

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04-09-2015

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE M.VENUGOPAL

C.M.A.No.2021 OF 2015

Tamil Nadu State Transport Corporation
(Villupuram) Limited,
rep.by its Managing Director,
No.3/137, Salamedu, Vazhuthareddy Post,
Villupuram Taluk and District-605 601
... Appellant/Respondent

-vs-

S.Gajendran ... Respondent/Petitioner

Appeal against the judgment and decree, dated 18.12.2014,
made in M.C.O.P.No.2331 of 2011, on the file of Motor Accident
Claims Tribunal, (IV Judge, Small Causes Court), Chennai.

For appellant : Mr.S.Sairaman

J U D G M E N T

(Judgment of the Court was delivered by S.Manikumar,J.)

Challenge in this appeal is to the finding, fixing negligence on the driver of the appellant State Transport Corporation bus, bearing registration No.TN 32 N 3285, involved in the accident, causing multiple injuries to the respondent, later on found to have suffered permanent disablement, resulting in assessment of loss of future earning capacity. The Tribunal has awarded compensation of Rs.23,71,500/-, with interest at the rate of 7.5% per annum, from the date of claim till deposit, under various heads.

2. Facts of the case, as deduced from the material available on record, are as follows :

On 30.04.2011 about 19.00 hours, while the respondent was riding a motorcycle bearing registration No.TN 09 BF 8013, and proceeding at Kathipara Over Bridge, Guindy,

Chennai, the appellant State Transport Corporation bus, bearing registration No.TN 32 N 3285, driven by its driver in a rash and negligent manner, dashed against the motorcycle and thereby, the respondent sustained grievous injuries, which resulted in amputation of his right leg below knee, fracture D12 paraplegia, injury in sacral, resulting in urological problem and head injury. In this regard, a case in Crime No.800 of 2011 has been registered against the driver of the appellant bus, on the file of St.Thomos Mount Police Station, Chennai.

3. Material on record further discloses that the respondent was treated in various hospitals and he suffered amputation. He claimed a compensation of Rs.40,00,000/- under various heads. The appellant Corporation, in its counter affidavit, disputed negligence on the part of the driver of the bus. According to the Corporation, it was due to the rash and negligent riding of the the motorcyclist, the accident occurred. He did not possess a valid and effective driving licence at the time of accident, and, that is why, he did not implead the owner and the insurer of the motorcycle. Without prejudice to the above, the Transport Corporation disputed the age, occupation, monthly income of the respondent, alleged nature of injuries, period of treatment, medical expenses and the alleged disability. The Corporation further submitted that there was no loss of earning capacity for the respondent. For the said reasons, the Corporation prayed for dismissal of the claim petition.

4. Before the Motor Accident Claims Tribunal, the respondent examined himself as P.W.1 and narrated the manner of accident, and explained how he had suffered injuries, resulting in the loss of earning capacity. P.W.2, doctor, who clinically examined the respondent with documents and assessed the extent of disablement, supported the version of the injured. Ex.P-1 Copy of FIR; Ex.P-2 Discharge Summary; Ex.P-3 Photograph with CD; Exs.P-4 and P-5 Discharge Summaries; Ex.P-6 Medical Bills; Ex.P-7 Continuous treatment record; Ex.P-8 Salary Certificate; Ex.P-9 Copy of Family Card; Ex.P-10 Work Sheet and Ex.P-11 Disability Certificate, issued by P.W.2, have been marked by the respondent/claimant. No oral or documentary evidence has been adduced by the appellant Corporation.

5. On evaluation of pleadings and evidence, the Claims Tribunal held that the driver of the appellant Corporation bus alone was negligent in causing the accident. Having regard to the oral testimony of P.W.1, injured, and

P.W.2, doctor, who assessed the extent of disablement, and after considering the documentary evidence, the Tribunal has awarded a compensation of Rs.23,71,500/- under various heads, with interest, at the rate of 7.5% per annum from the date of claim till deposit, and costs, as under :

