

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

**PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK**

**FMA No.804 of 2010
CAN No.1 of 2010 (Old CAN No.4009 of 2010)
CAN No.4 of 2019 (Old CAN No.4398 of 2019)
The New India Assurance Co. Ltd.**

versus

**Sri Manab Sen (deceased) reptd. by his legal heirs & Anr.
With**

**FMA No.197 of 2017
CAN No.5 of 2018 (Old CAN No.770 of 2018)
Aishwarya Sen & Anr.**

versus

New India Assurance Co. Ltd. and Anr.

For the appellant (in FMA No. 804 of 2010)
& the respondent (in FMA No. 197 of 2017) : Mr. Parimal Kumar Pahari, Advocate

For the respondents (in FMA No. 804 of 2010)
& the appellants (in FMA No. 197 of 2017) : Mr. Tapas Dutta, Advocate
Ms. Ujjala Banerjee, Advocate
Mr. Mrityunjay Halder, Advocate

Heard on : 06.12.2022, 15.12.2022

Judgment on : 12.05.2023.

Bivas Pattanayak, J. :-

1. Both the appeals being FMA No. 804 of 2010 filed by the insurance company and another being FMA No. 197 of 2017 preferred by the legal heirs of original claimant-injured is heard analogously and taken up together for consideration.

2. These appeals have been preferred against the judgment and award passed on 13th January, 2010 by learned Additional District Judge-cum-

Judge, Motor Accident Claims Tribunal, Fast Track, 3rd Court, Barrackpore, 24 Parganas (North) in Motor Accident Claim Case No. 37 of 2006 granting compensation of Rs. 10,00,000/-together with interest in favour of the claimant injured under Section 166 of the Motor Vehicles Act.

3. The brief fact of the case is that on 27th August, 2005 at about 11:30 hours the offending vehicle bearing registration No. WB-25A/8971 (truck) which was proceeding in rash and negligence manner dashed the victim near Halisahar Panchmatha More in front of the Motor Training School, as a result of which the victim sustained serious injuries. Immediately he was removed to the hospital. However, after prolong treatment, the injured could not recover and was permanently disabled due to the injury sustained in the said accident. In relation to the said injuries and the consequential disablement, the claimant-injured filed application for compensation of Rs. 14,90,000/- together with interest under Section 166 of the Motor Vehicles Act.

4. The claimant-injured in order to establish his case examined six witnesses and proved documents which have been marked as **Exhibit 1** to **17** respectively.

5. The insurance company (appellant in FMA No. 804 of 2010) adduced evidence of one witness and also proved documents which have been marked as **Exhibit A** and **B** respectively.

6. The owner of the offending vehicle did not contest the claim application and the case was dismissed *ex parte* against the owner of the offending vehicle.

7. Upon considering the materials on record and the evidence adduced on behalf of the respective parties, the learned Tribunal granted compensation of Rs. 10,00,000 together with interest in favour of the claimant-injured.

8. Being aggrieved by and dissatisfied with the impugned judgment and award, the insurance company preferred the appeal being FMA No. 804 of 2010.

9. The legal heirs of original claimant-injured filed the appeal being FMA No. 197 of 2017 on the ground that the compensation should be awarded as a death case, since the claimant-injured died on 18.08.2009 due to injury caused in the accident, prior to passing of the award on 13.01.2010.

10. Mr. Parimal Kumar Pahari, learned Advocate appearing on behalf of the insurance company (appellant in FMA No. 804 of 2010), submits that there is categorical finding of the learned Tribunal that there was no loss of income of the claimant injured due to the injuries and disablement caused for the reason of the said accident and, therefore, the claimant is not entitled to receive any compensation towards loss of income. In support of his contention, he relied upon the following decisions of this Court:

- i. ***Mukti Majumdar versus National Insurance Co. Ltd. and Another*** reported in **2007 (2) T.A.C. (Cal.)**.
- ii. ***Atanu Kumar Ghosal versus National Insurance Co. Ltd. and Others*** reported in **2007 ACJ 650**.
- iii. ***Barun Kumar Das versus New India Assurance Co. Ltd. and Another*** reported in **2005 (1) T.A.C. 225 (Cal.)**.

