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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of Decision: 17th February, 2016

+ **MAC.APP. 428/2011 & CM APPL. 9563/2011**

ORIENTAL INSURANCE CO LTD Appellant

Through: Mr. Pradeep Gaur & Mr. Amit Gaur,
Adv.

versus

RAJESH GROVER & ORS Respondents

Through: Mr. Mohinder Malhotra, Adv.for R-1.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The first respondent was driving maruti car bearing registration no. DL-8C-7051 (the car) on a public road at about 11:30 AM on 24.06.2006 in the area in front of Parasnath Builder Kumaspur Crossing, G. T. Road, when the car was involved in collision against the truck bearing registration no.HR-38K-7921 (the offending vehicle), driven by Pramod Yadav, (second respondent herein) statedly in a rash/negligent manner. As a result of the collision, the first respondent (the claimant) suffered injuries which resulted in permanent disability. The wife of the claimant, as his next friend, brought claim petition under Sections 166 & 140 of the Motor Vehicles Act, 1988 (the MV Act) before the motor accident claims tribunal (the tribunal) on 17.04.2007 seeking compensation, it being registered as suit no.56/10/2007 (old no.32/2009). The owners of the offending vehicle were impleaded as

second and third respondents in the claim petition, they now being third and fourth respondents in the appeal. The appellant/insurance company was also impleaded as a party respondent (fourth respondent) before the tribunal. The claim petition was decided by judgment dated 14.03.2011 granting compensation in the total sum of ₹44,63,101/- with interest at the rate of seven & half percent (7.5%) per annum from the date of filing of petition till realization. The insurance company, during the inquiry, had also taken up the plea of contributory negligence on the part of the claimant. The said contention was rejected and the insurance company, it having admitted the insurance cover against third party risk was directed to pay the compensation as awarded.

2. The insurance company in the present appeal has raised five contentions. It submits that the disability of the claimant assumed to be hundred percent (100%) was an erroneous conclusion drawn and, thus, compensation on account of loss of future earning capacity is overvalued. It points out that some of the bills relating to medical treatment, even though reimbursed under the scheme of Employees State Insurance Corporation of which claimant was a member, were wrongly added to the medical treatment expenses which requires to be compensated. It is further the contention of the insurance company that the income of the claimant for the financial year 2005-2006, which was the year preceding the date of accident (24.06.2006), corresponding to assessment year 2006-2007, was wrongly taken as ₹1,91,427/- even though the income tax return (ITR) as proved (Ex.PW3/10) showed the income from salary and income of business or profession to be only ₹1,71,427/-, the element of ₹20,000/- having been declared as income

from other sources, about which there is no clarity. In the same context, the insurance company further contends that for award of compensation for loss of earning capacity, the element of income tax should have been deducted. The insurance company also argues that the finding returned with regard to the plea of contributory negligence is against the admitted position of the witness examined by the claimant himself that he was using excessive speed while driving on public road and had hit the truck from its rear side. The reference in this context is made to the proof adduced before the inquiry that the driver (second respondent) was acquitted by the criminal court in the corresponding case on the allegations of causing accident due to rash or negligent driving resulting in grievous hurt to the claimant.

3. The Supreme Court in the case reported as *Raj Kumar vs. Ajay Kumar & Ors.*, (2011) 1 SCC 343, laid down detailed principle of assessment for future earning capacity (functional disability) resulting in permanent disability, drawing distinction between functional disability on one hand and physical disability on the other. The observations in (para 10 to 14 of) the judgment in case of *Raj Kumar* (supra) are instructive and may be taken note of. The same read as under:-

“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.

12. 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.

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.

14. 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 per cent, 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."

