

IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 127 OF 2012.

National Insurance Co. Ltd.,
Margao Branch, Through its Manager,
Second Floor, Marchon building
opposite Iohia Maidan,
Margao Goa.

.....Appellant.

Versus

1. Mr. Umesh Dessai
S/o Mr. Raghunath Dessai,
aged 53 years, service,
r/o H. No.6/208,
Siddhangar, Cuncolim,
Salcete Goa

2. Mr. Dinesh Velip
S/o Mr. Puno Velip,
Major In Age, Service,
r/o H. No. 7, Velipwaddo,
Barcem, Quepem – Goa
(driver of Tata Pickup)

3. Smt. Kavita K. Gaunkar
Wife Of Mr. Kusta Gaonkar,
Major In age, housewife,
R/o H.No. 244, Vaiz Wadda,
Shristal Canacona – Goa.
(owner of Tata Pickup)

.....Respondents.

Shri E. Afonso, Advocate for the appellants.

Shri C. A. Coutinho, Advocate for the respondent no.1.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :- 29th April, 2016.

Pronounced on:- 24th June, 2016.

JUDGMENT

The Insurer is in appeal challenging the judgment and the award dated 31.1.2012 passed by the learned Motor Accident Claims Tribunal, Margao ("the Tribunal" for the short) by which the learned Presiding Officer secured the respondent no.1 with an award in his favour ordering the Insurer/Appellants to pay the compensation arrived at with interest and the consequential reliefs and costs. It needs reckoning at this stage that there has been no cross objection filed at the instance of the respondent no.1 i.e. the original claimant before the Tribunal.

2. The brief facts of the case in a nutshell are that the respondent no.1 was returning from Canacona to Cuncolim Margao riding the motor cycle bearing Registration No. GA-09-B-2981 and on reaching at Padi Canacona, a pick up bearing Registration No. GA-02-T 9611 driven by the respondent no.2 herein and owned by the respondent no.3 came on the wrong side of the road, dashed against his motorcycle due to which it was dragged to a distance of about 12 to 15 mts resulting in grievous injuries to him. It was therefore his case that as a consequence of his injury and his treatment in the Primary Health Centre and thereafter in the GMC, Bambolim, he had lost his toes and part of the ankle due to amputation resulting in the permanent disability and entitling him to the compensation as claimed

for in the petition.

3. The appellants as the Insurer has resisted the petition on the grounds that the respondent no.1 was himself rash and negligent and responsible for the accident. He has claimed an amount from the Employees State Insurance Corporation under the Employees State Insurance Act, 1948 and was therefore barred from taking the benefit under the provisions of the Motor Vehicles Act, 1988 and therefore, the learned Tribunal had no jurisdiction. The appellants had however, not disputed the fact that the pickup involved in the accident was insured with them and had accordingly taken up all the defences available to the original respondents no.1 and 2 under Section 170 of the Act.

4. The parties had gone through the trial on these facts and issues arising for determination and culminating in the judgment and the award under challenge solely at the instance of the Insurer on the premise that the learned Tribunal was in error to compute the loss by taking into account the permanent disability as it were without considering, whether it tantamounted to a functional disability and therefore was in error to award the compensation. The appellants also assailed the impugned judgment and the award on the premise that the respondent had availed the benefit under the Employees State Insurance Act and yet the Tribunal had computed the benefits in his favour. There was no criteria or yardstick adopted by the learned

Tribunal while computing the amount towards the heads of transport and the loss of earnings and therefore on this count the impugned judgment justified interference in the appeal.

5. Shri Afonso, learned Advocate on behalf of the Insurer came to be heard on their behalf who relied in **Raj Kumar Vs. Ajay Kumar and another[(2011)1 SCC 343]** on the aspect of the functional disability being the criteria for computing the quantum of the compensation and not physical disability and that there was no basis for the learned Tribunal to compute the compensation taking the physical disability at 40%.

