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

% *Judgment delivered on: 4th April, 2014*

+ **MAC.APP. No.901/2012**

VINOD CHAUDHARY

..... Appellant

Represented by: Mr.V.K. Malik, Mr. Rahul Raj
Malik & Mr. Rajeev Chauhan,
Advocates.

Versus

RATTAN SINGH & ORS.

..... Respondents

Represented by: Ms. Shantha Devi Raman,
Mr. Sanjeet Ranjan and
Mr. Mukul Thakur, Advocates for
Respondent No.3/Insurance
Company.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. The present appeal is preferred against the impugned award dated 19.04.2012, whereby the learned Tribunal has granted compensation for a sum of Rs.1,91,663/- with interest at the rate of 9% *per annum* from the date of filing of the claim petition till realization of the amount.

2. Vide the instant appeal, the appellant is seeking enhancement of the aforementioned compensation amount.

3. Brief facts of the case are that on 28.02.1998, the appellant was returning to his house from his workplace in Gurgaon on his two wheeler Scooter No. DII-9323(Bajaj Super). When he reached near Rangpuri Petrol Pump opposite Sherey Punjab Hotel, at about 7.30 p.m. the

offending vehicle bus No. RJ-02P-0868 (Tata Bus) came from behind at a very fast speed, which was being driven in a rash and negligent manner by respondent No.1, struck the scooter of the appellant thereby caused the accident. The appellant was thrown away from his scooter and received serious head injuries and other bodily injuries. After the accident, the bus stopped for a while and then ran away. The appellant was taken by police gypsy to Safdarjung Hospital in an unconscious condition. The appellant got discharged from the said hospital and was admitted in Apollo Hospital for further treatment. He was treated as an indoor patient from 01.03.98 to 14.03.98 and was diagnosed with head injury with Bitemporo Parietal Haemorrhagic contusions.

4. It is pertinent to mention here that earlier an *ex parte* award was passed vide order dated 01.04.2006, which was set aside by this court and thereafter the award under challenge was passed on 19.04.2012. In the first round of litigation, the compensation of Rs.1,85,000/- was granted in favour of the appellant. The appellant did not lead any additional evidence after the earlier award was set aside. Hence, the learned Tribunal observed the same in Para 33 of the impugned award that there was no new evidence, however, increased the award only to an extent of Rs.6,413/-.

5. Mr. V.K. Malik, Learned counsel appearing on behalf of the appellant submitted that the appellant has been advised neither to drive nor to work on heavy machines. He lost all his working faculties of mind and as such was incapacitated to work of any nature. He is still taking treatment from Vidya Sagar Institute of Mental Health and Neuro Sciences (VIMHANS) and cannot take work load due to memory lapses and mental strain. He is still on medicines and has no hope of recovery.

6. Learned counsel further submitted that the learned Tribunal failed to appreciate the physical condition, medical record, and erroneously passed the impugned order without discussing the merit of the claim of future compensation on account of the appellant having been incapacitated to work. The learned Tribunal has further failed to appreciate the facts emerging from the claim petition that the medical circumstances which can be taken judicial notice. Therefore, the learned Tribunal ought not to have rejected the claim on account of non-production of any certificate of permanent disability. Whereas, disability itself is made out from the medical advice of Dr. N. Sairam, which clearly states that the appellant is unable to do any work as he has memory lapses and mental strain.

7. Learned counsel submitted that the learned Tribunal failed to appreciate the fact that the appellant was under continuous treatment of Dr. N. Sairam since 1998 till the date of passing of the impugned award.

8. It is submitted that the Ld. Tribunal has miserably failed to assess the medical expenses and also the future claim in that regard and improperly assessed the compensation against the loss of future earning at Rs.40,000/- whereas the appellant has been earning Rs.20,000/- per month in the year 1998 as he was Head of the Department working as General Manager (Works). He is a first class graduate in Production Engineering and had a vast experience, therefore, would have progressed both, in professionally and financially, and would have been drawing a salary of not less than Rs.2 lacs per month if he had not met with the accident.