- iv. ***The New India Assurance Co. Ltd. versus Amitava Das & Anr.*** reported in ***(2007) 2 WBLR (Cal) 354.***

He further submitted that after the death of the original claimant-injured the legal heirs are before the Court claiming enhancement of compensation, however, the cause of action being personal to the injured abates on his death, which is not caused due to the accident. The legal heirs are entitled only to such compensation which forms part of the estate of the deceased. Loss of salary, future prospects, pain and suffering alongwith attendant charges do not form part of estate of the deceased and therefore the legal heirs of the injured is only entitled to loss of estate which shall include expenditure on medicines, treatment, diet, doctor's fee nothing more, nothing less. Moreover, the compensation should not be fixed by application of multiplier as it is not a case of death caused or occasioned by or due to the accident. In support of his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Oriental Insurance Co. Ltd. versus Kahlon*** reported in ***2021 ACJ 2576.***

He further submitted that the learned Tribunal erred in granting compensation taking into account pain and sufferings, loss of amenities of life, loss of expectation of life, loss of personal capacity of earning, loss of prospect of life, which is totally based on guess work and without any basis. In view of his above submission, he prayed that save and except the amount towards medicines, treatment, diet, doctor's fee the legal heirs of the claimant-injured is not entitled to compensation under any other heads.

11. In reply to the contentions raised on behalf of the insurance company, Mr Tapas Dutta, learned Advocate representing the legal heirs of injured-claimant (appellants in FMA No. 197 of 2017), at the outset, not pressed the ground taken in the appeal being FMA No. 197 of 2017 for treating the claim case filed by the injured as a death case. He submitted that although the income tax return shows increase in the income yet such increase is not substantial in comparison to what it would have been had the claimant injured been able to discharge his previous activities and functions in pursuing his business after the accident. He drew the attention of the Court to the fact that the medical evidence adduced by the claimant-injured of the Doctor (PW6) and the disability certificate shows that the victim due to the injuries sustained in the accident became permanently disabled extending to 90% and could not travel without assistance of any escort. Thus, where the victim sustained permanent disability and was a contractor by profession, the preponderance of probabilities would show that his restrictive movement has certainly affected his earnings and, therefore, as per settled proposition, multiplier method should be applied for computation of the compensation amount. In support of his contention, he relied on the decisions of the Hon'ble Supreme Court passed in ***Mangla Ram versus Oriental Insurance Company Limited and Others*** reported in **(2018) 5 SCC 656** and in the matter of ***Jagdish versus Mohan and Others*** reported in **(2018) 4 SCC 571**. Relying on the decision of Hon'ble Supreme Court in ***Jakir Hussein versus Sabir and Others*** reported in **(2015) 7 SCC 252** he submitted that the legal heirs are also entitled to compensation under

pecuniary and non-pecuniary damages. Referring to the decision of the Hon'ble Supreme Court in **R. K. Malik and Another versus Kiran Pal and Others** reported in **(2009) 14 SCC 1**, he submitted that the compensation in law is paid to restore the person, who has suffered damages and loss, in the same position if the tortious act or breach of contract had not been committed and the law in all such matters requires payment of adequate, reasonable and just monetary compensation. In the light of his aforesaid submission, he prayed for enhancement of compensation amount.

12. Having heard learned Advocates for respective parties, the present appeals hinge on two-fold issues, *firstly*, whether the injuries sustained by the claimant has led to loss of income and *secondly* whether for assessment of compensation multiplier method is to be adopted in the facts and circumstances of the present case.

13. In order to appreciate the first issue involved in these appeals, it would be apposite to refer to the principles laid down by the Hon'ble Supreme Court in the decision of **Raj Kumar versus Ajay Kumar & Anr.** reported in **(2011) 1 SCC 343** which is reproduced hereunder:

"12. 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.

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

14. 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.

15. 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....."

13.1. Bearing in mind the aforesaid principles laid down by the Hon'ble Supreme Court, let me first decide whether the victim sustained any permanent disability due to the accident and, if so, to what extent. The victim in his claim application at column 11 stated that he sustained multiple injuries with comminuted fracture proximal tibia (right), fracture