4. The first respondent (claimant) having been injured had appeared before the Neurology Board, Department of Neurology of G.B. Pant hospital, New Delhi on 07.06.2010. After assessment by the board of doctors, his disability was certified (as per document Ex.PW5/A). Later, on 18.11.2010, he appeared before a board of doctors constituted by medical superintendent of LNJP hospital, Delhi thereupon his disability was certified as per document dated 22.11.2010 (Ex.PW6/A). During inquiry before the tribunal, the appellant examined one doctor each from the said two boards of doctors of two different hospitals to bring on record the state of disability to which he has been reduced as a result of the injuries suffered. The tribunal has noted the gist of the statement of the said two doctors in the impugned judgment (in para 35 to 40) in the following words:-

“35. PW6: Dr. P. N. Pandey Head of Neuro Surgery has deposed that petitioner Rajesh Grover was examined by the Medical board under of the chairmanship of Dr. S.S. Gambir. He has proved the disability certificate Ex. PW6/A stating that his disability was determined to the extent of 51.10%. He further deposed that determination of the disability due to memory loss was not given in the guidelines issued by Ministry of Health and patient was having memory loss to that extent that he was not able to memorise the talks which has taken place in his house in the morning so that he may recollect the same in the evening; he will not be able to walk alone so as to go outside from his house for boarding bus or Metro or any other conveyance; he was having difficulty in speech and also having slurring of speech and his speech could not be understand properly by other persons; he was unable to climb the stairs or descend the stairs himself without the help of others. In reply to a court question about disability of the petitioner to carry out his ordinary pursuits as a normal person, he has replied that patient is disabled to the extent that he is not able to perform his activity of daily living. He could not perform any intelligent or intellectual job or could not carry any profession/business etc.

36. In his cross-examination on behalf of insurance company, Doctor has stated that there is no chances of the improvement of disability of this patient and disability is irreversible. He further deposed that he has personally examined the patient Rajesh Grover and in such like cases there was no guidelines prescribed for assessing the disability because of lack of intellectual behaviour and intellectual function due to loss of memory or for any other reasons if a patient is having 100% loss of memory or loss of intellectual behaviour and intellectual function.

37. Petitioner has also placed on record disability certificate issued by ESI hospital, New Delhi wherein petitioner has been shown to be having 100% permanent disability, PW5 Dr. Neera Chaudhary Associate Professor, Department of Neurology G.

B. Pant hospital has deposed that petitioner Rajesh Grover was examined by the Neurology board of the said hospital on 07/6/2010; the patient was having following deficits :-

- 1. Significant memory loss: impaired recent memory and impaired new learning (anterograde amnesia), and also loss of memory for pretraumatic period (retrograde amnesia)*
- 2. he also had unsteadiness of gait, and is unable to walk in narrow passage independently.*
- 3. He also had significant post traumatic facial disfigurement*
- 4. He is significantly disabled.*

38. She further deposed that G.B. Pant hospital was not empowered to issue disability certificate regarding percentage of disability because as per internal procedure it is LNJP hospital who has to issue certificate. She was asked to clarify the term significant disability as mentioned in the disability certificate Ex. PW5/A to which she replied as under:-

'The significant disability would mean that the patient will not be able to carry out the activities of daily livings independently.'

39. She has further clarified that the disability of this patient is such which may prevent him for going to market independently and because of significant memory loss and other deficiencies mentioned in our certificate he will not be able to perform any executive functions or understanding and replying letter etc.

40. Ld counsel for the petitioner has argued that seeing the evidence of PW6 Dr. P. N. Pandey and PW5 Dr. Neera Chaudhary, it has become clear that the functional disability of petitioner has to be determined as 100% and therefore he may be by awarded compensation accordingly.

41. Ld counsel for insurance company on the other hand submitted that as per disability certificate Ex. PW5/A, the

disability was determined 51.10% and as such the compensation may be considered accordingly.

42. I have considered the rival submissions and gone through the evidence of PW6 Dr. P. N. Pandey and PW5 Dr. Neera Chaudhary. It was stated by PW6 Dr. P. N. Pandey that he has not determined the disability and due to the memory loss of patient as there was no guidelines by the Ministry of Health. It has become clear from the deposition of both these doctors that the petitioner is unable to do his daily pursuits as a normal human being; he would not be able to do any profession/ business or any job because of the memory loss or loss of intellectual behavior and intellectual functions. Considering these physical conditions of the patient and material on record, I am satisfied that petitioner has suffered 100% physical functional disability because of the accident.”

