IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

FIRST APPEAL NO.778 OF 2012

Ulhas s/o Balwant Meshram,
Aged about 56 years, Occu.- Business,
R/o. 38/A, Gurunanak School Road,
Bezonbagh, Nagpur. **APPELLANT**

// VERSUS //

1) Smt. Saroj Choudhary w/o D. K. Choudhary,
Aged Adult, Occ. Business,
R/o 436/1, Gole Bazar, Jabalpur (M.P.).

2) National Insurance Co. Ltd.,
Branch No.2, Above Bangali Shopping
Centre, Karamchand Chowk, Madhatlal,
Jabalpur – 482 002.

3) Shri Kissanrao Kashiprasad Borle,
Adult, Ocu. Business,
R/o. Pandharkawada, District Yavatmal.

4) Shri Ashok Dulichand Rai,
Adult, Occu.- Business,
R/o. 923, Deshpande Layout,
Wardhaman Nagar, Nagpur.

5) United India Insurance Company,
Bank of India Building,
Kingsway, Nagpur. **RESPONDENTS**

Mr. Prakash D. Randive, Advocate for appellant.
Mr. A. W. Paunikar, Advocate for respondent No.2.
Mr. B. Lahiri, Advocate for respondent No.5.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 03/03/2023

ORAL JUDGMENT

1. The appellant is the original claimant is seeking enhancement of the compensation granted to him by the Motor Accident Claims Tribunal, Nagpur (hereinafter referred as “the learned Tribunal”) under the Judgment and Award dated 23.02.2012 in Claim Petition No.432/2001.

2. Brief facts of the case in nutshell are as under:

The appellant who is the original claimant is resident of Nagpur. On 14.11.1995, he learnt that his travel bus met with an accident and seized by the police, and therefore kept in the Warora Police Station, therefore he was proceeding to Warora Police Station to release his bus. He was proceeding in his Maruti Car bearing No.MP/04/J/2555. When the car reached near Mouza Shedgaon on National Highway No.7, suddenly one truck bearing No. MP-20-G-1632 came from the opposite direction in a rash and negligent manner and dashed against the Maruti Car, in which the claimant was travelling. The said Car was owned by respondent No.3. Shri Kissanrao Kashiprsad Borle and insured with the United India Insurance Company/respondent No.5. Whereas, the truck bearing No.MP-

20-G-1632 was owned by the respondent No.1 and validly insured with the respondent No.2/National Insurance Co. Ltd. As per the contention of the claimant, the driver of the said truck has driven the truck in high and excessive speed without observing the traffic rules and regulations and dashed against the Maruti Car. Due to the aforesaid dash, the Maruti Car was severely damaged. The claimant and one Sanjay Mohata who were in the Car sustained grievous injuries in the said accident. As the said accident took place due to the rash and negligent driving of the truck driver, Crime No.112 of 1995 was registered against the truck driver under Section 279, 337 of the Indian Penal Code.

3. The claimant further claims that in the said accident he sustained fracture injuries to his shoulder and also injuries to his nasal bone. He was admitted in the hospital and Dr. Satish Kale treated him for the fracture of his left shoulder. He was indoor patient till 28.11.1995 in Oswal Hospital. He incurred huge expenses for his treatment as he undergone surgery. In spite of such treatment, claimant was not recovered completely from the said injuries and sustained permanent disablement. As

per the contention of the claimant, at the time of accident, he was running the business of R.T.O. Agency and was earning Rs.5,000/- to 6,000/- per month. He had also obtained the loan from Co-operative Bank for purchasing travel bus. Thus, he was also running the transport business. However, due to the accidental injuries which resulted into permanent disablement, he was bedridden and could not ply his luxury bus. Thus, due to the accidental injuries, he was permanently disabled and his earning capacity was reduced. As per contention of the claimant, as the said accident took place due the rash and negligent driving of the truck driver, which is owned by respondent No.1 insured with respondent No.2 – National Insurance Company as well as Maruti Car was owned by the respondent No.3 and insured with respondent No.5 – United India Insurance Company, therefore all the respondents are jointly and severally liable to pay compensation. The Car was in the possession of the respondent No.4.

4. In response to the notices issued, the respondent Nos.1 and 4 failed to appear and petition proceeded *ex-parte* against them. The respondent No.2 – Insurance Company with whom the offending truck was validly insured filed written

statement and denied the contention. As per the contention of the Insurance Company, the accident took place due to the rash and negligent Act of the Maruti Car driver. Maruti Car driver was not holding valid driving licence as well as truck driver was also not holding valid and effective driving licence. Thus, there was breach of policy. Hence, the respondent No.2 -- National Insurance Company is not liable to pay compensation to the claimant. The respondent No.5 – United India Insurance Company of Maruti Car bearing No. MP-04–J-2555 denied its liability and prayed for dismissal of the claim against it.

