

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

+ **FAO No. 827/2003**

% Judgment reserved on: 19.03.2008
Judgment delivered on: 6.4.2009

Bhirbhan Appellant
Through: Mr. J. S. Kanwar, Advocate.

versus

Shiv Narain & Ors.
..... Respondents
Through: Mr. S. S. Panwar, Advocate for
Respondent No.4.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | No |

KAILASH GAMBHIR, J.

1. The present appeal arises out of the award of compensation passed by the Learned Motor Accident Claim Tribunal on 01.9.2003 for enhancement of compensation. The learned Tribunal awarded compensation of Rs.26,000/- (50% of Rs.52,000/- deducted on account

of contributory negligence on the part of appellant) alongwith an interest @ 6% PA for the injuries caused to the claimant appellant in the motor accident.

2. The brief conspectus of facts is as under:

3. On 14.5.1996, at about 5:30PM, appellant was sitting on the driver seat in the bus bearing registration no. DL-1P-8665 by keeping his leg outside the window of driver seat and was talking to some driver. The appellant's bus was standing on the bus stop and bus bearing registration no. DL-1P-6605 came in a rash and negligent manner from side of Novelty Cinema and hit the bus in which appellant was sitting near the front driver door side of the bus, as a result of which, the right leg of the appellant was crushed and he fell down.

4. A claim petition was filed on 10.4.97 and an award was made on 1.9.2003. Aggrieved with the said award enhancement is claimed by way of the present appeal.

5. Sh. J.S. Kanwar, counsel for the appellant claimant urged that the award passed by the learned Tribunal is inadequate and insufficient looking at the circumstances of the case. He assailed the said judgment of Learned Tribunal firstly, on the ground that the tribunal erred in holding that there was 50% contributory negligence on the

part of the appellant. It is also submitted that Ld. Tribunal erred in awarding only Rs.5000/- towards pain and suffering. The counsel further stated that Ld. Tribunal erred in not awarding any compensation towards loss of amenities and other non-pecuniary losses. The counsel submitted that appellant was a driver by profession and he was earning Rs.3660/-per month . Due to the accident, he suffered 10% disability because of which he was unable to drive vehicle and was removed from his service also. The counsel pleaded that in this case, the loss of earning capacity should have been taken as 100% considering the nature of job, the appellant was doing at the time of accident. It is also submitted that Ld. Tribunal has not considered the future prospects and advancement in life of appellant. Further the counsel pleaded that the counsel erred in awarding an interest of 6% p.a instead of 9% p.a.

6. Per contra Sh. S.S. Panwar counsel for the respondent no. 4 contended that the award passed by the Ld. Tribunal is just and fair and does not require interference by this court.

7. I have heard counsel for the parties and perused the record.

8. In a plethora of cases the Hon'ble Apex Court and various High Courts have held that the emphasis of the courts in personal injury

cases should be on awarding substantial, just and fair damages and not mere token amount. In cases of personal injuries the general principle is that such sum of compensation should be awarded which puts the injured in the same position as he would have been had accident not taken place. In examining the question of damages for personal injury, it is axiomatic that pecuniary and non-pecuniary heads of damages are required to be taken in to account. In this regard the Supreme Court in **Divisional Controller, KSRTC v. Mahadeva Shetty, (2003) 7 SCC 197**, has classified pecuniary and non-pecuniary damages as under:

“**16.** This Court in *R.D. Hattangadi v. Pest Control (India) (P) Ltd.* 9 laying the principles posited: (SCC p. 556, para 9)

“ 9 . Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters i.e. on account of injury the

claimant may not be able to walk, run or sit; (*iii*) damages for the loss of expectation of life i.e. on account of injury the normal longevity of the person concerned is shortened; (*iv*) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.”

9. In the instant case the tribunal awarded Rs. 32,500/- for expenses towards medicines; Rs.500/- for conveyance expenses; Rs.5000/- for mental pain and sufferings; Rs.10,000/- on account of permanent partial disability and Rs. 4000/- on account of loss of earnings.

10. As regards mental pain & suffering, the tribunal has awarded Rs. 5,000/- to the appellant after considering Schedule II to the MV Act. On perusal of the award, it is manifest that the as per the MLC the appellant sustained fracture of femur and remained in LNJP Hospital for one month. Medical record of Dua Nursing Home dated 25/7/1996 to 30/11/1996, 27/11/2000 and 24/6/2003 proves that the appellant took treatment there for plating of right femur as an outdoor patient and stayed there only for three days. Considering the kind of injuries sustained by the appellant and also considering that no revision in the Second Schedule has taken place after the same was introduced in the year 1994 although under Section 163(3), the Central Government is required to amend the Second Schedule keeping in view the cost of living by appropriate notification in the Official Gazette from time to

time. I feel that the compensation in this regard should be enhanced to Rs. 15,000/-.

11. As regards the compensation towards permanent disability, I feel that the tribunal has erred in not awarding the same according to the settled principles of law. The income of the appellant was duly proved at Rs. 3,600/- pm as per the salary certificate issued by appellant's employer, Ex. PW3/46. Nothing has come on record to prove the future prospects of the appellant and therefore, the future prospects of the appellant cannot be considered. The age of the appellant at the time of the accident was 35 years and the 10% disability of the appellant was duly proved on record as Ex. Pw3/4. As per second schedule the multiplier prescribed at the age of 35 is 17, therefore, after considering all these factors, the compensation towards disability is awarded at Rs. 73,440/- ($3,600 \times 12 \times 10/100 \times 17$) to the appellant.

