:-

S.No.	Heads	Compensation
(i)	Loss of future income (23512 x 12 x 18)	Rs. 50,78,592/-
(ii)	Actual medical expenses (625000 + 69430 + 147062)	Rs. 8,41,492/-
(iii)	Estimated future medical expenses	Rs. 2,30,000/-
(iv)	Special diet & conveyance	Rs. 15,000/-
(v)	Attendant charges	Rs. 1,44,000/-
(vi)	Pain & sufferings	Rs. 1,00,000/-
(vii)	Loss of amenities of life	Rs. 1,00,000/-
	Total	Rs. 65,09,084/-

6. The contention of the insurance company about there being no proper proof of negligence on the part of taxi driver only because the claimant had conceded at one stage during her deposition (as PW-3) that she was sleeping during the travel cannot be accepted, the sequence of events leading to the occurrence having been brought out vividly by the evidence. The very fact that the taxi had collided

against the stationary truck speaks volumes about negligence on the part of taxi driver. Going by the preponderance of probabilities the finding returned by the tribunal on this score does not call for any interference.

7. Though going by the nature of injuries suffered by the claimant, in which regard evidence had been led during the inquiry before the tribunal, it appears that her condition at initial stages was one of no hope for return to normal life, this justifying the assumptions made by the tribunal in treating her case as that of permanent functional disability to the extent of 100%, given the efforts made by the claimant, with the support of her parental family, for which they need to be commended, it is clear that she has been able to show greater will and with sheer perseverance has returned to lead, to the extent possible, a normal working life where she can be financially independent, this inspite of she having been abandoned by her spouse. In her affidavit dated 26.09.2017, she has explained her functional disability as under:-

> *(i) "It is difficult task to get ready in the morning for work, as I always need the help of an assistant and my parents to get ready. The process involves shifting me from the bed to the wheelchair, to the washroom, again to get dressed and back into the wheelchair, and from there to the vehicle. Needless to say I cannot do this alone and need help of a hired assistant or my aged parents. I state that once my parents are no longer there, it would not be possible for me to do these tasks without keeping a permanent full time hired assistant, who would have to stay with me round the clock.*

(ii) Since December 2015 I am using a modified Maruti Celerio car which has hand controls, and I am able to drive myself to work. However I need assistance to get into the vehicle and keep the wheelchair and walker (used to enter/exit) the vehicle from the wheelchair) in the vehicle. Prior to this I had to engage a car and driver for the purpose.

(iii) Upon reaching the office premises, I have to again depend on help from the office staff/guard to get out of the vehicle and into the wheelchair, and be taken inside the office. Once inside the office, I cannot even perform simple tasks like taking out a file myself or to pick up a pen without seeking help etc.

(iv) At the office my job is entirely a desk based job, confined to the same floor and complete 8 hours of job. At this stage I may say that the FICCI Aditya Birla CSR Centre for Excellence is focused on Corporate Social Responsibility, and the focus of the centre are organizing conferences, programmes, brain storming sessions, trainings, award ceremonies etc. with different companies and organizations, most of which are done in different locations around the country and some in Delhi itself. However, due to my condition, I cannot participate in, help to organize, attend, or in any other way assist with such programmes. I cannot even attend any meetings in Delhi which are outside my office, which are an everyday affair for my other colleagues. As such I am entirely doing my job and whatever is assigned to me, at my own desk.

(v) This lack of mobility essentially means I cannot function like a normal employee, and this in turn limits my usefulness and role within the organization. As such my promotion and career prospects are severely limited, compared to other employees. This also means my income will be limited and shall remain limited, except small increments as outlined above, since I cannot take on any real position of responsibility.

(vi) I say that I leave home at 8 am and reach the office by 9 a.m. I leave by 5 p.m. and return home by 6 p.m. These long hours of sitting are aggravating my spinal injury, and causing

further deformity in my spine and legs. This is also painful for me in the upper region of my body where I have sensation. I have been advised by my doctors & physiotherapist that continued long sitting, will impact my body even further. Therefore, it is evident that my working life cannot continue for more than a few years. After that I will be entirely dependent of whatever I get from the compensation amount and whatever I have saved from my present earnings.

(vii) I say that I am further impacted in my work due to my lack of bowel/bladder control, as a result of the accident. I have to wear a urine bag/leg bag, which frequenstly overflows and I am unable to know when it would happen due to lack of sensation and control over my bladder. This means I often have to return home earlier than usual to change the urine bag or clean myself, as it is not possible to do in the office as I need support. This again limits my productivity as an employee."

8. Against the above backdrop, while a case for compensation for loss of income for the period 21.06.2006 to 01.10.2009 has been made out, which period of about 39 months represents the duration when she was under medical treatment and totally immobile, given the fact that she had started working w.e.f. 01.10.2009 and going by the present terms of engagement with FICCI would continue to be gainfully employed till the age of 60 and further bearing in mind the emoluments that she is presently earning from such employment (gross Rs. 44,382/- per month), the loss of future income due to functional disability will have to be assessed with reference to the date when she would turn 60 and retire from her service and consequently on the multiplier of 9.