5. The learned Tribunal has framed the necessary issues and recorded the evidence. After recording the evidence, the learned Tribunal awarded the compensation of Rs.55,000/- to the petitioner/claimant. The learned Tribunal observed that claimant failed to prove that he has sustained the functional disability and his avocation and profession is affected due to the accidental injury and awarded lump sum amount of Rs.55,000/- under the head of loss of income for three months, pain and sufferings etc.

6. Being aggrieved and dissatisfied with the said Judgment and Award, present appeal is preferred by the claimant on the ground that learned trial Court has not considered that due to the accidental injuries claimant has sustained permanent disablement to the extent of 15%. Due to the accidental injuries, claimant is unable to carry out his day to day affairs, his working capacity is affected. Thus, the Judgment and Award passed by the learned Tribunal is erroneous and liable to be modified. It is contended that the claimant is entitled to receive compensation by applying the multiplier method as he had sustained the permanent disability to the extent of 15%.

7. Heard learned Advocate Mr. Randive for the claimant/appellant. He vehemently submitted that the oral evidence of the claimant as well as the evidence of the Medical Officer shows that injured had sustained 15% permanent disability. Due to the permanent disability, he is unable to work as he was working initially. Considering his working capacity is affected, the learned Tribunal ought to have awarded the compensation which is not awarded by the learned Tribunal and

hence award passed by the learned Tribunal deserves to be modified.

8. In support of his contention, he placed reliance on **Prashant Bhaskar Kasar Vs. Kantilal Nemichand Jain and others** reported in **2023 DGLS (Bom.) 466** (Aurangabad Bench) wherein Aurangabad Bench has considering the nature of injuries sustained by the appellant and considering the aspect that the appellant must have recovered from those injuries, it can safely be inferred that the appellant must have suffered from 5% functional disability on permanent basis. He submitted that in the present case also, the medical evidence shows that claimant has sustained 15% of the permanent disability, and therefore on the basis of guess work his disability is to be ascertained and he is entitled to receive the compensation by applying the multiplier method.

9. Heard learned Advocate Mr. Lahiri for the respondent No.5 – United India Insurance Company. He submitted that there is absolutely no evidence that injured had sustained the functional disability. His avocation and profession

are not at all affected, due to the said injuries. There is no evidence to show that his avocation and profession is affected due to the accidental injuries, therefore the award passed by the Tribunal is correct one and no interference is called for.

10. Heard learned Advocate Mr. Paunikar for respondent No.2 - National Insurance Company. He also endorsed the same contention and stated that claimant failed to prove that he had sustained the functional disability, and therefore he is not entitled for any enhanced amount of compensation. The learned Tribunal had rightly observed that there is no evidence to show that injured had sustained the injury which resulted into the permanent disability and working capacity of the injured was affected due to the said injuries.

11. After hearing both the sides and after perusal of the record, first and foremost question arises for determination is whether the Judgment and Award passed by the learned Tribunal needs to be modified by enhancing the compensation.

12. A man is not compensated for physical injury. He is

compensated for the loss which he suffers as result of that injury. It is for his inability to live a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned. In calculating the compensation, it is the object of the Tribunal to award an amount which will put the injured person in the same position. Had he not sustained the injury, though it is proved that money cannot be renewed the physical frame which has been damaged. The Tribunals are supposed to endeavor in awarding sums which can be said to be just and reasonable compensation. The Tribunals are required to bear in mind that the exorbitant and unreasonable demands of the victim then to strike the balance by considering the unrealistic stand of the opposite party that the claims needs to be dismissed. This is a balancing act. The consideration for the precious human limb cannot be forgotten as it is the manifest that no award of money can possibly compensate the injured and renew his battered body. But the sympathy for the victim, an emotional consideration, should not come in way for analytical and rational assessment by resorting to thinking activity, therefore the Tribunal is required to determine the damages objectively by removing speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. Admittedly, an injured is not only entitled to compensation for the permanent disability but also for the pecuniary and other loss which is suffered on account of sustaining such injury. The Tribunal in injury cases while assessing the compensation should take into account all relevant circumstances, evidence, legal principles governing determination of compensation. There should be realization on the part of the Tribunals.

13. In the light of the above well settled legal principles, it has to be seen whether claimant has made out the case for enhancement of the compensation. To substantiate the claim, the claimant stepped into the witness box and filed affidavit of examination-in-chief. He reiterated the entire contentions as per his pleading. The sum and substance of his evidence is that on the day of accident that is on 14.11.1995, he was travelling by Maruti Car bearing No. MP-04-J-2555, when his Car reached near Mouza Shedgaon on National highway No.7 suddenly one Truck bearing No.MP-20-G-1632 owned by the respondent No.1

