

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.10.2016

CORAM

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

C.M.A.No.2326 of 2016
C.M.P.No.16327 of 2016

The Managing Director,
Metropolitan Transport Corporation Ltd.,
Pallavan Salai, Chennai-2. Appellant /Respondent

-vs-

Mrs.K.K.Bindu (Unconscious) Respondent/Petitioner
rep., by her husband, P.R.Sujith

Civil Miscellaneous Appeal is filed against the award, dated 08.01.2014, made in M.C.O.P.No.2410 of 2009, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai.

For Appellant : Mr.K.S.Suresh
For Respondent : Mr.K.V.Muthuvisakan

JUDGMENT

(Judgment of this Court was made by S.MANIKUMAR, J.)

Being aggrieved by the judgment and decree in M.C.O.P.No.2410 of 2009, dated 08.01.2014, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai, the present appeal has been preferred, on the grounds, inter alia that,

(i) The Tribunal has erred in fixing negligence, on the driver of the Metropolitan Transport Corporation bus, bearing Registration No.TN 01 N 7291.

(ii) The Tribunal has erred in awarding higher compensation, by fixing higher notional income of Rs.17,510/-, without deducting income-tax.

(iii) The Tribunal has erred in taking 100% permanent disability, for the purpose of computing loss of future earning.

2. Supporting the above, Mr.K.S.Suresh, learned counsel appearing for the appellant-Transport Corporation submitted that

the Tribunal has failed to consider, Ex.P1 - FIR or the evidence of RW.1, driver of the bus, in proper perspective. He further submitted that even as per the evidence of PW.5, the respondent/injured was talking in a cell phone, at the time of accident and therefore, she was negligent.

3. Mr.K.V.Muthuvisakan, learned counsel appearing for the respondent/claimant, made submissions to sustain the award.

Heard the learned counsel appearing for the parties and perused the materials available on record.

4. According to the respondent-injured, on 14.01.2009, about 9.25 Hours, while she was standing in the corner of Anna Salai road, near little mount, Sheckeris Hotel, along with her daughter, a Metropolitan Transport Corporation bus, bearing Registration No.TN 01 N 7291, driven by its driver, in a rash and negligent manner, dashed against both. In the accident, she sustained grievous injuries. A case in Cr.No.19/S1/09, has been registered against the driver of the Transport Corporation bus, by the Sub-Inspector of Police, J3 Guindy Traffic Investigation Police Station, Chennai. At the time of accident, she was aged 34 years and as an Assistant Manager, Saravana Stocks (P) Ltd., earned Rs.18,000/- per month. She filed M.C.O.P.No.2410 of 2009, on the file of the Motor Accident Claims Tribunal (III Court of Small Causes), Chennai, claiming compensation of Rs.75,00,000/-, under various heads. Her minor daughter, S.Harshada, who also sustained grievous injuries, made a separate claim in M.C.O.P.No.2391 of 2009, through her father.

5. As both the claim petitions, arose out of the same accident, they were tried together. During trial, the respondent-injured has become unconscious and therefore, she was represented through her husband, Mr.P.R.Sujith.

6. Before the Claims Tribunal, PW.1, husband of Mrs.K.K.Bindu, respondent-injured in M.C.O.P.No.2410 of 2009 and father of Minor S.Harshada in M.C.O.P.No.2391 of 2009, has narrated the manner of accident, but he has not witnessed the same. PW.5, stated to be an eye-witness, has deposed that on the date of accident, about 9.25 A.M., a Metropolitan Transport Corporation bus, bearing Registration No.TN 01 N 7291, driven by its driver, in a rash and negligent manner, from South to North, dashed against a lady and her daughter, who were standing on the left side of the road. PW.5 further submitted that they were thrown out and sustained grievous injuries. To corroborate the oral evidence, claimants have marked Ex.P1 - FIR. One Mr.Munusamy has witnessed the accident and lodged the complaint.