1. Loss of Future Earnings	-	Rs. 15,36,000/-
2. Pain and Suffering	-	Rs. 1,50,000/-
3. Extra Nourishment	-	Rs. 1,00,000/-
4. Transportation	-	Rs. 75,000/-
5. Damages to Clothes	-	Rs. 3,000/-
6. Attender Charges	-	Rs. 1,00,000/-
7. Medical Expenses	-	Rs. 1,11,505/-
8. Loss of Income	-	Rs. 96,000/-
9. Loss of Amenities	-	Rs. 1,00,000/-
10. Mental Agony	-	Rs. 1,00,000/-

Total		Rs. 23,71,505/-

6. Though Mr.S.Sairaman, learned counsel for the appellant, assailed the correctness of the findings of the Claims Tribunal, in fixing the negligence on the driver of the appellant Corporation bus, bearing registration No.TN 32 N 3285, on the grounds that the Claims Tribunal has failed to note that the driver of the appellant bus was proceeding slowly and consciously and it was the motorcyclist/respondent, who invited the accident and, therefore, the finding of the Tribunal requires reversal and further submitted that no police officer has been examined to prove negligence on the part of the bus driver, this Court is not inclined to accept the said contentions, for the reason, that P.W.1-respondent/injured himself has narrated the manner of accident. Police has registered a case against the driver of the bus in Crime No.800 of 2011, duly substantiated by production of Ex.P-1 FIR. Though the appellant corporation, in its counter affidavit, has projected a different case, attributing negligence on the part of the motorcyclist, no oral or documentary evidence has been adduced, but, the respondent has prima facie proved the manner of accident and, therefore, as rightly observed by the Claims Tribunal, the burden shifts on to the shoulders of the appellant Corporation to disprove the same.

7. Yet another fact to be considered is that the appellant State Transport Corporation has not examined the driver of the bus, alleged to have caused the accident. When the Transport Corporation has failed to examine the driver, against whom accusation is made, adverse inference can always

be drawn. Reference can be made to the following decisions.

(i). In *New India Assurance Co. Ltd., v. Debajani Sahu* reported in I (2002) ACC 103 (Ori.), the Orissa High Court held that,

"8. In the present case, the Claims Tribunal found about the negligence of the bus driver on the basis of the evidence of the P.Ws. It is contended that P.W. 2 himself being the driver employed by the deceased was a highly interested witness and his evidence cannot be accepted as reliable. There is no dispute in the fact that the accident was caused involving the scooter and the bus. Even assuming that the evidence of P.W. 2 is not accepted, still then the doctrine of *res ipsa loquitur* is applicable. In such a situation, the owner of the bus should have examined the driver of the bus to explain the circumstances under which the accident occurred, as the other person involved in the accident having died cannot speak from the grave to explain the circumstances under which the accident had taken place. Of course, the bus owner has remained *ex-parte*, but no attempt was made by the Insurance Company which was contesting the case even on merit (whether justifiably or not is immaterial), has not chosen to adduce any evidence to rebut the evidence of P.W. 2, not has bothered to summon the bus driver to explain the circumstances under which the accident took place. In such a case, an adverse inference can be drawn against the owner/Insurance Company for not examining the bus driver who would have been the best witness to explain the circumstance under which the accident occurred. In such view of the matter, the finding of the Tribunal on the question of negligence cannot be assailed and the contention in this regard raised by the Counsel for the appellant cannot be accepted."

(ii). In *Sitabai v. Ishak Hussain* reported in I (2001) ACC 761 (DB), the Madhya Pradesh High Court, at Paragraph 5, held as follows:

"5. In this case, the claimants could not examine any eyewitness of the accident. It was difficult for the claimants to search an eyewitness as the claimants were not present on the spot at the time of accident. This difficulty is avoided by applying the maxim *res ipsa loquitur*. Their Lordships of the Supreme Court in case of *Puspabai Purshottam Udeshi v. Ranjit*

Ginning and Pressing Co., reported in 1977 ACJ 343 (SC), observed:

"The normal rule is that it is for the plaintiff to prove negligence but as in some cases considerable hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant who caused it, the plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship is sought to be avoided by applying the principle of *res ipsa loquitur*. The general purport of the words *res ipsa loquitur* is that the accident 'speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have happened in a manner which did not connote negligence on his part. For the application of the principle it must be shown that the car was under the management of the defendant and that the accident is such as in ordinary course of things does not happen if those who had the management used proper care."

