

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

Date of decision: January 30, 2017

(i) + **MAC.APP. 573/2008**

DR.SAURABH KUMAR GUPTA @ SAURABH GUPTA

..... Appellant

Through: Mr. S.P. Singh Chaudhary &
Mr. Y.R. Sharma, Advocates

Versus

NEW INDIA ASSURANCE CO. LTD. & ORS.Respondents

Through: Mr. Pankaj Seth, Advocate for
respondent No.1
Mr. Akhilesh Kr. Sharma,
Advocate for respondent No.3

(ii) + **MAC.APP. 600/2008**

(iii) + **MAC.APP. 602/2008 & C.M.5157/2009**

THE NEW INDIA ASSURANCE CO LTD Appellant

Through: Mr. Pankaj Seth, Advocate

Versus

DR. SAURABH KUMAR GUPTA @

SAURABH GUPTA AND ORS.

.....Respondents

Through: Mr. S.P. Singh Chaudhary &
Mr. Y.R. Sharma, Advocates
for respondent No.1
Mr. Akhilesh Kr. Sharma,
Advocate for respondent No.3

**CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR**

**JUDGMENT
ORAL**

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1. The above captioned three appeals are directed against common impugned Award of 2nd August, 2008 vide which compensation of ₹15,90,000/- and ₹2,75,000/- with interest has been granted to Claimant-Dr. Saurabh Kumar Gupta on account of death of his wife, aged about 29 years and death of his minor daughter, aged about 2½ years, in a road accident on 24th May, 2005. The above captioned first appeal is by Claimant, who seeks enhancement of compensation, whereas above captioned second and third appeals are by the Insurer, who seeks to absolve itself from the liability to pay compensation by asserting that negligence was of the tractor-trolley driver and not of car driver and in the alternative, plea of contributory negligence has been put forth by the Insurer.

2. As per order of 26th February, 2009, in the above captioned first appeal and as per order of 29th May, 2012 in the above captioned second and third appeal, service is complete. Since these appeals arise out of common impugned Award of 2nd August, 2008, therefore, with the consent of learned counsel for the parties, these appeals have been heard together and are being disposed of by this common judgment.

3. The factual background of this case stands already noted in the impugned Award and so, needs no reproduction. Suffice to note that on 24th May, 2005 wife and daughter of Claimant along with his mother and mother-in-law, were travelling in Maruti Zen Car No.UP 75 B 7949,

which was driven by *Kuldeep* and on that day, at about 11:45 a.m., it collided with a tractor-trolley at the crossing near Chatta, Mathura. In this accident, driver of car in question and wife and daughter of Claimant had died. It is a matter of record that in respect of this accident, FIR was got registered against driver of tractor-trolley in question. Pertinently, the registered owner of car in question was *ex parte* before the learned Motor Accident Claims Tribunal and here also, he is *ex parte*. However, he has deposed before the learned Tribunal. Apart from his evidence, there is evidence of eye witness- *Dr. Vijay Gupta* and surveyor of the Insurer. On the basis of evidence on record, the impugned Award has been rendered. The breakup of compensation awarded by learned Tribunal is as under:-

Loss of income	₹15,20,000/-
Loss of love and affection and consortium	₹50,000/-
Funeral charges	₹10,000/-
Total compensation	₹15,80,000/-*
(*Inadvertently shown as ₹15,90,000/-)	

4. Mr. S.P. Singh Chaudhary, Advocate for Claimant- *Dr. Saurabh Kumar Gupta*, submits that income tax return of the year 2005-06 has not been considered while assessing the income of the deceased and income tax return of the earlier year i.e. 2004-05 has been considered and infact, the subsequent income tax return ought to have been considered and so, the compensation awarded needs to be suitably enhanced. It is submitted that interest of 7.5% p.a. granted is on lower side and the reasonable rate of interest which ought to have been granted is 9% p.a. It is submitted

that the compensation granted under the non-pecuniary heads is on the lower side and it needs to be suitably enhanced.

