

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

Reserved on: 11th January, 2012
Pronounced on: 13th January, 2012

+ **MAC APP. 328/2011**

UNITED INDIA INSURANCE CO. LTD. Appellant
Through: Mr. D.D. Singh Advocate with
Mr. Navdeep Singh, Advocate.
versus

RAMA SWAMY & ORS Respondent
Through: Mr. Nitinjya Chaudhry, Adv.
with Mr. Aatriya Singh, 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. The Appellant United India Insurance Co. Ltd. seeks reduction of compensation of ₹ 4,35,779/- awarded to the first Respondent in respect of the injuries suffered by him in a motor accident, which took place on 11.08.2006 while the first Respondent was crossing the road.
2. The Appellant suffered multiple grievous injuries i.e. *compound fracture BB right leg with fracture dislocation of surgical neck right humerus, deep wound and laceration on the left side of the forehead*. The first Respondent was removed to AIIMS. He was then shifted to Safdarjung Hospital where he remained admitted from 12.08.2006 to 20.08.2006. He was on leave from

the date of the accident till 15.03.2007. The first Respondent received treatment as an outdoor patient from 15.03.2007 till 23.07.2007. The treatment continued even thereafter. The first Respondent suffered permanent disability in respect of the right upper limb and the right lower limb to the extent of 28%. The disability certificate Ex. PW-1/15 describes the disability as under: -

“Old fracture surgical neck rt. humerus and fractured of both bone rt. leg. With residual stiffness right shoulder and right ankle

He/She is a physically handicapped and has 28% (TWENTY EIGHT PERCENT ONLY) permanent physical impairment in relation to his/ her RIGHT UPPER LIMB AND RIGHT LOWER LIMB”

3. The Tribunal awarded compensation of ₹ 4,35,779/- with interest @ 7.5% per annum under various heads, which are extracted hereunder: -

Sl. No.	Compensation Head	Amount (₹)
1.	On account of permanent disability	3,13,384.00
2.	Loss of income	42,395.00
3.	On account of medical expenses	10,000.00
4.	Loss of amenities	20,000.00
5.	Pain & Suffering	30,000.00

6.	Special diet and conveyance	20,000.00
	Total	4,35,779.00

4. Learned counsel for the Appellant contends that in case of *Raj Kumar v. Ajay Kumar & Anr.*, (2011) 1 SCC 343 it was brought out that in order to get compensation for a permanent disability it has to be established that the functional disability resulted into loss of earning capacity. It is urged that the first Respondent was an employee of Municipal Corporation of Delhi and apart from the loss of leave, there was no loss of income from date of accident till the date of his retirement. Therefore, the compensation of ₹ 3,13,385/- on account of permanent disability was not permissible.
5. There is no cross Appeal filed by the first Respondent. The learned counsel for the first Respondent, however, submits that he can resist the Appeal pleading enhancement of compensation under the heads he was granted low compensation and assessing grant of compensation under the heads where it was not considered. He submits that the compensation awarded towards loss of amenities, pain & suffering, special diet and conveyance was on the lower side considering the prolonged duration of treatment taken by the first Respondent both as an indoor and outdoor patient. In my view without filing a Cross Appeal, the first Respondent can justify and plead that the overall

compensation awarded by the Tribunal was just and proper. Of course, if any Claimant seeks enhancement, he would be under an obligation to file Cross Objections/Appeal.

6. The first Respondent filed his affidavit Ex. PW-1/X and entered the witness box as PW-1. He testified as under: -

“3. I state that in the accident, I suffered multiple grievous injuries. I was rushed to the casualty of AIIMS where MLC was prepared, there being no bed available in the hospital, I was referred to Safdarjung Hospital, where I remained under treatment as indoor patient from 12.08.2006 to 20.08.2006. I further state while under treatment at Hospital, I learnt that I had suffered compound fracture B B right leg along with fracture dislocation of surgical neck right humerus deep wound and laceration on the left side of the forehead along with minor injuries all over the body. The certified copy of the MLC is Ex. PW1/1. I have either submitted the original discharge summary of the Safdarjung Hospital to my employer or same has been misplaced, the copy of discharge summary is mark X1. At the time of discharge, my right leg was under plaster from below hip upto toe. I was advised to remain on strick bed rest while on prescribed medicines, and to attend Ortho OPD for review on Friday/ Tuesday.