5. Whilst it is true that in the opinion given by the board of doctors of G.B. Pant hospital, there is no assessment made as to the extent of disability, the opinion expressed by both board of doctors are generally on the same lines. The claimant has suffered significant memory loss, impaired recent memory and impaired new learning capacity. He suffers from unsteadiness of gait and has been rendered disabled even for performing the daily activities for ordinary living, leave alone with any capacity to undertake an intellectual work or intellectual functions or carry on with some profession or business of any kind.

6. In above view, having regard to the principles laid down in *Raj Kumar* (supra), the conclusion reached by the tribunal that the disability of the claimant is to be treated as 100% of permanent nature cannot be faulted.

7. There is indeed error committed on the part of the tribunal in allowing compensation on account of medical treatment even by adding the value of

bills (₹6,03,304/-) which were noted (in para 28 of the impugned judgment) to have been reimbursed by ESI. The bills which were reimbursed cannot be treated as expenditure incurred by the claimant.

8. There is also merit in the contention of the insurance company that the income of ₹20,000/- shown in the income tax return for assessment year 2006-2007 to be “income from other sources” cannot be treated as regular income without the nature thereof being clarified. The income tax return clearly showed ₹1,71,427/- to be the income from salary, business and profession. This alone should have been the basis of calculation for loss of future earning capacity.

9. Further, there is merit in the contention that the income tax payable on the income for the period in question should have been deducted before loss of earning capacity was computed. The income tax return (Ex.PW3/10) for assessment year 2006-07 itself shows income tax was paid to the tune of ₹8770/-. But then, ₹20,000/- having been deducted from the total income as reflected in the said return, the income tax liability is computed (at 10% over & above ₹1,00,000/-) as ₹7100/-. Thus, the net income on which loss of future earning capacity requires to be calculated comes to ₹1,63,900/-.

10. The claimant was 49 years 10 months old when the accident had occurred. His date of birth is 24.08.1956. Thus, the tribunal correctly adopted the multiplier of 13. On this basis, the total loss of earning capacity which needs to be compensated is concluded as (1,63,900x13) ₹21,30,700/-. Since the tribunal had calculated the compensation on this score at

₹24,88,551/-, the total compensation needs to be reduced further by an amount of ₹3,57,851/-.

11. The learned counsel for the insurance company referred to a portion of cross-examination of the eye witness, Bharat Bhushan Narang (PW4) as quoted in (para 18 of) the impugned judgment to urge that finding be returned that the claimant was guilty of contributory negligence. It was pointed out to him that this selective reading of the deposition of the witness is highly improper. Para 17 of the impugned judgment takes note of the evidence of the witness in entirety. It narrates that the offending vehicle had first allowed the right of way to the claimant when he was seeing the opportunity to overtake. But when the car was in the process of overtaking the truck, the truck moved in the wrong lane and, thus, came in the way of the car, resulting in the collision. The guilt of truck driver has rightly been found by the tribunal. In these facts and circumstances, the plea of contributory negligence is unmerited.

12. In the result, the total compensation awarded to the claimant needs to be reduced by an amount of (6,03,304+3,57,851) ₹9,61,155/-. The compensation awarded by the tribunal is, thus, reduced to (44,63,101-9,61,155) ₹35,01,946/-, rounded off to ₹35,02,000/-. Ordered accordingly.

13. Needless to add that the compensation awarded shall carry interest as levied by the tribunal and shall be paid in terms of the directions in the impugned judgment.

14. By order dated 13.05.2011, the insurance company had been directed to deposit the entire amount of compensation with up-to-date interest with

the Registrar General and fifty percent (50%) of such deposit was allowed to be released, the balance having been kept in fixed deposit receipts in a nationalized bank in the name of the Registrar General for a period of one year subject to automatic renewal. The Registrar General shall now calculate the amount payable to the claimant in terms of the award modified as above and release what is due to him forthwith in terms of the arrangements made in the impugned judgment by the tribunal, refunding the excess with proportionate interest and statutory deposit, if made, to the insurance company.

15. The appeal is disposed of in above terms.

FEBRUARY 17, 2016

SSC

**R.K. GAUBA
(JUDGE)**

