

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

Date of decision: 16th July, 2012

+ **MAC.APP. 635/2011**

ORIENTAL INSURANCE CO LTD Appellant
Through: Mr. A.K. Soni, Adv.

versus

MAHESH KUMAR & ORS Respondents
Through: Mr. Peeush Sharma, Adv.

+ **MAC.APP. 1175/2011**

MAHESH KUMAR & ORS Appellants
Through: Mr. Peeush Sharma, Adv.

versus

ORIENTAL INSURANCE CO Respondent
Through: Mr.A.K. Soni, Adv.

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 (MAC APP.635/2011 and MAC APP.1175/2011) arise out of a judgment dated 04.04.2011 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby a compensation of ₹23,00,263/- was awarded in favour of Mahesh Kumar for having suffered

injuries in a motor vehicle accident which occurred on 22.02.2009.

2. For the sake of convenience, the Appellant Oriental Insurance Company shall be referred to as the Insurance Company and the Cross Objector (MAC APP.1175/2011) shall be referred to as the Claimant.
3. On 22.02.2009 at about 6:45 A.M., the Claimant was riding on his motorcycle, when he reached Subroto Park near Dhaula Kuan, a truck No.HR-39D-1724 came from behind and hit the motorcycle. As a result of the forceful impact, the Claimant fell down on the road along with his motorcycle. His left hand was crushed. He was removed to Safdarjang Hospital where he remained admitted from 22.02.2009 to 05.03.2009. The claimant was not comfortable with the treatment. He was admitted to Santosh Medical College where the amputation above elbow was carried out. He remained admitted in Santosh Medical College from 04.04.2009 to 20.04.2009.
4. The Claimant filed a Petition alleging that he was working as a Supervisor in M/s. Sinar Jernix (India) Pvt. Ltd. and was getting a salary of ₹8500/- per month. PW-2 Dr. R.K. Wadhwa, CMO from Safdarjang Hospital deposed that the Claimant had suffered 80% disability in his left upper limb on account of the amputation of the arm above elbow.

5. On appreciation of evidence, the Claims Tribunal found that the accident was caused on account of rash and negligent driving of the truck No.HR-39D-1724 by Som Dutt (the Second Respondent). Finding on negligence is not challenged by the Insurance Company. The compensation of ₹23,00,263/- awarded by the Claims Tribunal is tabulated hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal
1.	Medical Treatment	₹17,463/-
2.	Loss of Income due to Disability	₹ 20,80,800/-
3.	Disfigurement	₹ 80,000/-
4.	Pain & Suffering	₹ 80,000/-
5.	Special Diet	₹ 30,000/-
6.	Conveyance Expenses	₹ 12,000/-
	Total	₹ 23,00,263/-

6. It is urged by the learned counsel for the Insurance Company that the Claimant suffered 80% disability in respect of his left upper limb on account of amputation of his arm. This could not have been more than 40% vis-à-vis the whole body. The Claims Tribunal erred in awarding a compensation of ₹20,80,800/-

towards the loss of earning capacity which was exorbitant and excessive.

7. On the other hand, it is urged by the learned counsel for the Claimant that it was proved during inquiry before the Claims Tribunal that the deceased was a left hander and he was unable to join his duties as he was unable to perform his duties of a supervisor on account of the injuries suffered by him. Thus, he should have been awarded compensation to the extent of 100% of the loss of his earning capacity and not 80% as granted by the Claims Tribunal.
8. It is contended that no compensation was awarded towards the period during which the Claimant was totally confined to bed. Some compensation ought to have been awarded towards the loss of amenities.
9. In *Raj Kumar v. Ajay Kumar & Anr.*, 2011 (1) SCC 343, the Supreme Court brought out difference between permanent disability and functional disability resulting in the loss of earning capacity. It was laid down that the Claims Tribunal must ascertain whether the victim was prevented or restricted from discharging his previous activities and functions but could carry on some other or lesser scale of activities/functions so that he could earn his livelihood. Paras 10,11,13, 14 and 15 of the report in *Raj Kumar (supra)* are extracted hereunder:-

“10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

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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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 find 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."

