IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.900 OF 2019

Shailesh Gajendra Bhagat] … Appellant

Vs.

Nitin V. Patel & Ors.] … Respondent

…

Mr. Varsha Chavan for the appellant.

Mr. Jyoti Bajpayee for respondent No.2.

…

CORAM : MRS. BHARATI DANGRE, J.

RESERVED ON : 22ND APRIL, 2022.

PRONOUNCED ON : 02ND MAY, 2022.

ORDER :-

1. The appellant, aged 55 years, engaged in the business of pest control, was driving his motorcar bearing Registration No.MH-02-PA-6026 on Mumbai-Pune Road on 06/10/2007, when he was hit by the offending motorcar bearing Registration No.MH-04-CM-5391 coming from the opposite direction on reaching boundary of Village Kon over-bridge. The said car being driven in rash and negligent manner resulted into a wide impact and in the incident,

the appellant sustained serious injuries.

2. A FIR came to be lodged against the driver of the offending motorcar at New Panvel Police Station being C.R. No.I-141 of 2007 for rash and negligent driving. The appellant, who sustained grievous injuries, was taken to Ashtavinayak Hospital and the injuries sustained by him were noticed to be of the following effect:

(i) Fracture right shaft femur
(ii) Fracture mandible
(iii) Fracture left 1 to 5 ribs
(iv) Right undisplaced lleum fracture
(v) Fracture 5th Metacarpal Left
(vi) Left undisplaced acetabulum fracture.

3. He was later on administered treatment in Wockhardt Hospital from 07/10/2007 to 16/10/2007 and further was admitted in BSES M.G. Hospital from where he was discharged on 03/11/2007. Claiming that he had to spent an amount of Rs.80,000/- on the medical treatment, including various surgeries, special diet, etc., he instituted a claim for compensation under Section 166 of the Motor Vehicles Act before the MACT, Mumbai vide Application No.3354 of 2007. He claimed compensation of Rs.50 lakhs from the owner of the offending vehicle and the New India Assurance Company Limited, Mumbai, the insurer with whom the vehicle was insured.

4. Pleading that the offending vehicle was driven at a high end excessive speed and the driver failed to take control of the vehicle, so as to avoid the accident, the principles of *res ipsa loquitur* was invoked. Highlighting the unbearable pain and suffering suffered by him, it is pleaded that the appellant is unable to perform the natural routine life independently since the date of the accident and was advised complete rest. The incident resulted in reduction of expectancy of life and the earning capacity and has adversely affected him and his family members, were the premises on which the compensation was sought.

5. In support of the claim, the applicant examined himself and also examined three other witnesses AW-2 Lalita Dewalekar, employee of BSES M.G. Hospital to prove the medical bills, AW-3 Dr. Vaibhav Gatade from Wockhardt Hospital, where he was administered treatment and AW-4 Dr. Naresh Khanna, who assessed his disability. Apart from this, he produced the medical bills reflecting the treatment administered to him and the expenses incurred by him.

6. The Tribunal proceeded to adjudicate the claim instituted before it on appreciating the oral evidence and the documentary evidence brought on record. The Insurance Company filed a written statement and resisted the claim and attributed the negligence and carelessness on the part of the appellant. The

Insurance Company also denied that the appellant was engaged in the business of pest control and his earnings were specifically denied. No witness was examined on behalf of the insurer though the witnesses examined by the appellant were subjected to cross-examination.

7. Determining the issue as to whether the appellant proved that he sustained injuries in the accident, which had taken place on account of the rash and negligent driving of the offending motorcar on 06/10/2007 at about 3.45 p.m., which was insured with the Insurance Company, the Tribunal relied upon the testimony of the appellant, who was a witness to the ghastly accident while he was driving his motorcar with due care and caution. His narration of the accident in his evidence affidavit was considered to be trustworthy and this was further fortified by the cross-examination at the hands of the Insurance Company, where it had come on record that he saw the offending motorcar at a distance of 15-20 feet and the car jumped over an auto-rickshaw and then dashed against his vehicle. He denied the specific suggestion that on account of his negligence, the accident had taken place. Since no independent witness was examined to controvert the case of the appellant that the driver of the offending vehicle was rash and negligent, the Tribunal accepted the said evidence. The said evidence was appreciated along with the papers of investigation and was held to be sufficient to reach a conclusion that the accident occurred on account of the rash and

negligent driving of the offending vehicle.

