

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.02.2017

CORAM

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

C.M.A.No.230 of 2016
C.M.P.Nos.1905 and 19923 of 2016

Reliance General Insurance Co. Ltd.,
Salem. ... Appellant

-vs-

1. Gopalakrishnan
2. Suresh ... Respondents

Appeal against the judgment and decree, dated 07.07.2015, passed in M.C.O.P.No.334 of 2013, on the file of Motor Accident Claims Tribunal, Sub Court, Rasipuram.

For appellant : Mr.S.Arun Kumar

For 1st respondent : MA.P.Thangavel

JUDGMENT

(Judgement of this Court was made by S.MANIKUMAR, J.)

Quantum of compensation is the only challenge in this Civil

Miscellaneous Appeal.

2. Arising out of an accident, on 19.03.2011, Mr.Gopalakrishnan, claiming to be a loadman, aged about 21 years, has stated that he has sustained the following injuries,

- (i) Fracture in neck right femur & shaft
- (ii) Fracture in ankle comminuted medial malleolus (right)
- (iii) Fracture in shaft left femur
- (iv) Fracture in BB left leg
- (v) Fracture in lower pole of left patella

He has filed M.C.O.P.No.334 of 2013, before the Motor Accident Claims Tribunal, Sub Court, Rasipuram, claiming compensation of Rs.15,00,000/-. Before the Claims Tribunal, he has contended that immediately after the accident, he was given First Aid in the Government Hospital, Pedathi and thereafter, taken to Gokulam Hospital, Salem and treated as inpatient for nearly six months. He has also contended that after discharge, he had taken treatment, as outpatient.

3. Before the Claims Tribunal, the injured has contended that at the time of accident, he was aged 21 years and working as loadman in Eicher Tata 1109 vehicle, in the accident and earned Rs.15,000/- per month. According to him, due to the displaced fracture of right femur

neck, he is unable to walk, stand, lift weight and to do any manual work, as before. He is incapacitated to do any work and thus, permanently disabled. He has claimed compensation of Rs.15,00,000/- for permanent disablement, and loss of earning.

4. Before the Claims Tribunal, the 1st respondent-injured/claimant examined himself as PW.1 and PW.2 is the Doctor, who issued the disability certificate. Apart from other documents, the 1st respondent/claimant has marked Ex.P4 - Wound Certificate, Ex.P5 (Series) - Discharge Summary, Ex.P6 (Series) - Medical Bills, Ex.P7 (Series) - Photographs, Ex.P8 - Percentage of Disability Certificate issued by the District Disabled Rehabilitation Officer, Ex.P9 (Series) - X-Rays and Ex.P10 - Disability Certificate.

5. Upon evaluation of evidence, the Claims Tribunal has awarded Rs.14,86,500/- with interest, at the rate of 7.5% per annum, from the date of claim, till the date of realisation.

6. Mr.S.Arun Kumar, learned counsel for the appellant submitted that as per the medical theory, disability would set in, after a considerable period, from the date of accident and not immediately. He further

submitted that in the case on hand, when the accident occurred on 19.03.2011, disability is said to have been assessed by the District Disabled and Rehabilitation Officer, on 12.12.2011, during the healing period and Ex.P8 - Certificate has been issued by the said Officer, fixing the percentage of physical disability as 80%. He further submitted that the Officer, who certified the extent of disability was not examined, when Ex.P8 was marked and thus, there was no opportunity to cross-examine him.

7. Learend counsel for the appellant further submitted that on the basis of the said extent of disablement, Ex.P10, Disability Certificate, has been issued by PW.2, Consultant and Orthopaedic Surgeon. In the abovesaid circumstances, he submitted that the Tribunal ought to have determined the extent of disablement as 80% and computed the loss of future earning capacity. He further submitted that the Tribunal has erred in awarding interest for future loss of earning capacity.