6. Shri C. A. Coutinho, learned Advocate on behalf of the contesting respondent no.1 placed reliance in **APSRTC rep. by its General Manager Vs. M. Ramdevi and others,[2008 Law Suit(SC) 123]** to contend at the outset that the respondent no.1 was entitled to the enhanced compensation even though no cross appeal or cross objection was filed at his instance. He adverted to the paper book and the evidence in particular to canvas that there was no challenge to the case made out by the respondent no.1 on various heads. Besides, the learned Tribunal was in error to consider the salary at ₹8201/- (Rupees eight thousand two hundred and one only) instead of ₹14000/- (Rupees fourteen thousand only) to ₹15000/- (Rupees fifteen thousand only) per

month despite the availability of the pay-slip on record. The learned Tribunal ought to have considered the functional disability of the respondent no.1 at 100% being a factory worker and it had failed to do. There was no infirmity in the finding of the learned Tribunal considering his disability at 40% and therefore, this Court was well within its powers to grant the compensation in favour of the respondent no.1.

7. Shri Coutinho, learned Advocate for the respondent no.1 placed reliance in **Syed Sadiq and others Vs. Divisional Manager, United India Insurance Company Limited[(2014) 2 SCC 735], Arvind Kumar Mishra Vs. New India Assurance Company Limited and another[(2010) 10 SCC 254] and Mohan Soni Vs. Ram Avtar Tomar and others [(2012)2 SCC 267]**. Shri E. Afonso, learned Advocate in reply submitted that there was no cross appeal and therefore, no relief could be granted in favour of the respondent no.1 for any enhanced compensation. He placed reliance in the judgment of the learned Single Judge of this Court in **Bajaj Allianz General Insurance Vs. Smt. Flona Furtado in First Appeal No.90/2008**. The Tribunal was in error to consider the quantum and even otherwise there was no evidence on record to delineate the nature and extent of the duty performed by the respondent no.1 as a plant operator as to draw any inference on the limitation to his mobility and therefore, applying the law laid down in **Raj Kumar** (supra), the functional

disability had to be computed as per the guidelines issued therein and the respondent no.1 was not entitled to the compensation awarded in his favour by the learned Tribunal.

8. i would consider these submissions in the light of the material on record and the judgments relied upon supra. The issue in the present appeal is restricted to the quantum of compensation awarded by the learned Tribunal in favour of the respondent no.1 on the extent of the permanent disability which according to the appellant had to be computed considering the functional disability vis-a-vis the physical disability assessed by the Doctor. In this context, i would advert to the judgment relied upon in the case at hand.

9. **Raj Kumar** (supra), had suffered injuries in the vehicular accident in the nature of a fracture of both the bones of the left leg and left radius and was under treatment from 1.10.1991 to 16.6.1992. The Motor Accident Claims Tribunal awarded compensation of ₹94,700/- (Rupees ninety four thousand seven hundred only) with interest at 9% per annum from the date of the petition till the date of realisation on the heads of ₹11000/- (Rupees eleven thousand only) towards the medical expenses, conveyance and special diet; ₹3600/- (Rupees three thousand six hundred only) towards the loss of earnings during the period of treatment; ₹25,000/- (Rupees twenty five thousand only)

towards the pain and suffering and ₹55080/- (Rupees fifty five thousand eighty only) towards the loss of the future earnings. Hence, he filed an appeal seeking an increase in the compensation which was rejected by the High Court on the ground that the disability certificate produced by him was not reliable and further challenged in the appeal by Special Leave where he put-forth two grievances: (i) the assessment of monthly income at ₹900/-(Rupees nine hundred only) was very low; and (ii) the deduction of one third of the income towards the personal and living expenses while assessing the future loss of earning was not warranted.

10. In **Raj Kumar** (supra), the questions that therefore arose for consideration of the Hon'ble Supreme Court were whether the principles adopted for assessing the compensation were erroneous and whether the compensation awarded was required to be increased. Their Lordships of the Apex Court while assessing the future loss of earning due to the permanent disability considered the ambit and scope of disability meaning the 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 would cease to exist at the end of the period of treatment and recuperation. Permanent disability would either be partial or total. Partial permanent disability being a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he could be able to perform some of them and is still able to engage in some gainful activity.