base of 4th, 5th metacarpal right hand with fracture phalanges, corneal injury on right eye and also internal haemorrhage of head. The discharge summary shows that the injured sustained polytrauma with multiple lacerated wounds, compound comminuted fracture proximal right tibia and fracture base of 4th and 5th metacarpal right hand with fracture phalanges, corneal injury right eye. The injuries stated in the claim application are reflected in the discharge summary, however, it is relevant to note that intra-cerebral haemorrhage and intraocular injury have been ruled out. It is further found from the discharge summary that the injured was taken up for operation management of his limb on 31.8.2005 after stabilizing him with packed cell transfusion. Interfragmentary screws and external fixation applied for the right tibial fracture. Percutaneous K-wire fixation of right 4th and 5th metacarpal fractures with external fixator stabilization and debridement of lateral wounds were performed. PW6 Dr Krishnalal Sarkar deposed in his evidence that he examined the injured and issued disability certificate on the basis of the condition of the patient. He further deposed that the disability certificate of the victim shows disablement to the extent of 90%. In his cross-examination, PW6 deposed that according to him the injury of the patient cannot be recovered. On perusal of disability certificate **(Exhibit 6)** it is found that the injured sustained disability to the extent to 90% which is of permanent nature. Therefore, it goes without saying that the injured sustained permanent disability to the extent of 90%.

13.2. Now, it is to be ascertained regarding the effect of such permanent disablement on the actual earning capacity of the injured victim. Admittedly

at the time of accident, the victim was running a construction firm under the name and style of *M/s. M.S. Construction* dealing with civil works. The disability certificate further reveals that the victim cannot travel without the assistance of escort. Though **Exhibit B** income tax return for assessment year 2005-2006, assessment 2006-2007 and assessment year 2007-2008, shows there is increase in the income yet the nature of injuries as noted above and the consequential permanent disablement of the injured would certainly have affected his earning capacity, if not 100%. Due to such injuries of the nature as above and disablement in all probabilities he was prevented and restricted from discharging his previous activities and functions, however, he could carry on lesser scale of activities and functions and continued to earn his livelihood to certain extent. This Court is not oblivious to the fact that for carrying on the work of a contractor dealing in civil works, extensive travelling is necessary for visiting the site of construction, procuring materials for construction so on and so forth and therefore his restrictive movements would certainly affect his earning capacity. The pertinent question at this stage is whether the person who continued to earn even after such injury is entitled to loss of earnings or not. At this juncture it would be profitable to refer to the observation of this Court in *Mukti Majumdar (supra)* as follows.

“9. Loss of income is one thing and loss of earning capacity is another and the two cannot be equated. It is possible that even after having sustained serious injury one may continue to earn at the same level or be retained by the employer whether on sympathy or otherwise. But

that is not the real test. The principle is whether the victim is capable of undertaking all possible jobs as he or she was before accident. In other words, the saleability of the services ordinarily rendered by the victim had been diminished. This principle of law has been discussed in a fairly old decision of this court rendered in the case of Calcutta Licensed Measurers v. Md. Hussain (reported in 1969 A.C.J, 92). In this case, on facts it was found that after the accident a workman was receiving a higher salary as a measure of concession or of grace. In substance there was no loss of earnings, but factually it was found that his partial and permanent disablement was caused by the accident and it was such that it was not possible for him to perform the same work that he performed before the accident. Of course, this case was decided under the Workmen's Compensation Act, 1923 but the principle can very well be applied to the present case, where there is no statutory guidance for assessment of damages. The Bench in that case while discussing the two earlier decisions of this Court (Agent, East Indian Railways v. Maurice Cecil Ryan : A.I.R. 1937 Cal. 526 and Sukhai v. Hukam Chand Jute Mills Ltd. : A.I.R. 1957 Cal. 601) observed in their lucid manner as follows:

“If a workman suffers as a result of an injury from a physical defect which does not in fact, reduce his capacity to work, but at the same time makes his labour unsaleable in any market reasonably accessible to him, there will be either total incapacity for work when no work is available to him at all or there will be a partial incapacity when such defect makes his labour saleable for less than it would otherwise fetch.”

The principle which culls out from the above observation is that even after having sustained serious injury one may continue to earn at the same level

or be retained by the employer whether on sympathy or otherwise. But that is not the real test. The principle is whether the victim is capable of undertaking all possible jobs as he or she was before accident. In other words, the saleability of the services ordinarily rendered by the victim had been diminished. Bearing in mind the aforesaid observation factually it was not possible for the victim, who was a civil contractor by profession, to perform the same work that he performed before the accident. Mr Pahari, learned advocate for insurance company relying on *Mukti Majumdar (supra)* tried to impress upon the court that where there is no loss of income or loss of earning capacity there cannot be compensation on such head. In the said case the victim lady even after the accident continued in the same job and was found fit therefore. She was not removed to any other position nor was she given salary on account of grace. She was eligible to retire with full benefits. Due to said reason the above principle was not applied. However, keeping in mind the facts of the case at hand and considering the nature of injuries and the disablement of permanent nature the principles as above in the *Mukti Majumdar (supra)* applies to the case at hand. I find substance in the submission of Mr Dutta, learned advocate for legal heirs of injured (since deceased) relying on the decision of Hon'ble Supreme Court in *R.K Malik (supra)* that compensation in law is paid to restore the person, who has suffered damage or loss in the same position, as if the tortious act or breach of contract had not been committed. Accordingly, the injured suffered loss of earnings.