7. On the contrary and rebutting the manner of accident, RW.1, driver of the bus, has deposed that the bus was driven cautiously. After alighting the passengers, at the Little Mount bus stop, the bus was moved at a slow speed. At that time, a Hero Honda Activa, bearing registration No.TN 07 AJ 6950, was going a head of the bus, on the left hand side. The rider of the two-wheeler, while speaking on a cell phone, without giving any signal, suddenly turned the motorcycle, to the right side. To avoid the accident, the bus was sewered to the right side and by applying brake, it was stopped. Despite his attempt to avoid the accident, the motorcyclist grazed against the left side of the bus and fell down. Thus, RW.1, driver of the bus, has disputed the manner of accident.

8. However, while evaluating the evidence adduced by the parties, the Tribunal has noticed that RW.1, driver of the Metropolitan Transport Corporation bus, has not lodged any counter complaint to the police. During cross-examination, RW.1 has also admitted that within two months from the date of joining, the accident has occurred. He has also admitted that Ex.P1 - FIR has been lodged against him. He was released on bail and that charge sheet has also been filed against him. When the claims for compensation was tried and heard, criminal case was pending. Analyzing the evidence of RW.1, driver of the Metropolitan Transport Corporation bus, the Claims Tribunal has also recorded that there were many contradictions in the statement of RW.1 with the averments made in the counter affidavit filed by the Metropolitan Transport Corporation Ltd.

9. Though Mr.K.S.Suresh, learned counsel for the appellant-Transport Corporation submitted that the Tribunal has not appreciated the evidence of RW.1, driver of the bus, in a proper perspective, this Court is not inclined to accept the said contentions. Evidence of RW.1, is not supported by any independent witness nor corroborated by any document.

10. While dealing with the scope of the enquiry in the Claims Tribunal, the Apex Court in N.K.V.Brother's Private Limited v. Kurmai [AIR 1980 SC 1354], has held that,

"Accident Claims Tribunal, must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plaint cases, culpability must be inferred from the circumstances where it is fairly reasonable. The Court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact

that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving."

11. In a decision in Union of India v. Saraswathi Debnath [1995 ACJ 980], High Court of Gauhati has held in Paragraph 6 as follows:

"The law is well settled that in a claim under the Motor Vehicles Act, the evidence should not be scrutinised in a manner as is done in a civil suit or a criminal case. In a civil case the rule is preponderance of probability and in a criminal case the rule is proof beyond reasonable doubt. It is not necessary to consider these niceties in a matter of accident claim case inasmuch as it is summary enquiry. If there is some evidence to arrive at the finding that itself is sufficient. No nicety, doubt or suspicion should weigh with the Claims Tribunal in deciding a motor accident claim case."

12. It is well settled that in motor accident claims cases that finding regarding negligence is arrived at by the Claims Tribunal, is on the principles of preponderance of probabilities. Strict proof of evidence is not required like that of a criminal case. It is also well settled that the adjudication of claims before the Motor Accident Claims Tribunal is summary in nature. Testing the finding of negligence recorded by the Claims Tribunal, on the above said principles, this Court is of the view that there is no perversity in the finding of negligence, warranting interference and the same is confirmed.

13. On the contention that the Tribunal has assessed 100% disability, for the purpose of computing loss of future earning, it could be seen from the award that during trial of the claim petitions, PW.1, husband of the respondent-injured, has been appointed as guardian on the ground that the injured became unconscious and unable to adduce evidence. Upon perusal of Ex.P4 - Discharge Summary, the Tribunal has recorded that she was hospitalised in Apollo Specialty Hospital, Chennai, from 14.01.2009 to 27.02.2009. On examination, the Doctors have recorded that,

"GCS - No eye opening, no motor response intubated and GCS - 2T/15.

Cranial Nerves - PERL right 3mm, left 2mm. Doll's eye movement (+).

Motor system: No motor response.

List of injuries: Punctured wound in the right ankle."

In Ex.P4 - Discharge Summary, the treatment given in the hospital, is as follows:

"CT brain plain revealed multiple right temporal haemorrhagic contusions diffuse SAH with no mass effect or midline shift. In view of low consciousness level patient was intubated and electively ventilated. Tracheostomy done to facilitate tracheal suctioning. Gradually patient was weaned off the ventilator. Opinion sought from Orthopaedic surgeon regarding leg injury and opinion followed. Despite treatment her consciousness level improved very slowly. She was febrile. ET cultures revealed growth of klebsiella. Opinion sought from Infection Disease Specialist and advice followed. Gradually with good nursing care and physiotherapy patient improved and became afebrile. At discharge she is opening eyes spontaneously, maintaining eye contact for a small time, localising to pain, pm tracheostomy, and ryles tube feeding."

