

\$~5 & 6

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

Date of decision: 29th May, 2012

+ **FAO. No.364/2002**

ORIENTAL INSURANCE CO. LTD. Appellant

Through: Mr. Pankaj Seth, Advocate

Versus

SIDHARATH BAG & ORS. Respondents

Through: Mr. Nitinjya Chaudhary,
Advocate

WITH

+ **FAO. No.34/2003**

SIDHARATH BAG & ORS. Appellants

Through: Mr. Nitinjya Chaudhary,
Advocate

Versus

ORIENTAL INSURANCE CO. LTD. Respondent

Through: Mr. Pankaj Seth, Advocate

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. These two Appeals (FAO. No.364/2002 and FAO. No.34/2003) arise out of a judgment dated 05.03.2002 in Suit No.266/95 whereby a compensation of ₹2,94,055/- was awarded in favour of Sidharath Bag for having suffered injuries in an accident which occurred on 17.11.1994.
2. FAO. No.364/2002 is preferred by Oriental Insurance Co. Ltd.(hereinafter referred to as the Appellant) on the ground that the policy was fraudulently obtained in collusion with the official of the Appellant and thus it had no liability to indemnify the injured. It is stated that the compensation towards loss of future earning capacity was not permissible; the Motor Accident Claims Tribunal(the Claims Tribunal) awarded a compensation of ₹1,50,000/- towards loss of earning capacity without any basis and the compensation of ₹80,000/- awarded towards conveyance charges is exorbitant and excessive.
3. On the other hand, the plea of Sidharath Bag, the Appellant in FAO No.34/2003 (hereinafter referred to as the Claimant) is that no compensation was awarded towards loss of amenities in life; the compensation awarded towards loss of earning capacity and pain and suffering was very meagre.
4. Before dealing with the respective contentions of the parties, I would tabulate the compensation awarded by the Claims Tribunal hereunder:

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Loss of Pay	₹23,640/-
2.	Loss of Pay to his Wife	₹4,415/-
3.	Expenses on a/c of employing Maid	₹9,000/-
4.	Expenses on a/c of Conveyance	₹87,000/-
5.	Loss of Pain and Suffering	₹20,000/-
6.	Loss of Permanent Disability	₹1,50,000/-
	Total	₹2,94,055/-

5. On 17.11.1994 at about 5.45 p.m., the Claimant was proceeding on his two-wheeler DL-4S-1150 from Connaught Place to Paschim Vihar. He was in the process of taking a right turn on green signal from Panchkuian Road to Chitra Gupta Road. A matador No. DL-IL-1645 came from behind and started taking a U-turn at the said intersection from his left side. The matador hit the two-wheeler as a result of which the Claimant fell down on the road. The Appellant(the Insurance Company) does not dispute the factum of accident and the negligence on the part of the matador driver and that the vehicle was duly insured. The Claimant suffered fracture of his right femur. He was initially

removed to Dr. Ram Manohar Lohia Hospital(RML Hospital). He was then shifted to Jaipur Golden Hospital where he remained admitted from 17.11.1994 to 23.11.1994. He was operated upon in Jaipur Golden Hospital. A four hole barrel plate with 95 mm screw was used to fix the bone. According to the Claimant although he joined his duties in February, 1995, he still had pain and was advised hip replacement. The compensation awarded on account of loss of pay to the Claimant and to his wife (who also took leave to attend to the Claimant) and expenditures on account of employing a maid are not disputed by the parties. I shall deal with the heads of compensation one by one where the parties dispute the award.

CONVEYANCE:

6. A perusal of the compensation awarded extracted earlier would show that a sum of ₹87,000/- was awarded on account of conveyance. It is urged by the learned counsel for the Claimant that the compensation awarded is very meagre considering the fact that the Claimant had to depend on a TSR/taxi throughout his life. On the other hand, it is urged by the learned counsel for the Appellant Insurance Company that the compensation awarded is excessive and exorbitant.
7. To appreciate the respective contentions, it would be appropriate to refer to the Claimant's testimony as PW2. Admittedly, the accident took place on 17.11.1994. He was in Hospital for six days and was advised bed rest for six weeks.

He was given a fitness certificate to resume his duties w.e.f. 20.02.1995. The number of visits to the doctor before resuming his duties has not been given. Considering the nature of injuries, there might be five to seven visits to the doctor before the Claimant resumed his duties. A perusal of the Trial Court record shows that even after resuming his duties, the Claimant still had pain. He consulted Dr. K.J. Dholakia, Dr. P.S. Maini, Dr. Debasish Chattopathyay and Dr. Murthy in RML Hospital during the year 1996 to 1999. The Claimant testified that on joining his duties, he used to walk with the help of crutches till 01.06.1995 and for one month thereafter with the help of a stick. He stated that during this period he used to spend ₹3000/- to 3,500/- on conveyance. In cross-examination, the Claimant admitted that Maruti Employees Society had organized a bus service for the employees who are working in the factory and he had been availing the said facility to reach the factory. No expert evidence has been produced by the Appellant to prove that he was unable to drive a two-wheeler after he recovered from the injuries. The Claimant was, therefore, entitled to a sum of ₹12,000/- for using a TSR from 20th February to June, 1995. In addition, the Claimant was entitled to a sum of ₹5,000/- towards conveyance for visiting various doctors and the Hospital for consultation after the accident. Thus, the compensation of ₹17,000/- ought to have been awarded to the Claimant instead of ₹87,000/-

awarded by the Claims Tribunal. The compensation under this head is accordingly reduced from ₹87,000/- to ₹17,000/-.

