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

Decided on: 21st April, 2015

\+ **MAC.APP. 813/2012**

ORIENTAL INSURANCE COMPANY LTD ..... Appellant

Through: Ms. Arpan Wadhawan, Adv.

versus

ROSHAN LAL & ORS. ..... Respondents

Through: Mr. S.N. Parashar, Adv. with
Ms. Monika Phartyal, Adv. for R-1.

CORAM:
HON'BLE MR. JUSTICE G.P.MITTAL

J U D G M E N T

G. P. MITTAL, J. (ORAL)

1. The appeal is for reduction of compensation of ₹7,55,060/- awarded by the Motor Accident Claims Tribunal (the Claims Tribunal) in favour of Respondent no.1 for having suffered injuries in a motor vehicular accident which occurred on 01.05.2007.

2. The compensation awarded by the Claims Tribunal under various heads, as computed in para 19 of the impugned judgment is extracted hereunder:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal (in ₹)
A)	**Pecuniary Damages (Special Damages):**	
a.	Medical bills and expenses	8,778/-
b.	Future medical expenses	40,000/-
c.	Special Diet	10,000/-
d.	Conveyance Charges	10,000/-
e.	Loss of Income	43,632/-
f.	Future loss of income	3,92,650/-
B)	**Non-Pecuniary Damages (General Damages):**	
a.	Loss of amenities and enjoyment of life	50,000/-
b.	Loss of marriage prospects and shortening of life	1,00,000/-
c.	Pain, suffering, inconvenience, frustration, hardship and trauma	1,00,000/-
	Total	**7,55,060/-**

3. Following contentions are raised by the learned counsel for the Appellant:-

(i) There was contributory negligence on the part of Respondent no.1 as he was hanging outside the bus at the time of the accident;

(ii) The loss of income granted for one year and the loss of earning capacity granted to the extent of 50% functional disability is on the higher side;

(iii) Addition of 50% towards future prospects/inflation was illegal and in violation of three Judge Bench decision of the Supreme Court in *Reshma Kumari & Ors. V. Madan Mohan & Anr., (2013) 9 SCC 65;*

(iv) The compensation awarded towards non-pecuniary damages is on the higher side; and

(v) Grant of compensation of ₹30,000/- towards counsel's fee and ₹2,000/- towards out of pocket expenses is illegal and in violation of the High Court Rules and Orders.

4. On the other hand, the learned counsel for Respondent no.1 supports the impugned judgment. He submits that on account of injuries to his brain, Respondent no.1 has been incapacitated for the whole of his life. It is urged that the compensation awarded is hence, just and reasonable.

NEGLIGENCE

5. In his evidence by way of Affidavit Ex.PW-2/A, Respondent no.1

deposed about the manner of the accident. He testified that he boarded the bus bearing registration no.DL-1PB-1916 which was plying on route no.982 from near his residence and he was proceeding to the place of his work in Samaipur Badli. He deposed that the bus was overcrowded and he was standing near the gate of the bus. He stated that the driver of the bus was driving the bus in a rash and negligent and zigzag manner. The passengers asked him not to drive the bus at such high speed but he continued to ply the same in a reckless manner.

6. This part of the testimony of Respondent no.1 was not challenged in cross-examination by putting any question or even a suggestion. In view of the unchallenged testimony, there is nothing on record to draw an inference that Respondent no.1 was hanging outside the bus or he was standing on the footboard. Hence, it is clearly established that the bus was being driven in a rash and negligent manner and the accident was caused on account of culpable negligence on the part of Respondent no.2 Bhupinder (driver of the bus).

FUNCTIONAL DISABILITY & LOSS OF INCOME

7. In *Raj Kumar v. Ajay Kumar & Anr., 2011 (1) SCC 343*, the Supreme Court drew the distinction between the disability suffered by a victim

of a motor vehicular accident and functional disability affecting his earning capacity.

8. In the instant case, the Claims Tribunal took 50% functional disability whereas Respondent no.1's brain capacity was affected to the extent of 20%. It will be appropriate to extract the testimony of PW-3 Dr. Subodh Kumar Gupta, In-charge Neurosurgery Unit, DDU Hospital, Delhi as Respondent no.1 remained under his treatment. His testimony shall also be relevant for award of non-pecuniary damages. PW-3 Dr. Subodh Kumar Gupta stated as under:-

> *"Petitioner Roshan Lal was admitted in Shushrut Trauma Centre on 01.05.2007 as unknown patient under my unit, who was referred from Sanjay Gandhi Memorial Hospital. During admission he was identified as Roshan Lal. He was discharged on 28.05.2007. During the course of treatment he remained unconscious for 8 days then he regained some consciousness for next 7-8 days and he became responding to command afer 16 days. He was admitted in ICU till 25.05.2007. During this course of treatment he was operated (Traecheostomy). He remained on ventilator for 15 days and during that course he also developed bed sores. He remains Cathetrice for more than 25 days and he was feeded through feeding tube. For easy respiration a hole was made in the neck. The hole mark remain forever. The petitioner sustained severe head injuries and the injuries were dangerous to life. As per record patient can lead normal life, but he can suffer seizure/fits at any time in whole life. His brain capacity may have been reduced to an extent of 20% approximately.*
>
> *TBI as mentioned in discharge summary means*

