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

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Decided on: 26.09.2019

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MAC.APP. 947/2018 & CM APPL. 44446/2018

IFFCO TOKIO GEN INS CO LTD

..... Appellant

Through: Ms. Shantha Devi Raman and Ms.
Aishna Jain, Advocates.

versus

MITHLESH DEVI & ORS

..... Respondents

Through: Mr. S.N. Parashar, Advocate for R-1
to R-3.
Mr. R.R. Raju, Advocate for R-5.
(Mob.-9873879680)

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J. (Oral)

1. The award of compensation dated 06.08.2018 passed by the learned MACT in MACP No. 6200/16 is impugned on three grounds that: (i) there was smell of alcohol in the breath of the deceased, as noticed by the attending doctor and so recorded in the MLC, (ii) deceased's own brother-in-law had stated to the police that the deceased was inebriated but was talking normally, and (iii) the Site Plan of the accident indicates that there was a 'head-on-collision'.

2. The Court would note that although the MLC records smell of alcohol in the breath of the deceased, it does not certify the degree of alcohol in his blood i.e. whether it was beyond the permissible limit or whether he was so inebriated that he was not able to speak and/or was not conscious of his actions or of his whereabouts. The mere recording of smell of alcohol in

the breath, would not necessarily mean that the driving skills of the driver had gotten compromised. Although deceased's brother-in-law had told the police that the deceased was inebriated, nevertheless, in the same statement he said that the latter was talking normally. His statement to the police was that *"We reached immediately at hospital where my brother-in-law was admitted. He was inebriated and talking normally..."*. Evidently, both the expressions: i.e. of the deceased being inebriated and his talking normally, are contradictory. Either he was inebriated or he was talking normally. This statement was neither questioned by the appellant nor the said brother-in-law was called for any examination by the insurance company. Therefore, reliance on the same is misplaced.

3. The learned counsel for the appellant relies upon the accident Site Plan to contend that it was a 'head-on-collision'. Apart from this statement, the appellant is not able to show that it was a head-on-collision. Point 'A' is the place where the accident happened. Point 'B' is the place where the scooter landed after the accident, i.e. on the extreme left side of the road, showing that the victim's vehicle was on the correct side of the road; whereas, the offending vehicle/truck had struck it, in such a manner that it landed at the place where it did or alternatively the offending truck was being driven on the wrong side of the road. Therefore, there is no reason to conclude that there was a 'head-on-collision'. Indeed the case of the appellant is discussed in the impugned order as under:-

"Onus to prove this issue was upon the petitioners. To prove the fact that victim suffered fatal injuries on account of rash and negligent driving of respondent no. 1, petitioner has examined PW2 Mr. Jagdish Prasad, who is stated to be eye-witness of accident. PW2 has not at all been cross

examined by respondents no. 1 and 2. In his cross examination, by Ld. Counsel for respondent no. 3, no suggestion was put to the witness that accident had occurred due to negligence of victim or it did not happen due to rash and negligent on the part of respondent no. 1 nor there is any question with respect to manner in which the accident had occurred. Respondent no. 1 even has not examined himself to prove that accident did not happen with his vehicle or he was not driving the vehicle rather it is admitted fact that deceased died due to said accident. Therefore the rash and negligent act on the part of respondent no. 1 stands established. Further, the IO has filed criminal case record which shows that respondent no, 1 was indicted by police for offences punishable under Section 279/304A IPC. Respondent no. 1 did not approach to any higher authority or any forum against his false implication in this case. Apart from deposition of PW1, the fact that deceased suffered fatal injuries in the accident is also supported from his postmortem report, etc. Considering all this, it stands proved that accident in question occurred due to rash and negligent driving of offending vehicle by respondent no. 1 and victim died due to fatal injuries suffered in such accident.”

4. The learned counsel for the appellant also relies upon the dicta of the Supreme Court in ***Bijoy Kumar Dugar vs. Bidya Dhar Dutta and Others*** (2006) 3 SCC 242, which held as under:-

“12. ... It is the evidence of Rajesh Kumar Gupta PW 2 who was travelling in the Maruti car along with the deceased Raj Kumar Dugar on the day of the accident that he also suffered some injuries in the said accident. He stated that while coming from Digboi, the Maruti car being driven by the deceased met with an accident at a place near Kharjan Pol. Before the accident, Raj Kumar Dugar noticed a passenger bus coming from the opposite direction and the movement of the bus was not normal as it was coming in a zigzag manner. The Maruti car being driven by the

deceased Raj Kumar Dugar and the offending bus had a head-on collision. MACT has not accepted the evidence of PW 2 to prove that the driver of the offending bus was driving the vehicle at abnormal speed. If the bus was being driven by the driver abnormally in a zigzag manner, as PW 2 wanted the Court to believe, it was but natural, as a prudent man, for the deceased to have taken due care and precaution to avoid head-on collision when he had already seen the bus coming from the opposite direction from a long distance. It was head-on collision in which both the vehicles were damaged and, unfortunately, Raj Kumar Dugar died on the spot. MACT, in our view, has rightly observed that had the knocking been on one side of the car, the negligence or rashness could have been wholly fastened or attributable to the driver of the bus, but when the vehicles had a head-on collision, the drivers of both the vehicles should be held responsible to have contributed equally to the accident. The finding on this issue is a finding of fact and we do not find any cogent and convincing reason to disagree with the well-reasoned order of MACT on this point. MACT has awarded interest at the rate of 10% per annum on the amount of compensation from the date of filing of the claim application till the date of payment. It is a discretionary relief granted by MACT and, in our view, the discretion exercised by MACT cannot be said to be inadequate and inappropriate.”

