

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

*Reserved on: 18th November, 2011
Pronounced on: 29th November, 2011*

+ **MAC APP. 415/2008**

SHIVPAD MANDAL Appellant
Through: Mr. R. S. Roy, Adv.

Versus

THE ORIENTAL INSURANCE
CO. LTD. & ORS. Respondents
Through: Mr. Mr. Mohan Babu Agarwal with
Mr. Harkesh Chand Agarwal, Adv.
For R-1.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J.

1. This appeal is for enhancement of compensation in respect of an accident which took place on 17.07.2004 resulting into serious injuries on Appellant's person. The Appellant suffered 49% disability in respect of the left limb. By impugned award the Tribunal awarded the compensation as mentioned in para 27 of the award, which is extracted hereunder: -

"Ld. Counsel for petitioner has submitted that on account of disability petitioner will not be in a

position to enjoy the basic amenities of life. Petitioner will not be in a position to walk, run or to sit for passing of stool properly. In view of disability having been suffered by the petitioner, submission made by ld counsel for petitioner has got force and I deem it expedient to allow the request. Keeping in view the nature of injuries, period of treatment and nature of treatment, I deem it expedient to award a sum of ₹ 30,000/- under the head of loss of amenities of life.

The amounts of compensation assessed under the different heads are being chunked together herein below: -

1	Treatment expenses :	₹ 5,500/-
2	Loss of earning :	₹ 20,300/-
3	Special diet, conveyance and Attendant charges.	₹ 9,000/-
4	Pain and suffering :	₹ 40,000/-
5	Loss of Amenities :	₹ 30,000/-
6	Disability :	₹ 1,47,000/-
		₹ 2,51,800/-

The Tribunal found that the accident took place on account of equal negligence of TATA 407 No.HR-38G-3655 wherein the Appellant was travelling as a representative of the owner of the goods and the Truck No.RJ-07G-4310 driven by Respondent No.2. The Tribunal held that since the Appellant had sued the driver, owner and Insurer of Truck No.RJ-07G-

4310, the Respondents were liable to pay only 50% of the compensation awarded. Respondent No.1 (Oriental Insurance Co. Ltd.) was directed to pay the compensation awarded being Insurer of the Truck No.RJ-07G-4310.

2. An FIR bearing No.276 dated 17.07.2004 under Section 279/ 337/ 304A IPC was registered in P.S. Sadar, Bhiwani against the Respondent Amar Singh driver of Truck No.RJ-07G-4310 and not against the driver of TATA 407. Respondent Amar Singh preferred not to enter the witness box to rebut the Appellant's testimony in his examination-in-chief that the driver of Truck No.RJ-07G-4310 was driving the Truck in a zig-zag manner, brought it on the left side of the road and applied the brakes all of a sudden. Thus on the basis of criminal case registered against Respondent Amar Singh, his failure to contest the claim petition and the Appellant's averment in the affidavit Ex. PW-1/6 that the driver of the Truck was driving it in a zig-zag manner and had applied its brake suddenly would be sufficient to infer culpable negligence on the part of the Respondent Amar Singh driver of the Truck No.RJ-07G-4310.
3. Otherwise also the fact whether there was negligence on the part of both the vehicles or there was negligence on the part of the driver of Truck No.HR-07G-4310 loses much significance in view of the Supreme Court decision in *T.O. Anthony v. Karvarnan*, (2008) 3 SCC 748 wherein it was held that in case of composite negligence each wrong-doer is jointly and severally liable to pay to the injured for payment of entire

damages and the injured has the choice to proceed against all or any of them. It was held that the injured need not establish the extent of responsibility of each wrong-doer separately, nor is it necessary for the court to determine the extent of liability of each wrong-doer separately. In view of the law laid down by the Supreme Court, the Appellant could recover the damages from the Respondents even if there was composite negligence on the part of the drivers of both the vehicles.

4. Coming to the extent of compensation the contention raised on Appellant's behalf is that the Tribunal fell into error in reducing 49% disability to the left limb to the extent of 20% disability with respect to his whole body. The Appellant was working as a fisherman. In the accident he suffered *fracture Tibia left both bones* resulting into 49% disability to the left lower limb. The Appellant even with this disability in the left lower limb can continue to work as a fisherman and his earning capacity would not be seriously impaired. In the case of *Raj Kumar v. Ajay Kumar & Anr.*, (2011) 1 SCC 343 it was held by the Supreme Court that where a claimant suffers permanent disability as a result of injuries, the assessment of compensation would depend upon the fact of impact on his permanent disability with regard to his earning capacity. Paras 13, 14 & 15 of the report are extracted hereunder: -

“13. *Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the*

permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood.

14. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence

of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.”

15. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.”

5. In the absence any specific evidence about the loss of earning capacity the compensation of ₹ 1,47,000/- extracted in para 13, 14 & 15 above was really compensation towards loss of amenities of life.
6. The Appellant would definitely have difficulty in walking, using public transport and carrying out his day-to-day affairs as also in pursuing his profession, if the amount of ₹ 1,47,000/- is added in the head of loss of amenities of life and disfigurement. The compensation under this head i.e. ₹ 1,47,000/- in addition to the sum of ₹ 40,000/- for non pecuniary damages appears to be

just and reasonable. Thus, I do not find any ground to enhance the compensation awarded.

7. It is proved that there was culpable negligence on the part of Truck driver Amar Singh Respondent No.2. Respondents No.2 & 3 being the driver and owner are jointly and severally liable to pay the compensation and Respondent No.1 being the Insurer is liable to indemnify the owner. Respondent No.1 Insurance Co. is directed to pay the entire compensation along with interest @ 7% per annum (awarded by the Tribunal) within six weeks.
8. The enhanced compensation (remaining 50%) shall be deposited with the Registrar General within six weeks. 25% of the amount deposited shall be released to the Appellant forthwith while remaining amount shall be held in FDR in Appellant's name in any nationalized Bank for a period of 3 years. The Appellant shall not be entitled to withdraw any amount or to take any loan within the said period of 3 years without the Court's permission.
9. The appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

NOVEMBER 29, 2011
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