8. The driver of offending vehicle held a valid and effective licence and the vehicle's policy was covered by the Insurance Company and, therefore, the appellant was held entitled for compensation from the opposite party and the Insurance Company.

9. The crucial question about the quantum of compensation came to be determined by the Tribunal and, I shall now advert to the said aspect since the appeal is filed by the appellant for enhancement of the said compensation.

10. The appellant claimed compensation of Rs.50 lakhs and to prove his claim he produced the medical papers from Ashtavinayak Hospital, Wockhardt Hospital, BSES M.G. Hospital and KEM Hospital, from where he was administered treatment. He examined AW-2 Lalita Dewalekar to prove the bills of BSES M.G. Hospital and AW-3 Dr. Vaibhav Gatade, who has proved the bills from Wockhardt Hospital. The medical bills produced by the appellant amounted to Rs.18,84,594/-. The Tribunal, therefore, held him eligible for reimbursement of the said amount by way of compensation.

11. As far as the compensation payable for the injury sustained by him, the Tribunal appreciated the evidence of the appellant, where he narrated his ordeal after he met with the accident and

requirement of hospitalization as Indoor patient and underwent rigorous physiotherapy treatment.

12. In support of the claim, the appellant examined Dr. Naresh Khanna, who issued a disability certificate to the appellant certifying his disability as 67%. The said certificate is exhibited as Exh.-40. On perusal of the medical papers from distinct hospitals, where the appellant was treated, he examined him clinically and radio-logically and assessed his condition as under:

> *"1) Tenderness, Deformity & Scarry of Rt Thigh, Pelvis Rt Joint of hip.*
>
> *2) Movements of hit, Rt knee, left wrist painful & restricted*
>
> *3) Unable to squat, climb, stand or walk for a long.*
>
> *4) Unable to do work as before due to above disabilities*
>
> *5) Will require further treatment, physiotherapy & surgery.*
>
> *6) # Rt. Femur, # Mandible, # Accetabulam Metacarple have consolidated clinically and*

> *Radiologically.*
>
> *My assessment of Disability is 67% patient permit."*

12. In the cross-examination, Dr. Khanna further deposed as under:

> *"The patient requires surgery for removal of implants. For removal of all implants, the applicant is required Rs.80000/- to Rs.90000/- for surgery and medicines."*

He has admitted in the cross-examination that he had never treated the appellant and the fractures were found to be united, when he examined him and he has not seen X-Ray plates, but seen the X-Ray report. He denied the specific suggestion that there are no test reports available with him for supporting his disability certificate at Exh.-40 and he specifically stated that such test reports are not required. In the cross-examination, he also denied the suggestion that the disability mentioned in the certificate are based on the complaints made by the appellant.

13. The appellant had also produced on record a disability certificate from KEM Hospital certifying his injury as permanent

disability to the extent of 67%, but there is no independent doctor examined to prove the certificate, though the same was exhibited. As per both the certificates, the injury suffered by the appellant was categorized as '*partial permanent disability to the extent of 67%*'.

14. The evidence of Dr. Khanna to the effect that several implants are still existing in his body, for which he will need medical expenses and surgery, was also taken into account. The Tribunal acknowledged the pain and suffering due to the multiple fracture suffered by the appellant and recorded as under:

> *"16. From the evidence of the Applicant oral as well as documentary, I hold that he must have undergone much pain and suffering due to the multiple fractures and must have suffered atleast 50% permanent partial disability. In such circumstances, I hold that the Applicant is entitled to get Rs.75,000/- for pain and suffering and Rs.75,000/- on account of permanent partial disability sustained by the Applicant. Due to the multiple fractures, to my mind, there is much loss of amenities of life for which he is entitled to get Rs.1,20,000/-.*
>
> *17. According to the Applicant, he has spent Rs.60,000/- for special diet and conveyance.*

