HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

M.A. C.M.A. No.3204 OF 2005

JUDGMENT:

The United India Insurance Company Limited preferred the instant appeal, aggrieved of the order, dated 28-03-2005, in O.P. No.246 of 2002, passed by the learned Chairman, Motor Accidents Claims Tribunal - cum - III Additional District Judge, Karimnagar, whereby and whereunder, an amount of Rs.8,02,000/- was granted with interest at 9% per annum, as against the claim of Rs.10,00,000/- laid under Section 166(1)(a) of the Motor Vehicles Act, 1988.

2 . The appellant herein, who is insurer of the motorcycle bearing No.AP-1-B-8485 that involved in the accident, is respondent No.2 in the O.P. before the Tribunal, while respondent No.1 is the original petitioner and respondent Nos.3 and 4, who are wife and son of the original petitioner, are brought on record as legal representatives of the original petitioner, since he died; and respondent No.2, who is owner of the above motorcycle, is respondent No.1.

3 . For the sake of convenience, the parties are hereinafter referred to as they were arrayed in the O.P. before the Tribunal.

4 . (a) The facts, in brief, are that on 11-03-2002, while the petitioner was proceeding on TVS XL bearing No.AIM-1403, at about 11-30 a.m., when he reached Community Hall of Godavarikhani, one Yamaha motorcycle bearing No.AP-1-B-8485 driven in a rash and

negligent manner at high speed, came in opposite direction, and hit the petitioner's vehicle, due to which, he fell down and sustained fracture to his right femur. Immediately, he was shifted to Surya Nursing Home, where he was treated till 25-03-2002 and undergone surgical intervention, and, thereafter, as the wound was not healed, he was admitted in the hospital of one Dr. I. Sreedhar Rao, Karimnagar, on 11-09-2002, where he was treated up to 26-09-2002 and again undergone surgical intervention. Even thereafter, since the wound was not healed, he joined in NIMS Hospital on 28-01-2003 and treated there as in-patient up to 17-03-2003. Thereafter, he took treatment in NIMS Hospital as out-patient and incurred an amount of Rs.1,00,000/- towards medical expenses. Claiming that he was employed in Singareni Collieries and due to fracture to his right fore-arm and permanent disability, he was terminated from service after being referred to the hospital at Kothagudem, and, thus, he lost his total earning capacity. According to him, he is unable to mobilise himself, and, therefore, he sought joint and several liability against respondents 1 and 2 to pay the compensation.

(b) The averments also reflect that originally, the claim was laid for Rs.1,00,000/- and thereafter amended it claiming Rs.2,00,000/-, and, again, since the petitioner was terminated from service, he amended the claim to Rs.10,00,000/-.

5. Respondent No.1, owner of the motorcycle involved in the accident, remained *ex parte* before the Tribunal.

6. Respondent No.2, insurer of the motorcycle, opposed the claim raising various pleas. It also filed additional written statement, when the claimant introduced amendment seeking Rs.10,00,000/-, contending that without any basis the above amount was claimed and, finally, sought to dismiss the claim.

7. Based on the above pleadings, the Tribunal framed three (3)

issues in order to fix responsibility for the accident. During enquiry, the petitioner besides examining himself as PW.1, also examined seven (7) more witnesses as PWs.2 to 8 amongst whom PWs.3 to 5 and 8 are doctors, and marked Exs.A-1 to A-16 apart from Exs.C-1 to C-6. On behalf of the respondents, no witnesses were examined and no documents were filed.

8. The Tribunal, based on appreciation of evidence through PW.1 and Exs.A-1 and A-3, held issue No.1 in favour of the petitioner. On issue No.2, the Tribunal, having considered the evidence of the medical officers examined as PWs.3 to 5 and 8 and the documentary evidence, more particularly, the medical records of various hospitals, taking into consideration the disability at 100%, despite the fact that PW.5 has certified that the petitioner has sustained 35% disability, holding that since the petitioner lost his job having been terminated from service, and based on Exs.A-14, 15, C-4 and C-5, which would show net salary of the petitioner as Rs.8,120/- and Rs.8,220/- respectively, and also based on the evidence of PW.6, the Manager in Singareni Collieries Company Limited, where the petitioner was employed, taken Rs.8,000/- per month as loss of earning capacity and Rs.96,000/- per annum, and applying multiplier '7', arrived at Rs.6,72,000/- towards loss of earning capacity, due to permanent disability suffered by the petitioner at 35%, as per the evidence of PW.5. Besides the same, the Tribunal, also awarded Rs.25,000/- towards fracture of right leg, Rs.20,000/- towards pain and suffering, Rs.80,000/- towards medical expenses, Rs.5,000/- towards transportation charges, and, thus, granted a total sum of Rs.8,02,000/- towards compensation with interest at 9% per annum.

