

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

Date of Decision: 19th November, 2012

+ **MAC. APP. 366/2009**

DAYA KISHAN

..... Appellant

Through

Mr.S.N.Parashar, Advocate

versus

RAKESH KUMAR & ORS.

..... Respondents

Through

Mr.D.K.Sharma, Advocate for R-3
Insurance Company

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.10511/2009

There is a delay of 70 days in filing the Appeal.

For the reasons as stated in the application, the delay in filing the Appeal is condoned.

The Application stands disposed of.

MAC. APP. 366/2009

1. The Appeal is for enhancement of compensation of ₹ 3,25,000/- awarded by the Motor Accident Claims Tribunal (the Claims Tribunal) in favour of the Appellant Daya Kishan, who suffered injuries in a motor vehicle accident, which occurred on 28.11.2003.

2. During the course of hearing two contentions are raised on behalf of the learned counsel for the Appellant:-
 - (i) It is stated that the Appellant suffered disability to the extent of 54% in respect of his right lower limb as per the disability certificate dated 04.03.2005 issued by the Rao Tula Ram Memorial Hospital. The disability was re-assessed and as per certificate dated 26.02.2010, he was declared to have suffered more than 40% disability in relation to his right lower limb. It is urged by the learned counsel for the Appellant that the Claims Tribunal erred in not granting any compensation towards loss of earning capacity.
 - (ii) It is contended that the Appellant had to take leave for two years, however, he had been awarded the compensation on account of loss of salary for only 11 months.
3. On the other hand, the learned counsel for the Respondent Insurance Company states that the compensation awarded is just and reasonable.
4. It is admitted by the learned counsel for the parties that during the pendency of the Appeal, the matter was taken up in Lok Adalat and as per certificate dated 26.02.2010, the Appellant was declared to have suffered more than 40% disability in relation to his right lower limb.
5. The Claims Tribunal dealt with the issue of loss of earning capacity in Para 38 of the impugned judgment. The Claims Tribunal observed that

the disability was temporary, and therefore, preferred not to award any compensation on account of the disability.

6. 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 with the nature of job undertaken by the victim of a 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."

7. Thus, to award compensation on account of permanent disability, the disability must impact the earning capacity. In the instant case, the Appellant joined the same job with the same Company after taking leave for 11 months. Thus, no loss of earning capacity was suffered by the Appellant.
8. The disability suffered by the Appellant is on account of stiffness of his right knee while having suffered fracture of shaft femur right side and comminuted fracture of right patella. The Claims Tribunal dealt with the aspect of the Appellant having undergone prolonged treatment and awarded a sum of ₹ 40,000/- towards pain and suffering.
9. Since the Appellant has stiffness in his right knee and was initially declared to have got temporary disability to the extent of 54% which was

later on reduced to more than 40%, the Appellant would have difficulty in walking, running, sitting, squatting and carrying out his normal activities on day to day basis. No compensation was awarded on account of loss of amenities and expectations in life to the Appellant. In the circumstances of the case, I would award a sum of ₹ 50,000/- towards loss of amenities in life.

10. As far as the grant of compensation on account of loss of income is concerned, the leave certificate issued by the Appellant's employer was proved as Ex. P-170. The certificate reveals that the Appellant had to take leave from the date of accident, that is, 28.11.2003 to 15.07.2004 and then from 01.08.2005 to 27.10.2007. The certificate clearly shows that the Appellant was not on leave for the period of 16.07.2004 to 31.07.2005. In effect, the Appellant availed leave for a period of 10 and a half months for which he had been awarded compensation as loss of pay for 11 months. The Claims Tribunal's order on this aspect cannot be faulted.
11. For the above reasons, the amount of compensation is enhanced by ₹ 50,000/- which shall carry interest @ 7.5% per annum from the date of filing of the Petition till its payment.
12. The Respondent Insurance Company is directed to deposit the enhanced compensation amount along with interest with the Claims Tribunal within six weeks.
13. Fifty percent of the enhanced compensation shall be held in fixed deposit for a period of two years. Rest shall be released on deposit.

14. The Appeal is allowed in above terms.
15. Pending Applications also stand disposed of.

(G.P. MITTAL)
JUDGE

NOVEMBER 19, 2012

v