> *However, I hold that atleast for one year after the accident, he must have spent Rs.50,000/- for special diet and conveyance."*

15. Considering the claim set out by the appellant that his income was Rs.78,000/- per month, the Tribunal did not accept the same in absence of any documentary evidence placed on record. On the other hand, based on the Income Tax Returns for the years 2006-07 and 2007-08, where his annual income was shown as Rs.1,49,659/- whereas, in 2007-08, it is reflected as Rs.1,63,703/-, the Tribunal arrived at a finding that he was earning Rs.1,50,000/- per year as an average income.

16. Recording that due to multiple fractures on the vital parts of the body, he must have prevented from carrying on his business atleast for one year and accepting his testimony to the effect that he was required to be permanently give up his business to his brother to keep it running, since his business involved sitting in the shop and only mental activities, which he was able to undertake, the Tribunal held the applicant to be eligible for a sum of Rs.1,50,000/- towards loss of income caused to him due to injuries sustained by him.

17. Totalling the compensation to a sum of Rs.25,04,594/-, the application was partly allowed and the opposite party and the insurer were jointly and severally held liable for the payment of

compensation along with interest at the rate of 7.5% per annum, including the amount of no fault liability.

18. The appellant is claiming enchancement of this compensation and the learned counsel Ms. Chavan would submit that the Tribunal has fallen into gross error in not applying the multiplier method in case of an injury sustained by him resulting into loss of earning capacity.

19. By placing reliance upon the latest judgment of the Hon'ble Apex Court dated 27/07/2020 in the case of ***Sandeep Khanuja v. Atul Dande & Anr.*** passed in ***Civil Appeal No.1329 of 2017***, where the appellant suffered physical injuries when he was riding a scooter and was hit by a Hyundai Getz car sustaining fractures on both legs, causing permanent disability to some extent and where the Tribunal accepted the aforesaid injuries and physical incapacity, the court was of the opinion that even when it was not possible for the appellant to work like an ordinary person, as he was working as a Chartered Accountant, he could still perform his duties properly and there was no impairment, has refused to award compensation by applying the principle of multiplier based on permanent disability and granted a lump sum amount. The Hon'ble Supreme Court has observed as under:

> *"10) In this conspectus, the only argument advanced by the learned counsel for the appellant*

was that the appellant was entitled to the compensation on the basis of multiplier, as per the provisions of the Act, fur suffering permanent disability to the extent of 70% and there was no reason not to apply the said multiplier.

11) xxx xxx xxx

12) We may observe at the outset that it is now a settled principle, repeatedly stated and restated time and again by this Court, that in awarding compensation the multiplier method is logically sound and legally well established. This method, known as 'principle of multiplier', has been evolved to quantify the loss of income as a result of death or permanent disability suffered in an accident. Recognition to this principle was given for the first time in the year 1966 in the case of Municipal Corporation of Delhi v. Subhagwanti & Ors. (1966) 3 SCR 649. Again, in Madhya Pradesh State Road Transport Corporation, Bairagarh, Bhopal v. Sudhakar & Ors. (1977) 3 SCC 64, the Court referred to an English decision while emphasising the import of this principle in the following manner:

"4. A method of assessing damages,

usually followed in England, as appears from Mallet v. McMonagle 1969 ACJ 312 (HL. England), is to calculate the net pecuniary loss upon an annual basis and to "arrive at the total award by multiplying the figure assessed as the amount of the annual 'dependency' by a number of 'year's purchase' that is the number of years the benefit was expected to last, taking into consideration the imponderable factors in fixing either the multiplier or the multiplicand..."

