

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO-2758-2010

Date of decision: 12.2.2016

Ashwani Kumar

...Appellant

Versus

Narinder Singh and others

...Respondents

CORAM: HON'BLE MRS.JUSTICE SNEH PRASHAR

Present: Mr.Sanjay Jain, Advocate for the appellant

Ms.Balpreet Kaur Sidhu, Advocate
for respondents No.1 & 2

Mr.Rajneesh Malhotra, Advocate
for respondent No.3- Insurance Company

SNEH PRASHAR, J.

The present appeal has been filed by the injured-appellant, seeking enhancement of the compensation amount awarded by learned Motor Accidents Claims Tribunal, Ambala (in short 'the Tribunal'), vide award dated 23.1.2010.

The submissions made by learned counsel for the parties have been heard and record perused.

Learned counsel for the appellant argued that learned Tribunal erroneously held that it was a case of composite negligence of driver of the motorcycle on which the appellant was travelling as pillion rider and the driver of the car which caused the accident. Referring to the

statement of PW4 appellant Ashwani Kumar, learned counsel pointed out that he admitted in his cross-examination that half of the road was closed as it was under repair and the traffic of both sides was moving on the side of road on which the motorcycle of the claimant-appellant was going from the side of Ambala towards Chandigarh. In such a situation the offending car which was coming from the side of Chandigarh and was on the wrong side of the road ought to have been careful and cautious and there could be no fault on part of driver of the motorcycle, who was going on his left side of the road. The statement of the claimant remained unrebutted by the respondents as the driver of the car did not appear in the witness box.

There appears no force in the argument of learned counsel for the appellant. It was not just for the vehicle coming from the side of Chandigarh to be more careful and cautious when the other side of the road was closed, it was also for the driver of the vehicle coming from the side of Ambala to drive carefully and cautiously when the vehicles coming from the opposite direction were also on same side of the road. No doubt, the driver of the offending car did not appear in the witness box but considering the site plan of the site of accident produced on record by the claimant-himself, learned Tribunal came to the conclusion that the motorcycle was being driven in the middle of the road and not on its left side of the road. If driver of the car did not step into the witness box, the driver of the motorcycle was also not examined and according to the claimant, who was pillion rider on the motorcycle, he

noticed the car only after it hit in the motorcycle, which means he was not in a position to state the actual cause of accident.

In the above premise, there appears no ground to interfere in the finding recorded by learned Tribunal regarding composite negligence on the part of the driver of the motorcycle and also on the part of the driver of the car in equal proportion.

Learned counsel for the appellant referred to the statement of PW3 Dr. Vijay Kumar and argued that the appellant suffered 25% provisional disability on account of stiffness in right knee joint and shortening of right lower limb by 1/2 inch, but learned Tribunal erroneously took the disability as only 10%. The appellant was operated upon. He was a young boy of 22 years old and due to shortening of leg, he would not be able to join the disciplinary forces. The appellant also remained hospitalised for a long period and visited the hospitals for follow up treatment. He has lost one year of academic career but he has not been compensated on any of the said grounds.

PW2 Dr. Rajiv Kansay, Senior Resident, Department of Orthopedics, GMCH, Sector 32, Chandigarh deposed that the patient was admitted on 1.9.2008 with history of multiple injuries i.e. compound fracture Grade-II distal end of femur right side and fracture of second, third and fourth metatarsal right foot for which he was operated on 2.9.2008 and debridement of the wound and fixation of fracture of distal end femur was done with DCS plate. The fracture of second, third and fourth metatarsal was managed conservatively. He was discharged from

the hospital on 6.9.2008. PW3 Dr. Vijay Kumar, who proved the disability certificate Ex.P46, deposed that the disability of the patient was assessed as 25% which was on account of stiffness at right knee joint and shortening of right lower limb by half an inch.

PW1 Dr.Ashok Nandra deposed that the appellant was admitted in his hospital on 29.1.2009 with diagnosis of infected non union right femur with implant insitu. He was operated upon on 30.1.2009 when removal of implant sequasterectomy and debridement of the bone was done. On 16.2.2009 he was again operated when the external fixture was removed. He was discharged on 23.2.2009 and was advised for follow up treatment.

The doctor assessed his disability as provisional to the extent of 25% but at the same time, he said that there was shortening of right lower limb by half an inch. The learned Tribunal has taken the disability as 10% permanent. The appellant was a student of 3rd year in Electronics and Communication Trade in Engineering College, Kurukshetra. Due to the injuries he continuously remained under treatment for six months and may have remained confined to bed for another one or two months. Needless to say that he must have suffered loss in studies. The leg having become short by half inch he cannot join disciplinary forces i.e. Army or police. He will also require special kind of shoes to be worn to avoid limping and that will cause embarrassment to him throughout life. There will effect on the marriage prospects as well.

In Raj Kumar vs. Ajay Kumar and another 2011(2) RCR

(Civil) 101, Hon'ble Supreme Court held as under:-

“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.”

Elaborating the method of ascertaining effect of the permanent disability on the actual earning capacity, Hon'ble Apex Court held in Para No.10 of **Raj Kumar's case (supra)** as under:-

“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."

In the case in hand, the disability of the appellant is provisionally assessed as 25%. No subsequent disability certificate indicating the permanent disability suffered by the appellant was proved in evidence. In case because of shortening of leg by half inch, it can be outrightly said that the disability will have direct effect on the future earning capacity of the appellant. Such being the position and keeping in mind the law laid down in **Raj Kumar's case (supra)**, the functional disability of the appellant can therefore be assessed to the same tune as is provisionally assessed by the doctor. The appellant is a student and 20 years old, therefore, his income is taken as Rs.5000/- per month. Taking functional disability as 25% and loss in future earning capacity to the same extent and applying the multiplier of 18, the compensation on account of disability comes to Rs.2,70,000/- (5000 x25%) x 12 x 18. Another sum of Rs.50,000/- is allowed on account of loss of marriage prospects and loss of amenities and enjoyment of life. The amounts under other heads i.e. Rs.One lac for expenditure on treatment, Rs.75,000/- for pain and suffering and Rs.10,000/- for special diet and

transportation charges are just and adequate.

Accordingly, the enhanced compensation comes to Rs.3,00,000/- (three lacs). However, it was a case of composite negligence of both the drivers, therefore, the appellant is entitled to Rs.1,50,000/- as compensation, which will be paid by the Insurance Company within two months from the date of the receipt of the certified copy of this judgment, failing which, it shall carry interest at the rate of 7.5% per annum from the date of the filing of the appeal till its realisation.

In the above premises, the present appeal is partly allowed and the impugned award is modified as noticed above.

12.2.2016
gsv

(SNEH PRASHAR)
JUDGE