IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.06.2017

C O R A M

THE HONOURABLE Mr.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE Mr.JUSTICE M.GOVINDARAJ

Civil Miscellaneous Appeal No.1929 of 2016
C.M.P.No.14054 of 2016
Cross Objection No.57 of 2017

United India Insurance Company Ltd
Chennai 600 006. ... Appellant in CMA.No.1929/16
1st Respondent in
Cross Objection No.57 of 2017/
2nd Respondent

Vs

1. Ponniappan .. 1st Respondent in CMA.1929/16
/Cross-Objector/Petitioner

2. K.Jaganraj ... 2nd Respondent in
both CMA & Cross Obj/1st Respondent

Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the award and decree dated 15.04.2016, made in M.C.O.P.No.3949 of 2013, on the file of the Motor Accidents Claims Tribunal (II Court of Small Causes), Chennai.

For Appellant in C.M.A.1929/16 and 1st Respondent in Cross objection : Mr.A.Dhiraviyanathan

For Cross-Objector and R5 Respondent in CMA : Mr.Terry Chellaraja for Mr.V.Velu

For 2nd Respondent in CMA & Cross objection : No appearance

J U D G M E N T

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

Challenging the quantum of compensation awarded to the injured- claimant, M/s.United India Insurance Company Ltd, Chennai, has filed C.M.A.No.1929 of 2016.

2. Not satisfied with the quantum of compensation, the injured- claimant has filed Cross Objection, seeking enhancement.

3. In the accident, which occurred on 10.04.2013, involving a bicycle and two wheeler, bearing Registration No.TN19Y-9771, insured with the Insurance Company, the claimant sustained multiple grievous injuries all over the body. Contending that at the time of accident, he was a carpenter and earned Rs.20,000/- per month, the injured-claimant has filed M.C.O.P.No.3949 of 2013, on the file of the Motor Accidents Claims Tribunal (II Court of Small Causes), Chennai, for a sum of Rs.30,00,000/-. On evaluation of pleadings and evidence, both oral and documentary, the Claims Tribunal found that the rider of the two wheeler, bearing Registration No.TN19Y-9771, insured with M/s.United India Insurance Company Ltd., was negligent in causing the accident and quantified the compensation as Rs.12,68,000/-, with interest, at the rate of 7.5% per annum, from the date of claim, till deposit and apportioned the same as hereunder:-

Transportation, nourishment and Miscellaneous Expenditure	...	Rs.	50,000.00
Medical expenses	...	Rs.	2,75,000.00
Attender charges	...	Rs.	20,000.00
Disability	...	Rs.	2,25,000.00
Loss of earning during the period of treatment	...	Rs.	13,000.00
Loss of future earning capacity	...	Rs.	6,14,250.00
Pain and suffering	...	Rs.	50,000.00
Loss of Amenities	...	Rs.	20,000.00
		Rs.	12,67,250.00

Rounded off to Rs.12,68,000/-.

4. Mr.A.Dhiraviyanathan, learned counsel appearing for the appellant-Insurance Company submitted that PW.2, Doctor, has not assessed the disability, for the wholy body and thefore, the Tribunal ought not to have applied the mutliplier method for assessment of loss of future earning. He further submitted that the Claims Tribunal, having assessed the functional disability as 35%, and having awarded a sum of Rs.6,14,250/-, has erred in awarding a higher sum of Rs.2,25,000/- towards disability, by taking the extent of disability as 75%. He further submitted that PW.2, Doctor, in his cross-examination, has admitted that he has not treated the injured claimant and also not produced the report of Radiologist, along with Check X-ray film, Ex.P13.

5. Learned counsel for the appellant-Insurance Company submitted that compensation of Rs.50,000/- awarded towards transportation and extra nourishment, is on the higher side. Similarly, compensation of Rs.20,000/- awarded under the head, loss of amenities, is superfluous, considering the fact that the Tribunal has already awarded compensation under the heads, disability and loss of earning capacity.

