

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

Date of decision: 9th August, 2012

+ **MAC.APP. 222/2007**

AJAY MITTAL Appellant
Through: Mr. N.D. Sharma, Adv.

versus

MADAN GOPAL & ORS. Respondents
Through: Mr. Pankaj Seth, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The Appeal is for enhancement of compensation of ₹80,800/- awarded by the Motor Accident Claims Tribunal (the Claims Tribunal) in favour of Appellant for having suffered injuries in a motor vehicle accident which occurred on 28.06.1992.
2. In the absence of any Appeal by the driver, owner and the Insurer the finding on negligence has attained finality between the parties.
3. In the accident, the Appellant suffered following injuries:-
 - (i) Fracture of (L) shaft femur – (mid-1/3rd) (displaced – oblique type).
 - (ii) Fracture of (Rt) lower end of fibula with diastasis of superior tibio fibular joint.
 - (iii) Comminuted, compound fractures of tibia (distal 1/3rd) with fracture fibula at same level (Rt).

- (iv) Dislocation of (L) Vth metatarsal phalangeal joint.
 - (v) Contusion (L) thigh (posterior aspect).
 - (vi) Laceration (R) Leg 2¹/₂" distal 1/3rd leg just above ankle joint.
 - (vii) Laceration (L) dorsum of foot 6¹/₂" size.
 - (viii) Contusion (L) Leg 8³/₄" from knee joint to middle half of leg lateral aspect.
 - (ix) Lacerated wound 5¹/₂" in (R) auxiliary region.
4. Immediately after the accident, the Appellant was removed to Hindu Rao Hospital where MLC was prepared. Since the Appellant's relatives were not satisfied with the treatment being given to him, he was shifted to Surya Hospital, a private Nursing Home in very serious condition. He remained admitted in Surya Hospital from 28.06.1992 to 12.07.1992.
5. The Appellant was operated upon on 28.06.1992 at 9:00 P.M. under general anesthesia. Debridement of wounds and closed reduction of fracture of tibia and fibula and skeletal traction was applied on left leg for fracture of femur.
6. The Appellant was again admitted in Surya Hospital on 04.09.1992, for change of plaster of right leg under general anesthesia. After re-plaster, he (the Appellant) was discharged late in evening. He was under treatment of Dr. Arvind Kumar Saxena and Dr. S.N. Mishra. On 01.10.1992 his plaster cast of right leg was removed. The healing was found to be satisfactory and right leg plaster cast was applied again for four weeks on 10.10.1992.

7. Though, some treatment papers, x-ray reports and some pathological reports were proved on record, but no documentary evidence was produced with regard to the amount spent on treatment. The Claims Tribunal awarded compensation of ₹80,800/- which is tabulated hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Cost of Treatment	₹10,000/-
2.	Pain and Agony	₹ 15,000/-
3.	Special Diet & Conveyance	₹ 5,000/-
4.	Loss of Earning for five months	₹ 10,000/-
5.	Loss of Future Earning	₹ 40,800/-
	Total	₹ 80,800/-

8. It is urged by the learned counsel for the Appellant that the compensation awarded under all the heads is too low and meager and, therefore, needs enhancement. It is contended that no addition towards future prospects / inflation was made while awarding loss of earning capacity. The Claims Tribunal, it is argued, erred in taking the loss of earning capacity as 10% as against permanent disability to 30% in respect of both lower limbs.
9. From the oral evidence produced by the Appellant, it is established that the Appellant remained confined to his home on account of treatment for a period of about seven months. Initially, he was issued a permanent disability certificate by LNJP Hospital showing disability of less than 40% in respect of both the lower limbs. Since, the Disability Certificate was not specific with regard to the percentage of disability, the Appellant

was examined by the Medical Board of Hindu Rao Hospital and a fresh Disability Certificate dated 26.04.2004 was issued whereby the Appellant was declared to have suffered disability to the extent of 30% of both lower limbs, on account of post traumatic mild restriction of both knee, right ankle with 2½ inch shortening of right lower limb.

10. Considering the nature of injuries suffered by the Appellant, the period of hospitalization and confinement at home, the compensation awarded is too low.
11. The Appellant was in his own business of plastic. No evidence was led by the Appellant to show the exact nature of his job.
12. 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.

x x x x x x x

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."

13. Unfortunately, the Appellant did not lead any evidence with regard to the exact nature of work performed by him nor any expert evidence was produced. Yet, considering the fact that there was stiffness in both the knees and shortening of right leg by 2½ inch as the Appellant's earning capacity would definitely have been affected. I make a guess work and hold that the earning capacity would be affected by 20%. The Appellant being self employed person was entitled to an increase of 30% in his income for award of compensation towards loss of earning capacity (*Santosh Devi v. National Insurance Company Ltd. & Ors., 2012 (4)*)

SCALE 559). His income at the time of accident as per the ITR was ₹24,700/-. The loss of earning capacity comes to ₹1,15,596/- (24,700/- + 30% x 18 x 20%).

14. The Appellant claimed that he spent a sum of ₹60,000/- on his treatment. This accident took place in the year 1992, and the treatment was largely received in a small Private Nursing Home, namely, Surya Hospital. The Appellant followed up with consultation from that hospital till he fully recovered. Some of the receipts with regard to the payment of fees have been placed on record. All the bills, however, have not been filed on record. In the circumstances, it would be difficult to say that the Appellant spent a sum of ₹60,000/- on his treatment. Yet, the compensation of ₹10,000/- awarded was on the lower side. I would enhance the same to ₹20,000/-.
15. On account of stiffness in both the knees and shortening of left leg of 2½ inch the Appellant would definitely have difficulty in walking, running, sitting and doing day to day work. I would award him compensation of ₹30,000/- towards pain and suffering.
16. The Appellant deposed that he was unable to attend to his work for a period of about two years. In the absence of any documentary evidence or testimony of the treating doctor, I am not inclined to believe the same. Considering the nature of injuries and surgeries underwent by him, I would held that he must have taken six-seven months in recovering in the injuries. Thus, he is entitled to compensation for loss of income for seven months i.e. ₹14,000/- instead of ₹10,000/- awarded by the Claims Tribunal.

17. The compensation awarded towards conveyance and special diet is enhanced to ₹5,000/- each.

18. The compensation is thus enhanced and tabulated hereunder:-

Sl. No.	Compensation under various heads	Awarded by this Court
1.	Cost of Treatment	₹20,000/-
2.	Pain and Suffering	₹ 30,000/-
3.	Special Diet & Conveyance	₹ 10,000/-
4.	Loss of Earning Capacity	₹ 1,15,596/-
5.	Loss of Income for seven months	₹ 14,000/-
	Total	₹ 1,89,596/-

19. The compensation is thus enhanced from ₹80,800/- to ₹ 1,89,596/-.

20. The enhanced compensation of ₹1,08,796/- shall carry interest @ 7.5% per annum from the date of filing of the petition till its deposit.

21. Respondent No.3 the New India Assurance Company Limited is directed to deposit the enhanced compensation along with interest in the name of the Appellant with the Claims Tribunal within six weeks which shall be released in favour of the Appellant on deposit.

22. The Appeal is allowed in above terms.

23. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

AUGUST 09, 2012

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