14. Upon perusal of Ex.P5 - Discharge Summary, issued by the Apollo Specialty Hospital, Chennai, the Tribunal has further recorded that the respondent-injured was inpatient from 15.04.2009 to 29.04.2009. The respondent-injured was diagnosed to follow up the case of polytrauma and diffuse axonal injury. Neurological examination and treatment details, evident from Ex.P5 - Discharge Summary, are extracted hereunder:

"Neurological Examination:

Higher functions: E4 M6 VT - 10T/15.

Obeys simple commands.

Cranial nerves: Pupils 3 + bilaterally.

EOM Full.

Sensation: Appreciates pain all over the body.

Motor system: Spontaneous movements in left upper limb and lower limb.

Paucity of movements in right upper limb and lower limb.

Bilateral foot drop +.

Reflexes deep: ++ in all 4 limbs.

Course in the hospital:

Patient was evaluated thoroughly. Opinion sought from Dermatologist and Orthopaedician and advice followed. Tracheostomy tube was blocked and further removed as patient tolerated well. It was decided to start on robotic mobilization. For the same patient was transferred to Apollo Main Hospital.

At discharge, she is conscious, afebrile, on physiotherapy."

15. Perusal of Ex.P6 - Discharge Summary, issued by the Apollo Hospitals, Chennai, shows that the respondent-injured was once again hospitalized from 29.04.2009 to 15.06.2009. Course given in the hospital and discussion, as noted in Ex.P6 - Discharge Summary, are as follows:

"Mrs.Bindu, K.K., 34 year female, was started on assisted physiotherapy. As because of equinus deformity mobilization was not possible, hence, opinion was sought from Orthopaedic Surgeon and equinus release done on 04.06.2009. For wrist spasticity opinion was sought from Neurologist and Inj.Botilinum was advised. As patient's attenders want to get it done later, procedure was postponed.

During her stay, she developed abdominal distension - managed in consultation with Gastroenterologist."

Operation Notes, evident from Ex.P6 - Discharge Summary, are extracted hereunder:

"Name of the procedure: TA lengthening both sides
Under general anaesthesia, prone position, right side - port midline incision over TA. TA lengthened by Z plasty technique and approximated by modified. Kewler technique. Plantain cut, Capulotomy done. Wound closed in layers.

Left similar procedure done.

Bilateral AK cast applied."

16. The Tribunal has also taken note of the treatment given in Ex.P7 - Discharge Summary, dated 13.03.2010, which indicates that the respondent-injured was hospitalised in Vijaya Health Care Hospital, Chennai, from 08.03.2010 to 13.03.2010. The treatment record, are as follows:

"RTA - HEAD INJURY / MYOSITIS OSSIFICANS RIGHT HIP JOINT
HYPOXIC ENCEPHALOPATHY - RECOVERING
PSREXIA OF UNKNOWN ORIGIN - RECOVERED"

Treatment given in the hospital, as evident from Ex.P7, Discharge Summary, is as follows:

"Known case of RTA - Head Injury with Hypoxic Encephalopathy on treatment, was admitted for Rehabilitation.

Neurophysician advised speech therapy PT & OT those were given.

Ortho Surgeon opinion obtained for Right hip Myositis Ossificans. He advised to continue the present line of treatment.

Treated with inj. Augmed/Inj.Nootropil/T.Liofen/T.Mgo MR./T.Somazina / T.Nootropil/T.Pan/and other supportive measures.

Patient general condition stable at discharge."

17. Ex.P8 - Discharge Summary, dated 25.12.2010, shows that the respondent-injured was inpatient treatment in Christian Medical College, Vellore, Physical Medicine & Rehabilitation Unit-II, from 08.11.2010 to 25.12.2010. Treatments details in the said Discharge Summary, are extracted hereunder:

"36 year old female was admitted after 20 months of road traffic accident with concerns of difficulty in walking, difficulty in communication. Goals at admission walker walking and maximizing the ADLs.