5. Mr. Akhilesh Kr. Sharma, Advocate for driver of the tractor-trolley supports the impugned Award and submits that as per evidence of eye-witness, the negligence was of the car driver and so, the liability to pay the compensation cannot be shifted upon the owner of tractor-trolley in question. Attention of this Court is drawn to certified copy of site plan of the spot prepared in the criminal proceedings to submit that mere registration of FIR against the driver of tractor-trolley in question is of no consequence for the reason that *Ved Prakash*, author of this FIR, has not been got examined. It is submitted that version put forth by aforesaid *Ved Prakash* stands contradicted from site plan of the spot and so, impugned Award need not be interfered with. It is further submitted that evidence of surveyor (*RIWI*) of insurer cannot be relied upon to shift the negligence upon tractor-trolley's driver because the said witness had not prepared site plan of the spot and had prepared the report at the instance of one Ashok Kumar, who has not come forward to depose and so, evidence of surveyor (*RIWI*) is of secondary nature and it deserves to be ignored. It is pointed out that the negligence aspect becomes abundantly clear from the fact that front portion of the car in question was extensively damaged and had tractor-trolley hit the said car, then there would have been damage on side of the car.

6. Mr. Pankaj Seth, Advocate, for Insurer draws the attention of this Court to deposition of eye witness- *Dr. Vijay Gupta (PW-1)* to point out that she in her cross-examination has stated that she had seen tractor in question 5-10 minutes prior to the accident in question and that she is an

interested witness, as she is mother of Claimant and wife of owner of car in question. It is pointed out that owner of the car in question- *Dr. S.C. Gupta (R3W3)* in his evidence nowhere stated that driver of the car in question was negligent and so, negligence cannot be attributed to driver of the car in question. He submits that negligence was of tractor-trolley driver and therefore, FIR has been registered against him. In the alternative, it is submitted that the instant case clearly depicts that it is a case of 50:50 contributory negligence. So, it is submitted by learned counsel for Insurer that infact Insurer needs to be absolved from the liability to pay the compensation, as the liability to pay the compensation is of owner of tractor-trolley in question.

7. On the aspect of quantum of compensation awarded, learned counsel for Insurer submits that there is no loss of dependency, as husband of the deceased/ Claimant is himself a doctor and by now, he would have remarried and ₹15,20,000/-under the head *loss of income* has been already granted and so, no case for enhancement of compensation is made out and rate of interest granted need not be enhanced, as it is just and proper. Nothing else is urged by either side.

8. Upon hearing and on perusal of impugned Award and the evidence on record, I find that Insurer's application under Section 170 of *The Motor Vehicles Act, 1988* has been already allowed by Motor Accident Claims Tribunal and so, Insurer is permitted to challenge the impugned Award on the negligence aspect as well. I find that evidence of eye witness- *Dr. Vijay Gupta* cannot be diluted merely because she happens to be mother of Claimant and wife of owner of the car in question, as the version put forth by her regarding the manner of accident finds supports

from the site plan of the spot. While relying upon evidence of eye witness- *Dr. Vijay Gupta (PW-1)*, which is supported from the site plan of the spot, I find that negligence was of the car driver and not of tractor-trolley's driver and so, finding returned by learned Tribunal on the negligence aspect need not be interfered with.

9. So far as enhancement of compensation is concerned, I find that learned Tribunal has rightly relied upon income tax return of the year 2004-05, as income tax return for the subsequent year i.e. post accident need not be taken into consideration and so, loss of dependency assessed appears to be just and fair. However, I find that under the non-pecuniary heads, compensation granted for loss of consortium is on the lower side, as Supreme Court in *Rajesh and Others v. Rajbir Singh and Others*, (2013) 9 SCC 54 has granted compensation of ₹1,00,000/- under the head “*loss of consortium*” and ₹25,000/- has been awarded under the head “*funeral expenses*”.

10. Accordingly, the compensation awarded under the head “*loss of consortium*” is enhanced from ₹50,000/- to ₹1,00,000/- and under the head “*funeral expenses*” is enhanced from ₹10,000/- to ₹25,000/-.

11. Thus the enhanced compensation awarded to Claimant is as under:-

Loss of income	₹15,20,000/-
Loss of love and affection and consortium	₹1,00,000/-
Funeral charges	₹25,000/-
Total compensation	₹16,45,000/-

12. In view of the aforesaid, the compensation awarded is enhanced from ₹15,80,000/- to ₹16,45,000/- only. The interest @7.5% p.a. granted by the learned Tribunal is in consonance with the rate of interest granted by the Supreme Court in *Rajesh (supra)* and so, rate of interest granted need not be enhanced. It is not disputed that 50% of the awarded amount has been already released to Claimant. Four weeks' time is granted to respondent-insurer to deposit the enhanced compensation with interest @7.5% p.a.

13. The statutory deposit, if any, be refunded to the appellant-insurer after enhanced amount is deposited.

14. With aforesaid modification, these appeals are disposed of.

(SUNIL GAUR)
JUDGE

JANUARY 30, 2017

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