11. In **Raj Kumar** (supra), Their Lordships observed that the total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. 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 the left leg, it does not mean that the extent of the permanent disability with reference to the whole body is 140%. 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%.

12. In **Raj Kumar** (supra), Their Lordships further went on to observe that where a 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, i.e. the percentage of loss of earning capacity arising from a permanent disability would be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases particularly, the extent 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 of loss of earning capacity to the extent of the permanent disability would result in an award of either too low or too high a compensation. What is required to be assessed by the Tribunal therefore, is the effect of the permanent disability on the earning capacity of the injured and after assessing the loss of earning capacity in terms of the percentage of the income, it had to be quantified in terms of money, to arrive at the future loss of earnings.

13. In **Raj Kumar** (supra), therefore, Their Lordships observed that in some cases, on an appreciation of the evidence and the assessment, the Tribunal may find that the percentage of loss of the 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. Their Lordships therefore spelt out the guidelines in the matter of assessment of loss of earning capacity qua the extent of permanent disability holding that the 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 and if the Tribunal concludes that there is permanent disability then it would 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.

14. In **Raj Kumar** (supra), Their Lordships further observed that the 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 inspite of the permanent disability and what he could not do as a result of the permanent disability. 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.

15. In **Raj Kumar** (supra), Their Lordships spelt out wherein case of left hand of a claimant was amputated, the permanent disability or functional disablement would be around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be 100%, if he is neither able to drive or do carpentry. On

the other hand, if the claimant was a clerk in the government service, the loss of his left hand may not result in the loss of the 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 would 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 the government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand.

16. In **Raj Kumar** (supra), Their Lordships observed that 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. The Tribunal should not be a silent spectator when the medical evidence is tendered in reference to the injuries and their effect, in particular and the extent of the 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 understanding the medical evidence and assessing the physical and functional disability apart from keeping in view the first schedule to the Workmen's Compensation, 1923.

17. The respondents had examined Dr. V. Gawade, who had occasion to examine the claimant/respondent no.1 in the ESI hospital while working as an Incharge Medical Officer but nothing much was stated by him vis-a-vis the nature and the extent of the injuries suffered by him. The respondent no.1/claimant no.1 had also examined Dr. V. Faldesai, Senior Orthopaedic Surgeon attached to the Employees State Insurance Hospital who stated that he had undergone various operations in the hospital and opined that he had an infected plate in the right thigh which needed removal in the next two months as otherwise it would not be possible to assess the disability of his right leg. Nonetheless, the claimant was not in a position to walk without crutches. His testimony was subjected to cross examination but there was no particular rebuttal thereof qua the injury and the extent of the treatment undergone by him.

18. The claimant had examined himself and had reiterated on oath that the injuries suffered by him were grievous in nature leading to permanent disability such as injury to the right ankle amongst others. He had undergone surgery thrice and steel plate was inserted in his thigh to support the bones. He was confined to the bed due to the grievousness of the injuries for a period of 6 months but there was no improvement in his condition. He had however not specifically stated the extent of the physical permanent disability suffered by him though it must be stated that the learned Tribunal had observed in the judgment under challenge that he had suffered 40% permanent disability as per the ALIMCO Scale and awarded the compensation appropriately in his favour.

19. The respondent/claimant had stated during his cross examination that he was working with Govind Poy Oxygen Ltd since 1976 but had not enumerated what was the nature of the work done by him though stating his monthly income as ₹8601/- (Rupees eight thousand six hundred and one only) and reiterating that he was on leave and had got payment from the ESI towards the leave pay. He had examined Kamat in support of his case who elaborated that he was employed as a plant operator since 1.11.1997 and spelt out the details of the salary assessed apart from coverage under ESI. However,

despite the opportunity of bringing the details of his employment on record through this witness no attempts whatsoever were made on his behalf to delineate the nature and the extent of the duties which he had to perform as a plant operator in the said establishment. These details were very much required and necessary to consider the impact on his job, post disability and to ascertain ultimately the functional disability qua the physical disability assessed by the Orthopaedic Surgeon.