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

8. At the time of accident, the respondent/claimant was stated to

be a Loadman, aged about 21 years. Having regard to the avocation pleaded, the Claims Tribunal fixed the monthly income of the injured, as Rs.5,000/-. By observing that the nature of work of the injured mainly depends on active movement of the lower limbs and due to fracture of femur bones, both left and right and implants fixed and that the injured would be prevented from carrying on his work, as loadman, due to 80% disablement assessed by PW.2, Doctor, the Claims Tribunal came to the conclusion that the injury suffered in the accident and the consequential disablement would certainly affect the loss of earning capacity of the injured and hence, decided to apply multiplier method. While arriving at the abovesaid conclusion, the Claims Tribunal has considered a decisions in **Nagarajappa v. The Divisional Manager, Oriental Insurance Company Ltd.**, reported in **2011 ACJ 1434** and **Tamil Kumaran v. Senthilkumar and others** reported in **2011 (1) TNMAC 39 (DB)**. The Claims Tribunal has determined the loss of earning capacity of the injured, by adopting '18' multiplier, as Rs.8,64,000/- ($\text{Rs.5,000/-} \times 12 \times 18 \times 80\%$). Upon perusal of Ex.P5 - Discharge Summary and other medical records, the Claims Tribunal has found that due to the fracture of femur bone, the respondent/claimant would not have attended his work, for a period of six months and accordingly, awarded Rs.30,000/- towards loss of income.

9. As the injuries were grievous in nature and during the first spell of hospitalisation in Sri Gokulam Hospital, Salem, for 25 days, ie., between 20.03.2011 and 15.04.2011, a surgery (ORIF with plate fixation) has been performed and having regard to the fact that there was reduction in the rotation and flex, and the necessity to undergo a surgery for removal, the Claims Tribunal has awarded Rs.75,000/- for pain and suffering. While considering the difficulties in day to day activities, the Claims Tribunal has awarded Rs.75,000/- towards loss of amenities. On the basis of Ex.P6 (series) - medical bills, the Claims Tribunal has awarded Rs.3,12,000/- for medical expenses. Considering the necessity to undergo a surgery for removal of plates and screws, a sum of Rs.75,000/- has been awarded towards future medical expenses. In addition to the above, the Claims Tribunal has awarded Rs.30,000/- for extra nourishment and Rs.25,000/- for transportation. Altogether, the Claims Tribunal has awarded Rs.14,86,500/- with interest, at the rate of 7.5% per annum.

10. PW.2, Doctor, who clinically examined the respondent/claimant, with reference to the medical records, has deposed that the right hip bone in the joint was broken and that a surgery was performed. During clinical examination, he has further observed that the screws were intact. He has further deposed that the femur bones were

malunited, though it was fitted with plates and screws and the function in the right leg was very much affected. Petalla bone in the left elbow was not united, due to which, movement was restricted upto 90 Degrees. On the basis of the above observation, he has opined that the injured cannot walk and do any work and he needs an attendant to do his day-to-day activities. He has further deposed that the injured has to depend only on the wheel chair, for rest of his life time. It is also his opinion that for the removal of plates, another surgery has to be performed. He has assessed the disablement as 80% and issued Ex.P10 - Disability Certificate. Ex.P9 (series) - X-Rays have been taken, prior to the assessment of disability.

11. Although creditability of Ex.P8 - Certificate issued by the District Disabled and Rehabilitation Officer, is questioned, on the grounds of non-examination of the said officer and submissions were made that the disability assessed before the healing period, should not be taken for computing the loss of earning capacity, this Court is not inclined to accept the said contention, for the reason that competence of the said officer is not disputed.

12. Perusal of the entry in Ex.P8 - Certificate shows that during the financial year 2013-14, the respondent/claimant has been given a tri-cycle

on 28.10.2014, thereby, evidencing that he continued to be incapacitated. At this juncture, it is to be noted that Tri-cycle given to a differently abled person, can be operated only with hands. Ex.P10 - Disability Certificate has been issued on 04.06.2015, by PW.2, Doctor and the said certificate is extracted hereunder:

He gives h/o. RTA and sustained injuries to his (R) Hip & (R) Thigh & (L) Thigh & (L) leg & (L) Knee, (R) Ankle on 19.03.2011 for which he was done surgery in a private hospital at Salem.

