

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

Date of Decision: March 03, 2017

+ **MAC.APP. 487/2008**

DINESH SAINI Appellant

Through: Ms. Aruna Mehta, Advocate

versus

DEVASHISH GHOSH & ORS.Respondents

Through: Mr. Shoumik Mazumdar,
Advocate for Mr. Pankaj Seth,
Advocate for respondents No.2 &
3

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

% **JUDGMENT**
(ORAL)

Impugned Award of 3rd March, 2008 grants compensation of ₹3,55,180/- with interest at the rate of 7% to appellant, who had sustained grievous injuries in a road accident on 20th July, 2004. The facts are already noted in impugned Award and so, need no reproduction. Suffice to note that appellant, a driver by profession, aged about 24 years, was driving Maruti Van on the day of accident in question and when he reached near Atta Chowk, Sector 27, Noida, his vehicle was hit by a Maruti Zen, which came from left side road. Apart from the evidence of appellant-Claimant, there is evidence of eye-witness-Sandeep Sharma

(PW-3) and *Dr.Rama Kant Gupta (PW-6)*, who has proved the Disability Certificate (PW6/1) of appellant indicating that due to injuries suffered in this accident, appellant has sustained 30% permanent disability. No evidence was led by respondents. On the basis of evidence on record, learned Tribunal has rendered impugned Award. The breakup of the compensation granted is as under: -

1.	Medical Bills	₹67,000/-
2.	Loss of earning	₹17,400/-
3.	Disability	₹2,72,000/-
4.	Special diet, conveyance and attendant charges	₹21,000/-
5.	Pain & Sufferings	₹50,000/-
6.	Loss of amenities of life	₹40,000/-
7.	Marriage prospects	₹40,000/-
Total		₹5,07,400/-

Out of the total compensation of ₹5,07,400/-, after deducting 30% towards contributory negligence, the net compensation awarded is ₹3,55,180/-.

In this appeal, to seek enhancement of compensation, learned counsel for appellant submits that no contributory negligence can be attributed to appellant because when the instant accident had taken place, appellant's vehicle had already crossed the crossing and the vehicle driven by first respondent had hit appellant's vehicle on the left rear side and so, the finding in impugned Award of appellant being negligent to the extent of 30% needs to be set aside and the quantum of compensation granted ought to be enhanced. To assert so, learned counsel for appellant

points out that the plea of contributory negligence was not taken by respondent-owner and Insurer in the written statement and so, this plea is not available to them and in a case where a vehicle was going on the main road and another vehicle coming from side road hits the vehicle going on the main road, then no contributory negligence can be attributed to the driver of vehicle going on the main road. To submit so, reliance is placed upon a decision of a co-ordinate Bench of this Court in *Sudha Nangia v. Ibrahim and Others*, 1993 ACJ 1290 and *Pramod Kumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak and Others*, 2002 ACJ 1720. Attention of this Court is drawn to Rule 9 of the *Central Motor Vehicles Rules, 1989* to point out that a vehicle coming from the side road has to give way to the traffic on the main road at a road junction.

It is next submitted by learned counsel for appellant that appellant has been erroneously considered as an unskilled worker whereas he was a skilled driver as he was holding a valid driving licence (*Ex.PW1/5*) for Light Motor Vehicle (LMV). It is further pointed out by appellant's counsel that after this accident, appellant is unable to drive any vehicle because of restricted neck movement and it is so evident from evidence of *Dr. Rama Kant Gupta (PW-6)*, who has categorically deposed that appellant can do other work which do not involve neck movement and so, appellant is selling vegetables. Reliance is placed upon Supreme Court's decision in *Pratap Narain Singh Deo v. Shrinivas Sabata and Another*, AIR 1976 SC 222 to submit that due to loss of neck movement, the disability of appellant-Claimant ought to be taken as 100%. Thus, it is submitted that '*loss of earning*' ought to be taken to be atleast 50% and

not 30%. Lastly, it is submitted that compensation granted for '*pain and sufferings*' is on lower side and it needs to be suitably enhanced from ₹50,000/- to ₹1 lac at least. To assert so, reliance is placed upon Supreme Court's decisions in *Laxman v. Divisional Manager, Oriental Insurance Co. Ltd. and Another*, 2012 ACJ 191 and *Rekha Jain v. National Insurance Co. Ltd.*, 2013 ACJ 2161.

Enhancement of compensation from ₹40,000/- to ₹1 lac is sought under the head of '*loss of amenities of life*' by appellant's counsel while asserting that the life of appellant has become restricted due to injuries sustained in the accident in question. So, it is submitted that the compensation granted needs to be enhanced and the rate of interest ought to be also enhanced from 7% to 9%.

Learned counsel for contesting respondents No.2 & 3 supports the impugned Award and submits that no case for enhancement of compensation is made out and the compensation granted is just and proper and that precedents cited are distinguishable on facts. Nothing else is urged by either side.