20. Therefore, the contention of Shri C. Coutinho, learned Advocate for the respondent no.1/claimant that his disability ought to have been considered at 100% being a factory worker in the absence of any material to substantiate his plea cannot stand the test of scrutiny even assuming that as a plant operator his job was not akin to that of desk or table job of a normal employee. For that matter all his contentions that as a plant operator he had no mobility and that his disability has to be considered at 100% cannot stand the test of scrutiny in the absence of any evidence to that effect. On the contrary, i would be inclined to entertain the contention of Shri E. Afonso, learned Advocate for the appellants that the Tribunal was in error to compute the functional disability at 40% while awarding the compensation in his favour.

21. Though the respondents/claimants had examined Kamat in

support of his case, proved his salary was ₹8601/-(Rupees eight thousand six hundred and one only) though he had stated that the claimant would work overtime sometimes. The evidence of the claimant had borne out that he used to work overtime and receive a salary of ₹14,000/-(Rupees fourteen thousand only) to ₹15,000/-(Rupees fifteen thousand only) per month but it was nowhere stated by him that it was a routine affair and even otherwise the overtime by its very nature cannot be a routine affair. He had also not shed light on that aspect that he has been receiving overtime on a regular basis inspite of his cross examination. Therefore to all intents and purposes this contention too on his behalf cannot stand the test of scrutiny.

22. **Syed Sadiq** (supra) questioned the correctness of the common judgment and final order dated 31.10.2011 passed by the High Court of Karnataka at Bangalore urging legal facts and contentions in justification of their claim. The appellant had suffered injuries to the lower end of the right femur and his right leg was amputated apart from sustaining injuries over his left upper arm. He was not only supported by his oral evidence but also by the doctor examined by him in support of his case. Dr. Rajesh, PW4 had stated that he had suffered disability to the extent of 24% to the upper limb and 85% to the lower limb while the Tribunal had considered the disability caused to the whole body at 30%. The High Court taking into considering the

amputation of the right leg of the appellant determined the disability as 65% without assigning any proper reason for coming to this conclusion and in that context Their Lordships held that the High Court had erred in that regard.

23. In **Syed Sadiq** (supra), Their Lordships considered the judgment in **Mohan Soni** (supra), as also that in **Raj Kumar** (supra), where the Apex Court had considered in great detail the co-relation between the physical disability suffered in an accident and the loss of earning capacity resulting from it and what was required to be assessed by the Tribunal was the effect of permanent disability on the earning capacity of the injured and after ascertaining the same it had to be quantified in terms of money to arrive at the future loss of earning. In the facts at large the appellant was a vegetable vendor whose occupation was not confined to selling vegetables from a particular location. It rather involved procuring vegetables from the whole-sale market or the farmers and then selling it off in the retail market. This often involved selling vegetables in the cart which required 100% mobility but even by a conservative approach, if we presume that the vegetable vending by the appellant/claimant involved selling vegetables from one place, the claimant would require assistance with his mobility in bringing vegetables to the market place which otherwise would be extremely difficult for him with an amputated leg. We are required to be sensitive while dealing with manual labour cases where loss of limb

is often equivalent to loss of livelihood. Yet, considering that the appellant/claimant is still capable to fend for his livelihood once he is brought in the market place, we determine the disability at 85% to determine the loss of income.

24. This judgment in that regard is clearly distinguishable inasmuch as the respondent/claimant had not at all spelt out the nature and the extent of his duties as a plant operator working with Govind Poy Oxgen Ltd, how he would be adversely affected in his performance on account of the physical disability assessed at 40% as per ALIMCO Scale unlike the present case where Their Lordships found that as a vegetable vendor he had not only to deal with the sale of vegetable from a particular location but had to procure them from the whole-sale market or the farmers and then sell it in the retail market requiring 100% mobility. Therefore, the contention of Shri Coutinho, the learned Advocate for the respondent no.1 that the Tribunal ought to have considered the permanent disability at 100% being a factory worker cannot at all be entertained.