9. He submitted that the learned Tribunal failed to consider future

earning and also not granted any compensation for future treatment whereas the appellant is continuing with the treatment till date.

10. The appellant PW 1 during his evidence proved 11 documents which are exhibited PW1/2, Degree of Bachelor of Science in Production Engineering Ex.PW1/3, Ex.PW1/4 Certificate dated 01.09.1997 given by NIPA International Pvt. Ltd. stating therein that the monthly salary of the appellant Shri Vinod Chaudhary General Manager (Works) is Rs.20,000/- per month.

11. Learned counsel for the appellant further submitted that the learned Tribunal has recorded in the impugned award that the appellant did not produce any certificate of any sort of permanent disability suffered by him from any Medical Board. It is well proved on the judicial file that he had suffered head injuries in the accident. Further recorded that it is a matter of experience that people could not preserve all the bills of their treatment, however, from the nature of injuries received by the appellant in this case it is clear that he might have spent huge amount on his treatment. Despite, an amount of Rs.60,000/- was awarded to him on account of his treatment and medical expenses, which is on lower side. It is further recorded that the appellant was getting a salary of Rs.20,000/- per month. He remained admitted in Appollo Hospital w.e.f. 01.03.98 to 14.3.98 after the accident on 28.2.98. After his discharge from the Appollo Hospital he had taken rest because of the serious head injuries received by him in the accident and he was awarded Rs.40,000/- towards loss of earning.

12. Ld. Counsel further submitted that the disability board constituted under the direction of this court assessed the permanent disability as 80%

intellectual impairment. The relevant medical evidence has been placed on record; and the same has been proved. The counsel has drawn the attention of this court regarding the employment and depositions of AW2, Vinay Joneja, who is working as AGM with NIPA International Pvt. Ltd. Therefore, compensation on account of loss of dependency and non-pecuniary damages may be granted.

13. Learned counsel argued that the respondent Insurance Company failed to give any reply in rebuttal and failed to examine any witness to disprove the evidence and the material produced by the appellant. He submitted that the earning capacity of the appellant is reduced to zero, therefore, compensation may be enhanced.

14. On the other hand, Ms. Santha Devi Raman, learned counsel appearing on behalf of the respondent/Insurance Company submitted that to prove the salary of the appellant his employer was not examined during trial.

15. Learned counsel further submitted that AW 2 Shri Vinay Jonega did not produce the record as to when the appellant joined the company. He simply stated that his salary at the time of the accident was Rs.20,000/-.

16. Learned counsel further submitted that the PW1/appellant in his cross-examination stated that he had not filed on record any resignation letter or termination letter from his employer. He had also not placed on record any bank statement to show that his salary was credited in his account. In Para 33 of the impugned award, the learned Tribunal has recorded as under:-

“There is no new evidence before this Tribunal today

to take a different view than the view already taken vide ex-parte award dated 01.04.2006. Additional documents which have now come on record are receipts of purchase of medicines from Chemists worth Rs.6,413/-. Besides that, there is a single OPD receipt worth Rs.250/- for payment made to treating Dr. N. Sairam at VIMHANS. There is another booklet of VIMHANS as per which petitioner was examined at VIMHANS on 15.09.10 by Dr. N. Sairam who has written in that booklet that the petitioner was under his treatment since 1998 and was advised rest since he is unable to take work load due to memory lapses and mental strain. He has written that rest is essential to avoid fits which can prove fatal for the life of petitioner.”

17. Learned counsel for the respondent further submitted that although the appellant claimed that he had lost his job due to the accident but admittedly did not file any resignation letter given by him to the employer or any letter of termination of service given by the employer to the appellant. Therefore, the appellant has not proved that he lost his service because of the accident.

18. Learned counsel further drew the attention of this Court to para 39 of the impugned award in which the learned Tribunal observed as under:-

“Ex.PW1/4 which is the Certificate dated 01.09.1997 given by employer of the petitioner is also not inspiring because the accident had taken place on 28.02.1999 but the certificate of employer is dated 01.09.97 i.e. 6 months prior to the date of accident. For what occasion this certificate was necessitated is not known. From this certificate even it cannot be inferred that petitioner was in the employment of said employer on the date of accident.”