Upon hearing and on perusal of impugned Award, evidence on record and the decisions cited, I find that accident in question had taken place in early hours in July, 2004 and the traffic signals/lights were not functioning and in such a case, it is driver's duty of the vehicle plying on the main road as well as of vehicle coming from the side road to slow down to avoid accident. Neither Mechanical Inspection Report of appellant's vehicle nor site plan of the spot is on record and so, in such a situation, by solely relying upon the oral evidence of appellant-Claimant

it cannot be concluded that there was no contributory negligence of appellant. Such a view is taken because eye-witness-*Sandeep Sharma (PW-3)* has not stated in his evidence that appellant's car was hit on left rear side. So, this Court is of the considered view that learned Tribunal has rightly attributed 30% negligence to appellant. Resultantly, impugned Award cannot be faulted with on this count.

Reliance placed upon decision in *Sudha Nangia (supra)* is of no avail as the plea of contributory negligence was not a subject matter in the said case. Merely because no plea is taken in the written statement regarding contributory negligence, it does not lead to the conclusion that contributory negligence angle cannot be examined as learned Tribunal is well within its rights to consider the evidence recorded and thereafter, to form an opinion as to whether it is really a case of contributory negligence or not. Thus, in the instant case, learned Tribunal has rightly concluded that appellant's contributory negligence was to the extent of 30%.

Regarding assessment of permanent disability of 30%, there is Disability Certificate on record, which has been proved by concerned Doctor. Merely because it has come in the cross-examination of *Dr. Rama Kant Gupta (PW-6)* that appellant can do work which does not involve neck movement, this by itself would not justify taking the functional disability to be 100%. Supreme Court's decision in *Pratap Narain (supra)* is of no avail as in the said case, there was amputation of left hand below elbow of a Carpenter and so, the disability was taken to be 100% whereas in the instant case, restricted neck movement is of 30%.

That being the situation, it is considered appropriate to take the functional disability to be 50% and not 30%. To this extent, impugned Award stands modified.

To assess the '*loss of income*', learned Tribunal has erred in considering appellant to be an unskilled worker as he was a driver by profession and was holding a driving licence. Merely because after the accident appellant is selling vegetables, would not justify assessment of his income while treating him to be an unskilled worker. So, while taking the income of appellant to be that of a skilled worker for the relevant period, i.e. ₹3319/- as on 01.08.2004 (rounded off to ₹3320/-), the '*loss of income*' for six months is reassessed as ₹3320/- X 6 = ₹19,920/-. While taking the functional disability of the Appellant to be 50%, actual annual income is assessed as ₹4980/- X 12=59,760/-. By applying the multiplier of 17, compensation under the head '*loss of earning capacity*', is reassessed as ₹59,760 X 50% X 17= ₹5,07,960/-.

Under the Head of '*pain and sufferings*', learned Tribunal has granted compensation of ₹50,000/- to appellant. To seek enhancement of compensation under this Head, reliance placed upon Supreme Court's decisions in *Rekha Jain (supra)* and *Laxman (supra)* is of no avail as injured in case of *Rekha Jain (supra)* was a film actress whereas in case of *Laxman (supra)*, the injured was a Carpenter. However, since the functional disability has to be taken to be 50% instead of 30%, therefore, compensation granted under this Head is enhanced from ₹50,000/- to ₹1 lac. Even under the Head of '*loss of amenities of life*', compensation needs to be enhanced from ₹40,000/- to ₹50,000/-. Similarly, under the

Head of '*marriage prospects*', compensation granted is enhanced from ₹40,000/- to ₹50,000/-. Compensation granted under remaining Heads is maintained.

To the aforesaid extent, impugned Award stands modified. The break up of re-assessed compensation is as under: -

1.	Medical Bills	₹67,000/-
2.	Loss of income	₹19,920/-
3.	Loss of earning capacity	₹5,07,960/-
4.	Special diet, conveyance and attendant charges	₹21,000/-
5.	Pain & Sufferings	₹1,00,000/-
6.	Loss of amenities of life	₹50,000/-
7.	Marriage prospects	₹50,000/-
	Total	₹8,15,880/-

In view of Supreme Court's decision in *T.O. Anthony Vs. Karvarnan & Ors.* (2008) 3 SCC 748 on the point of contributory negligence, while taking into account appellant's contributory negligence to the extent of 30%, the total compensation payable is ₹5,71,116/-.

In light of the aforesaid, compensation awarded is enhanced from ₹3,55,180/- to ₹5,71,116/-. In view of Supreme Court's dictum in *Kalpanaraj & ors. Vs Tamil Nadu State Transport Corporation*, (2015) 2 SCC 764, the enhanced compensation shall carry interest @ 9% *per annum* from the date of filing of the claim petition till the date of deposit of the enhanced amount. Respondent-Insurer is granted eight weeks time to deposit the enhanced compensation of ₹2,15,936/- with interest @ 9%

per annum and differential interest on the entire awarded amount with learned Tribunal, who shall ensure that the enhanced compensation is directly transmitted into the bank account of appellant-Claimant upon his furnishing bank account details.

This appeal is disposed of while modifying the impugned Award in aforesaid terms.

**(SUNIL GAUR)
JUDGE**

MARCH 03, 2017
s/r