6. Mr.Terry Chellaraja, learned counsel for the cross objector/claimant submitted that at the time of accident, the injured-claimant was working as carpenter and earned Rs.20,000/- p.m., but in the absence of documentary proof, the Tribunal has fixed his notional monthly income as Rs.6,500/- only. He further submitted that the Tribunal ought not to have reduced the functional disability from 95% to 70%. He also submitted that compensation awarded under the heads, medical expenses, transport expenses, extra nourishments, future medical expenses, pain and sufferings, loss of amenities and attendant charges, is on the lower side and hence, sought for enhancement.

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

7. Perusal of Ex.P3 - Discharge Summary, shows that for the injuries sustained in the accident, which took place on 10.04.2013, the claimant has taken inpatient treatment from 10.04.2013 to 20.04.2013. He was diagnosed for Traumatic Brain injury. Discharge Summary further shows that right frontal thin SDH with Sah with tentorial Haemorrhage with left frontal and parietal bone fractures and right zygomatic process fracture with right fronto - temporal haemorrhagic contusion and midline shift to left (9.2 MM) and mass effect. Left aspiration pneumonia was resolved. Thereafter, the claimant was taken to Indira Gandhi General Hospital, Pondicherry and has taken inpatient treatment from 20.04.2013 to 05.05.2013.

8. PW.2, Doctor, who clinically examined the claimant, has deposed that the claimant had sustained head and brain injury, as follows:

CTB: (1) # (L) Frontal Bone
(2) # (L) Partial Bone
(3) Tentorial Haemotage
(4) SAH - SDH. Mid Line Shift 9.2 MM
(5) FR. Temporal Haem. Contusion Brain. Craniotomy done.
(6) # (R) Zygoma
(7) # (L) Mastoid
(8) (L) Ear Bleeding
(9) (R) Hemipersis. (GGH, Pondicherry)
CTB: Oedema Tentorium. (18.04.2013)."

9. PW.2, Doctor, upon considering the nature of injuries, has assessed the partial and permanent disability at 95%, as follows:

"Disability due to the above injuries:

(1) Post Traumatic Hemi Peresis. (R) Hand 3/5. (R) Leg 4/5. Requiring other help. Speech affected. Cannot work as Carpenter - For this 70% Partial and Permanent Disability Assed.

(2) # (L) Mastoid bone, bleeding (L) Ear, T.M. Fibrosed. HOH, Watering from (L) Ear. - For this 20% Partial and Permanent Disability Assed.

(3) Malunited # (R) Zygoma, Fibroses TM joint. Chewing difficult - For this 5% Partial and Permanent Disability Assed."

10. Oral testimony of PW.2, Doctor, is duly supported by Ex.P3 - Discharge Summary [Be Well Hospital, Pondicherry, from 10.04.2013 to 20.04.2013], Ex.P4 - Treatment Summary [Be Well Hospital, Pondicherry], Ex.P9 - Discharge Summary [Indira Gandhi GG Hospital, Pondicherry, from 20.04.2013 to 05.05.2013], Ex.P12 - CT Brain Report, Ex.P13 - X-Ray - Skull (AP & Lat.) and Ex.P14 - Disability Certificate issued by PW.2, Doctor. Evidence adduced by PW.2, Doctor, on the assessment and extent of disability, has been assessed and co-related to the loss of earning capacity. However, the Claims Tribunal has reduced the extent of functional disablement to 35% and fixed partial permanent disablement as 75%.

11. Though injuries are grievous, assessment made by the Tribunal at 75%, towards permanent disability, is unacceptable. Considering the nature of injuries, evidence, both oral and documentary, the same is reduced to 40%. Fixing the disability as 75%, the Claims Tribunal has awarded Rs.2,25,000/- towards permanent disability. In view of the reduction, following the decision of this Court National Insurance Co. Ltd., v. G.Ramesh

reported in 2013 (2) TNMAC 583, we are inclined to award Rs.3,000/- per percentage of disability and compute the compensation as Rs.1,20,000/- (Rs.3,000/- x 40%), towards permanent disablement.

12. Though the injured-claimant has stated that at the time of accident, he was a Carpenter and earned Rs.20,000/- per month, in the absence of any evidence, the Tribunal has determined his monthly income as Rs.6,500/- and arrived at the loss of future earning as Rs.6,14,250/- [Rs.9,750/- (6,500/- x 50% towards future prospects) x 12 x 15 x 35% functional disability].