12. As regards loss of amenities, resulting from the defendant's negligence, which affects the injured person's ability to participate in and derive pleasure from the normal activities of daily life, and the individual's inability to pursue his talents, recreational interests, hobbies or avocations. I feel that the tribunal erred in not awarding the

same and in the circumstances of the case same is allowed to the extent of Rs. 10,000/-.

13. As regards loss of earnings, the income of the appellant was duly proved at Rs. 3,600/- pm as per the salary certificate issued by appellant's employer, Ex. PW3/46. On perusal of the award, it is manifest that the as per the MLC the appellant sustained fracture of femur and remained in LNJP Hospital for one month. Medical record of Dua Nursing Home dated 25/7/1996 to 30/11/1996, 27/11/2000 and 24/6/2003 proves that the appellant took treatment there for plating of right femur as an outdoor patient and stayed there for three days. The tribunal assessed income of the appellant at Rs. 4,000/- pm by taking a round figure and awarded Rs. 4,000/- towards loss of income for 1 month, the period during which the appellant could not work. I do not feel that the tribunal committed any error in this regard and hence, the award is not interfered with in this regard and compensation towards loss of income is taken at Rs. 4,000/-.

14. As regards the issue of interest that the rate of interest of 6% p.a. awarded by the tribunal is on the lower side and the same should be enhanced to 9% p.a., I feel that the rate of interest awarded by the tribunal is on the lower side and fair and requires interference. No

rate of interest is fixed under Section 171 of the Motor Vehicles Act, 1988. The Interest is compensation for forbearance or detention of money and that interest is awarded to a party only for being kept out of the money, which ought to have been paid to him. Time and again the Hon'ble Supreme Court has held that the rate of interest to be awarded should be just and fair depending upon the facts and circumstances of the case and taking in to consideration relevant factors including inflation, policy being adopted by Reserve Bank of India from time to time and other economic factors. In the facts and circumstances of the case, I do not find any infirmity in the award regarding award of interest @ 6% pa by the tribunal and the same is not interfered with.

15. In view of the discussion made here in above, Rs. 32,500/- is awarded for expenses towards medicines; Rs.500/- for conveyance expenses; Rs.15000/- for mental pain and sufferings; Rs.10,000/- for loss of amenities of life; Rs. 73,440/- on account of permanent partial disability and Rs. 4000/- on account of loss of earnings. Thus the total compensation comes to Rs.1,35,440/-

16. As regards the issue of contributory negligence of the deceased, I feel that the tribunal committed no error. The omission to do what the

law obligates or even the failure to do anything in a manner, mode or method envisaged by law would equally and per se constitute negligence on the part of such person. If the answer is in the affirmative, it is a negligent act. Where an accident is due to negligence of both parties, substantially there would be contributory negligence and both would be blamed. In a case of contributory negligence, the crucial question on which liability depends would be whether either party could, by exercise of reasonable care, have avoided the consequence of the other's negligence. Whichever party could have avoided the consequence of the other's negligence would be liable for the accident. If a person's negligent act or omission was the proximate and immediate cause of death, the fact that the person suffering injury was himself negligent and also contributed to the accident or other circumstances by which the injury was caused would not afford a defence to the other. Contributory negligence is applicable solely to the conduct of a plaintiff. It means that there has been an act or omission on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. It is now well settled that in the case of contributory negligence, courts have the power to apportion the loss between the

parties as seems just and equitable. Apportionment in that context means that damage is reduced to such an extent as the court thinks just and equitable having regard to the claim shared in the responsibility for the damage. It is the case of the appellant himself that he was sitting on the driver seat in the bus bearing registration no. DL-1P-8665 by keeping his leg outside the window of driver seat and was talking to some driver. The appellant's bus was standing on the bus stop and bus bearing registration no. DL-1P-6605 came in a rash and negligent manner from side of Novelty Cinema and hit the bus in which appellant was sitting near the front driver door side of the bus, as a result of which, the right leg of the appellant was crushed and he fell down. Clearly, in the first place the appellant should not have sat in such a manner so as to invite problem for himself. He should have been cautious as it is written inside of all the buses and it is taught even to each and every child by their parents that one should keep their body inside the bus, not even a finger should be put outside a window as the same may cause some accident. The appellant himself being a driver did not abide by the said rule and moral teaching of the elders and resultantly, met with an accident.

17. From the above discussion, it is manifest that no doubt mainly the bus driver of the bus bearing registration no. DL-1P-6605 was

negligent but the appellant also contributed to the said accident which led to the injuries sustained by him in the accident. Thus, clearly the appellant was 50% liable for negligence and I do not find any infirmity as regards the tribunal imputing liability on the injured. Therefore, no interference is made in the award on this count. Hence, after making 50% deduction towards contributory negligence of the appellant, the total compensation comes to Rs. 67,720/-

18. In view of the above discussion, the total compensation is enhanced to Rs. 67,720/-from Rs. 26,000/- along with interest @ 7.5% per annum from the date of institution of the present petition till realisation of the award and the same should be paid to the appellant by the respondent no. 4.

19. With the above directions, the present appeal is disposed of.

6.4.2009

KAILASH GAMBHIR, J