In physical therapy she was given stretches for the tight adductors and flexors of the hip and supinators and flexors of the elbow. She has given strengthening and co-ordination exercises to improve on trunk control. She was made to walk in suspension frame to improve the gait pattern. She was progressed to walk in walker with one person support. She was able to walk with walker for 50 meters with speed of 5 meters/min.

In occupational therapy she was given training for the improving ADL independence. She was also given activities to improve the trunk control.

In speech therapy, she was given exercises for identification of the pictures, use of communication chart and oromotor exercises.

She was started on timed void with goal to archive the social incontinence.

At the time of discharge, she was dependent for all her activities of daily living. She was given home program to follow at home."

18. From the above, it could be deduced that the injured has sustained grievous injuries on 14.01.2009. Though she had been continuously taking treatment from various hospitals, from 14.01.2009 to 25.12.2010 and thereafter also, her condition has not improved and the Doctors have opined that at the time of discharge, she was dependant for all her daily activities.

19. Yet another factor to be taken note of, is that during trial, the injured was stated to be unconscious and therefore, M.P.No.225 of 2013, has been filed to appoint PW.1, husband of the injured, to be the guardian and to pursue the claim. Satisfying with the reasons assigned, the Tribunal has allowed the application and there is no challenge to the said order.

20. PW.3, Attendant, has deposed that as the injured was unconscious and bed ridden and she has to take care of all her daily activities, including feeding, changing dress, etc. According to her, the injured was in a vegetative state.

21. PW.6, Doctor, who clinically examined the respondent-injured, with reference to medical records, has deposed that on 01.09.2013, he had examined the respondent-injured. He recommended MRI and EEG scan. Upon perusal of Ex.P16 - MRI report, he has deposed that there was a scar in the brain. EEG report also revealed that in the brain, there is diffuse

cerebral dysfunction. Due to the injuries in the brain, the respondent-injured cannot walk, speak, understand anything. To attend natural call, she require somebody. To avoid fitz, the injured has to take medicines, for the rest of her lifetime.

22. PW.6, Doctor, has also deposed that the injured is bed ridden and continuous treatment is given. With the assistance of others, food is given. PW.6, Doctor has assessed the disability at 100%. To prove the gravity of the injuries, which resulted in total immobilization of the respondent-injured, PW.1, husband has marked, Exs.P4 to P8 - Discharge Summaries, Ex.P9 - Medical Prescriptions, Ex.P12 - Photographs with CD, Ex.P15 - ECG and brain map analysis, Ex.P16 - MRI Brain report, Ex.P29 - Disability Certificate.

23. Considering the oral and documentary evidence and also of the fact that M.P.No.225 of 2013, filed by the husband of the respondent-injured, has been allowed, to pursue the claim petition, it would be inappropriate to contend that the Tribunal has committed an error in fixing 100% functional disability. Question remains to be considered, as to whether, 100% functional disability, is co-relatable to the loss of future earning.

24. To prove that at the time of accident, the respondent-injured was working as Assistant Manager in Saravana Stocks (P) Ltd., and earned Rs.18,000/- per month, one Mr.Karthick has been examined as PW.4. Exs.P14 and P22 are the Salary Certificates and Service particulars, with salary details of the respondent-injured. Upon perusal of the same, the Tribunal has noticed that at the time of accident, the monthly salary of the respondent-injured was Rs.17,510/-. Therefore, the Tribunal has fixed the monthly income of the injured as Rs.17,510/-.

25. In the foregoing paragraphs, we have already considered the medical evidence and also the condition of the respondent-injured, during trial. In the light of the above, when the respondent-injured is totally incapacitated and unable to continue her avocation, the extent of disablement, determined by the Tribunal has to be taken for computing the loss of future earning. On the above, reference can be made to a decision in United India Insurance Company v. Veluchamy reported in 2005 (2) CTC 36, wherein, at Paragraph 11(c), a Hon'ble Division Bench of this Court, held as follows:

"(c) (1) If there is categorical evidence that because of injury and consequential disability, the injured lost his employment or avocation completely and has to be idle till the rest of his life, in that event loss of income or earning may be ascertained by applying "multiplier method" as provided under Second Schedule to the Motor Vehicles Act, 1988."

