

\$~12

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

Decided on: 24th August, 2017

+ MAC.APP. 1068/2016 and CM 46379/2016

NATIONAL INSURANCE COMPANY LTD Appellant

Through: Mr. Zorawar Singh, Advocate

versus

PRITI GUPTA AND ORS

..... Respondents

Through: None

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT (ORAL)

1. The first respondent (claimant), then aged about 44 years, engaged in earning her livelihood by running a boutique, was travelling in a bus bearing registration no.UP-17T-1857 on 28.02.2011 at about 8.15 a.m. and as she was about to alight, the driver of the bus started it suddenly with a jerk rendering her lose balance and fall down on the road, her right leg coming under the wheels crushing the said limb. She was moved to the hospital where she underwent surgical procedures. Eventually, her right lower limb from the level of middle thigh - above knee - had to be amputated rendering her permanently disabled. She instituted accident claim case (MACT 210/11, new MACT No.14605/15) on 03.05.2011 impleading the driver and owner (second and third respondent herein) and the appellant / insurance

company, it admittedly being the insurer against third party risk in respect of the said vehicle.

2. The Motor Accident Claims Tribunal (Tribunal) held inquiry and, by judgment dated 22.09.2016, upheld the case for compensation on the principle of fault liability awarding total compensation in the sum of Rs.48,59, 835/- fastening the liability on the appellant / insurer to pay the same with interest, except against last two components calculating it as under :-

NON-PECUNIARY COMPENSATION

Compensation towards pain and suffering	Rs.1,00,000/-
Compensation towards loss of amenities of life	Rs.1,50,000/-
Compensation towards disfiguration and amputation of leg	Rs.1,50,000/-
Total non-pecuniary compensation	Rs.4,00,000/-

PECUNIARY COMPENSATION

Loss of Income for 6 months	Rs.91,750/-
Loss of future income due to permanent disability	Rs.28,38,745/-
Compensation towards salary of attendant	Rs.80,000/-
Compensation towards special diet	Rs.40,000/-
Compensation towards conveyance	Rs.12,960/-
Medical bills (treatment expenses)	Rs.2,58,269/-
Bills of artificial limb and its repair etc.	Rs.3,38,111/-
Artificial limb to be implanted in future	Rs.6,00,000/-
Future medical expenses such as maintenance of artificial limb etc.	Rs.2,00,000/-
Total	Rs.44,59,835/-

3. The insurer by the appeal at hand, questions the computation of compensation on various grounds.

4. In calculating the loss of income in future due to disability on account of amputation of substantial part of right lower limb, the tribunal considered certificate (Ex.PW2/A) whereby the medical board has assessed her disability to be permanent to the extent of eighty five per cent (85%) in relation to the said right lower limb. Though the claimant had argued that her disability be treated as 100%, the insurance company submitted before the tribunal that it be treated as half of the disability assessed by the medical opinion. The Tribunal took it as 85% in relation to the whole body for calculating the loss of income in future. It is this assessment which is questioned by the insurance company, reliance primarily being placed on the decision of the Supreme Court in *Raj Kumar Vs. Ajay Kumar and Anr.*, (2011) 1 SCC 343.

5. It is the argument of the learned counsel for the insurer that the work in which the claimant was engaged was not labour intensive and therefore, the assessment of functional disability is high. It is noted that the claimant had led elaborate evidence with regard to she being engaged in the business of boutique for last several years, income tax returns (ITRs) for the assessment year 2008-2009 to 2010-2011 having been brought on record and formally proved. It is not correct to argue that because the claimant was running a boutique all that she would be required to do would be to supervise, entertain clients at the cash desk and make collections. As the proprietor of the business

which she was running, she would be obliged to move around and monitor the entire show not only by participating in the work of the procurement of the necessary materials but also in managing the work of stitching and fabrication of clothes besides putting them on sale. In these circumstances, it cannot be accepted that she would not have much use of the lower limbs. To say so, rather, would be adding insult to the injury.

6. While it is true that the medical opinion about the disability cannot always be equated with the functional disability, cue can be taken from the prescription in the Employees' Compensation Act, 1923 which lists out, in the first schedule, the injuries deemed to result in permanent partial disablement and the extent of their effect on the earning capacity of the victim. The evidence shows that the claimant in this case suffered amputation of the right leg above knee. This is confirmed by the discharge summary (Ex. PW3/B) issued by Sir Ganga Ram Hospital where she had undergone several surgical procedures. Her photograph revealing the remainder of the said lower limb after the amputation is available at page 151 of the Tribunal's record.

7. The category included at serial no.17 in the second part of the first schedule appended to the Employees' Compensation Act, 1923, it being a case of amputation below hip with stump not exceeding 12.70 cms in length measured from the tip of great trochanter, as per the legislative assessment, is to be treated as a case of loss of earning capacity to the extent of 80%. The entry erroneously uses the

expression “*trenchanter*” which appears to be a reference intended to “*trochanter*”, which means – *a broad, flat process on the femur, at the upper end of its lateral surface (greater trochanter)*” (see medical-dictionary.thefreedictionary.com). The expression “*trenchanter*”, on the other hand means – “*severe, expressing, strong criticism or forceful opinions*” (see dictionary.cambridge.org). Similar error is noticed in entry at serial no. 18.

