

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

M.A.C.M.A. Nos.636, 638 and 643 OF 2009

COMMON JUDGMENT:

These three appeals are preferred under Section 173 (1) of the Motor Vehicles Act, 1988 (for short, 'the Act') by the second respondent – Insurance Company challenging the common judgment and award, dated 07.04.2005 passed in O.P.Nos.1478, 1479 and 1480 of 2001 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-Chief Judge, City Civil Courts, Hyderabad (for short, 'the Tribunal').

2. For the sake of convenience, the parties are hereinafter referred to as they are arrayed in the O.Ps. before the Tribunal.

3. The facts leading to filing of the appeals, in brief, are as follows:

On 26.01.2001, Sri K.V.J.R.Krishna Rao (hereinafter referred to as 'the deceased') and his family members were proceeding to Hyderabad from Nagpur on a maruthi car bearing No.MP 04J 1041 being driven by the deceased and when they reached near Madapur cross roads, the driver of the Ashok Leyland Lorry bearing No.APR 9933 stationed the lorry on the middle of the road without parking lights. The deceased dashed the car against the stationed lorry. Due to injuries, the deceased died on the way to the hospital. In the said accident, the sister as well as the son of the deceased have also sustained grievous multiple injuries. By the time of death, the deceased was aged about 59 years and used to earn more than Rs.19,272/- per month being an employee.

The wife of the deceased filed O.P.No.1478 of 2001 claiming compensation of Rs.5,39,426/- for the death of the deceased. The son of the deceased filed O.P.No.1479 of 2001 claiming compensation of

Rs.4,53,301/- and the sister of the deceased filed O.P.No.1480 of 2001 claiming compensation of Rs.3,95,100/- for the injuries sustained by them. The petitioners filed the petitions claiming compensation against the owner and insurer of the lorry.

4. The first respondent remained *ex-parte*. The second respondent filed counter denying all the material averments *inter alia* contending that the accident occurred due to the rash and negligent driving of the car by the deceased and there was no negligence on the part of the driver of the lorry. It is the case of the second respondent that the deceased was not having valid and effective driving licence as on the date of accident, thereby, he was responsible to cause the accident. The amount of compensation claimed by the petitioners under various heads is highly excessive and exorbitant. Hence, the petitions may be dismissed.

5. Basing on the above pleadings, the Tribunal framed the following issues:

In O.P.No.1478 of 2001:

1. Whether the petitioner has sustained injuries in the accident that took place on 26-1-2001 due to rash and negligent driving of lorry No.APR 9933?

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It seems that the issue was not properly framed. The correct issue to be framed is:

Whether the accident occurred due to rash and negligent driving of the driver of the lorry bearing No.APR 9933 which resulted in the death of deceased?

2. Whether the petitioner is entitled for any compensation and if so to what amount and from whom?

3. To what relief?

In O.P.No.1479 of 2001:

1. Whether the accident is due to rash and negligent driving of the driver of the Lorry bearing No.APR 9933?

2. Whether the petitioner is entitled for compensation and if so to what amount and from whom?

3. To what relief?

In O.P.No.1480 of 2001:

1. Whether the petitioner sustained injuries in the accident that took place on 26-1-2001 due to rash and negligent driving of lorry bearing No.APR 9933?

2. Whether the petitioner is entitled for compensation and if so to what amount and from whom?

3. To what relief?

6. All the three matters arise out of the same accident. Therefore, the Tribunal clubbed all the three matters and recorded common evidence.

7. During the course of trial, on behalf of the petitioners, P.Ws.1 to 4 were examined and Exs.A.1 to A.24 were marked. Exs.X.1 and X.2 - case sheets were marked by the Court. On behalf of the second respondent, RW.1 was examined and Ex.B.1 – Policey was marked.

8. Sri N.Jaya Surya, Advocate, representing Sri A.Veeraswamy, the learned counsel for the appellant/second respondent, strenuously submitted that that Tribunal ought to have held that the accident occurred due to the negligent driving of the car by the deceased. He further submitted that the Tribunal failed to consider that the deceased had contributed to cause the accident. He also submitted that the Tribunal awarded the compensation basing on assumptions and presumptions.

