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

Date of Decision: 23rd March, 2016

\+ **MAC.APP. 487/2010**

ZAMINDAR MOTOR TRANSPORT COOPERATIVE SOCIETY LTD

..... Appellant

Through Mr. Narendera M. Sharma, Ms. Prachi Gupta and Ms. Sakshi, Advs.

versus

HARJEET SINGH

..... Respondent

Through Ms. Hetu Arora Sethi and Mr. Shravan Sahny, Advs. for insurance

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

JUDGMENT

R.K.GAUBA, J (ORAL):

1. The first respondent Harjeet Singh (the claimant) had brought a claim case under Sections 166 and 140 of Motor Vehicles Act, 1988 (MV Act) before the motor accident claims tribunal (tribunal) on 27.09.2007 whereupon it was registered as petition No.257/2007. In the said claim case, it was alleged that on 29.08.2007 at about 8.35 PM when he was coming out of the Timarpur truck parking, he was hit by a bus bearing registration no.RJ 13P 3359 (the offending vehicle), which had come from behind at a high speed and in a rash/negligent manner, resulting in the injuries including multiple fractures. The claimant impleaded Makhan

Singh, the driver of the offending vehicle and the appellant company, it being admittedly the registered owner of the offending vehicle and the employer of the said driver, in addition to National Insurance Co. Ltd. (insurer) as the third respondent.

2. After inquiry the tribunal granted award by judgment dated 04.03.2010 directing compensation to be paid in the sum of Rs.9,94,000/- with interest in favour of the claimant from the date of filing of the petition. The insurance company had taken up the plea that there was a breach of terms and conditions of the insurance policy. This contention was upheld for the reason the offending vehicle was found to be plied without a valid permit. Against this backdrop, the insurance company was directed to pay the compensation as awarded but was granted rights to recover the said amount from the appellant (owner/insured).

3. The appellant preferred this appeal mainly to question the computation of compensation. In spite of notice neither the claimant nor the driver have appeared at the hearing on the appeal.

4. Against the above backdrop, the following order was recorded by this Court on 25.01.2016 :

> *"Heard for some time.*
>
> *The first respondent (the claimant) in spite of notice has chosen not to appear to contest. The record shows that though he was served by substituted service indicating the notice had been avoided earlier, he filed a vakalatnama on 24.09.2010 authorising Mr. Mukesh Sharma, Advocate to appear on his behalf.*
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> *The contentions of the appellant (the registered owner of the offending vehicle) are manifold including on the issue of error on the part of the Tribunal in computing the*

compensation. It has been pointed out that income much more than what had been pleaded has been assumed and that benefit of permanent/functional disability has been accorded even against the admitted position at the inquiry that the claimant was working on commission payable on daily basis and had resumed duty with the same employer after recuperation, with the same nature of work, thus having suffered no further loss requiring to be compensated.

On being asked, the learned counsel for the insurance company submitted that it did not prefer any appeal against the impugned judgment/award and rather deposited the awarded amount with up-to-date interest in terms of the directions of the Tribunal inasmuch as recovery rights had been granted in its favour against the appellant.

The impugned judgment shows that the learned Tribunal had taken care to direct an amount of ₹8 lakhs out of the awarded compensation to be put in several fixed deposit receipts with State Bank of India, Tis Hazari for different periods specified. Though almost six years have passed by, it is clear from the said directions that the entire money would not have been released by now. Learned counsel for insurance companies submits that she would check the position and report back the status of fixed deposits.

Given the facts and circumstances noted above, assuming that some of the fixed deposit receipts are still retained by the bank, further release of the said amounts therefrom in terms of impugned judgment in favour of the claimant is hereby stayed till next date of hearing.

Copy of this order shall be served by the counsel for the insurance company on Manager, State Bank of India, Tis Hazari. The Registrar shall also communicate the order to the bank and obtain status report about the fixed deposits as on date and place the same before Court on next date.

The interim order against enforcement of the recovery rights by the insurance company shall continue to be stayed till next date.

To be listed for further hearing on 23.03.2016.

Order dasti."

5. When the matter was taken up for hearing today, the learned counsel for the insurer referred to the report dated 16.03.2016, which has been gathered by her from State Bank of India, Tis Hazari branch, Delhi indicating that four fixed deposit accounts each with the principal balance amount of Rs.1 lakh are still held in the name of the claimant, in addition to savings bank account with present balance of Rs.2441/- it being the account wherein the interest against fixed deposits have been automatically transferred and made available to the claimant.

