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

Date of decision: 08.12.2014

+ MAC.APP. 1104/2014 and CM No. 20052/2014(stay)

THE ORIENTAL INSURANCE COMPANY LIMITED..... Appellant
Through Mr.R.C.Mohan, Advocate.

versus

DEV SUBHA AND ANR Respondents
Through None.

CORAM:
HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J. (Oral)

1. The present appeal is filed seeking to impugn the Award dated 8.09.2014.
2. A perusal of the Award shows that on 17.12.2012 the claimant/respondent No.1 reached at East Metro Station, Janak Puri, Delhi on a two-wheeler scooty. The offending vehicle hit the scooty and the petitioner and his friend who were travelling on the scooty fell down and sustained injuries.
3. Based on the evidence on record, the Tribunal granted a total compensation of Rs.12,64,040/- as follows:-

Treatment expenses:	Rs.5,000/-
Pain and sufferings:	Rs.75,000/-
Conveyance, attendant charges & special diet:	Rs.50,000/-
Loss of future earnings capacity due to disability	Rs.9,97,110/-

Loss of enjoyment of life:	Rs.50,000/-
Loss of income during treatment:	Rs.36,930/-
Loss of marriage prospects	Rs.50,000/-
Total	<u>Rs.12,64,040/-</u>

4. The Tribunal noted that respondent No.1 was working as a Waiter in a restaurant. He was said to be earning Rs. 6,155/- per month. As under the Minimum Wages Act the wages for an unskilled person were Rs.7,254/- p.m., accordingly, the income of the petitioner was accepted as Rs.6,155/- p.m. along with 50% enhancement on account of future prospects. Keeping in view that respondent No.1 suffered 30% permanent disability in relation to his left lower limb, the Tribunal assessed the functional disability at 50% and accordingly awarded a sum of Rs.9,97,110/- for loss of future earnings capacity due to disability.

5. Learned counsel appearing for the appellant submits that functional disability has been wrongly assessed at 50% which is very much on the higher side. He submits that as per the affidavit by way of evidence filed by respondent No.1, he suffered no loss of income inasmuch as he has continued to work as a Waiter. Learned counsel relies upon the judgment of this High Court in MAC. APP.602/2011 titled as ***Oriental Insurance Co. Ltd. vs. A Mohan & Ors.*** dated 14.03.2012. That was a case of a Room Attendant working in Hotel Maurya. In that case this court on the basis of evidence on record had concluded that as the salary of the claimant was not affected, there was no loss of future earnings.

6. As far as functional disability is concerned, the Supreme Court in the case of ***Raj Kumar vs. Ajay Kumar, (2011) 1 SCC 343*** on the issue regarding computation of functional disability held as follows:-

“14. 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 disability (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.”

7. In the present case in the evidence by way of affidavit respondent No.1 said as follows:-

“4. That injured is waiter in a restaurant and used to earn Rs.6,155/- per month. But due to this unfortunate accident the injured could not join the said job for over 7 months. That the injured was also attended by the family members at the time of treatment as well as recuperation.

5. That due to this accident, the injured has suffered great mental pain and agony, loss of enjoyment of life, impairment of body, pain and suffering nervous shock, loss of pleasure of amenities of life, shortening of life, disfigurement, discomfort, inconvenience etc. therefore, the deponent is entitled to claim compensation.

6. That all the respondents are jointly and severally liable to pay the compensation to the deponent.”

8. The permanent disability certificate states the disability as follows:-

“.. is a case of Post traumatic stiffness of left hip joint. He is physically disabled and has 30% (thirty percent) permanent physical disability in relation to his left lower limb.”

9. A waiter working in a restaurant has to be physically active. It is implicit that if he has 30% permanent physical disability of left lower limb

and stiffness of hip joint as described by the disability certificate, he will have difficulty in performing his functional duties as a waiter. It would severally affect his overall capacity of working. Given the competition in this unorganised sector, there would certainly be loss of earnings.

10. In the light of the above I see no reason to differ with the view expressed by the Tribunal assessing the functional disability at 50%.

11. As far as the judgment of this court in the case of ***Oriental Insurance Co. Ltd. vs. A Mohan & Ors.(supra)*** is concerned, the facts show that the claimant in that case was working as a Room attendant. He had admitted that he had suffered no loss of income. It was in those facts that this court reached a conclusion there was no loss of income. Further, that was a case where the certificate only showed that there was limited knee stiffness. It does not appear from the facts of that case that any disability certificate was placed on record to show the extent of disability suffered by the claimant. The said judgment would have no application to the facts of this case.

12. There is no merit in the submissions of the learned counsel appearing for the appellant.

13. The present appeal is dismissed.

14. The appellant may comply with the award within four weeks from today.

15. Statutory amount, if any, be refunded to the appellant.

16. Interim orders, if any, stand vacated.

JAYANT NATH, J

DECEMBER 08, 2014

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