8. It is hoped that the government will bring about suitable correction in the legislation by appropriate measures. For ready reference snapshot of the relevant portion of the schedule appended to the erstwhile Workmen’s Compensation Act, 1923 (since renamed as Employees’ Compensation Act, 1923) from the website of Ministry of Labour & Employment of the Govt. of India as on dated 24th August, 2017 at 13:38 hours is as depicted herein below:

Description of injury	Percentage of compensation payable
Separation of back part resulting in permanent deformity	80
Amputation through both feet proximal to the metatarsophalangeal joint	80
Loss of all four fingers of both hands proximal to the metacarpophalangeal joint	80
Loss of all four fingers of both hands proximal to the metacarpophalangeal joint	80
Loss of all four fingers of both hands proximal to the metacarpophalangeal joint	80
Amputation at hip	80
Amputation above hip with stump not exceeding 25 cm in length measured from top of stump to end of stump	80
Amputation below hip with stump not exceeding 25 cm in length measured from top of stump to end of stump	80
Separation of the middle finger of the right hand	80
Amputation below knee with stump not exceeding 30 cm in length measured from top of stump to end of stump	80
Amputation above knee with stump not exceeding 30 cm in length measured from top of stump to end of stump	80

9. Clearly, the case of the claimant herein falls in the aforementioned category of disability. The functional disability in the case of the claimant, thus, should have been considered to the extent of eighty per cent (80%) and the loss of future income computed accordingly. The suitable correction must now be made by the court.

10. The Tribunal considered the three ITRs referred to above and, on that basis, concluded that the claimant was earning Rs.1,83,500/- annually. It added the element of future prospects of 30% in increase. Given the progressive rise in the income, as reflected in the said ITRs for three consecutive years, such approach was correct as the claimant had mustered clear proof of future prospects it being restricted to 30% only. In view of her age, the multiplier of 14 was properly picked up and, thus, the loss of future income due to permanent functional disability, assessed by this court to the extent of 80%, is calculated as (Rs.1,83,500/- x 130 / 100 x 14 x 80/100) Rs.26,71,760/-.

11. Since the Tribunal had awarded Rs.28,38,745/- under this head, a deduction of (Rs.28,38,745/- (-) Rs.26,71,760/-) Rs.1,66,985/- required to be made.

12. The learned counsel for the insurance company also argued that the award under the head of future medical expenses / aid of artificial limb in the total of Rs.8 Lakh is inappropriate. The Tribunal has considered the issue thus :

“Sh. Agendra Kumar, Clinical Specialist & Manager Business Analyst, P & O International, Vimhans Hospital, Nehru Nagar, Delhi has been examined as PW-6 who deposed that documents already Ex. PW4/6 has been

issued by their company and the liner of artificial limb which is made of silicon material needs to be changed after every 6 months and it costs Rs.13,000/- every time. It is further deposed that petitioner has to visit two times for the purpose of changing liner and socket of artificial limb needs to be changed every two year and cost is Rs.40,000/- and the life of the artificial limb is for 5 years with the abovesaid changes. The entire cost of the artificial limb is Rs.2,60,000/-. During cross examination he deposed that their company manufactures the artificial limb and the maintenance of artificial limb with regard to its alignment is free for five years.

Petitioner has also filed bills for an amount of Rs.3,38,111/- and this amount is incurred by her towards implantation of artificial limb, its repair from time to time and purchase of wheel chair. Petitioner is also entitled to this amount of Rs.3,38,111/- as per bills filed on record.

Petitioner is still 45-46 years of age and certainly would require more than one artificial limb during her life time. Artificial limb would have to be replaced from time to time and some amount would also be incurred on maintenance of artificial limb.

Thus, it is deemed fit that an amount of Rs.6,00,000/- be awarded to petitioner towards cost of implantation of the artificial limb in future and an additional amount of Rs.2,00,000/- be awarded towards maintenance cost of artificial limb and future medical expenses etc. It seems that the petitioner would at least replace her limb once more during her lifetime and may also have to purchase the same more than once depending upon the number of years she survives.

As the amount awarded towards implantation of artificial limb and towards its maintenance, cost is calculated as on date and is awarded as per its cost as on date, therefore, petitioner would not be entitled to interest on the above said amount of Rs.8,00,000/- from the date of

the award till it is deposited by insurance co. with the tribunal...”

13. In the considered view of this court, the Tribunal has given sound reasons for the aforesaid computation. The award for artificial limb and its replacement / maintenance in future is well justified, it being based on evidence properly adduced. Therefore, this court does not find any good reason for interference.

14. In the result, the compensation is reduced to [Rs.48,59,835 (-) Rs.1,66,985/-] Rs.46,92,850/-, rounded off to Rs.46,93,000/- (Rupees Forty Six Lakhs Ninety Three Thousand Only). Needless to say, it shall carry interest as levied by the Tribunal. The award is modified accordingly.

15. By order dated 16.12.2016, the appellant insurance company had been directed to deposit the awarded amount with interest with the Tribunal as a pre-condition to the stay of the operation of the award. The Tribunal shall now release the compensation in terms of the modification ordered above from out of such deposit refunding the excess to the insurance company.

16. The statutory deposit shall also be refunded.

17. The appeal and the pending application are disposed of in above terms.

18. A copy of the judgment shall also be sent to Secretary, Labour & Employment, Ministry of Labour & Employment, Government of India; Secretary, Legislative Department, Ministry of Law & Justice, Govt. of India and Law Secretary, Ministry of Law & Justice, Govt. of

India, for considering suitable correction in the second part of First Schedule appended to the Employees' Compensation Act, 1923, in light of observations in para no.7 (supra).

R.K.GAUBA, J.

AUGUST 24, 2017

yg

