

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

**Reserved on : 12th January, 2016
Pronounced on : 22nd January, 2016**

+ MAC.APP. 956/2012

SUNIL KUMAR Appellant

Through Mr. S N Parashar, Adv.

versus

PYAR MOHD & ORS Respondents

**Through Mr. Sameer Nandwani, Adv. for
R-3**

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

R.K.GAUBA, J :

1. By judgment dated 30.03.2012 in motor accidents claim petition No.1123/2010, the Motor Accident Claims Tribunal, ("the Tribunal") awarded compensation in the sum of ₹9,20,961/- with interest in favour of the appellant, with suitable directions about its protection, for the injuries suffered by him on 27.10.2007 in a motor vehicular accident involving truck bearing registration No.HR-55F-9582 ("the offending vehicle"). The appellant, feeling aggrieved with the assessment of compensation, has come up through the appeal at hand under Section 173 of the Motor Vehicles Act, 1988 ("the MV Act") seeking enhancement.

2. Certain facts are no longer in dispute and may be noted at the outset. It has been found, upon enquiry by the Tribunal, that the appellant, then aged 33 years and working as a sweeper (under contract) of the Municipal Corporation, Ghaziabad, U.P. moving on his bicycle

on 27.10.2007 was hit by the offending vehicle driven by Pyar Mohd. (the first respondent before the Tribunal) in a rash/negligent manner, from behind, in the area of village Dundahera bye-pass of Ghaziabad, U.P., as a result of which he fell down and his right leg was badly crushed. The offending vehicle was owned by Raj Kumar Gupta (the second respondent before the Tribunal) and was concededly insured with the third respondent herein for the relevant period against third party risk.

3. The appellant proved through uncontroverted evidence before the Tribunal that he remained admitted in a hospital, for treatment on account of injuries suffered till 06.11.2007 and during the said hospitalisation his right leg was amputated below knee by a surgical procedure on 01.11.2007 rendering him permanently disabled. He proved the said medical condition, and the disability, through the evidence of Dr. Binod Kalita (PW-2), orthopaedic specialist, LBS hospital, Delhi on the basis of documentary evidence (Ex.PW-1/110), the disability having been assessed by the Board of Doctors as 80% in relation to the right lower limb.

4. The Tribunal concluded, and the appellant does not claim otherwise, that he had remained immobile, unable to attend to any gainful employment for five months. On the basis of the documentary evidence it was also assessed that he would have required services of an attendant for a period of three to four months.

5. The Tribunal referred to the judgment of the Supreme Court in *Raj Kumar V. Ajay Kumar and Anr.* (2011) 1 SCC 343, particularly para 13 of the report, *inter alia*, to hold that in spite of amputation of the right

leg before knee, the appellant was still in a position to undertake such job which would not require use of lower limbs and on that basis assessed the functional disability at 40%, as against the disability assessed by the medical authorities (at 80% in relation to the right lower limb).

6. Since the appellant had not led any formal evidence to prove the actual earnings from the employment he was engaged in at the time of accident, the Tribunal adopted the minimum wages at ₹3,516/- per month, as prevalent for unskilled workers w.e.f. 01.08.2007. Having regard to his age (33 years), the Tribunal adopted the multiplier of 16 to work out the loss of earnings for the period of five months and calculated the loss on account of future earnings on the same basis, taking into account the functional disability to the extent of 40%.

7. The compensation eventually granted was calculated, by the Tribunal, thus :

i.	Compensation towards pain and sufferings	₹1,00,000/-
ii.	Compensation towards loss of amenities and enjoyment	₹1,25,000/-
iii.	Compensation towards change of gait/disfigurement	₹1,00,000/-
iv.	Loss of future earning due to injuries	₹2,70,028/-
v.	Loss of earning of petitioner for 5 months @ ₹3516/- per month	₹17,580/-
vi.	Expenses towards medical bills	₹1,55,353/-
vii.	Compensation towards conveyance and special diet (without bills)	₹20,000/-

viii.	Compensation towards artificial limb	₹1,25,000/-
ix.	Compensation towards attendant charges @ 2000/- per month for four months	₹8,000/-
	Total	₹9,20,961/-

8. Though the appeal was initially presented impleading the driver and owner of the offending vehicle as first and second respondent, their names were deleted in terms of order dated 24.05.2013 as the insurer, having admitted the validity of the insurance, is the only contesting party.