13. In Sri Ramachandrappa Vs. The Manager, Royal Sundaram Alliance Insurance Company Ltd., reported in 2011 (2) TNMAC 190 SC, though a sum of Rs.4,500/- has been claimed as the monthly wages for the deceased, stated to be a coolie, the claims tribunal has taken Rs.3,000/- for the purpose of computing the loss of contribution to the family. However, when the matter was taken up on appeal, the Hon'ble Supreme Court having regard to the wages of a labourer, during the relevant period (2004 - between Rs.100 to Rs.150/- per day) found fault with the tribunal, for reducing the claim from Rs.4,500/- to Rs.3,000/- and determined the income as Rs.4,500/-.

14. In Syed Sadiq etc. Vs. Division Manager, United India Insurance Company Limited reported in 2014 (1) TN MAC 459, the Hon'ble Supreme Court, has determined Rs.6,500/- as the monthly income of a vegetable vendor, who sustained injuries in the accident, which occurred in February 2008. In the case on hand, the accident had occurred in the year 2013. Hence, this Court is inclined to fix the monthly income of the injured-claimant at Rs.7,500/-.

15. As regards nature of avocation, whether a Loadman or Mason as Carpenter, as the case may be, undoubtedly, it is purely a physical job, where hands and feet are the tools. Unless the physical frame is strong, a loadman or carpenter or mason or any skilled labourer, as the case may be, would find it difficult to perform his work.

16. At the time of accident, injured was aged 40 years. Income earned by a skilled person, or even a labourer, cannot be static, considering the price index, inflation and such other factors, that are taken into consideration, for computing the compensation. Moreover, periodical revision of wages, is being done by the Government, even for daily rated employees. Having regard to the avocation of the respondent/claimant, Carpenter and for the reasons, stated supra, this Court is not inclined to accept the contention of the appellant-Insurance Company and

reduce the income fixed by the claimant. On the other hand, for the reasons stated, this Court is inclined to fix the monthly income as Rs.7,500/-.

17. On the aspect that no document has been produced to prove avocation, this Court deems it fit to consider a decision in Valli v. Tamil Nadu State Transport Corporation, Vellore reported in 2010 (2) TNMAC 154, wherein, this Court held that,

> "Though the deceased was stated to be a mason, no document has been filed to prove the same. However, this Court is of the view that to expect documentary proof from small traders, self-employed skilled workers, construction workers, cannot be justified. All construction workers are not engaged by contractors or builders and during the relevant period, there was no chance for a skilled worker, to register himself with any agency or board."

18. As regards application of multiplier method for the purpose of loss of future earning, PW.2, Doctor, has assessed the extent of disablement as 95%. On the issue, as to whether, the Claims Tribunal has co-related, the extent of disablement and as to how, the same would affect the loss of earning capacity of the injured-claimant, a Carpenter, this Court is inclined to consider few decisions, on this aspect,

(i) In Yadava Kumar v. National Insurance Co. Ltd., reported in 2010 (10) SCC 341, a painter sustained fracture of right limb and consequential disablement. The Doctor assessed 33% disability, in respect of right upper limb, 21% in left upper limb and on the whole body 20%. Due to the injuries sustained, he was not able to engage himself, as painter, as before and thus, lost his earning capacity. Despite his plea and evidence, the Court below refused to award any amount towards loss of future earnings. In the abovesaid circumstances, the Hon'ble Supreme Court held that,

> "While assessing compensation in accident cases, the High Court or the Tribunal must take a reasonably compassionate view of things. It cannot be disputed that the appellant being a painter has to earn his livelihood by virtue of physical work. The nature of injuries, amply demonstrate that carrying those injuries he is bound to suffer loss of earning capacity as a painter and a consequential loss of income is the natural outcome. The courts are statutorily charged with a responsibility of fixing a "just compensation". It is obviously true that determination of a just compensation cannot be equated to a bonanza. At the

same time the concept of "just compensation" obviously suggests application of fair and equitable principles and a reasonable approach on the part of the tribunals and the courts. Both the courts and the tribunals in the matter of this exercise should be guided by principles of good conscience so that the ultimate result becomes just and equitable. (Paras 14, 15, 18 and 20)