13) While applying the multiplier method, future prospects on advancement in life and career are taken into consideration. In a proceeding under Section 166 of the Act relating to death of the victim, multiplier method is applied after taking into consideration the loss of income to the family of the deceased that resulted due to the said demise. Thus, the multiplier method involves the ascertainment of the loss of dependency or the multiplicand having regard to the circumstances of the case and capitalising the multiplicand by an appropriate multiplier. The choice of the multiplier is determined by the age of the deceased or that of *the claimant, as the case may be. In injury cases, the description of the nature of injury and the permanent disablement are the relevant factors and it has to be seen as to what would be the impact of such injury/disablement on the earning capacity of the injured. This Court, in the case of U.P. State Road Transport Corporation & Ors. v. Trilok Chandra & Ors. (1996) 4 SCC 362 justified the application of multiplier method in the following manner:*

> *"13. It was rightly clarified that there should be no departure from the multiplier method on the ground that Section 110-B, Motor Vehicles Act, 1939 (corresponding to the present provision of Section 168, Motor Vehicles Act, 1988) envisaged payment of 'just' compensation since the multiplier method is the accepted method for determining and ensuring payment of just compensation and is expected to bring uniformity and certainty of the awards made all over the country."*

The multiplier system is, thus, based on the *doctrine of equity, equality and necessity. A departure therefrom is to be done only in rare and exceptional cases.”*

20. Their Lordships of the Hon’ble Apex Court with approval, quoted the observations of the Apex Court in it’s earlier decisions in the case of ***Raj Kumar v. Ajay Kumar & Ors.*** reported in ***(2011) 1 SCC 343***, where it had propounded the manner in which the loss of future earning was assessed due to permanent disability in the following manner.

“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, the 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."

21. The crucial factor, which has to be taken into consideration when a person sustains an injury, which may be either in the nature of permanent total disability or permanent partial disability, it is necessary to assess how the disability has impacted the individual by restricting his movements and functions, which he was capable of performing and undertaking, prior to the accident. In order to calculate the amount of loss suffered to such an individual on account of permanent disability so incurred, the loss of his earning capacity is required to be computed. This surely would warrant a broad based approach and not a myopic view by assessing the earning capacity as equivalent to 'percentage' of the disability.

22. Under the Workmen's Compensation Act, 1923, the manner in which disability would be compensated is set out in the 2nd Schedule by raising a legal fiction as regards the 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 the Act. Under the Motor Vehicles Act, the amount of compensation to be awarded in case of permanent disability, though not specifically provided for, it must be necessarily directly relatable to the percentage of physical disability suffered by the injured, upon being certified by the a qualified Medical Practitioner so as to assess his loss of earning capacity.

23. Misplaced sympathy, generosity and benevolence cannot be the guiding factor for determining compensation. The object of providing compensation is to place the claimants, to the extent possible, in almost the same financial position, as they were in, before the accident and not to make a fortune out of misfortune that has befallen them. Section 168 of the Motor Vehicles Act, empowers the Tribunal to 'make an award determining the amount of compensation which appears to it to be just'. Therefore, the only requirement for determining the compensation is that it must be 'just'. However, the objective factors, which may constitute the basis of compensation appearing as just, have not been indicated in the Act.

24. However, the Tribunal is expected to follow the settled principles relating to determination of compensation and it may not allow it's discretion to be used as a source of profit, nor as a windfall to the persons affected nor should it be punitive to the persons liable to pay compensation. The compensation to be

awarded must follow the principle of certainty to avoid the arbitrary exercise of discretion and though there cannot be any fixed rules or formulae for measuring human life miseries or suffering of human being, who meet with an accident and suffer the anguish and agony, the compensation must be based on certain data establishing reasonable nexus between the loss incurred and the compensation.