PAIN AND SUFFERING:

8. As stated earlier, the Claimant suffered fracture of his right femur. He was operated in Jaipur Golden Hospital on 19.11.1994 and was discharged on 23.11.1994. A perusal of the documents Exs. P3 to P7 shows that the Claimant was still feeling pain and, therefore, had to consult various doctors which shows that he suffered 25% permanent disability on account of restriction of movement and shortening of his right leg by half an inch. It is difficult to measure the pain and suffering in terms of money which has been suffered by the claimant on account of serious injuries caused to him in a motor accident. Since the compensation is required to be paid for pain and suffering an attempt must be made to award compensation which may have some objective relation with the pain and suffering underwent by the victim of a motor accident. For this purpose, the Claims Tribunal and the Courts normally consider the nature of injury; the parts of the body where the injuries were sustained; surgeries (if any) underwent by the victim; confinement in the hospital and the duration of the treatment. Considering the nature of injuries, the period of hospitalization and long duration of the treatment, the compensation of ₹20,000/- awarded towards the pain and suffering was on the lower side. Considering that this accident

took place in 1994, the same needs to be enhanced to ₹40,000/.
I order accordingly.

PERMANENT DISABILITY AND LOSS OF EARNING CAPACITY:

9. It is urged by the learned counsel for the Claimant that considering the Claimant's salary to be ₹7,543/- per month the compensation awarded towards loss of earning capacity was on the lower side. On the other hand, the learned counsel for the Appellant Insurance Company urges that the Claimant earned promotion even after the accident and in the absence of any evidence as to the loss of future earning, the Claimant was not entitled to any compensation under this head. In *Raj Kumar v. Ajay Kumar & Anr.*, 2011 (1) SCC 343, the Supreme Court brought out the difference between permanent disability and functional disability resulting in the loss of earning capacity. It was laid down that the compensation on account of loss of earning capacity has to be granted in accordance to the nature of job undertaken by the victim of a motor accident. In his cross-examination recorded on 04.01.2000, the Claimant admitted that his salary on the date of recording his statement was ₹20,000/- per month. He admitted that he had been promoted as Service Executive in Maruti Udyog Ltd. Thus, he (the Claimant) did not suffer any financial loss in his earning capacity on account of the injuries. He was not entitled to any compensation under this head. Rather, he should have been

granted appropriate compensation towards loss of amenities in life.

10. Obviously, because of the permanent disability and shortening of his right leg by half an inch, the Claimant would always feel handicapped in running and attending to his day to day work. In the case of *Govind Yadav v. New India Insurance Co. Ltd. (2011) 10 SCC 683*, the Claimant suffered amputation of leg above knee in an accident which occurred in the year 2004. The Hon'ble Supreme Court granted a sum of ₹1,50,000/- towards loss of amenities in life and loss of marriage prospects. In this case, the Claimant was a married person and the disability was much less. In the facts and circumstances, I would award a compensation of ₹60,000/- towards loss of amenities in life instead of a compensation of ₹1,50,000/- towards permanent disability.
11. No compensation was awarded towards special diet. Considering that the Claimant remained confined to bed for about three months, I would award a compensation of ₹5,000/- towards special diet.
12. It is urged by the learned counsel for the Claimant that the Claims Tribunal erred in not awarding any compensation towards future treatment. He urges that the Claimant was advised hip replacement by Dr. K.J. Dholakia, Dr. P.S. Maini and Dr. Murthy of RML Hospital and thus a sum of ₹2,00,000/- should have been awarded to the Claimant towards future treatment.

13. The Claimant preferred not to examine any doctor to prove that he would need a hip replacement. Ex.P8 is the opinion (dated 23.10.1996) whereby Dr. Debasish Chattopadhyay advised him partial hip replacement. By an advice Ex.P7 (dated 10.09.1997), Dr. P.S. Maini advised removal of the plate and total hip replacement. The Claimant was not satisfied with the advice of Dr. Debasish Chattopadhyay and Dr. P.S. Maini. He consulted Dr. K.J. Dholakia, an Orthopaedics Surgeon in Bombay and vide Ex.P6 (dated 25.11.1999), the doctor advised *“he is able to carry out his work. So continue normal activity. If pain and disability is severe then only answer is total hip replacement.”* These opinions by the experts (although not legally proved) were merely advices. None of these doctors were summoned to prove that the Claimant really needed hip replacement. Moreover, this accident took place in the year 1994. We are in the year 2012 and eighteen years have already passed since the date of the accident. The Claimant has not filed any application/document to show that he has undertaken a hip replacement during the pendency of the Appeal and has incurred any expenditure thereon. In the circumstances, the Claims Tribunal rightly declined to award any compensation towards future treatment.
14. It is urged by the learned counsel for the Claimant that an amount of ₹2,04,908/- was spent on the medical treatment. This amount was reimbursed to him by his employer but the tortfeasor cannot gain advantage because of the benefit

provided by his employer. Thus, it is urged that the Claimant was entitled to the amount spent on medical treatment irrespective of its reimbursement.

