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

% *Decided on: 02.09.2019*

+ MAC.APP. 105/2018 & CM APPL. 49801/2018

IFFCO TOKIO GENERAL INSURANCE CO LTD Appellant

Through: Mr. Varun Sarin, Advocate.

versus

SUDESH KUMAR @ CHHOTU & ORS Respondents

Through: Ms. Sarika Goel, Advocate for R-1.

None for R-2.

Mr. B.R. Sharma, Advocate for R-3.

+ MAC.APP. 111/2018, CM APPL. 3425/2018 & CM APPL. 49805/2018

IFFCO TOKIO GENERAL INSURANCE CO LTD Appellant

Through: Mr. Varun Sarin, Advocate.

versus

ALI ASGAR & ORS Respondents

Through: Ms. Sarika Goel, Advocate for R-1.

Mr. B.R. Sharma, Advocate for R-3.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. Respondent no. 2-Om Prakash Rai has been served through publication in terms of the Court's order. Proof of service has been filed on 14.03.2019.

2. The said respondent no. 2 is stated to have not appeared even before the learned Tribunal. The owner of the vehicle is represented by a counsel, so are the claimants.

3. These appeals impugn the award of compensation dated 10.10.2017, awarding compensation to the claimants Sudesh Kumar @ Chhotu Rs. 15,97,190/- in claim MACT No. 4175/2016 and to Ali Asgar Rs.8,22,545/- in MACT No. 4619/2016.

4. It is the case of the claimants that they were employed by respondent no. 3-the owner of the insured vehicle, a truck bearing no. HR 55G 1795; that they were going from Bahadurgarh to Jasola on 03.03.2016 at 5.00 am; the vehicle was carrying building material; they were helpers on the truck and had been employed by the truck owner. The latter has simply denied the employment of the said persons. Apart from bare denial he has offered no explanation as to how the said two persons got injured in the accident at 5.00 am in the morning on the Outer Ring Road, near Savitiri Cinema, C.R. Park, New Delhi, when the insured vehicle hit into a stationary truck bearing no. HR-55F-6536. As a result of the collision the canter was damaged and the claimants suffered grievous injuries: i) Sudesh suffered disability in respect of his both lower limbs upto 98%, he cannot move about without assistance of crutches and of people shifting him from one place to another, he is able to move on a wheel chair, ii) while Ali Asgar has suffered permanent disfigurement and irredeemable injury, he too cannot move without the assistance of another person. Both of them are present in the Court. It is evident that they are unable to get up from their seats, on their own.

5. The appellant contends that the vehicle was being driven by a person, who did not possess a valid driving licence. The appellant has admitted in his cross-examination that it did not conduct any inquiry regarding driving licence of the driver, who was admittedly employed by the insured two or three months prior to the accident. The employer stated that he had perused the driving licence and that it appeared to be genuine, he had gotten the same from the licence authority but did not possess it at the time of deposition on 15.02.2017. He also stated that at the time of appointment of driver, he had taken his driving test and was satisfied that he could drive a vehicle. Furthermore, he also stated that *“Respondent no. 1/ driver never caused or involved (sic) in any accident before this alleged accident and always used to drive the vehicle carefully and in a safe manner following all the traffic rules.*

6. In his reply to the claim petition, the owner has simply denied the paragraph wherein the claimants had stated that they were employed with him. However, the accident led to the police registering a case of rash and negligent driving. In his statement under section 161 Cr. PC in case FIR No. 58/2016 at Police Station, CR Park, New Delhi, the injured-Ali Asgar had stated that the owner/employer had employed the two injured persons. The impugned order has recorded this argument as under:-

“50. Though petitioners have admitted in their cross-examination that they have no documentary evidence to show that they were working as helpers in the offending vehicle, but present case is based upon the DAR filed by the police. Police has shown the profession of both the petitioners as helpers in the DAR. DAR also shows that driver of other vehicle involved in the accident i.e. Sultan Singh took both the petitioners to the

hospital. Sultan Singh stated to police that he with the help of other persons pulled out the helpers i.e. Chhotu and Asgar from the offending vehicle and took them to the hospital. Statement of petitioner Asgar Ali recorded under Section 161 Cr.P.C. by the police on the date of accident itself shows that he stated to police that he is working for respondent No. 2 for the last 2 years. Though counsel for Insurance Company has argued that respondent No. 2 has not stated anything regarding employing both the petitioners as helpers in his entire testimony before this Tribunal, but statement of respondent No. 2 recorded under Section 161 Cr.P.C, on the date of accident itself is annexed in the DAR which shows that he has stated to police that he indeed had two helpers namely Chhotu and Asgar Ali. Thus, it is established on record that petitioners were the employee of the owner. Hence, Insurance Company has failed to prove its defence that petitioners were travelling as gratuitous passengers in the offending vehicle.

(emphasis supplied)

7. A perusal of the reply of the owner of the vehicle shows that it is evasive apropos the employment of the injured parties obviously for the reason to escape any liability of indemnification. Nevertheless, since he had admitted before the police of the employment of the claimants, the impugned order has rightly concluded that the injured claimants were employed by respondent no. 3 and at his instance were in the vehicle. In other words, their injury was during the course of their employment as helpers for loading and unloading of the building material, etc.

8. Apropos the argument that the driver did not have a valid driving licence, the impugned order held as under:-

“48. Since the owner had satisfied himself after taking the driving test of the driver and also checking the driving licence of the driver which apparently was found him to be a

genuine one, basing my decision in terms of the aforesaid judgment of Hon'ble Supreme Court of India in Lehu's Case (supra), no recovery right can be granted to Insurance Company against respondent No. 2/insured. However, Insurance Company is given recovery rights against respondent no. 1/driver who was having a fake driving licence at the time of accident.”

9. In view of the above, the liability of the insurer to indemnify is not obviated. In terms of the principle of ‘pay and recover’ as laid down in *Manuara Khatun & Ors. vs. Rajesh Kumar Singh and Ors.* (2017) 4 SCC 796, the insurer would have to first pay the compensation amount to the injured persons and then recover the same from the owner/driver of the offending-insured vehicle under the principle of pay and recover.

10. In view of the above, the appeal is liable to be dismissed. However, the Award has granted interest @9% per annum on Rs. 6 lacs which has been awarded towards provision of two prosthetic limbs on Sudesh Kumar @ Chhotu whereas in the case of Ali Asgar interest has been awarded on the amount of Rs. 50,000/- which was awarded for provision of wheel chair. Let a comfortable wheelchair of standard quality, with life time warranty, be provided to Ali Asgar within three weeks of receipt of this order. The insurer shall provide the telephone numbers and E-mail Ids of three responsible officers of the insurance company, who shall respond to the appellant in case any difficulty arises apropos the functioning of the wheel chair. Should it require to be changed or upgraded, the same shall be at the cost of the insurance company. By the 5th day of each January and August the insurer shall ascertain the functioning of the wheelchair and otherwise rectify any malfunctioning of it within two days of receipt of such

intimation. The parties are at liberty to approach the Court in case of difficulty. Since the said monies have been awarded for prosthetic and wheel chair, it would not carry any interest. The learned counsel for the claimants fairly states that that is the correct position. Better still and to obviate any issue of the cost of the wheelchair.

11. The impugned order is modified accordingly.

12. The appeal is disposed-off in the above terms.

13. Statutory amount, alongwith interest accrued thereon, be returned to the appellant.

SEPTEMBER 02, 2019

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NAJMI WAZIRI, J

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