The High Court and the Tribunal must realise that there is a distinction between compensation and damages. The expression compensation may include a claim for damages but compensation is more comprehensive. Normally damages are given for an injury which is suffered, whereas compensation stands on a slightly higher footing. It is given for the atonement of injury caused and the intention behind grant of compensation is to put back the injured party as far as possible in the same position, as if the injury has not taken place, by way of grant of pecuniary relief. Thus, in the matter of computation of compensation, the approach will be slightly more broad based than what is done in the matter of assessment of damages. At the same time it is true that there cannot be any rigid or mathematical precision in the matter of determination of compensation. (Para 17)"

(ii) In B.T.Krishnappa v. D.M., United India Insurance Co. Ltd., reported in 2010 ACJ 1971, the claimant sustained compound fractures in the tibia and fibula bones, injuries in the head and other parts of the body. He was hospitalised for 14 days and continued his treatment for six months. The injured was a Mason, aged 50 years. The Doctor, who examined the injured, opined that the injured suffered 48% disability and cannot do the work, as Mason or any other construction work. Though the Tribunal has accepted 48% disablement, but assessed the loss of earning capacity only at 20% and awarded Rs.1,55,000/-. The High Court accepted the Tribunal's assessment of the whole body disablement at 20% and further observed that the compensation awarded under the heads, loss of amenities, enjoyment of life and loss of earning during the period of hospitalistion, were on the lower side. The High Court allowed a further sum of Rs.34,000/- for future medical expenses, but did not deal with the aspect of future loss of earning. By observing that the High Court's order was starkly lacking in any details, on assessment of compensation, under the heads, loss of amenities and enjoyment of life and loss of earning during the period of hospitalisation and that the injuries, which resulted in irreversible damage to his right leg, would pose difficulties for him, in carrying out his avocation, as a mason and taking note of the decisions in Concord India Insurance Co. Ltd., v. Nirmala Devi [1980 ACJ 55 (SC)], Divisional Controller, Karnataka State Road Transport Corporation v. Mahadeva Shetty [2003 ACJ 1775 (SC)] and R.D.Hattangadi v. Pest Control (India) Pvt. Ltd., [1995 ACJ 366 (SC)], the Hon'ble Supreme Court remanded the matter to the High Court, with an expectation that the High Court would consider the case of enhancement, keeping in mind the factual aspects and in the light of the views expressed by the Apex Court in various decisions. The judgments referred to in B.T.Krishnappa's case (cited supra), at Paragraphs 15 to 19, are reproduced hereunder:

> "…..This Court in Concord of India Insurance Co. Ltd., v. Nirmala Devi, 1980 ACJ 55 (SC), has observed that:
>
> "….The jurisprudence of compensation for motor accidents must develop in the direction of no fault liability and the determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales……..." [at page 56, para 2]
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> 16. In the case of Divisional Controller, Karnataka State Road Trans. Corpn. v. Mahadeva Shetty, 2003 ACJ 1775 (SC), where the claimant was also a mason, this court held that:
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> "...It has to be borne in mind that compensation for loss of limb or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance to the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for the mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life which has been curtailed because of physical handicap. The normal expectation of life is impaired..." [at page 1780, para 15]
>
> 17. Long expectation of life is connected with earning capacity. If earning capacity is reduced, which is the case in the present situation, that impacts the life expectancy as well.
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> 18. Therefore, while fixing compensation in cases of injury affecting earning capacity the court must remember:
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> "...No amount of compensation can restore the physical frame of the appellant. That is why

it has been said by courts that whenever any amount is determined as the compensation payable for any injury suffered during an accident, the object is to compensate such injury 'so far as money can compensate'; because it is impossible to equate the money with the human suffering or personal deprivations. Money cannot (renew a broken and shattered physical frame." [See R.D. Hattangadi v. Pest Control (India) Pvt. Ltd., 1995 ACJ 366 (SC), at page 370, para 10].

19. Further, the court in the same case also held that:

"In its very nature whenever a Tribunal or a court is required to fix the amount of compensation in cases of accident, it involves some guesswork, some hypothetical consideration, some amount of sympathy linked with the nature of the disability caused. But all the aforesaid elements have to be viewed with objective standards." [at page 370, para 12]”

(iii) In Rajkumar v. Ajay Kumar reported in 2011 (1) SCC 343, the Hon'ble Supreme Court considered the 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 terns 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 ability (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, this Court deems it fit to extract paragraphs 4 to 17, in Raj Kumar's case, 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 terns 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 ability (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 12 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."