4. I state that on 31.08.03 while I was confined to bed at home, I developed severe pain on my affected leg, I was taken to Dr. Sandeep Gupta of Jeewan Hospital and Nursing Home, Jeewan Nagar, New Delhi, where doctor advised operation which would cost ₹ 1,00,000/- (Rupees One Lac). I conveyed that I am a poor person and do not have

that much amount. I was referred to Govt. Hospital. The original of the advised rendered by Doctor Sandeep Gupta of Jeewan Hospital and Nursing Home has been misplaced, the photocopy of the same is Mark-X2.

5. I state that it was decided by the family, to take me to the native place i.e. Village-Vandipalyayam, District-Villupuram, Tamilnadu, for further treatment at Rajah Muthiah Medical College & Hospital, Annamalainagar, Tamilnadu.

6. I state that on 02.09.06 I along with my wife and two sons left New Delhi for villupuram for my treatment at Rajah Muthiah Medical College & Hospital, Annamalainagar, Tamilnadu. The original of the Railway Ticket for journey is Ex.PW1/2.

7. I state that we reached our native place on 03.09.06 and I was got admitted to Rajah Muthiah Medical College & Hospital, Annamalainagar, Tamilnadu on 04.09.06 for further treatment.

8. I state that I remained under treatment as indoor patient at Rajah Muthiah Medical College Hospital, Annamalinagar from 4.09.2006 to 26.09.2006. I further state that the original discharge summary was either submitted to the employer or same has been misplaced, the photocopy of discharge summary is mark-X3. While I was under treatment, an operation was advised. I was asked to arrange and deposit ₹ 15,000/- for the operation. As I could not arrange the required sum, I was discharged from the hospital on 26.09.06 with advised to remain on strict bed rest, while on prescribed medicines and to undertake physiotherapy exercises and to seek

admission for operation on arrangement of the requisite amount.

9. I state that since I could not arrange for requisite amount for the operation, I went for Ayurvedic Treatment at my Native Place. I remained under Ayurvedic Treatment at my native place, such as bandages on affected leg and hand after application of Ayurvedic paste and oral medicines for about five months. There was sufficient improvement in my general condition. I returned back to New Delhi on 01.03.2007.

10. I state that though I was not physically fit to resume duty, to avoid loss of leave, I was permitted to join duty w.e.f. 15.03.2007.

11. I state that during the period 15.03.2007 till 23.12.2007. I used to take medicines prescribed and undertake physiotherapy exercises as advised. However, despite medication and physiotherapy exercises, pain, subsisted and I was not able to move about freely, I therefore, left New Delhi in third week of December 2007 for Annamalinagar, Tamilnadu for further checkup, advise and treatment. I was treated as OPD patient of Rjah Muthiah Medical College Hospital, Annamalinagar from 24.12.2007 to 18.02.2008. The original nine OPD cards of Rajah Muthiah Medical College Hospital, Annamalainagar are Ex.PW1/3 to Ex.PW1/11.

12. I state that I returned to New Delhi in the last week of February 2008 and resumed duty on 01.03.2008. I remained on leave firstly from 22.08.06 to 14.03.07 and secondly from 23.12.07 to 28.02.08.

13. I state that on returning back to New Delhi in the last week of February 2008, since I was

feeling discomfort in movement, pain in the affected part of the body. I of my own approached department of Physical Medicine and Rehabilitation Safdarjung Hospital for further advise treatment and grant of Disability Certificate on 01.03.2008. The doctors advised for X-rays of the affected part of the body, the original advise is Ex.PW1/12. The doctors on receiving the report of X-Rays and on my physical examination on 08.03.08, carried out the assessment for grant of Disability Certificate. The originals of advised for X-Ray and assessment recorded by the doctors of Safdarjung Hospital on two cards are Ex. PW1/13 and Ex.PW1/14 respectively.