25. In ***Kerala SRTC v. Susamma Thomas*** reported in ***(1994) 2 SCC 176***, the broad template of the compensation to be awarded under the Motor Vehicles Act was expressed as under:

> *"5. …. the determination of the quantum must answer what contemporary society 'would deem to be a fair sum such as would allow the wrongdoer to hold up his head among his neighbours and say with their approval that he has done the fair thing'. The amount awarded must not be niggardly since the 'law values life and limb in a free society in generous scales'."*

26. The Hon'ble Apex Court in the case of ***Syed Basheer Ahmed v. Mohd. Jameel*** reported in ***(2009) 2 SCC 225***, has recorded as under:

> *"16. As noted earlier, in the matter of computation of compensation, there is no uniform*

rule or formula for measuring the value of a human life. Though a special provision for assessment of compensation on structured formula basis for the purpose of a claim petition under Section 163-A of the Act has been inserted in the Act with effect from 14-11-1994, but no such formula has been laid down for determination of compensation in a claim petition under Section 166 of the Act, though there is no bar in taking the said schedule as a guiding factor while determining the just compensation by applying multiplier method. In fact, in Managing Director, TNSTC Ltd. Vs. K.I. Bindu & Ors.3, it has been observed that the second schedule to the Act may serve as a guide but cannot be used as an invariable ready reckoner."

27. In ***Sandeep Khanuja (supra)***, as narrated above, where Their Lordships were confronted upon with a case of a Chartered Accountant and on assessing his disability, it was held that his movements are restricted to a large extent of that too, at a young age and though the High Court recognized this, it did not apply the principles of multiplier, Their Lordships held as under:

"15) The crucial factor which has to be taken into consideration, thus, is to assess as to whether the permanent disability has any adverse effect on

the earning capacity of the injured. In this sense, the MACT approached the issue in right direction by taking into consideration the aforesaid test. However, we feel that the conclusion of the MACT, on the application of the aforesaid test, is erroneous. A very myopic view is taken by the MACT in taking the view that 70% permanent disability suffered by the appellant would not impact the earning capacity of the appellant. The MACT thought that since the appellant is a Chartered Accountant, he is supposed to do sitting work and, therefore, his working capacity is not impaired. Such a conclusion was justified if the appellant was in the employment where job requirement could be to do sitting/table work and receive monthly salary for the said work. An important feature and aspect which is ignored by the MACT is that the appellant is a professional Chartered Accountant. To do this work efficiently and in order to augment his income, a Chartered Accountant is supposed to move around as well. If a Chartered Accountant is doing taxation work, he has to appear before the assessing authorities and appellate authorities under the Income Tax Act, as a Chartered Accountant is allowed to practice up to Income Tax Appellate Tribunal. Many times Chartered Accountants are supposed to visit their *clients as well. In case a Chartered Accountant is primarily doing audit work, he is not only required to visit his clients but various authorities as well. There are many statutory functions under various statutes which the Chartered Accountants perform. Free movement is involved for performance of such functions. A person who is engaged and cannot freely move to attend to his duties may not be able to match the earning in comparison with the one who is healthy and bodily abled. Movements of the appellant have been restricted to a large extent and that too at a young age. Though the High Court recognised this, it did not go forward to apply the principle of multiplier. We are of the opinion that in a case like this and having regard to the injuries suffered by the appellant, there is a definite loss of earning capacity and it calls for grant of compensation with the adoption of multiplier method, as held by this Court in Yadava Kumar v. Divisional Manager, National Insurance Company Limited & Anr. (2010) 10 SCC 341:*

> *"9. We do not intend to review in detail state of authorities in relation to assessment of all damages for personal injury. Suffice it to say that*

the basis of assessment of all damages for personal injury is compensation. The whole idea is to put the claimant in the same position as he was insofar as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered.

10. In some cases for personal injury, the claim could be in respect of lifetime's earnings lost because, though he will live, he cannot earn his living. In others, the claim may be made for partial loss of earnings. Each case has to be considered in the light of its own facts and at the end, one must ask whether the sum awarded is a fair and reasonable sum. The conventional basis of assessing compensation in personal injury cases—and that is now *recognised mode as to the proper measure of compensation—is taking an appropriate multiplier of an appropriate multiplicand.”*

16) In that case, after following the judgment in Kerala SRTC v. Susamma Thomas (1994) 2 SCC 176, the Court chose to apply multiplier of 18 keeping in view the age of the victim, who as 25 years at the time of the accident.”