25. **Arvind Kumar** (supra), a student of Engineering final year at Birla Institute of Technology, Mesra (B.I.T.) was seriously injured as a result of a truck being driven negligently which had come from the opposite direction and dashed against the motorcycle driven by him causing his fall on the road. He had sustained multiple injuries; diffused

multifocal damage of the brain with interventricular haemorrhage; optic atrophy in the right eye and 3+ relative afferent papillary in the left eye; amputation of the right hand distal to carpometacarpal joint level; compound fracture of the shaft of the tibia (left); total bronchial plexus palsy; blocking of anterior wall of the trachea and treated by several doctors at different hospitals namely, R.M.C.H, Ranchi, CCL Hospital, Gandhinagar, Christian Medical College and Hospital, Vellore and Shankar Netralaya, Madras and had to undergo few surgical operations.

26. **Arvind Kumar** (supra), filed a petition under Section 166 of the Act claiming the total compensation in the sum of ₹22,00,000/- (Rupees twenty two lakhs only) which included the expenditure already incurred by him up to that date for his treatment. The vehicle was duly insured and the owner as well as the insurer contested his claim and the appellant in the meantime passed out the Bachelor of Engineering during the pendency of the petition. The Motor Accident Claims Tribunal Ranchi held that the accident occurred due to the rash and negligent driving of the truck and held the owner and the insurer liable to pay the compensation of ₹2,50,000/- (Rupees two lakhs fifty thousand only) along with the interest at the rate of 9% per annum considering the expenses under the head of pecuniary damages and lump sum amount towards the inconvenience, hardship, discomfort, disappointment and mental stress throughout his life.

27. **Arvind Kumar** (supra), challenged the award of the High Court of Jharkhand, Ranchi which increased the amount of compensation from ₹2,50,000/- (Rupees two lakhs fifty thousand only) to ₹3,50,000/- (Rupees three lakhs fifty thousand only). Their Lordships observed that the basis of assessment all the damages for personal injury is the compensation and the whole idea was to put the claimant in the same position as he was insofar as money can. The perfect compensation was hardly possible but one had to keep in mind that the victim has done no wrong; he had suffered at the hands of the wrongdoer and the Court must take care to give him full and fair compensation for what he had suffered. Their Lordships observed that the appellant at the time of the accident was a final year engineering (Mechanical) student in a reputed college and remarkably brilliant student having passed all his semester examinations with distinction and that due to the accident he had suffered grievous injuries and remained in coma for about two months. His studies got interrupted as he was moved to different hospitals for surgeries and other treatments, for many months his condition remained serious; his right hand was amputated and vision seriously affected leading to 70% permanent disablement. Besides he was rendered incapacitated and a career ahead of him in his chosen line of mechanical engineering got dashed for ever. He was now in a physical condition requiring domestic help

throughout his life and was deprived of the pecuniary benefits which he could have reasonably acquired had he not suffered permanent disablement to the extent of 70% in the accident.

28. In **Arvind Kumar** (supra), Their Lordships went on to observe that having completed the Bachelor of Engineering (Mechanical) from the prestigious institute like B.I.T., it can be reasonably assumed that he could have got a good job. Besides he had stated that in the campus interview he was selected by Tata as well as Reliance Industries and was offered a pay package of ₹3,50,000/- (Rupees three lakhs fifty thousand only) per annum. Even if that was not accepted for want of any evidence, there would not have been any difficulty for him in getting a decent job in the private sector and ultimately considering his earning at ₹60,000/- (Rupees sixty thousand only) per annum and 70% permanent disability awarded ₹9,06,000/- (Rupees nine lakhs six thousand only). This judgment in that respect is clearly distinguishable inasmuch as he was a meritorious student with a bright career having passed from the prestigious institute like B.I.T.. Moreover he had multiple injuries which had affected his vision apart from the condition of being in coma and moreover his right hand was amputated bringing his career to naught, unlike the respondent who continued in his service and he was not shown to suffer any functional disability on account of physical disablement assessed at 40%.