9. *Per contra*, Smt. G.Rajeswari, the learned counsel for the respondents/petitioners, submitted that there are no grounds much less valid grounds to interfere with the finding recorded by the Tribunal so far as the issue No.1 is concerned and the Tribunal awarded meagre amount.

10. Now the points that arise for consideration in these appeals are:

1. Whether there is any contributory negligence on the part of the deceased to cause the accident or not?
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2. Whether the Tribunal has awarded just and reasonable compensation to the petitioners or not?"

11. Point No.1:

PWs.1 to 3 are the eye witnesses to the accident. As per the oral testimony of PWs.1 to 3, the accident occurred due to the rash and negligent driving of the driver of the lorry. The oral testimony of PW.1 is supported by Ex.A.1 - F.I.R., and Ex.A.17 - charge sheet. Basing on the oral testimony of PWs.1 to 3 and Exs.A.1 and A.17, the Tribunal arrived at a conclusion that the accident occurred due to the negligence of the driver of the lorry only.

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12. The learned counsel for the appellant strenuously submitted that the finding recorded by the Tribunal is contrary to the factual back ground of the cases on hand as well as the settled principle of law. To substantiate the argument, the learned counsel for the appellant has drawn my attention to the following decisions:

1. Raj Rani and others vs. Oriental Insurance Company

Limited and others ^[1], wherein in paras 17, 18 and 19 it was held as under:

"17. So far as the issue of "contributory negligence" is concerned, we may notice that the Tribunal has deducted 1/3rd from the total compensation on the ground that deceased had contributed to the accident. The same, we find, has been upheld by the High Court. This Court in *Usha Rajkhowa v. Paramount Industries* ((2009) 14 SCC 71) discussed the issue of contributory negligence noticing, inter alia, earlier decisions on the same topic. It was held that : (SCC p.75, para 20)

"20. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in *Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak* ((2002) 6 SCC 455 : 2002 SCC (Cri) 1355). That was also a case of collision between a car and a truck. It was observed in SCC p.458, para 8:

'8. ... The question of contributory negligence arises when there has been some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as "negligence". Negligence ordinarily means breach of a legal duty to care, but when used in the expression "contributory negligence" it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an "author of his own wrong".'

18. The principle of 50:50 in cases of contributory negligence has been discussed and applied in many cases before this Court. In *Krishna Vishweshwar Hede v. Karnatara SRTC* ((2008) 15 SCC 771 : 2008 ACJ 1617) this Court upheld the judgment of the Tribunal assessing the ratio of liability at 50:50 in view of the fact that there was contributory negligence on the part of the appellant and fixed the responsibility for the accident in the ratio of 50:50 on the driver of the bus and the appellant.

19. In this case, the truck was stationary. Some amount of negligence on the part of the deceased cannot be ruled out. Hence in the instant case, we find that there was contributory negligence on the part of the deceased and accordingly the claimant was entitled to only 50% of the total amount of loss of dependency."

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2. Municipal Corporation of Greater Bombay vs. Laxman

Iyer and another^[2], wherein in para 7 it was held as under:

" At this juncture, it is necessary to refer to the 'doctrine of last opportunity'. The said doctrine is said to have emanated from the principle enunciated in *Davies v. Mann*, 1842 (10) M & W 546, which has often been explained as amounting to a rule that when both parties are careless the party which has the last opportunity of avoiding the results of the other's carelessness is alone liable. However, according to **Lord Denning** it is not a principle of law, but test of causation. (See *Davies v. Swan Motor Co. (Swansea) Ltd.*, 1949 (2) KB 291). Though in some decisions, the doctrine has been applied by courts, after the decisions of the House of Lords in *The Volute*, 1992 (1) AC 129, and *Swadling v. Cooper*, 1931 AC 1, it is no longer to be applied. The sample test is what was the cause or what were the

causes of damage. The act or omission amounting to want of ordinary care or in defiance of duty or obligation on the part of the complaining party which conjointly with the other party's negligence was the proximate cause of the accident renders it one to be the result of contributory negligence."