9. The appellant is aggrieved and has pressed the following issues at the hearing on this appeal :

- (a) The evidence had shown that the appellant is a matriculate and, therefore, the income should have been assessed at ₹3,964/-, the minimum wages payable to matriculates during the relevant period.
- (b) The Tribunal has not factored in the prospects of increase in the income in future and, thus, had under-estimated the loss of earnings and loss of future income. Reliance is placed on *V. Mekala v. M. Malathi & Anr.*, (2014) 11 SCC 178.
- (c) There was no justification for the loss of future earning capacity on account of functional disability to be reduced from what was assessed by the medical authorities (80%) to 40%, on the mere speculative reason that the appellant would be in a position to do some manual labour using limbs other than the one affected.

(d) The award under the heads of compensation towards conveyance and special diet, pain and suffering, and loss of amenities & enjoyment have not been properly estimated and there is no award to take care of the needs of artificial limb.

(e) The interest granted at 7.5% per annum on the total compensation is on the lower side and therefore, does not take care of the loss of the real value of the money realisable as compensation during the pendency of the inquiry on the petition.

10. On the assessment of the income, this Court finds substance in the submissions of the appellant. The material on record of the Tribunal (pages 415-417) clearly show that the appellant is a matriculate of 1991 from U.P. Education Board. In this view of the matter, he was entitled to claim minimum wages @ ₹3,964/-. The assessment of compensation @ ₹3,516 for unskilled workers, thus, is erroneous and the same will have to be recomputed accordingly.

11. The issue of future prospects of increase in the income to be factored in is still at large in cases of “self-employed” or those working at “fixed salary”. In *Sarla Verma (Smt.) & Ors. v. Delhi Transport Corporation & Anr.*, (2009) 6 SCC 121 (para 24), the Supreme Court ruled thus :

“In Susamma Thomas (1994) 2 SCC 176, this Court increased the income by nearly 100%, in Sarla Dixit (1996) 3 SCC 179, the income was increased only by 50% and in Abati Bezbaruah (2003) 2 SCC 148 the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects,

where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words “actual salary” should be read as “actual salary less tax”). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances.”

(emphasis supplied)

12. In *Santosh Devi v. National Insurance Company Ltd. & Ors.*, 2012 (6) SCC 421, the Supreme Court took a slightly divergent view and observed as under :

“14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma’s case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.

15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who

get fixed income/emoluments. They are the worst affected people. Therefore, they put extra efforts to generate additional income necessary for sustaining their families.

16. The salaries of those employed under the Central and State Governments and their agencies/instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lakh.

17. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

18. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30

per cent increase in his total income over a period of time and if he / she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation.”

(emphasis supplied)

13. In *Reshma Kumari V. Madan Mohan* (2013) 9 SCC 65, by judgment dated 02.04.2013, a bench of three Hon’ble Judges of the Supreme Court upheld the decision in *Sarla Verma* (supra) and, *inter alia*, directed (para 43.5) that “while making addition to income for future prospects the Tribunals shall follow para 24 of the judgment” in the said case [*Sarla Verma* (supra)].

14. In the case reported as *Rajesh & Ors. v. Rajbir Singh & Ors.*, (2013) 9 SCC 54, decided on 12.04.2013, however, another bench of three Hon’ble Judges of the Supreme Court, referring to the aforementioned views in *Santosh Devi* (supra) held as under :

“8. Since, the Court in Santosh Devi case (supra) actually intended to follow the principle in the case of salaried persons as laid in Sarla Verma's case (supra) and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.

9. In Sarla Verma case (supra), it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those

self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter.”
(emphasis supplied)

15. The divergence of opinion in *Reshma Kumari* (supra) and *Rajesh* (supra) was noticed by the Supreme Court in cases report as *Sanjay Verma v. Haryana Roadways* (2014) 3 SCC 210, *National Insurance Company Ltd. V. Pushpa & Ors.* (2015) 9 SCC 166 and *Shashikala V. Gangalakshamma* (2015) 9 SCC 150. The question of manner of addition of income of future prospects in the cases of those who are “self-employed” or working on a “fixed salary” was referred to a larger Bench by order dated 02.07.2014 in the case of *Pushpa* (supra), and again by order dated 13.03.2015 in the case of *Shashikala* (supra). The issue is yet to be finally determined on such references by a larger bench of the Supreme Court.

16. Against the above noted backdrop, a learned Single Judge of this Court, by order dated 12.01.2015 in MAC.APP.No.189/2014 (*HDFC Ergo General Insurance Co. Ltd. V. Smt. Lalta Devi & Ors.*) held that in view of the judicial hierarchical discipline, as explained in *Union of India & Ors. V. S.K. Kapoor* (2011) 4 SCC 589, the three Judge Bench decision in *Reshma Kumari* (supra), earlier in time in relation to *Rajesh* (supra), is to be presently treated as binding precedent, till such time the law on the subject of future prospects for those who are “self-employed” or engaged in gainful employment at a “fixed salary” is clarified by a

larger bench of the Supreme Court. The judgment in *V. Mekala* (supra), it be noted, was rendered by a bench of two Hon'ble Judges.