In this case, the respondent No. 1 was driving the vehicle which left the road and dashed against a tree. In view of this maxim, the burden shifts on the respondent No. 1 to prove that he was not negligent. It was in the special knowledge of respondent No. 1 as to how the vehicle left the road and came down and struck against a tree. The respondent No. 1 did not examine himself. Under

such circumstances, adverse inference that he drove the vehicle in a rash and negligent manner as a result of which this accident occurred, shall be drawn against him. The learned Tribunal committed error in not applying this maxim. We hold that the accident occurred due to rash and negligent driving of the vehicle by respondent No. 1."

(iii). In Beni Bai & others v. A. Salim & another reported in II (1999) ACC 408 (DB) (M.P.), the Madhya Pradesh High Court, held as follows:

In the circumstances, for non-examination of the material witnesses particularly the driver and the conductor, who had the first hand knowledge of the manner in which the accident occurred, necessarily an adverse inference has to be drawn against the respondents. For want of evidence on behalf of the respondents, the plea raised in defence cannot be said to be established. On the other hand, the appellants have examined Atmaram, A.W.1. who was at the spot, who stated that at the bus stop when the passengers were getting down from the bus, the driver without seeing that the passengers have got down or not, started the bus and there one boy came under the wheel of the bus. From the circumstances, it cannot be inferred that the deceased might have jumped from the running bus. Hence it was the duty of the driver and conductor to have taken care to see whether passengers have got down from the bus or not, then only the driver could have started the bus. As the driver and conductor have failed in their duties to take care, we hold that the accident occurred due to negligence of the driver of the city bus. This Court in similar circumstances where the same type of defence was taken, has observed that it is the driver of the passenger bus who has to take care that the passengers who wish to get down from the bus have got down and then to start the bus. But that care was not taken. Therefore, it was held that the accident was caused because of the negligence of the driver and conductor.

8. Rash and negligent driving is a personal act of the driver of a vehicle, who had caused the accident. On the facts and circumstances of the case, the State Transport Corporation has failed to prove the same, and it has not even examined the driver. It is well settled in motor accident

claims cases, that finding regarding negligence is arrived at by the Claims Tribunal on the principles of preponderance of probabilities. Strict proof of evidence is not required like that of a criminal case. It is also well settled that the adjudication of claims before the Motor Accident Claims Tribunal is summary in nature. Testing the finding of negligence recorded by the Claims Tribunal, on the above said principles, this Court is of the view that there is no perversity or it is a case of no evidence. Hence, the finding of negligence fixed on the driver of the State Transport Corporation, is confirmed.

9. In addition to the above, while recording its finding against the driver of the appellant Corporation bus, the Claims Tribunal has also relied on a decision of the Apex Court in *Vimala Devi and Others v. Himachal Pradesh State Transport Corporation*, reported in 2009 (1) TNMAC 700 (SC), wherein the Hon'ble Apex Court has held that in respect of motor accident cases, strict proof of accident is not necessary, and it is suffice that claimants establish their case on the touchstone of preponderance of probability. The Hon'ble Supreme Court further held that standard of proof beyond reasonable doubt as followed in criminal cases is not applicable to motor accident claims cases.

10. When the appellant Corporation has denied the manner of accident, it should have adduced the evidence on the touchstone of preponderance of probability, and even the driver of the bus has not been examined, testing the finding on the principle of preponderance of probability. Therefore, this Court is of the view, that there is no manifest illegality in the findings recorded by the Claims Tribunal, warranting interference.

11. On the quantum of compensation, the respondent/injured has adduced evidence, that after the accident, he was admitted in Chennai Government Hospital for 105 days from 30.04.2011 to 12.08.2011. According to him, his right leg was run over by the wheel of the bus, and, as a result, it was completely crushed; his urinary track was damaged and D12 Bone was also fractured. He has also deposed that his right leg below knee was amputated and he underwent surgery in his spinal cord. In support of the contentions, he has marked Ex.P-2 Discharge Summary and Ex.P-3 Photographs with CD. The respondent/injured has also adduced evidence, that he was again admitted to Government Institute of Rehabilitation Medicine on 16.04.2013 and hospitalised there, for a period of 116 days till 12.08.2013. To support the

above, he has marked Ex.P-4, Discharge Summary. The respondent has further deposed that he was also admitted at ESI Corporation Hospital on 22.09.2013 and, due to the continuous hospitalisation, backside of his body was completely infected. In this regard, he underwent another surgery. For the third period of hospitalisation, he has marked Ex.P-5 Discharge Summary.