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3. Gujarat State Road Transport Corporation vs.

Rameshbhai Parsottambhai and others ^[3], wherein in para 8 it was held as under:

"8. In view of the above, looking to the evidence led before the Tribunal and considering the observations made by the Tribunal, according to our opinion, Tribunal has rightly appreciated the evidence led before it and has not committed any error in coming to the conclusion that because of the negligence on the part of the drivers, the accident has occurred. Admittedly, the truck was a stationary vehicle having no movement and only the ST bus was having movement which suggests regarding the excess speed of the ST bus which dashed with the truck causing damage to the bus as well as the truck. Therefore, the finding recorded by the Tribunal and holding the contributory negligence of 60 per cent on the part of the ST driver is proper and based on the evidence on record."

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As per the principle enunciated in the cases cited supra, the Tribunal has to take into consideration the negligence on the part of the drivers of the both vehicles.

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13. It is not in dispute that at the time of accident, the lorry was stationed on the middle of the road without parking lights. As per the testimony of PW.1, just prior to the accident, one vehicle came from opposite direction with heavy lighting and due to dazzling the deceased was unable to identify the stationed lorry. PW.1 is the wife, PW.2 is the son and PW.3 is the sister of the deceased and in one way they are interested witnesses. It is the duty of the Tribunal or the Court to scrutinise the testimony of interested witnesses so as to eliminate exaggerations, thereby, to ascertain the truthful version. Except the

self-served testimony of PWs.1 to 3, there is no other convincing evidence that just prior to the accident one vehicle came from opposite direction with heavy focus lighting. One person by name Khaleel Khan, who is shown as an eye witness, was not examined for the reasons best known to the petitioners. There is no hard and fast rule or thumb rule to measure percentage of the negligence on the part of the both vehicle drivers in case of head on collision. In the case on hand the deceased while driving the maruthi car hit the stationed lorry from behind. The Tribunal or the Court has to take into consideration the other attending circumstances in order to ascertain whether there was any negligence on the part of the deceased or not? Merely because Police registered a criminal case against the driver of the heavy vehicle by itself is not a sufficient ground to fix the liability. While driving the vehicles, more particularly in night time, one has to visualise the possibility of stationing vehicles either due to breaking down of the vehicle or for any other reason beyond the control of the drivers. Whether the drivers of the both vehicles have acted diligently or not is the only test to fix percentage of negligence. If the deceased had taken a reasonable care, there is every possibility to avert the accident even otherwise to reduce the impact of the accident.

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14. Basing on the material available on record, the Court can safely arrive at a conclusion that the deceased was also responsible for the accident to certain extent. It is the duty of the driver of the vehicle to switch on the parking lights while parking the vehicles on left side or middle of the road. No one is entitled to station the lorry on the middle of the road more particularly in night time. Absolutely, there is no evidence on record to establish that the driver of the lorry had switched on the parking lights while parking the lorry so as to give an indication to drivers of other vehicles thereby to prevent unfortunate road accidents. It is not the case of the second respondent – Company that due to break down of the lorry, the driver of the lorry is not in a position

to switch on the parking lights. Even in case of breaking down of the vehicle, duty is cast on the part of the driver of the vehicle to take reasonable steps so as to avoid accidents. The material available on record clearly reveals that the driver of the lorry had not evinced any interest to take reasonable care in order to avoid the mishap. During the night time, it may not be possible to identify the vehicles stationed on the road more particularly in the absence of parking lights. While appreciating the material available on record, the Tribunal or the Court has to take into consideration the ground realities.

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15. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the Tribunal has not considered the evidence available on record in right perspective and arrived at a conclusion that the accident occurred due to the rash and negligent act of the driver of the lorry.

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16. Taking into consideration the principle enunciated in the cases cited supra, I am of the considered view that the accident occurred due to the rash and negligent driving of the driver of the lorry as well as the deceased in the ratio of 75% and 25%.

Hence, point No.1 is held in favour of the appellant/second respondent.