19. Learned counsel submitted that there is nothing on record to show the payments made by the appellant on his treatment and by the second award Rs.6,000/- was added towards purchase of medicines. He alleged to have spent Rs.90,000/- on medical treatment, however, the learned Tribunal granted Rs.60,000/- on the basis of presumption.

20. While concluding her arguments, learned counsel for the respondent submitted that the accident had taken place on 28.02.1998 and the first award was passed on 01.04.2006 and in the said award the Insurance Company was not made a party. However, the respondent/Insurance Company was impleaded in the year 2010, therefore, there is a lapse of 8 years, therefore, the whole liability cannot be fastened upon the Insurance Company.

21. She further submitted that the said objection was taken by the Insurance Company before the Tribunal and the same has been recorded by the learned Tribunal in Para 15 of the impugned award as under:-

“They have taken an objection that insurance company was arrayed as a party in the year 2010 whereas claim petition was pending since 06.12.99 and therefore they be not saddled with the liability to pay interest for this period.”

22. Learned counsel submitted that the disability which has been proved now cannot be attracted any interest on the compensation for loss of income. If it is awarded the respondent No.3 cannot be held liable for payment of any interest for all these years. The law has been settled in the case of **Sarla Verma Vs. DTC and Ors. 2009 (6) SCC 121**.

23. Learned counsel further submitted that appellant's disability of 80% has been proved before this Court only in the month of May, 2013.

However, before the Tribunal failed to prove disability, therefore, while adjudicating the instant appeal, this Court may keep in mind all these facts. The learned counsel has relied upon the case of *Sarla Verma Vs. DTC and Ors. 2009 (6) SCC 121* to contend that the respondent Insurance Company shall not be liable for the interest, if the delay is caused by the claimants.

24. Learned counsel further submitted that the learned Tribunal correctly recorded in Para 20 of the impugned award that the appellant in his cross-examination stated that he did not file any resignation letter or termination letter from his employer and also submitted that he did not place on record any bank statement to show that his salary was credited in his account.

25. This clearly shows that the appellant could not show any piece of paper to prove his employment with NIPA International Pvt. Ltd.

26. Moreover, the accident had taken place on 28.02.1998, but the appellant had produced a certificate dated 01.09.1997 of his alleged employer, i.e., prior to the date of accident. The learned Tribunal has made a categorical observation that the said certificate does not inspire confidence because the certificate was issued six months prior to the date of the accident and further observed that it could not be inferred that the appellant was in the employment of the said employer on the date of the accident.

27. Learned counsel for the respondent/Insurance Company further submitted that the learned Tribunal has clearly observed in Para 35 of the award that there was no proof that the appellant was undergoing treatment all this period for injuries suffered in the accident in question,

except for payment receipt of Rs.250/- dated 03.04.2003 and there is no other prescription or receipt for payment given to any treating doctor by the appellant in this span of twelve years. Thus, the learned Tribunal was right in observing that there is no proof that the appellant was undergoing treatment from 09.11.1999 to 15.09.2010 continuously as he had not submitted any prescription or receipt for payment given to any treating doctor in the span of twelve years.

28. In rejoinder, Mr. V.K. Malik, learned counsel for the appellant argued that very lately the appellant received the particulars of the Insurance Company. In the first award the driver and owner of the offending vehicle were served through publication and they were proceeded ex parte. In the award in question also the driver and owner were served through publication. The driver of the offending vehicle appeared in criminal case who was convicted and sentenced till rising of the court. The said order was challenged by the appellant only then the documents of the Insurance Company were supplied to him. Thus, there is no deliberate delay or lapse on the part of the appellant. He further submitted that vide order dated 26.02.2013 this Court granted liberty to lead additional evidence and also directed to assess the disability of the appellant. The said order was not challenged by the respondent, therefore, at this stage, it cannot have the benefit of the same. Learned counsel further submitted that the appellant has successfully proved his case, his disability, his salary and his mental condition as on date and prayed that the present appeal may be allowed.