28. Placing reliance upon the decision in the case of ***Sandeep Khanuja (supra)***, where the multiplier method was accepted to be logically sound and legally well established to quantify the loss of income as a result of death or permanent disability suffered in an accident. In another decision of the Hon’ble Apex Court dated 27/07/2020 in the case of ***Erudhaya Priya v. State Express Transport Corporation Ltd.*** in ***Civil Appeal Nos.2811-2812 of 2020***, dealing with a case of an appellant travelling in a bus owned by the State Corporation, which was ran into a stationary lorry causing multiple injuries to the appellant, who remained admitted in hospital for eight months and suffered grievous injuries including fractures and his disability was assessed of 31.1 % of the whole body, the Apex Court assessed the loss of earning capacity of the appellant with the aforesaid permanent disability in the following manner:

"In respect of the aforesaid, the appellant has claimed compensation on what is stated to be the settled principle set out in Jagdish v. Mohan & Ors. (2018) 4 SCC 571 and Sandeep Khanuja case (supra). We extract below the principle set out in the Jagdish case (supra) in paragraph No.8:

> *"8. In assessing the compensation payable the settled principles need to be borne in mind. A victim who suffers a permanent or temporary disability occasioned by an accident is entitled to the award of compensation. The award of compensation must cover among others, the following aspects:*
>
> *(I) Pain, suffering and trauma resulting from the accident;*
>
> *(ii) Loss of income including future income;*
>
> *(iii) The inability of the victim to lead a normal life together with its*

amenities;

(iv) Medical expenses including those that the victim may be required to undertake in future; and

(v) Loss of expectation of life."

[emphasis supplied]

The aforesaid principle has also been emphasized in an earlier judgment, i.e. the Sandeep Khanuja case (supra) opining that the multiplier method was logically sound and legally well established to quantify the loss of income as a result of death or permanent disability suffered in an accident."

29. The aforesaid authoritative pronouncements deserve an application to the case of the appellant, who has also sustained a partial permanent disability, which has been assessed at 67%. The learned counsel for the respondent has placed reliance upon a decision dated 08/04/2011 of the Delhi High Court in the case of ***Purushotam Dass v. New India Assurance Company & Anr.***, which held that where 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 it's 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. The aforesaid proposition set out in paragraph 9 of the said judgment cannot be read in isolation as attempted to be pointed out by the leanred counsel for the Insurance Company.

30. The learned Single Judge of the Delhi High Court has specifically held that the Tribunal has to decide whether there is any permanent disability and, if so, the extent of such permanent disability and, therefore, it 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. Offering further insight to the above, in paragraph No.10, the manner of ascertaining the effect of the permanent disability on the actual earning capacity has been set out by the learned Judge in the following words:

> *"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."*

31. The aforesaid judgment, therefore, does not come to the rescue of the appellant.

32. The principle that emerges from the various authoritative pronouncements and can be culled out is to the effect that the accident which results in disability leads 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, continuing to operate even at the end of the period of the treatment and recuperation and 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, which will definitely cease to exist after treatment. 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 be able to engage in some gainful activity. In contrast, the total permanent disability refers to a person's inability to perform any avocation or employment related activities, as a result of the accident and such types of disabilities would cover a wider range.

The percentage of the disability will be assessed by an expert with reference to different parts of the body by accounting for the inability of the distinct parts to exercise it's functions and the sum total thereof expressed may at times exceed 100%.

33. When a claimant suffers from permanent disability on account of injury sustained in an accident, the assessment of compensation under the head 'loss of future earnings' would thus depend on the impact of such permanent disability of his earning capacity. What is expected is to assess the effect of disability on the earning capacity in the injured, which can be referred as functional disability.