10. Turning to the facts of the instant case, the Claimant testified that he was a left hander. PW-4 Mr. M. Pramod Kumar, Deputy Manager, HR of Sinar Jernix (India) Pvt. Ltd. also testified that the deceased was a left hander. Although, the Claimant did not state that he went to join his duties, but at the same time, a perusal of PW-4's testimony would show that the employer would have been unable to give him employment as he could not carry the job of Supervisor because of the amputation of his left arm. Although, there was no documentary evidence that the Claimant was a left hander perhaps there could be none except oral evidence, which came in the shape of PW-4's testimony. No evidence was produced by the Claimant to show that he

could not carry out any other activities because of amputation of his left arm. Assuming that the Claimant was a left hander, but with a little practice for a couple of months, he could write with his right hand also which may not be with the same fluency, but to some extent will be usable. Thus, as stated in *Raj Kumar (supra)* extracted earlier, the Claims Tribunal ought to have been considered his earning capacity with his right hand. The Claimant was a Graduate and work on a computer. In the circumstances, at the most, the loss of earning capacity could have been taken as 60%.

11. Thus, the compensation on account of loss of earning capacity would come to ₹15,60,600/- ($8500 + 50\% \times 12 \times 17 \times 60\%$) instead of ₹20,80,800/- awarded by the Claims Tribunal.
12. It is true that the Claimant was not awarded any compensation towards the loss of amenities in life. The compensation of ₹80,000/- was awarded towards disfigurement which was quite liberal. In Para 15 of the report in *Raj Kumar (supra)* extracted above, it was held that where any compensation more than 50% is awarded, award of compensation separately under the head of loss of amenities in life and expectations in life may disappear and as a result only a token or nominal amount may have to be awarded.

13. The award of compensation of ₹80,000/- towards disfigurement is taken as award of compensation towards disfigurement as well as loss of amenities in life.
14. The Claimant remained admitted initially in Safdarjang Hospital from 22.02.2009 to 05.03.2009 and then in Santosh Medical College from 04.04.2009 to 20.04.2009 where the amputation was carried out. Thus, it can be stated that the Claimant must have taken at least three months to recover from the injuries. The Claimant is entitled to a sum of ₹25,500/- (8500/- x 3) towards loss of income for three months.
15. I have observed above that the Claimant could have started working with his right hand at least to the extent of 40% with a little effort in a couple of months.
16. I hold that after practising by himself for three months, the Claimant could have carried out his work at least to the extent of 40%. Accordingly, I grant a compensation of ₹25,500/- (8500/- x 3) for practice / training for a period of three months to work with his right hand as the Claimant was a left hander.
17. The compensation awarded is extracted hereunder:-

Sl. No.	Compensation under various heads	Awarded by this Court
1.	Medical Treatment	₹17,463/-

2.	Loss of Income due to Disability	₹ 15,60,600/-
3.	Disfigurement & Loss of Amenities in life	₹ 80,000/-
4.	Loss of Income for three months (8500/- x 3)	₹ 25,500/-
5.	Practice/Training for three months (8500/- x 3)	₹ 25,500/-
4.	Pain & Suffering	₹ 80,000/-
5.	Special Diet	₹ 30,000/-
6.	Conveyance Expenses	₹ 12,000/-
	Total	₹ 18,31,063/-

18. The compensation thus stands reduced from ₹23,00,263/- to ₹18,31,063/- which shall carry interest @ 7.5% per annum from the date of filing of the petition till its deposit.
19. The excess amount of ₹4,69,200/- along with proportionate interest and the interest earned during the pendency of the Appeal shall be refunded to the Insurance Company.
20. Rest of the compensation shall be released to the Claimant in terms of the order passed by the Claims Tribunal.
21. Both the Appeals stand disposed in above terms.

22. The statutory deposit of ₹ 25,000/- be refunded to the Insurance Company.
23. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

JULY 16, 2012
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