29. I have heard Ld. Counsels for the parties and perused the evidence on record.

30. It is pertinent to mention here that vide order dated 26.02.2013, this Court directed the Medical Superintendent of Safdarjung Hospital, New Delhi to constitute a Medical Board to examine the appellant for assessing the disability suffered by him. Apart, the appellant was granted liberty to lead additional evidence to prove his disability and the loss of earning of future income.

31. Accordingly, AW1 Dr. N. Sairam, a consultant Neurologist in VIMHANS Hospital, was examined on 30.04.2013 who deposed that he had examined the appellant on 02.03.2013. OPD slip dated 02.03.2013 qua the appellant is Exhibited AW1/1. The documents Exhibited PW1/1 & PW2/2 before the trial court were prepared in his handwriting and he also admitted that the said documents bear his signatures. As per the OPD cards Ex.AW1/2 to 4, he deposed that the patient had suffered severe head injury with Bitemporo Parietal Haemorrhagic contusions. The appellant has been suffering from said injury and more prone to epileptic seizures and the same are fatal to the patient. The appellant is a neurological disabled person. The appellant is suffering from lack of memory and due to the above reasons, the appellant is not able to work normally.

32. AW 2 Shri Vinay Jonega, AGM with NIPA International Pvt. Ltd. deposed that the appellant was working with the aforesaid establishment as a General Manager till February, 1998. He has seen the Ex.2 before the learned Trial Court and deposed that the same is salary certificate of the appellant which is dated 03.09.1977 and the said salary certificate is signed by Shri J.C. Khanna, the then Managing Director and now the CEO of the company. He recognised his signature and stated that he had seen him signing in the normal course of the business. He submitted that

his salary is Rs.56,000/- as per pay slip Ex.PW2/3. He specifically stated that no perks or other benefits are given to them as per the salary certificate. He categorically stated that it is not necessary that the GM's salary is more than the AGM post.

33. AW3 Shri Narender Pal Singh Jolly, working in the Safdarjung Hospital as Assistant Administrative Officer in the Medical Record Department, has proved the medical report dated 09.05.2013 Ex.AW3/2 wherein stated as under:-

“The board met under the chairmanship of Dr. Vinu Khanna, Addl. M.S.(MRD), Safdarjung Hospital at MRD Section on 08.05.2013 at 2.30 PM. The patient Vinod Chaudhary was examined and his medical treatment records were reviewed. He is suffering from traumatic brain injury sequelae with cognitive impairment. IQ assessment report from department of Psychiatry, AIIMS, (vide OPD No.20130234047 dated 26.4.2013 and 27.4.2013) was reviewed. His IQ is in the range of 30-40, suggestive of severe intellectual impairment. He has 80% (Eighty Percent) disability.”

34. It is important to note the report of Dr. N. Sairam dated 02.03.2013, which is as under:-

“Is under treatment since 22/12/98. Is advised rest since patient is unable to take work load due to memory lapse, and mental strain. Rest is essential to avoid fits which can prove fatal for his life”

35. I further note, in his report dated 22.12.1998, the same doctor has written ‘head injury with Bitemporoparietal Haemorrhagic contusions’ and has observed as under:-

“ Patient is unable to take work load due to memory lapses and mental strain”

36. In view of above medical records and material placed on record, it is established that the appellant / injured aged 49 years sustained severe injury; and the permanent disability has been assessed at 80% in relation to intellectual faculties. Therefore, the appellant / injured is entitled to the compensation on account of future loss of income due to permanent disability.

37. In order to assess the just compensation, in the injury case, the Apex Court in ***Raj Kumar v. Ajay Kumar and Anr. (2011) 1 SCC 343*** has held as under:

8. 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. 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) SCALE 298 and Yadava Kumar v. D.M., National Insurance Co. Ltd. 2010 (8) SCALE 567.

9. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

10. 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. 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. 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.

