

\$~9 & 15

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

Date of Decision: 13th May, 2016

+ **MAC.APP. 1119/2013**

THE ORIENTAL INSURANCE CO LTD Appellant
Through Mr. J P N Shahi, Adv.

versus

SH SAJAN NAYAK & ORS Respondent
Through Ms. Shantha Devi Raman, Adv. for
R-3
Mr. S N Parashar, Adv. for claimant

+ **MAC.APP. 305/2014**

SH ASHOK KUMAR Appellant
Through Ms. Shantha Devi Raman, Adv.

versus

SH SAJAN NAYAK & ORS Respondent
Through Mr. J P N Shahi, Adv. for R-2
Mr. S N Parashar, Adv. for claimant

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. On 27.10.2010 Sajan Nayak (first respondent in both these appeals) (claimant) was travelling in motor vehicle described as Vikram bearing registration No.DL 1L 5938 (Vikram) which was driven by one Tinku with admittedly one other person named Monu also a passenger. The vehicle Vikram was moving on Desh Bandhu Gupta Road and had reached Axis

Bank near Bali Nursing Home at about 11.30 AM when bus bearing registration No.DL 1PA 7270 (bus), admittedly driven by Rajesh Kumar (second respondent in MAC.APP.No.1119/2013 and third respondent in MAC.APP.No.305/2014) came from behind and collided against it on account of which impact Vikram overturned. In the process Sajan Naik (claimant) suffered grievous injuries and in the course of treatment his left arm had to be amputated rendering him permanently disabled, his functional disability having been assessed by the motor accident claims tribunal (tribunal) to be to the extent of 60%.

2. The claimant instituted accident claim case (suit No.603/10) on 02.12.2010 before the tribunal impleading Oriental Insurance Company Ltd. (appellant in MAC.APP.No.1119/2013) and Ashok Kumar (appellant in MAC.APP.No.305/2014) as parties, they concededly being the insurer and owner of the bus, this in addition to Rajesh Kumar (the driver). Upon inquiry, by judgment dated 11.10.2013, the tribunal upheld the case of the claimant that the accident had occurred due to negligence on the part of the bus driver. Compensation in the sum of Rs.12,82,337/- was awarded with interest at 9% per annum from the date of filing of the petition till realization. This amount would include Rs.10,26,043/- calculated as loss of earning capacity in future due to the disability, the income of the claimant having been assumed to be Rs.5,278/-, equivalent to minimum wages, over and above which 50% was added towards future prospects of increase.

3. It may be added here that the insurance company had pleaded breach of terms and conditions of the insurance policy on the ground that there was no valid route permit taken in respect of bus for the period in question. This

contention was found to be correct and on that basis recovery rights were granted to the insurance company against the owner of the bus.

4. Both the insurer, and the owner, of the bus have come up with their respective appeals questioning the computation of the compensation on the ground the element of future prospects could not have been factored in. Additionally, the owner in his appeal submits that there was negligence on the part of the driver of the vehicle described as Vikram inasmuch as he had not only carried two persons in a small vehicle but also was not holding a valid driving license. The owner in his appeal (MAC.APP.No.305/2014) has moved an application (CM No.5993/2014) under Order 1 Rule 10 of the Code of Civil Procedure, 1908 (CPC) requesting for the driver, owner and insurer of Vikram also to be impleaded as parties primarily on the basis of contention regarding negligence on the part of Tinku (Vikram driver).

5. Arguments have been heard at length. The record has been perused.

6. The contention of the owner of the bus in his appeal about negligence on the part of the Vikram (driver) is primarily founded on the fact that the driver Tinku had allowed two persons to travel in what the counsel described as a small vehicle. In a case of this nature it is not the smallness or largeness of the vehicle which is to be seen. Evidence was required to ascertain as to what is the seating capacity of the vehicle. No queries were raised or effort made during the inquiry to bring in any evidence on this score. The reliance on the certified copies of the conviction slips (pages 147 – 150) respecting Tinku (Vikram driver) and Hirdiya Lal (owner of Vikram) on the prosecution for offences under Sections 146 read with Section 196, section 3 read with Section 181 and Section 5 read with Section 180 of MV

Act is misplaced. It does appear that on such prosecution both the said persons had pleaded guilty before the criminal court on which they were let off with punishment restricted to fine. Even it were to be assumed on the basis of such material, that Tinku (Vikram driver) was not holding a valid or effective driving license at the relevant point of time, it cannot lead to the conclusion that he had been negligent in driving his vehicle. For such conclusions to be reached the party raising such contentions was required to bring further evidence. On the contrary, the evidence on record clearly shows that the negligence on the part of the bus driver was the sole reason why collision took place. The bus had come from behind the Vikram and had hit it in the process of overtaking from the wrong side. In these circumstances, there is no case made out for the driver, owner or insurer of Vikram to be impleaded as parties. The application to such effect thus must be rejected. For the same reasons, the contention of the owner of the bus respecting the issue of negligence is repelled.

7. 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.

8. 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. Lalita Devi & Ors.*) decided on 12.1.2015, 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.

9. It is true that the claimant did not lead any clear evidence as to the nature of his avocation or earnings therefrom. In these circumstances, the tribunal was left with no option but to assume his income notionally on the basis of minimum wages. With no evidence concerning progressive rise in income, the factor of future prospects must be kept out. The claimant was 18 year old at the time of the accident. He has been found to be disabled functionally to the extent of 60%. Though, it appears that in the preceding para at internal page 12 of the impugned judgment the tribunal mentioned that the functional disability shall be taken up as 40% *qua* the whole body, in the calculation, the loss of earning capacity has been taken as 60%. Given the extent of amputation suffered by the claimant, there is no error found in such calculation. The future income loss due to disability has to be calculated on the multiplier of 18. It is recomputed as $(5,278 \times 60 \div 100 \times 12 \times 18)$ ₹6,84,029/-. Since the tribunal had calculated the award under this head at ₹10,26,043/-, the total needs to be reduced by $(10,26,043 - 6,84,029)$ ₹3,42,014/-.

10. The total compensation awarded being 12,82,337/- as a result of above conclusion, it stands reduced to (12,82,337 – 3,42,014) ₹9,40,323/- rounded off to ₹9,41,000/-. Needless to add, it shall carry interest as levied by the tribunal.

11. By order dated 09.12.2013 in MAC.APP.No.1119/2013, the insurance company had been directed to deposit the entire awarded amount with up-to-date interest and 75% was allowed to be released, the balance kept in fixed deposit receipt with UCO Bank, Delhi High Court branch for a period of six months to be renewed periodically. The Registrar General shall now calculate the amount payable to the claimant in terms of the award modified as above and release the same in accordance with the tribunal's judgment refunding the excess to the insurance company with statutory deposit made by it. The stay against recovery rights is vacated.

12. The application (CM No.5992/2014) filed in MAC.APP.No.305/2014 stands dismissed. It appears the appellant in that appeal has also made statutory deposit under Section 173 of MV Act. The said amount shall be released to the insurance company towards part satisfaction of its recovery rights. For the balance, the insurance company may take out appropriate proceedings before the tribunal.

13. The appeals are dismissed with above directions.

R.K. GAUBA
(JUDGE)

MAY 13, 2016
VLD