19. PW.2, Doctor, has assessed the functional disablement as 95% and Tribunal has fixed the same, as 35%. Taking note of the guidelines in Rajkumar's case (cited supra) and the evidence on record, we are not inclined to accept the decision of the appellant-Insurance Company and that there cannot be any further reduction, in the percentage of functional disability. After fixing the monthly income at Rs.7,500/-, loss of earning capacity is now estimated as Rs.7,08,750/- [Rs.11,250/- (Rs.7,500/- + Rs.3,750/-) x 12 x 15 x 35% Functional Disability).

20. The claimant has taken treatment, in two different hospitals, in two different spells, for nearly two months. Therefore, the Claims Tribunal has awarded loss of income for nearly two months. Considering the nature of injuries and Ex.P10

- Continuous Treatment Record, this Court is of the view that the injured-claimant would have taken outpatient treatment atleast for another three months and therefore, this Court is inclined to award Rs.37,500/-, taking the monthly income of Rs.7,500/- for five months.

21. Compensation of Rs.50,000/- awarded towards transportation, extra nourishment and miscellaneous expenditure is just and reasonable. However, compensation of Rs.20,000/- awarded towards attender charges is less and the same is enhanced to Rs.25,000/-. Considering the nature of injuries and CT Brain Report, marked as Ex.P12, the compensation of Rs.50,000/-, awarded under the head, pain and suffering, is less and the same is enhanced to Rs.75,000/-. Similarly, compensation of Rs.20,000/- towards loss of amenities is less. Loss of amenities as per the Full Bench decision of this Court in Cholan Roadways Corporation Ltd., Kumbakonnam vs. Ahmed Thambi and others reported in 2006 (4) CTC 433, is as follows:

> "deprivation of the ordinary experiences and enjoyment of life and includes loss of the ability to walk or see, loss of a limb or its use, loss of congenial employment, loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function",

In view of the aforesaid decision, this Court is inclined to enhance the compensation to Rs.50,000/-, under the head, loss of amenities.

22. In view of the reworking, the award of the Tribunal is modified and the quantum of compensation is enhanced to Rs.13,19,000/-, with interest at the rate of 7.5% p.a., from the date of claim till deposit, as apportioned hereunder:-

Transport & Nutrition	...	Rs.	50,000/-
Medical expenses	...	Rs.	2,75,000/-
Attender charges	...	Rs.	25,000/-
Disability	...	Rs.	1,20,000/-
Loss of income	...	Rs.	37,500/-
Loss of earning capacity	...	Rs.	7,08,750/-
Pain & Suffering	...	Rs.	50,000/-
Amenities	...	Rs.	50,000/-
Damages	...	Rs.	2,500/-
		Rs.13,18,750/-	

Rounded off to Rs.13,19,000/-

Amount awarded by the Tribunal	...	Rs.12,68,000/-
Amount now determined by this Court	...	Rs.13,19,000/-
Amount now enhanced	Rs.	51,000/-

23. In the light of the reworking, Civil Miscellaneous Appeal No.1929 of 2016 is dismissed and Cross Objection No.57 of 2017, is allowed, as indicated above. M/s.United India Insurance Co. Ltd., is directed to deposit the amount, now determined by this Court, less the amount already deposited, with proportionate accrued interests and costs, to the credit of M.C.O.P.No.3949 of 2013, on the file of the Motor Accidents Claims Tribunal (II Court of Small Causes), Chennai, within a period of four weeks, from the date of receipt of a copy of this order. On such deposit being made, the 1st respondent/claimant is permitted to withdraw the same, by making necessary applications before the Tribunal. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

mvs/skm

To

The Motor Accidents Claims Tribunal
(IICourt of Small Causes), Chennai.

+1cc to Mr.A.Dhiraviyanathan, Advocate Sr. 44353
+1cc to Mr.V.Velu, Advocate Sr. 44462

Civil Miscellaneous Appeal No.1929 of 2016
C.M.P.No.14054 of 2016
Cross Objection No.57 of 2017

RSI(CO)
VR(22/09/2017)