17. Following the view taken by the learned Single Judge in the case of *Lalta Devi* (supra), and in view of the fact that in the present case, the appellant himself pleaded that he was working at a fixed salary of ₹5,000/- per month and led evidence only to such effect, not showing in any manner that his salary was subject to any periodic increase, the contention that future prospects should have been taken into account by the Tribunal is rejected.

18. Coming to the question of disability, in *Raj Kumar V. Ajay Kumar and Anr.* (supra), the Supreme Court summarised the relevant principles (in para 19) as under :

“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.”

19. In *Raj Kumar V. Ajay Kumar* (supra), the court noted (in para 21) that the second schedule appended to MV Act, with reference to Section 163A, *inter alia*, refers to the first schedule under Workmen's Compensation Act, 1923 in the context of loss of earning capacity in cases of permanent total or partial disability, and observed (in para 16) thus:

“16. 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 Orthopaedic Surgeons, prepared by American Academy of Orthopaedic 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.”

(emphasis supplied)

20. It is clear from the evidence on record that what was assessed by the Medical Board in respect of the injuries suffered by the appellant and its effect is disability in relation to the affected limb and not in relation to the whole body or earning capacity. The best parameter to assess the consequent functional disablement or loss of earning capacity is the one available in the first schedule appended to the Workmen's Compensation Act, 1923. It is noted that according to items 20 and 21 of part-I of the said first schedule appended to the Workmen's Compensation Act, loss of earning capacity in the case of amputation below knee is stipulated as 50%. In this view of the matter, the assessment of the functional disability at 40% by the Tribunal was deficient. The appellant's contention in this regard is partially correct and it is held that the loss of future earning is to be assessed taking account of 50% functional disability.

21. On the question of award of compensation on account of conveyance and special diet, pain & suffering and loss of amenities, the grievance submitted is misplaced. Having regard to the nature of injuries suffered, their effect and the station in life of the appellant, as indeed the period for which he was totally incapacitated, the compensation awarded by the Tribunal under these heads is found to be just and proper. Noticeably, no formal proof about the actual expenditure on conveyance or special diet was adduced.

22. The submission that the award did not take care of the needs of artificial limb is factually incorrect. The Tribunal noted (in para 16) that the appellant would require artificial limb and its regular maintenance or

periodic replacement and awarded ₹1.25 lakhs on this score. In absence of any formal proof as to the expenditure, if required on the higher side, there is no case made out for any increased compensation on the subject.

23. In above view, the award of compensation for loss of earning for five months needs to be recomputed on the basis of minimum wages payable on ₹3,964/- per month. Further, the loss of future earnings also needs to be worked out afresh taking into account 50% functional disability.

24. Thus, the loss of earnings is calculated at (₹3964/- x 5) ₹19,820/-. The loss of future earnings is calculated at (₹3,964/- x 12 x 16 x 0.5) ₹3,80,544/-. The total increase in the award comes to ₹1,12,756/- raising it to ₹10,33,717/-, rounded off to ₹10,34,000/-.

25. This court finds the grievance as to the rate of interest awarded to be correct. In the given facts and circumstances wherein the appellant cannot be blamed for any delay in the adjudication of the claim petition, the rate of interest at 9% would have been just and proper and is now allowed. [*Municipal Corporation of Delhi, Delhi V. Association of Victims of Uphaar Tragedy and Ors.*, (2011) 14 SCC 481; *Surti Gupta V. United India Insurance Company and Ors.*, 2015 (3) SCALE 795; *Basappa V. T. Ramesh*, (2014) 10 SCC 789; *Kumari Kiran V. Sajjan Singh* (2015) 1 SCC 539 and *Syed Sadiq etc. V. Divisional Manager, United India Ins. Company* (2014) 2 SCC 735]

26. Thus, the appeal is partly accepted. The compensation awarded by the Tribunal in the impugned judgment is enhanced to ₹10,34,000/- (ten lakh thirty four thousand). The insurance company (the third

respondent) is liable to pay the said amount of compensation with interest @ 9% per annum from the date of filing of the petition before the Tribunal till realisation. Needless to add, the amount already paid in terms of the interim orders passed by this Court shall be adjusted. The award, as modified above, would be subject to the conditions imposed by the Tribunal in the impugned judgment for protecting the interest of the claimant. In case of any default on the part of the insurance company to abide by these directions, the appellant shall be at liberty to take out appropriate execution proceedings before the Tribunal.

27. The appeal stands disposed of with above observations/directions.

R.K. GAUBA
(JUDGE)

JANUARY 22, 2016/VLD