5. She further relies upon the dicta of the Supreme Court in **Raj Rani & Ors. vs. Oriental Insurance Co. Ltd. and Ors.** (2009) 13 SCC 654, which held as under:-

“17. So far as the issue of “contributory negligence” is concerned, we may notice that the Tribunal has deducted 1/3rd from the total compensation on the ground that deceased had contributed to the accident. The same, we find, has been upheld by the High Court.

19. In this case, the truck was stationary. Some amount of negligence on the part of the deceased cannot be ruled out.

Hence in the instant case, we find that there was contributory negligence on the part of the deceased and accordingly the claimant was entitled to only 50% of the total amount of loss of dependency.”

6. From the preceding discussion of the manner of the accident, it cannot be deduced that the accident was ‘head-on-collision. The facts of **Bijoy Kumar Dugar** (supra) and **Raj Rani** (supra), are differ from the present case, therefore, reliance upon them is misplaced.

7. The appellant next contends is that minimum wages applicable to a skilled workman was taken into consideration for computation of compensation towards ‘loss of dependency’, as the deceased was a driver of TSR, while he held a driving licence for LMV. He did not hold a driving licence for a TSR. The Court is of the view that the LMV’s are ordinarily four wheeled vehicles, the driving of such vehicles involves and requires a different set of skills than driving three wheeler vehicles. Additionally, plying of a TSR i.e. commercial three-wheeler vehicle, requires a different set of skills apropos parking of the vehicle on the side of the road to facilitate the boarding and alighting of passengers, alongwith familiarization of other rules as specifically applicable to such commercial vehicles. In the circumstances, the driver could not be treated as having the permit to drive a TSR. However, insofar as he had a licence to drive a light motor vehicle (LMV), it would include a non-commercial three wheeler. From the nature of the accident and for the non-possession of the specific licence for driving a commercial TSR, the degree of negligence cannot be deemed to be beyond 10%. The decision of the Supreme Court in **Mukund Devangan** (supra), covers the field apropos driving licence for a reliable having weight of upto

7500 kgs. Therefore, 10% contributory negligence is fixed on driver, for equivalent deduction from the awarded amount.

8. A person bearing a driving licence possesses a skill which is tested and certified by the Road Transport Authority. The skill is certified by the State, therefore, such person would be entitled to be classified as a skilled workman. The claimant had stated that the TSR driver was earning his living by plying a TSR commercially, but after the accident he is incapable to do so. In the circumstances, the learned Tribunal has rightly taken into consideration the minimum wages applicable to a skilled person. This conclusion calls for no interference.

9. The Court would note that for non-pecuniary compensation, there is a single compensation of Rs. 40,000/- towards 'loss of love and affection'. However, in terms of the dicta of the Supreme Court in *Magma General Insurance Co. Ltd. v. Nanu Ram Alias Chuhru Ram & Ors.* 2018 SCC OnLine SC 1546, each of the claimants are entitled to compensation towards 'loss of love and affection' @ Rs. 50,000/- and towards 'loss of consortium' @ Rs. 40,000/-. It is so granted.

10. Accordingly, the total payable amount by the insurer would be as under:

S.No.	Particulars	Amount
1.	Loss of Dependency (Rs.19,98,797/- less 10%)	Rs. 17,98,917/-
2.	Loss of love and affection [Rs. 50,000 x 3 (claimants) less Rs. 40,000/- (already granted)]	Rs. 1,10,000/-
3.	Loss of consortium [Rs. 40,000 x 3 (claimants)]	Rs. 1,20,000/-
TOTAL		Rs. 20,28,917/-

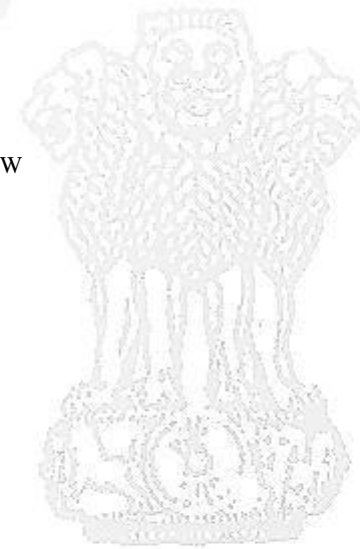
11. Let Rs. 20,28,917/-, alongwith interest @ 9% from the date of filing of the petition till its realisation, be deposited before the learned Tribunal, within three weeks from date of receipt of copy of this order, to be released to the beneficiaries of the award in terms of the scheme of disbursement specified therein.

12. Since the appellant has succeeded partially in the appeal, the statutory amount, alongwith interest accrued thereon, be refunded. .

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

NAJMI WAZIRI, J

SEPTEMBER 26, 2019/RW



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