6. The tribunal computed the compensation as under :

1.	*Medical Expenses &Treatment*	*: Rs. 90,000/-*
2.	*Pain &Sufferings*	*: Rs. 75,000/-*
3.	*Loss of Income*	*: Rs. 40,500/-*
4.	*Permanent Disability and Loss of Amenities of Life*	*: Rs. 50,000/-*
5.	*Loss of Earning Capacity*	*: Rs. 6,23,700/-*
6.	*Attendant Charges*	*: Rs. 14,064/-*
7.	*Conveyance*	*: Rs. 05,000/-*
8.	*Special Diet*	*: Rs. 05,000/-*
	Total	*Rs.9,93,264/-*
	Rounded off to	*Rs.9.94,000/-*

7. The learned counsel for the appellant submitted that it is a case of unjust enrichment inasmuch as the tribunal has assumed permanent disability and loss of amenities of life even though there was no proper proof adduced to this effect. He submitted that the loss of earning capacity (in future) could not have been ordered to be compensated to the extent granted inasmuch as the evidence instead shows that the claimant has continued to be in the same employment without suffering any losses in earnings except what he concedes to be the period wherein he would have

remained under treatment. The learned counsel submitted that the awards under the heads of pain and suffering, loss of income, permanent disability, loss of amenities of life and loss of earning capacity are wholly unjust and improper.

8. It is noted that in the claim petition, submitted in September, 2007, the claimant had pleaded that he was in private service, he being a conductor on a private bus at a salary of Rs.5,000/- per month plus allowances. He stated (against column No.11 in the petition) that he had sustained "*fracture of condyeux femur, fracture of left oblique fracture of shaft of tibia and other multiple grievous injuries*". While elaborating the facts on the basis of which he was seeking compensation, (vide annexure 'A' added with reference to column 23 of the petition) he stated that as a result of the fall on the road he had 'sustained multiple grievous injuries including fractures etc. etc.'. He further elaborated the state in which he has been rendered as under :

> *"Due to fracture and other grievous injuries, the petitioner remained confined to bed for long period and under constant treatment. The injured has spent his entire savings over his treatment and rather he has to take loans from his friends, relatives and neighbours and presently running under severe financial crisis and even he is unable to continue his treatment due to paucity of funds. The health of the petitioner had badly deteriorated. The job of petitioner is quite laborious and active, but due to injuries it is most likely that he may not perform his duties as efficiently as he was performing prior to the accident. The petitioner has suffered a great mental setback and jolt. Since the date of accident, the petitioner is running on leave without pay and most probably he may further not be able to join his duties for further many months. The losses suffered by the petitioner cannot be measured in pecuniary terms."*

9. During the inquiry, the claimant tendered his affidavits (Ex.PW4/A and A1) and appeared for cross-examination on 27.05.2008. In the affidavit (Ex.PW4/A), he only reiterated what had been pleaded in the petition as noted above. For completion of narration, the declaration in the said affidavit, which has a bearing on the issues raised, may be extracted as under :

> *"xxx Consequent upon hitting by the offending bus, the deponent fell down on the road and sustained multiple grevious injuries including fractures etc.*
> *xxx*
>
> *8. That due to fracture and other grevious injuries, the deponent remained confined to bad for long period and under constant treatment.*
>
> *9. That the deponent has spent his entire savings over his treatment and rather he has to take loans from his friends, relatives and neighbours and presently running under severe financial crisis and even he is unable to continue his treatment due to paucity of funds. The health of the deponent had badly deteriorated.*
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> *10. That the job of the deponent is quite laborious and injuries it is most likely that he may not perform his duties as efficiently as he has performing prior to the accident. The deponent suffered a great mental setback and jolt.*
>
> *11. That since the date of accident, the deponent is running on leave without pay and most probably he may further not be able to join his duties for further many months and the losses suffered by the deponent can now be measured in pecuniary terms."*

10. The claimant had also submitted a certificate dated 18.10.2008 issued by a board of doctors of Babu Jagjivan Ram Hospital, Jahangirpuri, Delhi (Ex.PW4/X) which certified that he had been rendered physically disabled,

his disability having been assessed to the extent of 55% (permanent) in relation to left femur and left tibia fracture with soft tissue injury and left lower limb. Noticeably, Dr. Sameer Mehta (PW5) Ortho Specialist was one of the members of the said board of doctors. Dr. Sameer Mehta was examined (as PW5) to prove the said disability and in his deposition he only affirmed what had been mentioned in the certificate. During cross-examination, however, PW5 clarified that he had not treated the claimant and could not say whether the injuries which have been assessed were old or arising out of accident. He also clarified that the disability mentioned in the disability certificate was 'not regarding whole body'. He was unable to give any assessment regarding the percentage of disability in connection with the whole body nor was he able to make any comment whether the claimant could continue with the same job as conductor in the bus.