12. He has further deposed that his urinary track was completely damaged. A tube was fixed inside his stomach. The area was infected. An artificial leg was fixed in his right leg and he incurred huge medical expenses. Supporting the same, he has marked Ex.P-6 Medical Bills. During chief-examination, the respondent/injured has further submitted that due to the injury in D12 bone, all the time, he has to lie in bed. Below the hip, both the legs have become dysfunctional. He was not able to even feel urination. According to him, before the accident, he was working as a mason in M/s.Vinayaka Constructions and earning Rs.15,000/- per month. To prove the same, he has marked Ex.P-8 Salary Certificate.

13. P.W.2, doctor, who clinically examined the respondent with reference to the medical records, has deposed, that from the upper portion of the stomach till toes, there was no sensation. He has further deposed that the respondent was lying in bed. According to him, the respondent cannot stand and control urine.

14. Thus, both the injured P.W.1 and doctor P.W.2 have adduced cogent oral and documentary evidence, that the respondent sustained grievous injury in the spinal cord; there was amputation and the lower limb was totally immobilised; that on the basis of oral and documentary evidence, the Claims Tribunal has found that the respondent has suffered permanent disablement, due to amputation, and, consequently, loss of future earning capacity. सत्यमेव जयते

15. Having regard to the avocation, number of members in the family, wife and children, depended on the respondent, the Claims Tribunal has decided to apply the principle of law in Rajkumar v. Ayaj Kumar, reported in 2010 (2) TNMAC 581 (SC) and, accordingly, awarded Rs.15,36,000/- towards loss of earning capacity. Following the decision of this Court in A.Elango v. Natarajan and Another, reported in 2013 (1) TNMAC 812, and observing that pain is one, which is experienced momentarily, but it may continue even for a longer period, depending upon the gravity and situs of the injury, whereas suffering is loss of happiness, on account of the

same, the Tribunal has awarded Rs.1,50,000/- under the head 'Pain and Suffering'.

16. In Cholan Roadways Corporation Ltd., Kumbakonam v. Ahmed Thambi and Others, reported in 2006 (4) CTC 433, a Full Bench of this Court has explained 'Loss of Amenities', as under :

"deprivation of the ordinary experiences and enjoyment of life and includes loss of the ability to walk or see, loss of a limb or its use, loss of congenial employment, loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function"

Considering the nature of injuries sustained by the respondent, and amputation, which has affected the amenities, the Tribunal has awarded a sum of Rs.1,00,000/-, under the head 'loss of amenities'.

17. Material on record further discloses that the respondent was admitted and treated in various hospitals and surgeries have been performed. A person, whose leg has been crushed in the accident, would have engaged in a motor vehicle accident. Now that he has lost his leg, the Tribunal has awarded a sum of Rs.75,000/- towards 'transportation'. Though the said amount is slightly on the higher side, considering the expenses likely to be incurred in future for transportation, the same can be justified. A sum of Rs.1,00,000/- has been awarded under the head 'extra nourishment'. This again is slightly on the higher side. When loss of amenities of Rs.1,00,000/- is awarded, the tribunal has awarded a further sum of Rs.1,00,000/- under the head 'mental agony'. Attendant charges of Rs.1,00,000/- is also on the higher side. However, the Tribunal has failed to consider that the respondent/injured was fitted with an artificial leg, and that he might incur expenses in future, for replacement of the same. No amount has been awarded under the said head.

