

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

Date of decision: 4th July, 2012

+ **MAC.APP. 164/2011**

MOHD SALEEM

Through: Appellant
Mr. Arun Srivastava, Adv. with
Mr. B.K. Tomar, Adv.

versus

CHANDER & ORS

Through: Respondent
Mr. R.K. Tripathi, Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

C.M. APPL.No.3788/2011 (delay)

There is a delay of 178 days in filing the Appeal.

For the reasons stated in the application, the delay of 178 days in filing the Appeal is condoned.

The Application is allowed.

MAC.APP. 164/2011

1. The Appeal is for enhancement of compensation of ₹2,17,000/- awarded in favour of the Appellant for having suffered injuries in a motor accident which occurred on 16.02.2008.
2. On appreciation of evidence, the Motor Accident Claims

Tribunal (the Claims Tribunal) found that the accident was caused on account of contributory negligence of the Appellant. The Appellant suffered fracture of right shaft femur which was fixed with implant. Because of restriction of movement in right hip and right leg, the Medical Board of Hindu Rao Hospital issued a Disability Certificate Ex.PW-2/A declaring the Appellant to be physically disabled to the extent of 55% in respect of his left lower limb. The compensation of ₹4,34,000/- was computed and since the Appellant was held to be contributory negligent, a sum of ₹2,17,000/- was awarded as compensation with interest @ 7.5% per annum. The compensation awarded is tabulated hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Medicines and Medical Treatment	₹ 15,000/-
2.	Pain and Sufferings	₹ 25,000/-
3.	Loss of Income/Loss of Amenities of Life	₹ 3,50,000/-
4.	Attendant Charges	₹ 24,000/-
5.	Conveyance	₹ 10,000/-
6.	Special Diet	₹ 10,000/-
	Total	₹ 4,34,000/-

3. The following contentions are raised on behalf of the Appellant:-
- (i) There was no contributory negligence on the part of the Appellant. 50% deduction ought not to have been made in award of the compensation.
 - (ii) Although, the Appellant suffered 55% permanent disability, a lumpsum compensation of ₹2,00,000/- was awarded which is very meager. The Claims Tribunal took the disability to be 30%. Even on this, the loss of future earning capacity would come to ₹9,18,000/-.
 - (iii) No compensation towards loss of amenities in life was granted although it was mentioned in item No.3 extracted above. (The compensation of ₹3,50,000/- consisted of ₹2,00,000/- towards future loss of earning capacity and ₹1.5 lacs towards loss of income).
4. On the other hand, it is urged by the learned counsel for the Respondent Insurance Company that the contributory negligence on the part of the Appellant was evident as he was coming from a by lane and was not conscious of the traffic coming on the main road while entering the same. It is stated that the loss of earning capacity was not proved by the Appellant vis-à-vis the nature of his job and the Claims Tribunal in its discretion granted a sum of ₹2,00,000/- towards the loss of earning capacity which was quite liberal.

5. It is stated that the compensation towards loss of amenities in life may be suitably awarded.

NEGLIGENCE:-

6. On the basis of the report lodged by the Appellant, FIR No.38/2008 was registered in Police Station Subzi Mandi, whereas on the complaint of Respondent No.1, the owner of the offending motor cycle, FIR No.189/2008 was recorded in the same Police Station. The Claims Tribunal dealt with the issue of negligence as under:-

“..RW1 respondent No.1 driver/owner of the offending motorcycle denied his negligence and claimed petitioner was responsible for the accident in question and a counter FIR was also lodged by him. He had suffered grievous injuries and remained hospitalized in Tirath Ram Hospital from 16/08/08 to 18/08/08 and was still continuing treatment. He admitted that he was arrested in the FIR lodged by petitioner and was facing trial. In cross-examination he denied the suggestion that the accident was caused due to his negligence.

Ex.PW-1/6 is the site plan relied by the petitioner which is also part of record filed by the Police as accident information report. The contents of FIR no.38/08 Ex.PW1/2 lodged by the petitioner reveals that the petitioner was going to his home but due to traffic jam near the Cinema Hall had entered the adjoining Gali and had come to the main road. As soon as the petitioner came to the main road the offending vehicle hit him. The site plan also shows, that the petitioner had entered the main road and in the middle of the main road, exactly opposite to the Gali, from where petitioner had entered the main road, the accident took place. This also reveals

that the respondent no.1 was coming from the opposite direction on the main road. The petitioner in these circumstances therefore should have exercised caution when he entered the main road from the Gali. The main road is wide enough to easily accommodate two vehicles. Both the vehicles are of similar power. It is therefore, clear that there was equal contributory negligence by the petitioner and respondent no.1 in causing of the accident..”