14. I state that the doctors of Physical Medicine and Rehabilitation Department of Safdarjung Hospital, despite having taken out the X-rays on 01.03.2008 and physical Assessment on 08.03.2008 did not issue the disability certificate and advised me to obtain orders of the court where compensation claim was pending for directions to be hospital for issuing disability certificate. On my application the Hon'ble Tribunal by its order dated 19.04.2008 directed the medical superintendent Safdarjung Hospital to issue the Disability Certificate. In case petition is found to be suffering for any permanent disability. In pursuance to the order of this Hon'ble Court, the Doctors of Safdarjung Hospital issued the disability certificate on 09.05.2008. I have brought the original disability certificate along with the photocopy of the same is Ex.PW1/15. The disability has been assessed as permanent physical impairment in relation to right upper limb and right lower limb as 28% (Twenty Eight percent only). I state that the disability suffered is much more then what has been stated in the disability

certificate. The court may make its own observation on seeing my physical condition.”

7. In *Raj Kumar v. Ajay Kumar & Anr.* (supra) it was held that in the disability certificate the extent of disability of a limb cannot be assumed to be the extent of disability of whole body. The relevant portion of the report in *Raj Kumar v. Ajay Kumar* (supra) is 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 ability (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 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."

8. Turning to the facts of the case, it is evident that the first Respondent was employed as a Beldar and was aged about 54

years on the date of the accident. Apart from the leave taken by him, it has also come on record that he was not paid salary for the period of November, 2006 to March, 2007 for which he was entitled to be compensated and has been so done by the Tribunal. But, he did not come out with any material to show that there was loss of any salary till the date of his retirement. Thus, upto the age of 60 years there was no loss of earning capacity to the first Respondent and he was not entitled to any compensation for the same.

9. Government employees whether retiring from a high post or a low post, carry out their profession even after the date of superannuation provided he/she possesses good health. The permanent disability in the left upper and lower limb to the extent of 28% would definitely affect his earning capacity. In the absence of any expert evidence led by the first Respondent, I would reduce the loss of earning capacity to 14% in respect of whole body and award a compensation of ₹ 8,479/- x 12 x 9 x 14 ÷ 100 = 1,28,200/-. The compensation is reduced from ₹ 3,13,384/- to ₹ 1,28,200/-.
10. The first Respondent's testimony that he was looked after by his wife as an attendant-cum-nurse during the period of his hospitalization and then while he was on bed rest was not challenged in cross-examination. He estimated the monetary value of the services rendered by his wife to him @ 5,000/- per month. In the case of *Delhi Transport Corporation and Anr. v.*

Lalita, AIR 1981 Delhi 558 it was held that a Claimant has to be compensated for the gratuitous services rendered by his family members. Considering the nature of injuries, I would value the services rendered by a family member @ ₹ 2,000/- per month for a period of six months as ₹ 12,000/-. The compensation awarded towards loss of amenities of ₹ 20,000/- is on the lower side. It needs to be enhanced to ₹ 40,000/-. The overall compensation is computed as under: -

Sl. No.	Compensation Head	Granted by Tribunal (₹)	Granted by High Court (₹)
1.	On account of permanent disability	3,13,384.00	1,28,200.00
2.	Loss of income	42,395.00	42,395.00
3.	On account of medical expenses	10,000.00	10,000.00
4.	Loss of amenities	20,000.00	40,000.00
6.	Pain & Suffering	30,000.00	30,000.00
7.	Special diet and conveyance	20,000.00	20,000.00
8.	For attendant services rendered by family member		12,000.00
	Total	4,35,779.00	2,82,595.00

11. The compensation is thus reduced from ₹ 4,35,779/- to ₹ 2,82,595/-.

12. The Appeal is allowed in above terms.

(G.P. MITTAL)
JUDGE

JANUARY 13, 2012
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