15. In *Helen C. Rebello v. Maharashtra SRTC*, 1999 (1) SCC 90, the Supreme Court considered various English decisions and it was held that whatever the victim or the legal representative of the deceased get on account of accidental death would be liable to be deducted from the gain on account of the compensation awarded. Paras 34 and 35 of the report is extracted hereunder:

“34. So far as the general principle of estimating damages under the common law is concerned, it is settled that the pecuniary loss can be ascertained only by balancing on one hand, the loss to the claimant of the future pecuniary benefits that would have accrued to him but for the death with the "pecuniary advantage" which from whatever source comes to him by reason of the death. In other words, it is the balancing of loss and gain of the claimant occasioned by the death. But this has to change its colour to the extent a statute intends to do. Thus, this has to be interpreted in the light of the provisions of the Motor Vehicles Act, 1939. It is very clear, to which there could be no doubt that this Act delivers compensation to the claimant only on account of accidental injury or death, not on account of any other death. Thus, the pecuniary advantage accruing under this Act has to be deciphered, co-relating with the accidental death. The compensation payable under the Motor Vehicles Act is on account of the pecuniary loss to the claimant by accidental

injury or death and not other forms of death. If there is natural death or death by suicide, serious illness, including even death by accident, through train, air flight not involving motor vehicle, would not be covered under the Motor Vehicles Act. Thus, the application of general principle under the common law of loss and gain for the computation of compensation under this Act must co-relate to this type of injury or deaths, viz., accidental. If the words 'pecuniary advantage' from whatever source are to be interpreted to mean any form of death under this Act it would dilute all possible benefits conferred on the claimant and would be contrary to the spirit of the law. If the 'pecuniary advantage' resulting from death means pecuniary advantage coming under all forms of death then it will include all the assets movable, immovable, shares, bank accounts, cash and every amount receivable under any contract. In other words, all heritable assets including what is willed by the deceased etc. This would obliterate both, all possible conferment of economic security to the claimant by the deceased and the intentions of the legislature. By such an interpretation the tortfeasor in spite of his wrongful act or negligence, which contributes to the death, would have in many cases no liability or meagre liability. In our considered opinion, the general principle of loss and gain takes colour of this statute, viz., the gain has to be interpreted which is as a result of the accidental death and the loss on account of the accidental death. Thus, under the present Act whatever pecuniary advantage is received by the claimant, from whatever source,

would only mean which comes to the claimant on account of the accidental death and not other form of death. The Constitution of the Motor Accidents Claims Tribunal itself Under Section 110 is, as the Section states;

"...for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to,..."

35. Thus, it would not include that which claimant receives on account of other form of deaths, which he would have received even apart from accidental death. Thus, such pecuniary advantage would have no correlation to the accidental death for which compensation is computed. Any amount received or receivable not only on account of the accidental death but that would have come to the claimant even otherwise, could not be construed to be the 'pecuniary advantage', liable for deduction. However, where the employer insures his employee, as against injury or death arising out of an accident, any amount received out of such insurance on the happening of such incidence may be an amount liable for deduction. However, our legislature has taken note of such contingency, through the proviso of Section 95. Under it, the liability of the insurer is excluded in respect of injury or death, arising out of, in the course of employment of an employee."
(underlines are mine).

16. Thus, the Claimant is not entitled to the medical expenditure he spent on treatment of injuries which has been reimbursed to

him by his employer. In view of the aforesaid discussion, the compensation awarded is tabulated hereunder:

Sl. No.	Compensation under various heads	Awarded by this Court
1.	Conveyance	₹17,000/-
2.	Loss of Pain and Suffering	₹40,000/-
3.	Loss of Amenities	₹60,000/-
4.	Special Diet	₹5,000/-
5.	Loss of Pay(awarded by the Claims Tribunal)	₹23,640/-
6.	Loss of Pay to his Wife (awarded by the Claims Tribunal)	₹4,415/-
7.	Expenses on a/c of employing Maid (awarded by the Claims Tribunal)	₹9,000/-
	Total	₹1,64,055/-

17. The overall compensation thus stands reduced from ₹2,94,055/- to ₹1,64,055/-.
18. The excess compensation of ₹1,30,000/- along with proportionate interest and the interest earned, if any, during the

pendency of the Appeal, if deposited, shall be refunded to the Appellant Insurance Company.

19. The compensation held payable along with proportionate interest and the interest accrued during the pendency of the Appeal shall be released in favour of the Claimant.
20. The statutory amount of ₹25,000/- shall be refunded to the Appellant Insurance Company.
21. Both the Appeals are disposed of in above terms.
22. Pending Applications stand disposed of.
23. No costs.

(G.P. MITTAL)
JUDGE

MAY 29, 2012
pst