34. Applying the aforesaid principles to the present case, it can be seen that the appellant, who was engaged in the business of pest control has specifically deposed that on account of the disability suffered by him, he has become dependent on his family members as his job involved visiting the actual site for operating the pest control and also moving in the market for securing work of pest control. His Income Tax Returns depicted his income and earnings before the accident and it is argued on his behalf that the accident has deprived him of his earning capacity and the learned counsel for the appellant would submit the computation as under:

> "The total computation now work out as under:-

Age of the Applicant	:	53 Years
Monthly income Rs.78,000 x 12 months	:	Rs.9,36,000/-
Half of yearly income as per disability.	:	Rs.4,68,000/-
Loss of future Income Multiplier	:	12
		Rs.56,16,000/-
+ Permanent Disablement Physical loss of amenities of life, discomfort	:	Rs.2,00,000/-
+ Special Diet	:	Rs. 30,000/-
+ Conveyance	:	Rs.20,000/-
+ Original Medical Bills	:	Rs.18,84,594/-
Total	**:**	**Rs.77,60,594/-** ===========

(Rupees Seventy Seven Lacs Sixty Thousand Five Hundred Ninety Four only)”

35. The said computation is, however, vehemently opposed by the learned counsel for the Insurance Company by submitting that though the appellant staked his earnings as Rs.78,000/- per month, he has failed to prove the same and, going by the Income Tax Returns, his earnings are not reflected as Rs.78,000/-. In absence of any proof supporting the income of the appellant, it is submitted that the income cannot be accepted as Rs.78,000/-. The Tribunal has accepted his income as Rs.1,50,000/- on an average, based on the Income Tax Returns for the year 2006-07 and 2007-08. The accident occurred on 06/10/2007 and, since for the said year, the annual income of the appellant was depicted as Rs.1,63,703/-, I

deem it appropriate to consider the same as the annual income.

36. By considering the said income, the disability is calculated as under:

"The total computation now work out as under:-

Age of the Applicant	:	53 Years
Annual Income as per ITR.	:	Rs.1,63,703/-
Half of yearly income as per disability.	:	Rs.81,851/-
Loss of future Income Multiplier	:	12
		Rs.9,82,218/-
+ Permanent Disablement Physical loss of amenities of life, discomfort	:	Rs.2,00,000/-
+ Special Diet	:	Rs. 30,000/-
+ Conveyance	:	Rs.20,000/-
+ Original Medical Bills	:	Rs.18,84,594/-
Total	**:**	**Rs.31,16,812/-** ===========

(Rupees Thirty One Lakhs Sixteen Thousand Eight Hundred Twelve only)"

37. The aforesaid modification in the impugned judgment is warranted in the background of the fact that the appellant cannot be put back to the original position of his physical health, which he was enjoying before the accident, but since he has suffered at the hands of the tortfeasor he must get a just and fair

compensation.

38. As far as the case of the appellant, who has suffered the disability, he has to live his life with this disability being mentally, physically and emotionally traumatized. The Tribunal had failed to discharge it's responsibility of determining a 'just and fair compensation' and has determined the loss of earning capacity to the minimum by recording that the appellant can still run his business for the remaining part of his life as it needs sitting in the shop and only mental activities, ignoring the nature of work of the appellant being carrying out the work of pest control, which necessarily involved a field job. The Tribunal has, therefore, erred in awarding the lump sum compensation of Rs.25,04,594/-, which needs to be corrected to the aforesaid effect. The additional amount of compensation shall carry an interest of 7.5% per annum from the date of the application till it's realization, since the Tribunal has adopted a wrong mechanism of computing the compensation payable to the appellant for the injury sustained in the accident. The above mandatory monitory compensation may not be sufficient to put him back in his original position, but considering that he is getting the compensation only once for the loss sustained by him and for the capacity, which he has lost, it is necessary to have regard to the degree of deprivation and loss caused by such deprivation and, therefore, the compensation or damages must be substantial to compensate for the deprivation suffered by him throughout his life. Though it is not possible to

equate money with human suffering or personal deprivation, since the money cannot bring in a physical frame that has been battered and shattered, but it will surely infuse some sort of security in him, in the form of the damages suffered apart from the pecuniary damages, by compensating him by payment of non pecuniary damages, which is incapable of being assessed by arithmetical calculations. By modifying the impugned judgment to the above effect, the appeal is partly allowed.

[SMT. BHARATI DANGRE, J.]