18. Frame of the respondent has been shattered. Leg has been amputated. There is a urological problem. He is unable to sense urination and defecation. Continuous medication is required. Though nobody knows as to when he would die, expectation is based on the longevity of an Indian citizen, which judicial notice can be taken. Considering the nature of injuries, resulting in amputation, surgery in the spinal cord and loss of sensation in the lower limb,

certainly, one may think that his life may not be, as long as he expected. In other words, it is shortened due to the injuries and complications. Age, nature of injuries, complicating treatment and other factors are relevant for assessment under this head. In Rajkumar's case, the Hon'ble Supreme Court held that compensation under the head 'loss of expectation of life' is also a factor, to be taken into account. There is no award under this head.

19. Thus, even if the quantum of compensation awarded under the heads 'extra nourishment', 'attendant charges', and 'mental agony' are on the higher side, the same can be adjusted as against future medical expenses, to be incurred by the respondent, and loss of expectation of life. Mental agony for a 32 year old man, who has lost his right leg, and to be bedridden for the rest of his lifetime with no senses below the hip, has been compensated. But, it may be slightly on the higher side. Application of multiplier method for the purpose of computing loss of future earning capacity cannot be said to be erroneous.

20. At this juncture, it is worthwhile to refer to a decision of the Hon'ble Apex Court in Raj Kumar v. Ajay Kumar reported in 2011 ACJ 1 (SC), wherein, in paragraphs 4 to 17, it has been held as follows :

"General Principles relating to compensation in injury cases:

4. The provision of the Motor Vehicles Act, 1988 ('Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See C. K.

Subramonia Iyer vs. T. Kunhikuttan Nair - AIR 1970 SC 376, R. D. Hattangadi vs. Pest Control (India) Ltd. - 1995 (1) SCC 551 and Baker vs. Willoughby - 1970 AC 467).

5. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life. Assessment of pecuniary damages under item (i) and under item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence. Award under the head of future medical expenses - item (iii) -- depends upon specific medical evidence regarding need for further treatment and cost thereof. Assessment of non-pecuniary damages - items (iv), (v) and (vi) -- involves determination of lump sum amounts with reference to circumstances such as age, nature of

injury/deprivation/disability suffered by the claimant and the effect thereof on the future life of the claimant. Decision of this Court and High Courts contain necessary guidelines for award under these heads, if necessary. What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(a). We are concerned with that assessment in this case.

Assessment of future loss of earnings due to permanent disability

6. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accidents injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ('Disabilities Act' for short). But if any of the disabilities enumerated in section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

7. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not,

with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

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.

11. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to 'hold an enquiry into the claim' for determining the 'just compensation'. The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the 'just compensation'. While dealing with personal injury cases, the Tribunal should preferably equip itself with a Medical Dictionary and a Handbook for evaluation of permanent physical impairment (for example the Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by American Academy of Orthopedic Surgeons or its Indian equivalent or other authorized texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the first schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen. If a Doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so the percentage.

12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give 'ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal

disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability. 13. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.

14. The assessment of loss of future

earnings is explained below with reference to the following illustrations:

Illustration 'A': The injured, a workman, was aged 30 years and earning Rs.3000/- per month at the time of accident. As per Doctor's evidence, the permanent disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

- a) Annual income before the accident : Rs.36,000/-.
- b) Loss of future earning per annum (15% of the prior annual income) : Rs. 5400/-.
- c) Multiplier applicable with reference to age : 17
- d) Loss of future earnings : (5400 x 17) : Rs. 91,800/-

Illustration 'B': The injured was a driver aged 30 years, earning Rs.3000/- per month. His hand is amputated and his permanent disability is assessed at 60%. He was terminated from his job as he could no longer drive. His chances of getting any other employment was bleak and even if he got any job, the salary was likely to be a pittance. The Tribunal therefore assessed his loss of future earning capacity as 75%. Calculation of compensation will be as follows:

- a) Annual income prior to the accident : Rs.36,000/-.
- b) Loss of future earning per annum (75% of the prior annual income) : Rs.27000/-.
- c) Multiplier applicable with reference to age : 17
- d) Loss of future earnings : (27000 x 17) : Rs. 4,59,000/-

Illustration 'C': The injured was 25 years and a final year Engineering student. As a result of the accident, he was in coma for two months, his right hand was amputated and vision was affected. The permanent disablement was assessed as 70%. As the injured was incapacitated to pursue his chosen career and as he required the assistance of a servant throughout his life, the loss of future

earning capacity was also assessed as 70%. The calculation of compensation will be as follows:

a) Minimum annual income he would have got if had been employed as an Engineer : Rs.60,000/-

b) Loss of future earning per annum (70% : Rs.42000/- of the expected annual income)

c) Multiplier applicable (25 years) : 18

d) Loss of future earnings : (42000 x 18) : Rs. 7,56,000/-

[Note : The figures adopted in illustrations (A) and (B) are hypothetical. The figures in Illustration (C) however are based on actuals taken from the decision in Arvind Kumar Mishra (supra)].