13.3. In *Atanu Kumar Ghosal (supra)* the injured, who was an insurance agent, lost three fingers. The Court taking into account that his movement, power of speech, hearing power and the vision not impaired and he is doing his business held that he cannot be said to have lost his earning capacity. The facts involved in the said case is dissimilar to the facts at hand.

13.4. In *Barun Kumar Das (supra)* the injured-claimant sustained injuries on his toes of one leg and lost some sensation in the toes. However, he attended his office regularly as law assistant and received salaries as before. So, the facts involved is dissimilar to the case at hand.

13.5. In *Amitava Das (supra)* the claimant deposed categorically that after the accident he became fit and joined in the service with proper medical fitness certificate. The Court considering the said fact set aside the quantification of compensation amount on account of loss of income. The facts of the said case are distinguishable from the case at hand.

13.6. In view of the above discussion, from the facts and circumstances of the case, bearing in mind the nature of injury, the permanent disablement, the avocation, profession and nature of work of the victim, I am of the opinion that the injured-claimant suffered loss of income to the extent of 80% of his actual earnings.

14. The next the question that has fallen for consideration in these appeals is whether multiplier method is to be adopted for assessing the amount of compensation in the present case or not. At this stage it would be appropriate to refer the decision of Hon'ble Supreme Court passed in

Karthik Subramanian versus B. Sarath Babu & Anr reported in **2021 SAR (Civ) 1180** wherein the Hon'ble Court observed as follows:

“ 4. Learned Counsel for the appellant had relied upon the recent judgement of this Court in Erudhaya Priya v. State Express Transport Corporation Ltd.-2020 Supp. SAR (Civ) 962= 2020 SCC Online SC 601. The judgement took into consideration the earlier judgements including in Pranay Sethi (supra) and Sandeep Khanduja v. Atul Dande-2017 SAR (Civ) 385 = (2017) 3 SCC 351. The latter judgement had opined that 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. The present case being one of permanent disability of 40 per cent, it has been urged that the same principle should be applied in the present case while in fact nothing has been granted on account of future prospects.

In our view, this issue is no more res integra in view of Sandeep Khanduja's case (supra) and Erudhaya Priya's case (supra) opining that multiplier method has to be applied for future prospects and advancement in life and career.”

Bearing in mind the aforesaid observation of Hon'ble Supreme Court and since from the material discussed above it is found that the injured-victim sustained permanent disablement, it is settled proposition that to quantify just and fair compensation the multiplier method is to be adopted as has been rightly argued by learned advocate for the legal heirs of injured-claimant, referring to the decisions of *Jagdish (supra)* and *Mangla Ram (supra)*. Further in *Kahlon (supra)* as well cited on behalf of the insurance company it is found that the Hon'ble court applied multiplier method for assessing compensation.

15. Now the next aspect which is to be decided is whether the legal heirs of the original injured-claimant is entitled to receive compensation upon death of the injured. Mr. Pahari, learned advocate for insurance company referring to the decision of Hon'ble Supreme Court in *Kahlon (supra)* submitted that the legal heirs of injured are only entitled to loss of estate which shall include expenditure on medicines, treatment, diet, doctor's fee nothing more, nothing less. The Hon'ble Supreme Court in *Kahlon (supra)* in a similar situation where legal heir of the injured was before the court pursuing the appeal on substitution, at paragraph no. 20 observed as follows:

"20. We see no reason to deviate from the consistent judicial view taken by more than one High Court that loss of estate would include expenditure on medicines, treatment, diet, attendant, Doctor's fee, etc. including income and future prospects which would have caused reasonable accretion to the estate but for the sudden expenditure which had to be met from and depleted the estate of the injured, subsequently deceased."