Traumatic brain injury with left frontal bone fracture and bilateral frontal Extra Dural Haematoma (EDH) and air in brain (Pneumocranium) with haemorrahgic contusion and Intra Venticular Haemorrahage (IVH). At the time of discharge the feeding pipe was still inserted in his nose. He was put on mainly liquid and semisolid diet. Normally 3 to 4 years patient of such type has to take the medicines (Tab. Eptoin/AED) for fits. The approximate cost of Tab. Eptoin/AED per month is approximately ₹180/- as patient has to take 3 tablets per day. Tab. Eptoin/AED is available in the govt. hospital. This tablet has some side effect and the patient may suffer giddiness, nausea, double vision etc. The working capacity of the patient might have reduced due to brain injury. In the initial stage the patient is prohibited to drive, swimming, playing, etc. and is advised not to move alone. I think the patient can do lamination work at present but keeping in view the condition of the patient he was not able to do this lamination work for about 3 months after discharge."

9. Respondent no.1 was re-examined for assessment of his disability in pursuance of the order passed by the Claims Tribunal and a report dated 29.09.2011 was furnished by the doctor in this regard, which has been filed along with paper book in the instant appeal. The relevant portion of the report is extracted hereunder:-

"As per the Hon'ble Court order dated 04.07.2011 on the above mentioned subject, and in continuation to our earlier letter 166 dated 14-07-2011, it is submitted:

- *That Sh. Roshan Lal reported back on 17-09-2011 after getting his detailed Neuropsychological assessment/evaluation done by the Consultant/ Clinical Psychologist of Institute of Human Behaviour and Allied Sciences, Shahdara, Delhi which is enclosed as Annexure-I for kind perusal.*

- *That the candidate has been re-assessed by Neurosurgeon Lok Nayak Hospital who has commented/opined as under:*

  "HMF (Higher Mental Function) – Normal
  Cranial Nerve Function appears to be Normal
  Motor System-Within Normal Limits.
  Sensary System-Within Normal Limits.
  Gait-Within Normal Limits.
  There is No Neuro-surgical deficit at present".

10. Thus, although PW-3 Dr. Subodh Kumar Gupta testified that the brain capacity of Respondent no.1 might have been reduced to the extent of 20%, but at the same time, he stated that Respondent no.1 would be able to do lamination work (which was his profession) after three months of his discharge. Similarly, Dr. Anita Bangotra did not find any abnormality or disability or neurological disability at the time of examination of Respondent no.1 on 17.09.2011. Thus, taking the testimony of PW-3 and report of Dr. Anita Bangotra together, it can be said that there was only temporary functional disability on account of effect in brain capacity to the extent of 20% to 25%.

11. Respondent no.1 claimed his salary from the job of lamination to be ₹5,000/- per month which was more than the minimum wages of a skilled worker. As stated above, since Respondent no.1's testimony was not challenged in cross-examination, I will take his income from the job of laminator as ₹5,000/- per month.

12. It is borne out from the testimony of PW-3, which has been extracted earlier that Respondent no.1 was hospitalised for about a month. He remained on ventilator for 15 days and was catheterised for 25 days. Although, Dr. Subodh Kumar Gupta stated that Respondent no.1 might not be able to do the lamination work for about three months after his discharge, but taking Respondent no.1's testimony that he could not go to the job for two years, I am inclined to hold that on account of the serious injuries caused to the brain and the fact that Respondent no.1 remained on ventilator catheterised and was feeded through ryles tube even after discharge from the hospital, Respondent no.1 could not have gathered confidence to attend to his work for about an year even after his discharge. Accordingly, I will award a sum of ₹60,000/- (5,000/- x 12) on account of loss of income for not attending work for one year.

13. Since I have awarded the compensation for not attending to the work for one year and have taken temporarily disability for four years to the extent of 25%, I tend to award compensation to the extent of 25% loss of earning capacity for three years (4 years – 1 year) as ₹45,000/- (5,000/- x 12 x 3 x 25%).

14. I may also at this stage say that addition towards future

prospects/inflation was not permissible in view of the three Judge Bench decision of the Supreme Court in *Reshma Kumari & Ors. v. Madan Mohan & Anr., (2013) 9 SCC 65* and a judgment of this Court in *HDFC ERGO General Insurance Co. Ltd. v. Smt. Lalta Devi & Ors.*, *MAC. APP. 189/2014 decided on 12.01.2015*. Otherwise also, I have granted loss of earning capacity only for a period of three years after one year of the accident to the extent of 25%. Thus, future prospects were otherwise also not permissible.