I had seen the Wound Certificate & Discharge Summary.

X ray Pelvis with both Hips AP view taken on 04.06.2015 shows non union of neck of femur (R) with implant situ with erosion of acetabulum with osteoporosis.

X ray (R) thigh AP & Lat view taken on shows malunited fracture shaft (R) femur M/3rd with implant insitu.

X ray (R) thigh AP & Lat view taken shows malunion of medial malleolous with bone ankylosis with implant in situ.

X ray (L) thigh AP & Lat view taken on shows malunited fracture shaft (L) with implant insitu.

X ray (L) Leg AP & Lat view taken shows malunited fracture of both bones (L) with angulation with implant insitu.

X Ray (L) Knee AP & Lat view shows non of patella.

He C/o. pain in his (L) & (R) Hip.(L) & (R) Thigh (L) & (R) Knee, (L) Leg & (R) Ankle. He is unable to walk. He is unable to do any works.

He is using wheel chair only for moving.

Movements at (L) & (R) Hip & (L) & (R) Knee are restricted grossly and painful.

(R) Knee ROM is 0" to 20" only & (L) Knee ROM - greater than 90". (R) Ankle & (L) Foot movements are fixed in equines and adduction & inversion. Sitting crosslegged & squatting is not at all possible. He has got severe atrophy of (L) & (R) quadriceps & calf muscles.

He has exposed bone over (R) ankle region with non healing wound.

He requires another surgery for removal of the protruding implants.

So he is unable to continue his work as loadman.

So I am of the opinion tht he has got a disability of 80% (Eighty only) and is permanent.

Sd/-

Dr.R.Ravi, MBBS, D.Ortho.,
Consultant Orthopaedic Surgeon.

13. Oral testimony of PW.2, Doctor, is duly supported by Ex.P8 - Certificate issued by the District Disabled and Rehabilitation Officer and Ex.P10 - Disability Certificate issued by PW.2, Doctor. Evidence adduced by PW.2, Doctor, on the assessment and extent of disability, has been properly assessed and co-related to loss of earning capacity. Determination of extent of disablement cannot be said to be perverse, warranting interference.

14. Though Mr.S.Arun Kumar, learned counsel for the appellant-Insurance Company submitted that in the absence of any proof, the Claims Tribunal has erred in determining the monthly income of the respondent/claimant, this Court is not inclined to accept the same, for the reason that 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/-.

15. As regards the nature of avocation, whether a Loadman or Mason, 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 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 21 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, a loadman and for the reasons, stated supra, this Court is not inclined to reduce the income fixed by the claimant.

17. On the aspect that no document has been produced, this Court deems it fit to consider a decision of this Court 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 the application of multiplier method for the purpose of loss of future earning, PW.2, Doctor, has assessed the extent of disablement only at 80%. On the issue, as to whether, the Claims Tribunal has co-related the injuries, extent of disablement and as to how, the same would affect the loss of earning capacity of the respondent/claimant, a loadman, the Claims Tribunal has clearly observed that the active movement of lower limbs was reduced and if there was a disablement in both the left and right leg, loss of earning capacity to a loadman, would be inevitable. Useful reference can be made to few decisions,

(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 hospitalisation, 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]

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:

"...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.

18. Therefore, while fixing compensation in cases of injury affecting earning capacity the court must remember:

"...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 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 terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of

course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in Arvind Kumar Mishra v. New India Assurance Co.Ltd. - 2010(10) SCALE 298 and Yadava Kumar v. D.M., National Insurance Co. Ltd. - 2010 (8) SCALE 567).

.....

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood."

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 terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on

appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this court in **Arvind Kumar Mishra v. New India Assurance Co.Ltd. - 2010(10) SCALE 298** and **Yadava Kumar v. D.M., National Insurance Co. Ltd. - 2010 (8) SCALE 567**).

