

\$~R-231 & 233

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

Decided on: 19th September, 2017

+ MAC APPEAL No. 514/2010 & CM No. 13977/2010

IFFCO TOKIO GENERAL INSURANCE. CO. LTD

.... Appellant

Through: Ms. Suman Bagga, Adv.

versus

TENZIN PELDON & ORS.

..... Respondents

Through: Mr. R.K. Kohli, Adv. for R-1.

+ MAC APPEAL No. 593/2010

TENZIN PELDON

..... Appellant

Through: Mr. R.K. Kohli, Adv.

versus

TELEMART COMMUNICATION INDIA PVT. LTD.

& ANR.

..... Respondents

Through: Ms. Suman Bagga, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. On 28.02.2004, four persons were moving in car bearing registration no. DL 4C AB 0735 (the car) driven by Nitesh Gupta (respondent in these appeals), it being registered in the name of Telemart Communication (India) Pvt. Ltd. (another respondent in these appeals), it admittedly being insured against third party risk with

IFFCO Tokio General Insurance Co. Ltd. (appellant in MAC Appeal No. 514/2010). The passengers on the rear seat included Dalbir Singh aged 20 years and Tenzin Peldon (appellant in MAC Appeal No. 593/2010), aged 17 years. It is alleged that the car was driven negligently by the said Nitesh Gupta and this resulted in a motor vehicular accident that occurred at about 0400 hours. The occupants of the car, particularly Dalbir Singh and Tenzin Peldon suffered injuries, the former dying in the consequence.

2. Two accident claim cases came up before the motor accident claims tribunal one (case no. 456/2004) filed by Phoolwati on account of death of her son Dalbir Singh and the other (case no. 455/2004) filed by Tenzin Peldon, (appellant in MAC Appeal no.593/2010), she also being the first respondent in MAC Appeal No. 514/2010). The tribunal clubbed both the cases and held inquiry.

3. By judgment dated 28.05.2010, the case of the claimants in the two cases under Section 166, Motor Vehicles Act, 1988 was accepted with the finding that the accident had occurred due to negligent driving of the car. Compensation in each case was determined and the liability was fastened on the insurer, its plea of contributory negligence on the part of car driver, on account of drunken driving, this constituting breach of terms and conditions of the insurance policy having been rejected.

4. By its appeal (MAC Appeal 514/2010), the insurance company reiterates its plea of breach of terms and conditions of the insurance policy on the ground that the driver was guilty of drunken driving referring in this context, *inter alia*, to a statement (Ex.PW-2/D-1)

attributed to Tenzin Peldon (PW-3) made to a surveyor/investigator of the insurance company with which she was confronted during the course of her cross-examination. The tribunal did not accept the above evidence rejecting the reference to a document (Ex.PW-2/D1) for the reason, the person before whom the said statement was made by PW-3 had not been examined by the insurance company. The contention of the insurance company about the driver of the car being under the inference of alcohol at the relevant point of time was rejected with the following reasoning:-

“14. The insurance company has also taken the plea that the driver of the offending vehicle/respondent no. 2 was heavily drunk as it suggested from his MLC dated 22.08.2004 issued by Indraprastha Appollo Hospital. In the said MLC, the doctor has opined that there was smell of alcohol present while examining the driver of the offending vehicle/the respondent no.2 Shri Nitesh Gupta. The percentage of the said alcohol contents in the breath of respondent no.2 was not mentioned in the MLC. Neither any breath analyzer test was carried on for respondent no.2. The said R3W1 Dr. Deepak Vats have categorically termed it to be correct that despite presence of smell of alcohol it cannot be conclusively opined as to whether the patient was under influence of alcohol. It was further admitted by the Dr. R3W1 that the blood and urine examination of the patient was done but not for the purpose of alcohol contents. The said R3W1 proved the MLC and the discharge summary of the respondent no.2/driver. The R3W2 proved the contents of the insurance policy besides other documents.