29. **Mohan Soni** (supra), made a grievance in the appeal about the low amount of compensation awarded to him by the Tribunal and the High Court. He used to earn his livelihood as a cart-puller when he was hit by a tanker driven in rash and negligent manner due to which his left leg was crushed and ultimately had to be amputated below the knee. He carved a case before the Motor Accident Claims Tribunal, Gwalior that he was 50 years old at the time of the accident with monthly income of ₹3300/- (Rupees three thousand three hundred only) as a cart-puller and due to the amputation of his leg, he was no longer in a position to walk without support and therefore, rendered incapable of doing any work and to earn his livelihood. The Tribunal held in his favour on the rashness and negligence on the tanker driver, that his age was 55 years and income was ₹2400/- (Rupees two thousand four hundred only) and not as claimed by him. Though his disability card showed his disability at 60%, the Tribunal held his disability to be 50% with reference to Schedule I of the Workmen's Compensation Act, 1923 and by applying the multiplier of 11 fixed the compensation and ultimately the appellant was held entitled to ₹2,03,400/- (Rupees two lakhs three thousand and four hundred only) as compensation with interest at the rate of 9% per annum.

30. **Mohan Soni** (supra), preferred an appeal before the

Madhya Pradesh High Court, Gwalior Bench which disposed off the appeal on merits as it could not be settled at the Lok Adalat holding him entitled to ₹2,58,000/- (Rupees two lakhs fifty eight thousand only). The Hon'ble Apex Court held on going through the material that both the Tribunal and the High Court were in error in pegging down the disability to 50% with regard to the Schedule I of the Workmen's Compensation Act, 1923, considered its judgment in **Raj Kumar** (supra), qua the correlation between the physical disablement and the loss of earning capacity and held that it was extremely difficult to uphold the decision of the High Court and the Tribunal based on the findings that the loss of the appellant earning capacity as a result of amputation of his left leg was only 50%.

31. In **Mohan Soni** (supra), Their Lordships were seized of the fact that the appellant was 55 years old and at which age it would be impossible for him to find any job. Their Lordships also observed that it was all very well to theoretically talk about a cart-puller changing his work and becoming a vegetable vendor. But the computation of compensation payable to a victim of the motor accident who suffered some serious permanent disability resulting from the loss of a limb, etc should not take into account such indeterminate factors. The parties advocating for a lower amount of compensation must plead and show before the Tribunal that the victim enjoyed some legal protection and

by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving such income. In the ultimate it was held that the loss of earning capacity could be as high as 100% but in no case could it be less than 90% and accordingly computed the compensation at ₹4,01,400/- (Rupees four lakhs one thousand four hundred only) with interest. This judgment too is clearly distinguishable on facts unlike the case at large where the respondent no.1 continued in service and had no impediment to continue in his job as such despite the quantification of disability at 40% hence the respectful departure. Therefore neither the judgment in **Mohan Soni** nor that in **Syed Sadiq** (supra) as also that in **Arvind kumar** can find parity with the case of the respondent to seek for the enhanced compensation by buttressing a plea that the disability assessed by the doctor did in fact come in his way in continuing his job. The only other aspect which remains for consideration is the plea canvassed on behalf of the appellant that the respondent is not entitled to any enhanced compensation in the absence of any cross appeal being filed. Shir E. Afonso, learned Advocate for the appellant had relied in **Bajaj Alliance** (supra) a judgment of this Court to substantiate his contention in that regard.