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17. Point No.2:

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Learned counsel for the appellant strenuously submitted that the compensation awarded by the Tribunal under various heads is excessive. A perusal of the record clearly reveals that by the time of unfortunate death, the deceased was earning gross salary of Rs.19,272/-. The basic salary of the deceased is Rs.11,625/-. The Tribunal has taken into consideration the basic salary of the deceased. One of the contentions of the learned counsel for the

appellant/second respondent is that the Tribunal ought not to have placed reliance on Ex.A.7 - Pay Slip in view of non-examination of the issuing authority. It is not the case of the appellant/second respondent that the deceased was not an employee at the relevant point of time. In Exs.A.1- F.I.R., A.2 – charge sheet and A.5 – inquest panchanama, it is mentioned that by the time of accident, the deceased was an employee in Nagpur. By the time of untimely death of the deceased, he was at fag end of service. The Tribunal has considered all these aspects and taken basic salary of the deceased as monthly income. As per the principle enunciated in **Ramachandrappa vs. Manager, Royal Sundaram Alliance Insurance Co. Ltd.**^[4] and **Syed Sadiq vs. Divisional Manager, United India Insurance Co. Ltd.**^[5], the Hon'ble Apex Court has taken the salary of vegetable vendor as Rs.6,500/- per month.

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18. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the Tribunal has rightly considered the income of the deceased. The Tribunal has applied the multiplier as '5'. In fact as per the principle enunciated in **Sarla Verma v. Delhi Transport Corporation**^[6], the appropriate multiplier to be applied in this case is '7'. The petitioners/respondents have not filed any appeal. The Tribunal has awarded an amount of Rs.15,000/- towards loss of consortium and Rs.15,000/- towards loss of estate. Petitioner No.1 being wife of the deceased is entitled for consortium. The amounts awarded under the heads of loss of consortium and loss of estate are just and reasonable.

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19. Having regard to the facts and circumstances of the case, I am unable to accede to the contention of the learned counsel for the appellant that the compensation awarded by the Tribunal under various heads is highly excessive and exorbitant. On the other hand,

the compensation awarded under various heads is just and reasonable. In view of my finding on point No.1, the petitioner in O.P.No.1478 of 2001 has to forego 25% of the compensation awarded by the Tribunal.

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20. Respondent No.1 being the owner of the lorry is vicariously liable for the wrongful acts done by his employee during the course of employment. The lorry which belongs to the first respondent was insured with the second respondent – Company under Ex.B.1 – Policy as on the date of accident. Absolutely, there is no material on record to establish that the first respondent had violated terms and conditions of the policy so as to absolve the liability of the second respondent. The second respondent has to indemnify the liability of the first respondent. Therefore, respondent Nos.1 and 2 are jointly and severally liable to pay 75% of the compensation i.e., Rs.3,75,000/- (5,00,000/- - 1,25,000/-) awarded to the petitioner in O.P.No.1478 of 2001 with interest as awarded by the Tribunal. The petitioners have to forego 25% of compensation i.e., Rs.1,25,000/-.

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21. M.A.C.M.A.No.638 of 2009:

The petitioner filed O.P.No.1480 of 2001 claiming compensation of Rs.3,95,100/- whereas the Tribunal awarded an amount of Rs.2,50,000/-.

The petitioner examined herself as PW.3. As per the testimony of PW.3, she sustained fracture to right femur and upper jaw and took treatment as in-patient in Apollo Hospital, Hyderabad from 27.01.2001 to 18.02.2001. As per Ex.A.15 – discharge summary, the petitioner sustained head injury with right TT fracture. A perusal of Ex.X.2 – case sheet also reveals that the petitioner took treatment as in-patient. The oral testimony of PW.3 is fully supported by PW.2, who is an Orthopaedic Surgeon in Apollo Hospital. The petitioner filed medical

bills to the tune of Rs.1,99,452-60 ps. As per the testimony of PW.4, the petitioner paid the said amount. Basing on the oral testimony of PWs.3 and 4, and Ex.A.14, the Tribunal awarded an amount of Rs.2,00,000/- towards medicines. It is a known fact that one has to spend huge amount in Corporate Hospitals. It is not the case of the second respondent that the petitioner (PW.3) produced the false medical bills. In view of the recitals of Ex.A.14 and oral testimony of PW.4, I am unable to accede to the contention of the learned counsel for the appellant/second respondent that the petitioner boost up the bills to claim more compensation. The Tribunal also awarded lumpsum amount of Rs.50,000/- without specification. Due to fractures, the petitioner might have suffered a lot. The petitioner might have spent amount towards attendant charges and extra nourishment. The petitioner (PW.3) might not have discharged her duties even as house wife at least for a period of 3 to 4 months.