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 disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to

award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. 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 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 : (27000×17) : 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 : (42000×18) : 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. On the quantum of compensation of Rs.75,000/- awarded under the head, pain and suffering and a further compensation of Rs.75,000/- under the head, loss of amenities, this Court deems it fit to extract the diagnosis and summary of the discharge summaries, marked as Ex.P5, as follows:

SRI GOKULAM HOSPITAL
DISCHARGE SUMMARY

Ad. Dt: 20.03.2011

Dis.Dt 15.04.2011

DIAGNOSIS:

- (i) # NECK RT. FEMUR & SHAFT
- (ii) # ANKLE COMMINUTED MEDIAL MALLEOLUS (RT.)
- (iii) # SHAFT LEFT FEMUR
- (iv) # BB LEFT LEG
- (v) # LOWER POLE OF LEFT PATELLA

SUMMARY:

RTA on 19.03.2011. Patient initially treated at Bangalore.

O/E:

Patient conscious, febrile,

Oriented, Pallor (+), not dyspnoeic

CVS - SIS2 (+), RS - BAC (+),

P/A - Soft, BP - 110/60 mmHg,

PR - 90/min,

L/E:

1. Swelling + Deformity + Tenderness over (R) thigh m/3.
2. Swelling + Deformity + Tenderness over (L) thigh m/3.
3. Tenderness over (R) Hip.
4. Swelling + Deformity on (R) leg m/3.
5. Swelling + Deformity on (L) leg m/3.
6. Crush injury (R) Ankle and foot exposing the lacerated muscles, tendons and deeper structure over medial aspect.
7. 4 x 3 x 2cm laceration (L) leg m/3 leg.

SRI GOKULAM HOSPITAL

DISCHARGE SUMMARY

Ad. Dt: 02.05.2011

Dis.Dt 10.05.2011

DIAGNOSIS:

POST TRAUMATIC RAW AREA / SSG DONE.

SUMMARY:

21 years old male patient a came of post traumatic raw area (Rt) ankle exposing lower end of tibia - devoid of periosteum of raw area (Lt) leg posterior aspect (Pop fossa and leg). Had Bil. fracture fixed with K nailing and (R) neck of femur - fixed during the previous admission.

19. From the above, it is clear that the injured has sustained grievous injuries. Pain is one, which is experienced momentarily, but it may continue even for a longer period, depending upon the gravity and situs of the injury, whereas, suffering is loss of happiness, on account of the same.

Pain has no difference between Rich and Raff. Hence, the compensation awarded towards pain and suffering and loss of amenities, is just and reasonable.

20. Compensation of Rs.3,12,500/- awarded by the Tribunal is supported by Ex.P6 (Series) - Medical Bills. There is sufficient evidence that the respondent/claimant may have to incur considerable amount, towards future medical expenses, as the plates and screws intact, have to be removed in future and hence, compensation awarded under the said head, cannot be said to be excessive. However, the Hon'ble Apex Court in **Nagappa v. Gurudayal Singh**, reported in **2003 (6) SCC 274**, held that interest cannot be levied on future medical expenses or future transportation and hence, the respondent/claimant is not entitled to any interest on the award towards future medical expenses.

21. In the light of the discussion and decisions considered, this appeal is partly allowed, deleting the interest awarded to future medical expenses. Thus, deducting the amount already deposited and the statutory deposit of Rs.25,000/-, the Reliance General Insurance Co. Ltd., Salem, is directed to deposit the balance award amount, with proportionate accrued interest at the rate of 7.5% on all heads, except

interest on future medical expenses of Rs.75,000/-, within a period of six weeks, from the date of receipt of a copy of this order. Pursuant to the deposit, the claimant is permitted to withdraw the entire amount with interest and costs, by making necessary application before the Tribunal. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Index : Yes/No
Internet : Yes/No

(S.M.K.,J.) (M.G.R.,J.)
01.12.2015

skm

To

The Motor Accident Claims Tribunal,
Sub Court, Rasipuram.

S.MANIKUMAR, J.
AND
M.GOVINDARAJ, J.

skm

C.M.A.No.230 of 2016

23.02.2017