9. In the given facts and circumstances of the case, and the medical condition of the claimant, besides the educational

qualifications she possesses, as indeed the job profile in which she has been engaged, the learned counsel on both sides fairly agree that the functional disability for calculating the future income be pegged at 50%.

10. For calculating the loss of actual income for the period of 39 months (21.06.2006 to 01.10.2009), the calculation will have to be made on the basis of income then earned (i.e. Rs. 20,900/- per month) but given the progressive rise in income that she would earn in normal course as indeed the effect of inflation on the real value of the money, such calculation will have to factor in the element of future prospects which should be to the extent of 30%. On the other hand, the loss of future income due to functional disability to the extent of 50% with reference to the date on which she would retire, the calculations would require the present emoluments (Rs. 44,382/-) to be taken into consideration with the element of future prospects of increase to the extent of 50%.

11. Thus calculated, the loss of actual income for the period of 39 months comes to (20,900 x 130÷100 x 39) Rs. 10,59,630/-. The loss of future income due to functional disability as assessed above is computed as (44,382 ÷2 x 150 ÷100 x 12 x 9) Rs. 35,94,942/-.

12. The tribunal had granted Rs. 8,41,942/- towards actual medical expenditure incurred till the date of impugned judgment and Rs. 2,30,000/- towards estimated future medical expenditure. By additional evidence adduced during the pendency of these appeals, the claimant has proved through her affidavit (Ex.AW1/A) that she has

incurred future medical expenditure in the sum of Rs. 17,07,710.13. The said amount includes Rs. 2,44,000/- towards attendant charges and Rs. 3,97,150/- towards salary to driver. Since the emoluments of attendant charges and engagement of driver is being taken care of under different heads, the same may be deducted for purposes of calculating the actual medical expenditure. The additional expenditure post-decision by the tribunal thus comes to (17,07,710 - 2,44,000 - 3,97,150) Rs. 10,66,560/-. This amount will have to be added to the compensation towards additional medical expenditure. It may be clarified here that given the medical condition as explained by the claimant through her declaration on oath, taken note of above, the award of additional medical expenditure will not result in the amount of Rs. 2,30,000/- estimated by the tribunal towards future medical expenditure to be displaced or affected.

13. The amount of Rs. 1,44,000/- towards attendant charges granted by the tribunal by the impugned judgment is towards the engagement of two nurses during the period of treatment. This, however, does not mean that the claimant is now in a position to be on her own. As noted above, her medical condition would require constant services of an attendant, though part time, as also of a driver, again part time. In this view, the services of an attendant full time should take care of both the needs. Having regard to the fact that she started moving out w.e.f. 01.10.2009 when she was gainfully employed again, such calculation would deserve to be made with reference to the said date, on the basis of minimum wages of semi-skilled person it being Rs.

4,119/-. Since the claimant was about 31 years old at that time, the multiplier of 16 would apply for such purposes. Thus, the attendant charges for the future, post recovery, is calculated as (4119 x 12 x 16) Rs. 7,90,848/-

14. The compensation in the present case thus is recomputed as (35,94,942 + 10,59,630 + 8,41,492 + 10,66,560 + 2,30,000 + 15,000 + 1,44,000 + 7,90,848 + 1,00,000 + 1,00,000) Rs. 79,42,472/-, rounded off to Rs. 79,43,000/-. The award is modified accordingly.

15. It is noted that the tribunal has awarded interest @ 7.5% per annum only which is on the lower side. Having regard to the consistent view taken by this Court, the rate of interest is increased to 9% (see judgment dated 22.02.2016 in MAC.APP. 165/2011 *Oriental Insurance Co Ltd v. Sangeeta Devi & Ors*.].

16. It is, however, clarified that the interest on the additional medical expenditure (Rs.10,66,560/-, rounded off to Rs. 10,67,000/-) would be calculated only w.e.f. 01.03.2013 till the date of payment, in view of the declaration made in the affidavit (Ex.AW-1/A of the claimant) submitted during the pendency of these appeals. The objection of the insurance company to the levy of interest over and above the attendant charges cannot be accepted since the entitlement of the claimant is with reference to the date of the filing of the original petition and the intent is to create a corpus the real value of which cannot be allowed to be eroded.

17. By order dated 15.01.2008 on MAC Appeal no. 23/2008, the insurance company had been directed to deposit 75% of the awarded amount within the period specified and out of such deposit 50% was allowed to be released to the claimant. By order dated 21.04.2015 release of quarterly interest against the balance kept in fixed deposit was also granted on the application of the claimant. Since the amount of compensation has been increased, the entire balance lying in fixed deposit with accrued interest shall be released to the claimant by the registry. The insurance company will be obliged to deposit the balance of its liability under the modified award with accrued interest till date within thirty days with the tribunal which shall release it to the claimant. The release of the balance by the registry and the tribunal, however, shall be in the form of fixed deposit receipts split into as many fixed deposit receipts as desired by the claimant, each taken out from a nationalized bank for a period of ten years with right to draw periodic interest.

18. The statutory deposit shall be refunded to the insurance company after proof is furnished of the modified award having been satisfied.

19. Both appeals are disposed of in above terms.

R.K.GAUBA, J.

OCTOBER 09, 2017
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