15. From the aforesaid statement of R3W1 Dr. Deepak Vats it is clear that in case of a smell of alcohol is found to be present in the body of a person, it cannot be conclusively stated that a patient can be under the

influence of alcohol. As already said no breath analyzer test, no blood or urine test was done, therefore the insurance company have utterly failed to prove the fact that there was a contributory negligence on the part of the driver of the offending vehicle/respondent no.2 consequent to which the policy conditions were violated. Hence the plea of the insurance company regarding the fact that inebriated state of the driver of offending vehicle contributory to the accident stands rejected.”

5. In the view of this Court, the above reasoning cannot be faulted. In absence of any corroborative proof, the plea of contributory negligence cannot be accepted, not the least so as to defeat the claim of third parties.

6. The claimant Tenzin Peldon has sought enhancement of the award in her case (MAC Appeal No. 593/2010). It is noted that by evidence she had proved that she has been rendered permanently disabled, she having suffered fracture and dislocation of C7/D1 Vertebrae, it leading to paraplegia and comminuted fracture of left superior and inferior pubic rami, such injuries having resulted in loss of total function of both lower limbs, the loss of total control over bowel and urine functions besides permanent scars on face and neck.

7. The claimant (Tenzin Peldon) was examined by a board of doctors constituted by Chief Medical Officer who had issued medical report (Ex.PW-2/5) affirming that she is a case of permanent disability, her impairment having been evaluated as 75% (Seventy Five Percent), she being a case of paraplegia.

8. It is noted that the tribunal awarded the compensation in her favour calculating it thus:-

S.No.	Heads	Compensation
1.	Medical Expenses	Rs. 2,30,062/-
2.	Pain and sufferings	Rs. 2,00,000/-
3.	Loss of (i) earning capacity on account of disability (i) amenities of life and expectation of life (iii) inconvenience and hardship (iv) loss of common pleasure of life (v) reduction in longevity and stress	Rs. 4,00,000/-
4.	Special Diet	Rs. 50,000/-
5.	Future attendant & medicine charges	Rs. 1,50,000/-
	total	Rs. 10,30,000/-

(The correct total comes to Rs. 1030062/-)

9. A perusal of the impugned judgment would show that the tribunal though taking note of the permanent disability to the extent of 75 % (Seventy Five Percent) did not undertake the exercise of assessing the loss of future income on such account. It has awarded lumpsum amount of Rs. 4,00,000/- under various heads including loss of earning capacity on account of disability, amenities and expectation of life, inconvenience and hardship and loss of common pleasure of life and reduction in longevity and stress. This approach was not correct. It is noted that the claimant was born on 12.01.1987 and had studied upto senior secondary level, she being a student of degree

course at the time she suffered injuries and became permanently handicapped. If the accident had not occurred, in normal course she would have attained graduation degree in 2007 and would have become capable of becoming an earning hand. The loss of income due to disability will have to be worked out afresh, consequently bearing in mind the minimum wages of a graduate (Rs. 4230) which would apply in 2007.

10. Thus calculated, with the multiplier of 18, loss of future earnings due to disability are computed as $(4230 \times 75 \div 100 \times 12 \times 18)$ Rs. 6,85,260/-, rounded off to Rs. 6,86,000 (Rupees Six Lakhs Eighty Six Thousand only).

11. The amount of Rs. 4,00,000/- awarded under various heads mentioned above are treated as non-pecuniary damages under said heads other than loss of earning capacity on account of disability. The amount of Rs. 1,00,000/- is added towards loss of marriage prospects.

12. Thus, there shall be an increase in the total award by $(6,86,000 + 1,00,000)$ Rs. 7,86,000/- (Rupees Seven Lakhs Eighty Six Thousand only).

13. However, following the consistent view taken by this Court the rate of interest is increased to 9% (nine percent) per annum from the date of filing of the petition till realization. [see judgment dated 22.02.2016 in MAC.APP. 165/2011 *Oriental Insurance Co Ltd v. Sangeeta Devi & Ors.*]

14. Since the compensation in the case of Tenzin Peldon has been increased, the insurance company shall make the requisite deposit within 30 days, to be released to the claimant.

15. Statutory amount deposited by the insurance company in its appeal shall be refunded.

16. This disposes of both the appeals and pending application.

R.K.GAUBA, J.

SEPTEMBER 19, 2017

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