26. In Rajkumar v. Ajay Kumar reported in 2011 (1) SCC 343, the Hon'ble Supreme Court considered co-relation between the physical disability suffered by the injured and the loss of earning capacity, resulting from it. At Paragraphs 10, 11 and 13, the Hon'ble Apex Court observed as follows:

"10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra v. New India Assurance Co.Ltd. - 2010(10) SCALE 298 and Yadava Kumar v. D.M., National Insurance Co. Ltd. - 2010 (8) SCALE 567).

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the

permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood."

On the aspect of assessment under the head, loss of future earning, at paragraphs 4 to 17, in Raj Kumar's case, the Apex Court held as follows:

"General Principles relating to compensation in injury cases:

4. The provision of the Motor Vehicles Act, 1988 ('Act' for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned. (See C. K. Subramonia Iyer vs. T. Kunhikuttan Nair - AIR 1970 SC 376, R. D. Hattangadi vs. Pest Control (India) Ltd. - 1995 (1) SCC 551 and Baker vs. Willoughby - 1970 AC 467).

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

Pecuniary damages (Special Damages)

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

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

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

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

(iii) Future medical expenses.

Non-pecuniary damages (General Damages)

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

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

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

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

Assessment of future loss of earnings due to permanent disability

6. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human-being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to

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

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

8. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic

loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra v. New India Assurance Co.Ltd. - 2010(10) SCALE 298 and Yadava Kumar v. D.M., National Insurance Co. Ltd. - 2010 (8) SCALE 567).

9. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on

the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

10. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity

as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.

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

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

doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability. 13. We may now summarise the principles discussed above:

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

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

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

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

14. The assessment of loss of future earnings is explained below with reference to the following illustrations:

Illustration 'A': The injured, a workman, was aged 30 years and earning Rs.3000/- per month at the time of accident. As per Doctor's evidence, the permanent

disability of the limb as a consequence of the injury was 60% and the consequential permanent disability to the person was quantified at 30%. The loss of earning capacity is however assessed by the Tribunal as 15% on the basis of evidence, because the claimant is continued in employment, but in a lower grade. Calculation of compensation will be as follows:

a) Annual income before the accident : Rs.36,000/-.

b) Loss of future earning per annum (15% of the prior annual income) : Rs. 5400/-.

c) Multiplier applicable with reference to age : 17

d) Loss of future earnings : (5400 x 17) : Rs. 91,800/-

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

a) Annual income prior to the accident : Rs.36,000/-.

b) Loss of future earning per annum (75% of the prior annual income) : Rs.27000/-.

c) Multiplier applicable with reference to age : 17

d) Loss of future earnings : (27000 x 17) : Rs. 4,59,000/-

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

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

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

c) Multiplier applicable (25 years) : 18

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

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

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

"5. Disability in non-fatal accidents :

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

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

PLUS either of the following :-

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

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

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

16. We may in this context refer to the difficulties faced by claimants in securing the presence of busy Surgeons or treating Doctors who treated them, for giving evidence. Most of them are reluctant to appear before Tribunals for obvious reasons either because their entire day is likely to be wasted in attending the Tribunal to give evidence in a single case or because they are not shown any priority in recording evidence or because the claim petition is filed at a place far away from the place where the treatment was given. Many a time, the claimants are reluctant to take coercive steps for summoning the Doctors who treated them, out of respect and gratitude towards them or for fear that if forced to come against their wishes, they may give evidence which may not be very favorable. This forces the injured claimants to approach 'professional' certificate givers whose evidence most of the time is found to be not satisfactory. Tribunals should realize that a busy

Surgeon may be able to save ten lives or perform twenty surgeries in the time he spends to attend the Tribunal to give evidence in one accident case. Many busy Surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the Doctors to attend the Tribunal to give evidence. The solution lies in recognizing the valuable time of Doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating Doctors on commission, after ascertaining their convenient timings. Secondly, if the Doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the Doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 A.M. or 11.00 A.M. and wait in the Court Hall. Fourthly, in cases where the certificates are not contested by the respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that Courts/Tribunals show concern for litigants and witnesses. Assessment of compensation.