9. It is the aforesaid order, which is under challenge in the instant appeal preferred by the insurance company contending in the grounds that the Tribunal ought to have taken contributory

negligence, as the manner in which the accident had occurred would reflect contribution of the petitioner for taking place of the accident. It is also stated that Rs.25,000/- awarded towards grievous injury ought not to have awarded when loss of earning capacity was assessed and even without there being legally acceptable evidence, the Tribunal awarded Rs.80,000/- towards treatment and medicines. It is stated that the Tribunal ought to have taken permanent disability at 35%, but not 100% loss of earning capacity, which is without any basis, and, ought to have deducted Rs.3,00,000/-, which was due to the petitioner by his employer, and, therefore, sought to set aside the order and decree passed by the Tribunal.

10. Heard Sri K. Venkata Rao, learned counsel for respondent No.2 - Insurance Company (appellant), and Sri Ram Chander Rao Vemuganti, learned counsel for respondent Nos.3 and 4.

11. Despite service of notice, none appears for respondent No.1, owner of the motorcycle involved in the accident.

12. Learned counsel for respondent No.2 (appellant) while commenting the order under challenge contended that the Tribunal ought not to have taken 100% loss of earning capacity, placing reliance on the decision of the Hon'ble Apex Court in **Raj Kumar v. Ajay Kumar and another** referring to illustration (b) contained in paragraph No.20, which reads thus:

> "*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 not 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.27,000

(*c*) Multiplier applicable with reference

to age : 17

(*d*) Loss of future earnings(27,000 x 17) :Rs.4,59,000"

It is his submission that the Tribunal ought to have taken loss of earning capacity of the petitioner at 75% in view of the fact that he lost his job. It is also his submission that the Tribunal ought not to have granted Rs.25,000/- towards injury as such.

13. Learned counsel for the claim petitioners (respondents 3 and 4) supported the order under challenge contending that in view of the change in the decisional law, had the original petitioner preferred cross-objection, he would have entitled to more than what was granted by the Tribunal even taking into consideration the percentage of disability, as in "illustration – b", referred to by the learned counsel for the insurer.

14. Perused the order under challenge and the evidence on record, both, oral and documentary, let in by the petitioner.

15. The Tribunal has taken Rs.8,000/- as monthly salary of the original petitioner and applied multiplier '7', as per the law then holding the field, but, in view of the decision of the Hon'ble Apex Court in **Sarla Verma v. Delhi Transport Corporation,** the relevant multiplier would be '11' for the age group of the persons between 46 and 50 years. Even taking into consideration the loss of future

earning capacity at 75%, instead of 100% taken by the Tribunal, since in the instant case also, the employer of the petitioner terminated his services on account of fracture sustained by him, though, the permanent disability is assessed at 35% as per ‘illustration – b’, on which learned counsel for the insurer placed reliance, the amount would work out to more than Rs.6,72,000/- determined by the Tribunal, taking it at 100%, and, it works out to around Rs.7,00,000/-. When viewed in that angle, certainly, there is no merit in the instant appeal. It is no doubt true, the original petitioner has not preferred cross-objection or appeal, but he cannot be deprived of the amount which was granted by the Tribunal and the amount to which he would be entitled had he preferred the same. The other sums awarded by the Tribunal also cannot be disturbed, and, therefore, the compensation awarded by the Tribunal as Rs.8,02,000/- is confirmed. However,
the rate of interest is reduced to 7.5% per annum as against 9% per annum granted by the Tribunal, in view of the decision of the
Hon’ble Apex Court in **Rajesh and others v. Rajbir Singh and others.**

16. Accordingly, the Civil Miscellaneous Appeal is allowed in part modifying the impugned award passed by the Tribunal to the extent of rate of interest alone, as indicated above. There shall be no order as to costs.

17. As a sequel thereto, Miscellaneous Applications, if any, pending in this appeal stand disposed of.

A. SHANKAR NARAYANA, J

March 10, 2015.

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