15. I have extracted earlier the testimony of PW-3 Dr. Subodh Kumar Gupta. Respondent no.1 suffered immense pain on account of head injury. Apart from the fact that he was on ventilator and catheterised, he had also to undergo Traecheostomy for breathing which also left a permanent scar on the front portion of his neck near the wind pipe. Therefore, the compensation of ₹1,00,000/- awarded towards pain and suffering, ₹50,000/- towards loss of amenities and ₹1,00,000/- towards loss of marriage prospects cannot be faulted.

16. As far as grant of sum of ₹40,000/- towards future medical expenses is concerned, again from the testimony of Dr. Subodh Kumar Gupta (PW-3), it is clear that on account of the head injuries suffered by Respondent no.1, he (Respondent no.1) will have to take Tab. Eptoin

(AED) for a very long period. He may have to continue with the medicines for the whole of his life. In view of this, award of a sum of ₹40,000/- towards future medical expenses is perfectly in order, which I hereby affirm.

17. As far as grant of counsel's fee to the extent of ₹30,000/- and out of pocket expenses of ₹2,000/- are concerned, this question was gone into at great length by this Court in *ICICI Lombard General Insurance Co. Ltd. v. Kanti Devi and Ors. MAC APP No. 645/ 2012 decided on 30.07.2012.* This Court had gone into the question of granting counsel's fee and concluded in Para 32 as under:

> *"32. To sum up, it is directed:-*
>
> *(i) The Claims Tribunal is empowered to award costs in a Claim Petition in terms of Section 35 read with Order XXA of the Code.*
>
> *(ii) The Claims Tribunal is entitled to award the Counsel's fee in accordance with Rule 1 read with Rule 1A and Rule 9 of Chapter 16 Volume I of the Rules extracted earlier.*
>
> *(iii) In case of compromise/settlement of the claims, the Claims Tribunal is not entitled to go beyond the settlement reached between the parties. If the settlement does not provide for payment of any Counsel's fee, it shall not be within the domain of the Claims Tribunal to award the Counsel's fee.*

(iv) If the compensation is awarded on the basis of DAR in pursuance of the legal offer made by the Insurer, the Claims Tribunal is not empowered to award any costs unless it forms part of the legal offer.

(v) The counsel fee can be directly paid to the counsel only when a specific agreement is filed and the Claimant requires payment of fee directly to the counsel because only then the Claimant would be liable to reimburse the fee or part thereof in case the award is set aside or varied.''

18. It was thus, concluded that instead of awarding counsel's fee, the claim petition ought to be allowed with costs and counsel's fee be paid only in accordance with Rules 1, 1A and 9 of Chapter 16 Vol. I of the Delhi High Court Rules and Orders.

19. Hence, the award of counsel's fee and out of pocket expenses in this manner was not permissible. At the most, the Claims Tribunal could have decreed the Claim Petition with costs which should have included counsel's fee in accordance with Delhi High Court Rules and Orders. The award of counsel's fee and out of pocket expenses is, consequently, set aside.

20. The compensation awarded is re-computed as under:-

Sl. No.	Compensation under various heads	Awarded by the Claims Tribunal (in ₹)	Awarded by this Court (in ₹)
A)	**Pecuniary Damages (Special Damages):**		
a.	Medical bills and expenses	8,778/-	8,778/-
b.	Future medical expenses	40,000/-	40,000/-
c.	Special Diet	10,000/-	10,000/-
d.	Conveyance Charges	10,000/-	10,000/-
e.	Loss of Income	43,632/-	60,000/-
f.	Future loss of income	3,92,650/-	45,000/-
B)	**Non-Pecuniary Damages (General Damages):**		
a.	Loss of amenities and enjoyment of life	50,000/-	50,000/-
b.	Loss of marriage prospects and shortening of life	1,00,000/-	1,00,000/-
c.	Pain, suffering, inconvenience, frustration, hardship and trauma	1,00,000/-	1,00,000/-
	Total	**7,55,060/-**	**4,23,778/-**

21. The compensation thus stands reduced from ₹ 7,55,060/- to ₹4,23,778/-.

22. By an order dated 30.07.2012 only 50% of the award amount, less counsel's fee and out of pocket expenses was ordered to be deposited.

Balance amount along with interest shall be deposited by the Appellant Insurance Company with UCO Bank, Delhi High Court Branch, New Delhi within four weeks.

23. The amount lying deposited and the balance amount to be deposited shall be held in fixed deposit for a period of one year and the amount so deposited shall be released to Respondent no.1 after maturity of the FDRs.

24. The appeal is allowed in above terms.

25. Pending applications stand disposed of.

26. Statutory amount, if any, deposited shall be refunded to the Appellant Insurance Company.

(G.P. MITTAL)
JUDGE

APRIL 21, 2015
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