32. **Bajaj Alliance** (supra) was an appeal by the insurer challenging the award granting the compensation of ₹13,14,400/-

(Rupees thirteen lakhs fourteen thousand four hundred only) to the claimants with interest. The learned Presiding Officer of the MACT by his award concluded that the claimants had proved the rashness and negligence of the respondent no.3 and death being a result thereof, were accordingly entitled to an amount awarded in their favour. The insurer challenged the award in the appeal in which an order of the remand was made by this Court under Order XLI Rule 25 CPC for recording further evidence. The Tribunal accordingly recorded further evidence and passed the award dated 3.1.2011 and then the appeal was placed for final hearing. There was no challenge to the award on behalf of the respondent nos.1 and 2 nonetheless it was contended on their behalf that though the Tribunal had actually concluded that the respondent nos.1 and 2 were entitled to ₹ 16,43,000/-(Rupees sixteen lakhs forty three thousand only) while calculating the amount it had committed a mistake and wrongly arrived at ₹13,14,400/-(Rupees thirteen lakhs fourteen thousand four hundred only). The learned Single Judge held that as there was no appeal by the respondents no.1 and 2, therefore it would not be appropriate to consider this aspect. This has been a mere observation of the learned Single Judge and it is not as if a proposition of law had been culled out.

33. In **Rama Devi** (supra), the challenge was offered to the judgment of the learned Single Judge of the Madhya Pradesh High

Court by the insurer questioning the correctness of the award made by the Motor Accident Claims Tribunal. No appeal was preferred by the claimant. The High Court had held that the award as made was inadequate and just compensation was not awarded. The High Court took the view that the pay of the deceased was ₹3536/- (Rupees three thousand five hundred thirty six only) and not ₹2367/- (Rupees two thousand three hundred sixty seven only) as noted by the Tribunal and after deducting 1/3rd towards the personal expenses and applying the multiplier of 12, worked out the entitlement at ₹3,35,952/- (Rupees three lakhs thirty five thousand nine hundred fifty two only) and in addition awarded ₹20,000/- (Rupees twenty thousand only).

34. In **Rama Devi** (supra), the insurer took a plea that there was no appeal by the claimant in the appeal filed by the insurer and therefore, the High court should not have enhanced the amount. The Apex Court considered the judgment in **Nagappa Vs. Gurdial Singh and Ors. [2003(2) SCC 274]** dealing with the power of the Tribunal or the Court to award just compensation which is reasonable on the basis of the evidence produced on record and brushed aside the objection raised by the appellant/insurer. Though academically learned Advocate Coutinho might be successful in canvassing the point that he could raise the issue about the quantum of the compensation in the insurer's appeal without filing any cross appeal or cross objection, the

facts of the case however do not warrant any enhancement of the compensation for the earlier recorded reasons after discussing the judgment relied upon by him in **Syed Sadiq, Arvind Kumar Mishra and Mohan Soni** (supra).

35. Rather considering the judgment in **Raj Kumar** (supra) which had clearly spelt out on the functional disability qua the physical disability and the evidence on record which was brought on behalf of the respondent/claimant, i find myself in agreement with the contention of Shri E. Afonso, learned Counsel appearing for the appellant that the learned Tribunal was in error to compute the compensation considering the permanent disability at 40%. No material too was brought on record on behalf of the respondent to show that the quantum of disability assessed by the doctor would interfere in his work as a plant operator and therefore considering the Schedule I of the Workmen's Compensation Act, the actual loss would translate to 25%. Accordingly, considering his salary at ₹8601/- (Rupees eight thousand six hundred and one only) per month, the compensation towards the disability would work out to ₹3,35,439/- (Rupees three lakhs thirty five thousand four hundred thirty nine only) as against ₹5,36,692/- (Rupees five lakhs thirty six thousand six hundred ninety two only) awarded by the learned Tribunal. The other benefits awarded in his favour would continue taking the tally to ₹4,47,704 (Rupees four lakhs forty seven

thousand seven hundred and four only) rounded off to ₹4,48,000/-
(Rupees four lakhs forty eight thousand only).

36. In the result therefore, i pass the following:-

ORDER

The appeal is partly allowed and the respondent is held
entitled to the amount which is computed as before.

The Appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J.

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