Bearing in mind the aforesaid observation of the Hon'ble Supreme Court, the legal heirs are entitled to loss of estate which would include expenses on medicine, treatment, diet, attendant, doctor's fees including income and future prospect. It is further relevant to note that the Hon'ble Supreme Court in the aforesaid decision has re-assessed the total compensation taking into account the said aspects and factors. Therefore, the argument of Mr. Pahari, learned Advocate appearing for insurance company in this regard fall short of merit.

16. As per income disclosed in the income tax return for the assessment year 2004-2005 (**Exhibit 9**) filed on 13.10.2004, prior to the accident, the

victim had total income of Rs.1,71,490/- and the tax paid on the total income is Rs. 25,447/-. Thus, the actual yearly income of the victim at the time of accident would be total income less tax component which comes to Rs. 1,46,043/-.

17. Since the victim, at the time of accident, was admittedly 36 years old and was self-employed carrying on the business of civil works under the name and style of *M/s M.S. Construction*, hence following the observation of the Hon'ble Supreme Court in the matter of ***National Insurance Company Limited versus Pranay Sethi and Others*** reported in **(2017) 16 SCC 680**, the income of the victim should include an additional amount equivalent to 40% of the annual income of the victim towards future prospect.

18. So far as the medical expenses are concerned, it is found that the claimant injured produced medical bills amounting to Rs.3,12,955.43/-, as noted by the learned tribunal, which should be granted since such medical bills have not been challenged on the ground that those are not paid or have been manufactured.

19. The Hon'ble Supreme Court in *Kahlon (supra)* disallowed compensation under the head of pain and sufferings holding the same to be unsustainable being personal injuries. Though relying on the decision of Hon'ble Supreme Court in *Jakir Hussein (supra)* it is argued on behalf of the legal heirs that they are entitled to non-pecuniary damages yet the case before the Hon'ble court was pursued by the injured and not by his legal heirs and therefore is distinguishable in facts. Following the aforesaid observation of the Hon'ble

Court in *Kahlon (supra)* the compensation under the head of pain and sufferings is disallowed.

20. The victim being 36 years of age at the time of accident following the decision of the Hon'ble Supreme Court passed in the matter of ***Sarla Verma (Smt) and Others versus Delhi Transport Corporation and Another*** reported in ***(2009) 6 SCC 121***, the multiplier to be adopted in the present case should be 15.

21. Keeping in mind the aforesaid factors the compensation amount is calculated as hereunder.

Calculation of Compensation

Annual income	Rs. 1,46,043/-
Add: 40% of annual income towards future prospect	Rs. 58,417/-
Total Income	Rs. 2,04,460/-
Loss of income: 80% of the total income	Rs. 1,63,568/-
Adopting the multiplier 15	Rs. 24,53,520/-
Medical expenses	Rs. 3,12,955/-
Total amount	Rs. 27,66,475/-

22. Thus, the respondents-claimants are entitled to compensation of Rs.27,66,475/- along with interest @ 6% per annum from the date of filing of the claim application till payment. It is found that the appellant-insurance company has made statutory deposit of Rs. 25,000/- vide OD challan no. 391 dated 7.5.2010 and a sum of Rs.9,75,000/- vide OD challan no.486 dated 17.05.2010 with the Registry of this Court in terms of order

dated 5th May 2010. Accordingly, the amount deposited and accrued interest be adjusted against the entire compensation amount and the interest thereon. By the order of this court dated 11 April 2017 the respondents-claimants have withdrawn an amount of Rs.5,00,000/- which shall be adjusted against payment.

23. The appellant-Insurance Company is directed to deposit balance amount of compensation and interest as indicated above, by way of cheque with the learned Registrar General, High Court, Calcutta within the period of six weeks from date.

24. Respondents-claimants are directed to deposit *ad valorem* court fees on the compensation assessed, if not already paid.

25. Learned Registrar General, High Court, Calcutta upon deposit of the aforesaid balance amount and the interest as indicated above shall release the entire compensation amount along with interest in favour of respondents-claimants, in equal share upon satisfaction of their identity and payment of *ad valorem* court fees on the compensation assessed, if not already paid.

26. With the aforesaid observation both the appeals being FMA 804 of 2010 and FMA 197 of 2017 are accordingly disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.

27. All connected applications, if any, stand disposed of.

28. Interim orders, if any, stand vacated.

29. Let a copy of this judgment be forwarded to the learned Tribunal along with lower court records for information.

30. Urgent photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)