7. Learned counsel for the Appellant has taken me through the Inspection Reports in respect of both the vehicles got inspected in the criminal case by Investigating Officer and has urged that the front portion of the offending vehicle had struck against the left portion of the motorcycle driven by the Appellant. From the Mechanical Inspection Report, it is not possible to give such finding. Even if, it is assumed that the front portion of the motorcycle No.DL-6SZ-8138 had struck against the motorcycle of the Appellant, even then it is established that the Appellant entered the main road from a by lane and should have been cautious and mindful of the traffic coming on the main road. In this view of matter, the finding of contributory negligence reached by the Claims Tribunal cannot be faulted.

LOSS OF FUTURE EARNING CAPACITY:-

8. It is not disputed that the Appellant suffered 55% permanent disability in respect of his right lower limb. It is established that he suffered fracture of right shaft femur and this fracture ultimately resulted in restricted movement of his hip and right

leg.

9. 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 motor accident. Paras 11 and 14 of the report are extracted hereunder:

“11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Co. Ltd. 2010 (10) SCC 254 and Yadava Kumar v. D.M., National Insurance Co. Ltd. 2010 (10) SCC 341.

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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 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."

10. Turning to the facts of the instant case, the Appellant as per his testimony was in the business of manufacturing / trading in the name and style of *Golden Product*. He testified that on account of the injuries suffered in the accident, the Appellant was totally disabled to perform his business. The Appellant failed to bring out as to what exactly was the nature of work being performed by him during the course of his business. In any case, trading activity of any person in small business would be impacted by restriction of movement of hip and one of the legs. Unfortunately, the Appellant did not bring in any evidence to

prove as to how much was the impact on his earning capacity. He was content to say that he was totally disabled which is not acceptable for want of any expert evidence. In the circumstances of the case, I would make a guess work and hold that there was an impact of about 15% on Appellant's earning capacity. The compensation on account of loss of future earning capacity would thus come to ₹3,69,750/- (1,50,000/- - 5,000/- (income tax) x 15% x 17). The compensation under this head is enhanced from ₹2,00,000/- to ₹3,69,750/-.

LOSS OF AMENITIES IN LIFE:-

11. As stated earlier at Serial No.3 of the table it was mentioned that the compensation under the head of loss of amenities in life is being granted but this was not actually reflected as a sum of ₹3,50,000/- shown against this item consisted of a sum of ₹2,00,000/- towards loss of future earning capacity and ₹1,50,000/- towards loss of income for not attending the business. On account of the restriction of right hip and right leg movement, the Appellant would have difficulty in running, walking and in his day to day life. Considering that the Appellant was a young person, aged about 26 years, I would make a provision for ₹60,000/- under this head.

12. The compensation granted is tabulated hereunder:-

Sl.	Compensation under various heads	Awarded by the Claims	Awarded by this Court
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No.		Tribunal	
1.	Medicines and Medical Treatment	₹ 15,000/-	₹ 15,000/-
2.	Pain and Sufferings	₹ 25,000/-	₹ 25,000/-
3.	Loss of Income	₹ 2,00,000/-	₹ 3,69,750/-
	Loss of Amenities of Life	₹ 1,50,000/-	₹ 1,50,000/-
4.	Attendant Charges	₹ 24,000/-	₹ 24,000/-
5.	Conveyance	₹ 10,000/-	₹ 10,000/-
6.	Special Diet	₹ 10,000/-	₹ 10,000/-
7.	Loss of Amenities in Life	--	₹ 60,000/-
	Total	₹ 4,34,000/-	₹ 6,63,750/-

13. Since the Appellant also contributed to the accident, the compensation stands reduced to 50% as held by the Claims Tribunal.

14. The compensation is thus enhanced from ₹2,17,000/- to ₹3,31,875/- rounded off to ₹3,32,000/-. The enhanced compensation of ₹1,15,000/- shall carry interest @ 7.5% per annum as awarded by the Claims Tribunal, which shall be deposited in the name of the Appellant with the Claims Tribunal within six weeks.

15. The Appellant is in business. In the circumstances, I would not

like to keep the enhanced compensation in a long term deposit.
The enhanced compensation along with interest shall be released to the Appellant immediately on deposit.

16. The Appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

JULY 04, 2012

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