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

27. In *B.Kothandapani v. Tamil Nadu Transport Corporation Ltd.*, reported in 2011 (5) SCC 420, the Hon'ble Supreme Court

held that an injured person is entitled to claim compensation under both heads, disability and loss of earning capacity. The relevant passage is extracted hereunder:

"It is true that the compensation for loss of earning power/capacity has to be determined based on various aspects including permanent injury/disability. At the same time, it cannot be construed that compensation cannot be granted for permanent disability of any nature. For example, take the case of a non-earning member of a family who has been injured in an accident and sustained permanent disability due to amputation of leg or hand, it cannot be construed that no amount needs to be granted for permanent disability. It cannot be disputed that apart from the fact that the permanent disability affects the earning capacity of the person concerned, undoubtedly, one has to forego other personal comforts and even for normal avocation they have to depend on others. In the case on hand, two doctors had explained the nature of injuries, treatment received and the disability suffered due to partial loss of eye-sight and amputation of middle finger in the right hand and we have already adverted to the avocation, namely, at the time of accident, he was working as Foreman in M/s Armstrong Hydraulics Ltd. Taking note of his nature of work, partial loss in the eye sight, loss of middle finger of the right hand, it not only affects his earning capacity but also affects normal avocation and day-to-day work."

28. One of the challenges in this appeal, is that the Tribunal ought to have deducted income-tax, from the annual loss of income, as computed by the Tribunal, ie., Rs.2,10,120/- (Rs.17,510 x 12). At the time of accident, the age of the injured was 34 years and therefore, on the basis of the decision in Sarla Verma v. Delhi Transport Corporation Ltd., reported in 2009 (2) TNMAC 1 (SC), the Tribunal has applied '16' multiplier, for 100% disability and computed the loss of future earning as Rs.33,61,920/-.

29. As rightly contended by the learned counsel for the appellant, the Tribunal has not deducted income-tax. The accident has occurred on 14.01.2009. Even by applying the standard deduction of income-tax, for the assessment year 2009-10, the ceiling limit for women, is Rs.1,80,000/-. For Rs.2,10,120/-, the income-tax has to be deducted. The rate of income-tax for the assessment year 2009-10, is 10%. Therefore, income-tax, which ought to have been deducted is, for Rs.21,012/-. If '16' multiplier is applied, the income-tax ought to have been deducted is Rs.3,36,192/-.

30. Though the Tribunal has accepted the avocation, as Assistant Manager, Saravana Stocks (P) Ltd., earning Rs.17,510/- per month and loss of future earning to the respondent-injured, who was just 34 years, at the time of accident, the Tribunal has not considered, as to whether, the respondent-injured is entitled to just and reasonable compensation, for loss of future prospects. Further, it could be seen from the award that there is no compensation towards permanent disability. Compensation awarded under some other heads, is less. Therefore, even taking it for granted that the Tribunal had not deducted any amount, towards income-tax, while computing the loss of future earning, the amount arrived at, in the foregoing paragraphs, can be adjusted against lesser compensation awarded under other heads and also under the head, disability compensation, in terms of B.Kothandapani's case (cited supra). In the light of the above discussion, this Court is of the view that the quantum of compensation, awarded by the Tribunal, cannot be said to be excessive or bonanza, warranting interference.

31. In the result, the Civil Miscellaneous Appeal is dismissed. The appellant-Transport Corporation is directed to deposit the entire award amount, with proportionate accrued interest and costs less the amount already deposited to the credit of M.C.O.P.No.2410 of 2009, on the file of Motor Accident Claims Tribunal, (III Court of Small Causes), Chennai, within a period of four weeks from the date of receipt of copy of this order. On such deposit being made, the respondent/claimant is permitted to withdraw the same, by making necessary application before the Tribunal. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

To
The Judge -III
The Motor Accidents Claims Tribunal,
(III Court of Small Causes), Chennai.

Copy to

The Section officer,
VR Section, High Court, Madras.

C.M.A.No.2326 of 2016
C.M.P.No.16327 of 2016

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srg 03/11/2016