38. Undisputedly, the appellant / injured is a Bachelor of Science in Production Engineering from Punjab University and the certificate of the same has been proved. It is also come on record that the injured had been working as a General Manager at NIPA International Ltd. Moreover, the representative of the employer, namely, Mr. Vinay Joneja, AW2, testified to the effect that the appellant / injured had been working as a General Manager, NIPA International Ltd. at the time of accident on a salary of Rs.20,000/-.

39. I note, in the absence of any substantial evidence, this Court while exercising the appellate jurisdiction cannot presume that the appellant was not properly employed; and was not receiving the salary of Rs.20,000/-. Therefore, the monthly income is taken at Rs.20,000/-. Considering the age of the claimant / injured, the multiplier of '13' is applied.

40. The assessment of functional disability is an important factor in the process of computing the compensation on account of future loss due to the permanent disability wherein it affects the working capacity of the injured. Considering the nature of avocation and the percentage of permanent disability, the functional disability is assessed at 40% qua whole body.

41. Importantly, the shattering of mental frame is grievous than the disability in respect of physical frame as in the present case. Therefore, the injured is also entitled for non-pecuniary damages. I note, since 1998, the appellant has been receiving treatment. Therefore, considering

the duration of treatment and the gravity of disability, the appellant is entitled for the compensation on account of treatment and loss of expectation of life.

42. Regarding the assessment of non-pecuniary damages, the Apex Court in the case of ***B.T. Krishnappa Vs. DM, United Insurance Co. Ltd. & Anr.*** AIR 2010 SC 2630 has held as under:

16. In the case of ***Divisional Controller, KSRTC v. Mahadeva Shetty and Anr.*** : (2003) 7 SCC 197, where the claimant was also a mason, this Court held that:

...It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance with the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The normal expectation of life is impaired....

17. Long expectation of life is connected with earning capacity. If earning capacity is reduced, which is the case in the present situation, that impacts life expectancy as well.

18. Therefore, while fixing compensation in cases of injury affecting earning capacity the Court must remember:

...No amount of compensation can restore the physical frame of the appellant. That is why it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered

*during an accident, the object is to compensate such injury "so far as money can compensate" because it is impossible to equate the money with the human sufferings or personal deprivations. Money cannot renew a broken and shattered physical frame." [See **R.D. Hattangadi v. Pest Control (India) (P) Ltd. and Ors.**: (1995) 1 SCC 551]*

43. It is trite, whenever a tribunal or a court is required to fix the amount of compensation in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards.

44. In view of above discussions, evidence on record and legal propositions, the compensation is assessed as under:-

Sr. No.	Heads	Calculation as per MACT	Calculation as per this Court
i.	Loss of future income on account of disability	Rs.40,000/-	Rs.16,22,400/- (Rs.20,000 + 30% of Rs.20,000)x12x13x ⁴⁰ /100
ii.	Medical treatment	Rs.66,663/-	Rs.66,663/-
iii.	Future medical treatment	Rs.40,000/-	Rs.40,000/-
iv.	Special diet and conveyance	Rs.20,000/-	Rs.20,000/-
v.	Physical pain and mental agony	Rs.25,000/-	Rs.25,000/-
vi.	Loss of expectation of life	Nil	Rs.1,00,000/-

	Total	Rs.1,91,663/-	Rs.18,74,063/-
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Resultantly, the compensation is assessed at Rs.18,74,063/-.

45. Accordingly, an amount of Rs.16,82,400/- is enhanced (Rs.18,74,063 – Rs.1,91,663).

46. The enhanced compensation shall carry interest @ 9% *per annum* from the date of filing of the appeal till its realization.

47. Accordingly, the respondent No.3/Insurance Company is directed to deposit the enhanced compensation with interest with the Registrar General of this Court within a period of six weeks from today, failing which, appellant/claimant shall be entitled for penal interest @ 12% *per annum* on account of delayed payment.

48. On deposit, the Registrar General is directed to deposit 50% of the enhanced amount in the form of FDR for a period of five years; and the remaining 50% of the enhanced amount be released in favour of injured / claimant on taking necessary steps by him.

49. In view of the above, the appeal is allowed.

SURESH KAIT, J.

APRIL 4, 2014

RS/jg/sb