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Viewed from any angle, granting an amount of Rs.2,50,000/- under different heads is quite reasonable. Having regard to the facts and circumstances of the case, the submission made by the learned counsel for the appellant/second respondent is not sustainable.

22. M.A.C.M.A.No.643 of 2009

At the time of accident, the petitioner (PW.2) in O.P.No.1479 of 2001 was travelling in the car. The petitioner is no way responsible to cause the accident. So far as the petitioner is concerned, it can be treated as a composite negligence on the part of both vehicle drivers. In such circumstances, the question of determining the contributory negligence on the part of the petitioner does not arise at all.

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The contention of the learned counsel for the appellant/second respondent is that the petitioner has not produced any document to prove the income and the Tribunal awarded the compensation without evidence much less legally admissible evidence.

The *factum* of sustaining fractures by the petitioner is not in dispute. As per the testimony of the petitioner (PW.2), he lost his 13 teeth and took treatment as an in-patient in Apollo Hospital, Hyderabad from 27.01.2001 to 08.02.2001. A perusal of the record clearly reveals that the petitioner underwent bone grafting for the purpose of fixation of artificial teeth. A perusal of the record further reveals that the petitioner sustained the following fractures:

1. Fracture of shaft of right femur
2. Fracture of facial bones
3. Fracture of left wrist

Whatever deposited by the petitioner is fully supported by the oral testimony of PW.4, who is an Orthopaedic Surgeon of the Apollo Hospital. The petitioner (PW.2) filed medical bills worth of Rs.1,57,641/-. Even as per Ex.A.9 – medical bills, the petitioner spent an amount of Rs.1,60,000/-. It is not uncommon to charge a little bit higher amount in Corporate Hospitals. The petitioner has no other option except to join in Apollo Hospital, which is very nearer to the place of accident. Awarding of an amount of Rs.1,50,000/- towards medicines and treatment is just and reasonable. It is a known fact that one has to undergo treatment for fixation of artificial teeth. As observed earlier, the petitioner lost his 13 teeth. The Tribunal awarded an amount of Rs.40,000/- towards future operation and treatment. Viewed from any angle, the amount awarded under this head is just and reasonable.

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The contention of the learned counsel for the appellant/ second respondent is that by the time of accident, the petitioner is only a student and not an employee. As per the averments in the petition, the petitioner is a Software Engineer. It is the case of the petitioner that he has been working as a Software Engineer in NECO Infotech, Nagpur. As per Ex.A.10, the petitioner has been working as Software Engineer

in NECO Infotech, Nagpur with effect from 26.12.2000. As per Ex.A.11, the gross salary of the petitioner is Rs.9,934/- and basic pay is Rs.3,145-94 ps. For one reason or other, the petitioner did not choose to examine the authority, which issued Exs.A.10 and A.11. In the absence of documentary evidence, some guess work is inevitable to determine the income of the deceased or injured persons. Now-a-days, a Software Engineer may earn not less than Rs.8,000/- per month. As per the principle enunciated in **Ramachandrappa's** case (4 supra) and **Syed Sadiq's** case (5 supra), the Hon'ble Apex Court held that a vegetable vendor may earn Rs.6,500/- per month.

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Having regard to the facts and circumstances of the case, I am of the considered view that a Software Engineer may earn even Rs.8,000/- per month under any circumstances. Admittedly, the petitioner took treatment as inpatient from 27.01.2001 to 15.02.2001. Due to lost of his 13 teeth, the petitioner might not have attended to his work for a minimum period of four months. Hence, I am inclined to award an amount of Rs.35,000/- towards loss of earnings.