15. After the insertion of section 163A in the Act (with effect from 14.11.1994), if a claim for compensation is made under that section by an injured alleging disability, and if the quantum of loss of future earning claimed, falls under the second schedule to the Act, the Tribunal may have to apply the following principles laid down in Note (5) of the Second Schedule to the Act to determine compensation :

"5. Disability in non-fatal accidents :

The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents:-

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

PLUS either of the following :-

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923."

16. We may in this context refer to the difficulties faced by claimants in securing the presence of busy Surgeons or treating Doctors who treated them, for giving evidence. Most of them are reluctant to appear before Tribunals for obvious reasons either because their entire day is likely to be wasted in attending the Tribunal to give evidence in a single case or because they are not shown any priority in recording evidence or because the claim petition is filed at a place far away from the place where the treatment was given. Many a time, the claimants are reluctant to take coercive steps for summoning the Doctors who treated them, out of respect and gratitude towards them or for fear that if forced to come against their wishes, they may give evidence which may not be very favorable. This forces the injured claimants to approach 'professional' certificate givers whose evidence most of the time is found to be not satisfactory. Tribunals should realize that a busy Surgeon may be able to save ten lives or perform twenty surgeries in the time he spends to attend the Tribunal to give evidence in one accident case. Many busy Surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the Doctors to attend the Tribunal to give evidence. The solution lies in recognizing the valuable time of Doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating Doctors on commission, after ascertaining their convenient timings. Secondly, if the Doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the Doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 A.M. or 11.00 A.M. and wait in the Court Hall. Fourthly, in cases where the certificates are not contested by the respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that Courts/Tribunals show

concern for litigants and witnesses. Assessment of compensation.

17. In this case, the Tribunal acted on the disability certificate, but the High Court had reservations about its acceptability as it found that the injured had been treated in the Government Hospital in Delhi whereas the disability certificate was issued by a District Hospital in the State of Uttar Pradesh. The reason given by the High Court for rejection may not be sound for two reasons. Firstly though the accident occurred in Delhi and the injured claimant was treated in a Delhi Hospital after the accident, as he hailed from Chirori Mandi in the neighbouring District of Ghaziabad in Uttar Pradesh, situated on the outskirts of Delhi, he might have continued the treatment in the place where he resided. Secondly the certificate has been issued by the Chief Medical Officer, Ghaziabad, on the assessment made by the Medical Board which also consisted of an Orthopaedic Surgeon. We are therefore of the view that the High Court ought not to have rejected the said disability certificate."

21. Going through the materials on record and the impugned award, this Court is of the view, that there is no manifest illegality, in fixing negligence on the driver of the appellant Corporation bus, and, consequently, making the Corporation liable to pay the compensation. Though under some heads, the compensation awarded is slightly excessive, as observed in the foregoing paragraphs, the same can be adjusted against the other heads, which the Tribunal has failed to award a just and reasonable compensation and, therefore, the quantum of compensation is sustained. The award impugned is confirmed.

22. C.M.A.is dismissed. Consequently, appellant Corporation is directed to deposit the entire award amount with proportionate interest and costs within a period of four weeks from the date of receipt of a copy of this judgment, to the credit of M.C.O.P.No.2331 of 2011, on the file of Motor Accident Claims Tribunal, (IV Court of Small Causes), Chennai. Connected Miscellaneous Petition No.1 of 2015 is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

dixit

To

1.The Motor Accident Claims Tribunal,
(IV Small Causes Court),
Chennai.

2.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.S.Sairaman, Advocate, S.R.No.48213

C.M.A.No.2021 OF 2015

NM(CO)
CA(27/10/2015)



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