11. Through his affidavit (Ex.PW4/A), the claimant submitted that he had been working as a conductor with M/s Krishna Bus Service, office at ISBT, Kashmiri Gate, Delhi and was in receipt of salary ₹5,000/- per month as per salary certificate (Ex.PW4/79). He examined J D Upretti, Accountant of Krishna Bus Service Pvt. Ltd. (R2W1). The said witness, interestingly, deposed against the averments and evidence of the claimant, as indeed contradicting the salary certificate (Ex.PW4/79). According to his testimony, the claimant had been working, not as an employee, but on daily commission basis with Krishna Bus Service for last three to four years. He stated that he (the claimant) was not a permanent employee and commission was payable to him at the rate of 5% of the total income of the day. He referred to the certificate of payments made to him for the month of August, 2007 (Ex.R2W1/1). During his cross-examination, he further sought to

clarify that the commission on overall basis worked out to ₹250/- each for the driver and conductor. Crucially, he admitted (while deposing on 18.08.2008) that the claimant had "resumed work about a month back". This would mean that after having suffered injuries in the accident on 29.08.2007, the claimant had rejoined the gainful employment in June, 2008.

12. The tribunal, by the impugned judgment, concluded that the claimant had suffered functional disability resulting in loss of earning capacity so as to deserve to be granted compensation for loss of future income to the extent of 55%.

13. The reasoning applied by the tribunal in taking the above view deserves to be taken note of in extenso :

> *"Loss of Earning Capacity :*
>
> *34. The petitioner sustained Haematoma of the left thigh with fracture of the condyle femur and a fracture of the shaft of the left tibia. Due to the injuries sustained by the petitioner, he remained admitted in Aggarwal Dharmarth Hospital from 05.09.2007 to 08.09.2007, thereafter in Partmarth Mission Hospital from 08.09.2007 to 12.09.2007 and thereafter from 22.09.2007 to 26.09.2007 in Aggarwal Dharmarth Hospital. The petitioner again remained admitted in Parmarth Mission hospital from 17.10.2007 to 20.10.2007 for skin grafting. As per the disability certificate Exh. PW4/X, he sustained permanent disability to the tune of 55% of his left lower limb. No doubt, the said disability is in relation to the left lower limb only and not the entire body.*
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> *Permanent Disability and Loss of Amenities of Life :*
>
> *35. The petitioner sustained Haematoma of the left thigh with fracture of the condyle femur and a fracture of the shaft of the left tibia and sustained a permanent disability of 55% of his left lower limb. Besides bring about a loss in the earning*

capacity, the said disability has also brought about a disfigurement of his body, which would also remained an hindrance through out his life in discharging certain functions and duties towards his family. He would be deprived off several amenities of life and recreational pursuits of life. I therefore, grant a total compensation of Rs. 50,000/- towards permanent disability and loss of amenities of life to the petitioner.

36. In OIC Vs. Satish Sharma & Ors. 2008 ACJ 2259, Delhi, Hon'ble Justice Pradeep Nandrajog has categorically observed;-

> *"while estimating the future loss of income, the effect of the earning capacity ought to be Judged in the light of the importance of the loss of permanently impaired limb in the vocation or profession or employment career of the injured person. The nature of work or business has to be considered and the extent of disablement cannot be indifferent to the nature of the work".*

37. In the cited case, the victim had sustained a 60% disability of one of the lower limb and while discussing further Hon'ble Justice Pradeep Nandrajog had further held that

> *"The injured was working as a labourer. The nature of business of the injured is such that amputation of right leg will seriously hamper his earning capacity as h is movement would be restricted."*

38. In the said case, therefore, the functional disability of the claimant was also taken to be 60% and it was on this basis that the future loss of earning capacity was calculated.