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The Tribunal awarded an amount of Rs.1,63,200/- towards loss of future earnings.

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The learned counsel for the appellant/second respondent strenuously submitted that absolutely there is no material on record to establish the income of the petitioner/PW.2 as on the date of accident. In the absence of documentary evidence, some guess work is inevitable to determine the income of the victims in the road accident. In the instant case, the petitioner lost his 13 teeth. As per the testimony of PW.4, the petitioner incurred 25% disability whereas the Tribunal has taken the disability as 10%. The functional disability of an individual cannot be equated with loss of earnings. The Tribunal has to take into consideration whether the permanent disability incurred by the petitioner is affecting his earning capacity or not? If really the

petitioner incurred 25% disability, what prevented him to obtain disability certificate from the Medical Board? PW.4 has not issued disability certificate stating that the petitioner incurred 25% disability. The Tribunal has taken the disability of the petitioner as 10% instead of 25%. Even assuming but not admitting that the petitioner incurred 10% disability, the same may not affect the earning capacity of the petitioner. Due to loss of 13 teeth, there may be some disfiguration to the petitioner. The petitioner has to suffer throughout his life even though artificial teeth were fixed. A person with artificial teeth may not enjoy his life like a person having original teeth. At the time of accident, the petitioner was aged about 24 years. The petitioner has to suffer for the entire remaining life.

Hence, I am inclined to award an amount of Rs.1,25,000/- towards loss of future amenities. The finding of the Tribunal that the functional disability of the petitioner affects 10% of his future earnings is not legally sustainable. Moreover, the petitioner has not produced the documentary evidence to prove his avocation and income. Hence, the finding of the Tribunal that the petitioner is entitled for Rs.1,63,200/- towards future earnings is not sustainable. The Tribunal awarded an amount of Rs.30,000/- towards pain and suffering. Amounting of an amount of Rs.30,000/- towards pain and suffering is just and reasonable in view of the nature of injuries sustained by the petitioner.

Thus, in all, the amount of compensation to which the petitioner is entitled under various heads is as follows:

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<u>For medicines and treatment</u>	<u>Rs.1,60,000/-</u>
<u>For future treatment</u>	<u>Rs. 40,000/-</u>
<u>Loss of earnings</u>	<u>Rs. 35,000/-</u>
<u>Loss of future amenities</u>	<u>Rs.1,25,000/-</u>
<u>Pain and suffering</u>	<u>Rs. 30,000/-</u>

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Total:	Rs.3,90,000/-
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23. The amount of compensation awarded under various heads is just and reasonable to meet the ends of justice.

I am fully agreeing with the submissions of the learned counsel for the appellant/second respondent that the compensation awarded by the Tribunal is somewhat on higher side. Hence, it is a fit case to interfere with the judgment and award of the Tribunal.

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24. In the result, M.A.C.M.A.No.636 of 2009 is allowed in part by reducing the compensation amount as awarded by the Tribunal from Rs.5,00,000/- to 3,75,000/- with interest at the rate of 7.5% per annum from the date of petition till the date of realisation. Respondent Nos.1 and 2 are jointly and severally liable to pay compensation to the petitioner.

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M.A.C.M.A.No.638 of 2009 is dismissed and M.A.C.M.A.No.643 of 2009 is allowed in part by reducing the compensation amount as awarded by the Tribunal from Rs.4,34,000/- to 3,90,000/- with interest at the rate of 7.5% per annum from the date of petition till the date of realisation. Respondent Nos.1 and 2 are jointly and severally liable to pay compensation to the petitioner. There shall be no order as to costs.

25. Consequently, Miscellaneous Petitions, if any, pending in these Appeals shall stand closed.

T.SUNIL CHOWDARY, J

23rd January, 2015

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[\[1\]](#) (2009) 13 SCC 654

[\[2\]](#) 2004 ACJ 53

[\[3\]](#) 2004 ACJ 1731

[\[4\]](#) 2011 ACJ 2436

[\[5\]](#) 2014 (2) SCC 735

[\[6\]](#) . 2009 ACJ 1298