39. Reverting back to the case in hand, it is to be kept in mind that the petitioner was a helper/conductor in a private bus, and the nature of his duties required him to remain on his two legs and assist the driver in driving of the bus. Therefore, guided by the afore said judgment of the Hon'ble Delhi High Court, the functional disability of the petitioner is also assessed to be 55%.

40. As per the Election I-Card of the petitioner, the petitioner was 28 years of age as on 01.01.1994 and therefore, *on the date of accident, his age was above 41 years of age. Taking the help from the modified multiplier chart given by the Hon'ble Apex Court, in "Sarla Verma & Ors. vs. Delhi Transport Corporation &Am.,(2009) 6 Scale, the appropriate multiplier, as per the age of the petitioner, would be 14. Therefore, I, grant a total compensation of Rs. 6750/- X 12 X 14 X 55/100 = Rs. 6,23,700/- to the petitioner towards loss of earning capacity."*

14. It is indeed a matter of concern that the tribunal proceeded to draw conclusions and calculate compensation ignoring the basic facts pleaded by the claimant himself. The disability certificate referred to above was apparently very vague. Though it referred to fractures of two bones and injury of the soft tissue of an upper limb, it would not mention as to what is the effect of such injuries so as to be treated as a disability suffered in the aftermath, that too permanent in nature. Neither the pleadings nor any other evidence throw light on the nature of disability inflicted on the claimant, particularly disability which would affect his functional capacity. With no logic indicated as to how the disability of 55% in relation to an upper limb could be treated as disability affecting the functional or earning capacity, the tribunal has proceeded to make an award assuming the loss of future income to be to the extent of 55%. The reference to the case of *Satish Sharma* (supra) was wholly improper as there is no amputation of any limb in the case at hand.

15. The claimant had himself pleaded that he was earning ₹5,000/- as salary from Krishna Bus Service. He affirmed this fact on oath through his affidavit. But his word was contradicted by the evidence of R2W1. The assumption of income at ₹6,750/- per month which was not even the case

set up by the claimant was wholly improper and incorrect. It is not clear as to how the tribunal assumed it to be a case where the claimant had suffered "disfigurement". Neither the claimant nor the other witnesses examined by him would refer to any disfigurement.

16. For the foregoing reasons, the award of ₹50,000/- under the heads of permanent disability and loss of amenities of life and ₹6,23,700/- on account of loss of earning capacity was wholly uncalled for.

17. As conceded by the learned counsel for the appellant, the loss of income due to injuries suffered, however, deserves to be awarded for the period of 10 months i.e. from 29.08.2007 (the date of accident) to June, 2008 (when the claimant admittedly had resumed duty). Assuming what was pleaded was correct, the said loss of income is calculated as ₹50,000/-. In the given facts and circumstances, it will not be proper to disturb the award of ₹75,000/- granted by the tribunal under the head of pain and sufferings. The tribunal had also granted award of ₹90,000/- towards medical expenses and treatment, attendant charges at ₹14,064/-, besides expenditure towards conveyance and special diet at ₹5,000/- each. The total compensation payable in the case, thus, is calculated as (90,000 + 75,000 + 50,000 + 14,064 + 10,000) 2,39,064/-, rounded off to ₹2,40,000/-. Therefore, the compensation awardable in the case is reduced to ₹2,40,000/-. Needless to add, it shall carry interest at the rate granted by the tribunal.

18. In view of the above, the insurer has paid to the claimant, by way of deposit, more than what was just compensation. Since a part of the amount deposited is still retained in the fixed deposit receipts, as noted above, the same shall have to be refunded forthwith to the insurer along with accrued

interest lying in the savings bank account mentioned above. Ordered accordingly.

19. The tribunal is directed to calculate the amount payable to the claimant in terms of the award modified as above and facilitate the insurer recover the excess paid from the claimant.

20. The learned counsel for the appellant fairly concedes that the stay against recovery rights deserves to be vacated to the extent of the entitlement of the claimant to the compensation under the modified award. He, at the same time, assures and undertakes that the appellant shall pay to the insurance company, the amount payable by it to the claimant, for which the tribunal has been directed to draw fresh calculations, within a month of the findings in this regard being recorded by the tribunal. The appellant and the insurer may approach the tribunal for aforementioned purposes within a month of this judgment.

21. Statutory deposit, if made, shall be refunded.

22. The appeal with pending applications is disposed of.

23. *Dasti.*

R.K. GAUBA
(JUDGE)

MARCH 23, 2016
VLD