and validly insured with the respondent No.2 - National Insurance Company came from the opposite direction in rash and negligence manner and gave dash to the Maruti Car. Due to the severe dash, he sustained fracture injury on his left shoulder and also injury on his nasal bone. As the said accident took place due to the rash and negligent driving of truck driver, Crime bearing No.112/1995 was registered against the truck driver. Regarding the said accidental injuries, he was treated in Oswal Hospital. He sustained 15% permanent disability. At the time of accident, he was running R.T.O. Agency and was earning Rs.5,000/- to Rs.6,000/- per month. He had also started the transport business and from the said transport business also he was earning the handsome amount. He testified that due to the injuries which resulted into permanent disablement his working capacity was affected, and therefore he claimed the compensation of Rs.11,90,000/- from the respondents. He claimed that as the said accident took place due to the rash and negligent driving of truck driver which is owned by the opponent No.1 and insured with the opponent No.2 and Maruti Car in which he was travelling is owned by respondent No.3 and insured with the respondent No.5. Therefore, all the respondents are jointly and severally liable to pay compensation. He had claimed hospitalization charges to the tune of Rs.30,750/-, towards medicines and other surgical requirements Rs.10,969/-, X-rays and Pathology test Rs.1,430/-, conveyance for the family members Rs.2,240/-, conveyance expenses Rs.48,000/-, pain and sufferings Rs.2,00,000/- and damages and compensation towards permanent disability to the tune of Rs.5,00,000/-, damages and compensation for loss of earning as Rs.3,00,000/-. Thus, he claimed Rs.10,99,149/-. Besides his oral evidence, he placed reliance on FIR Exh.35. Spot panchnama Exh.36, Charge-sheet Exh.37, AA Form Exh.38, Disability Certificate Exh.39, Registration Certificate of Truck Exh.40 and attested copy of driving licence of truck driver Exh.41.

14. The claimant was cross-examined on behalf of United India Insurance Company i.e. respondent No.5. During cross-examination of respondent No.5, he admitted that his Maruti Car in which he was travelling was driven by its driver by left side of road in moderate speed. It is further stated that the truck which was coming from the opposite side was in rash and

negligent manner and dashed against Maruti Car. Respondent No.2 had also cross-examined the claimant. During cross-examination on behalf of respondent No.2, it is stated that the crime was registered against both Car driver and truck driver. He further admitted that the collision between two vehicles was head on collision. Thus, the cross-examination shows that the accident took place due to the head on collision and both the vehicle drivers are responsible for the said accident.

15. Claimant has also adduced the evidence by examining PW.2 Samir Arun Gupta, who is the owner of Medical Store. As per his evidence, claimant has purchased the medicines from his shop and his father has issued the bills, he identified the signature of his father. The said bills are at Exhs.48 to 48-H. During cross-examination of this witness by respondent No.2, he admitted that he has not brought the bill book of his shop. He had not brought the sale tax return etc...

16. To prove the disability, claimant placed reliance on Dr. Jitendra Shrikrishnadas Mehta whose evidence shows that he was attached to Oswal Hospital, Nagpur. Claimant was admitted

in the hospital from 14.11.1995 to 28.11.1995. As he sustained the injuries in the road accident, he treated him and operated him for nasal bone fracture. Petitioner has paid Rs.11,000/- towards the charge of the hospitalization. During cross-examination of this Medical Practitioner, it is brought on record that after such surgery patient can perform his daily routine work. He further admitted that patient in such situation can do his work after surgery also. Admittedly, claimant has not adduced any evidence regarding the disability which is caused due to the fracture injury towards the left shoulder and to show that said injury resulted into permanent disablement. Exh.39 is the certificate which shows that injured had sustained the fracture which is malunited fracture with neck humerus restricting movement of the shoulder. The said certificate is at Exh.39 which is issued by the Government Medical College and Hospital, Nagpur. As already observed earlier no evidence is adduced by the claimant to show that injury sustained by him on his hand is resulted into permanent disablement. Admittedly, no evidence is adduced by the respondents either by the National Insurance Company or United Insurance Company. Though respondent No.2 - National Insurance Company raised the defence that there was a contributory negligence of Maruti Car driver. However, findings of the trial Court are not challenged by the National Insurance Company - respondent no.2. Present appeal is filed by the appellant who is the claimant for enhancement of the compensation. It is vehemently submitted by the learned Advocate Mr. Randive for the claimant/appellant that due to the accidental injuries claimant has sustained permanent disability to the extent of 15%. The principles of assessment of compensation in the injury cases are laid down by the Hon'ble Apex Court in the case of **Raj Kumar Vs. Ajay Kumar and another** reported in **2011 ACJ 1**. The principles are as follows:

> (i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.
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> (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 percentage of permanent disability.
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> (iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of this permanent disability can give evidence only in regard to 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 entirely.

> (iv) The same permanent disability may result in different percentage of loss of earning capacity in different persons depending upon the nature of profession, occupation or job, age education and other factors.

17. It is further laid down by the Hon'ble Apex Court that the 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 or some part of the body, found existing 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. The Hon'ble Apex Court further held that 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. 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 claimant is totally disabled from earning any kind of livelihood, or 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 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. Thus, the Tribunal should assess the compensation on the basis of the above principles narrated by the Hon'ble Apex Court.

18. Here in the present case, admittedly, claimant has not adduced any evidence to show that due to the accidental injuries i.e. fracture injury sustained by him on his left shoulder, he is suffering from permanent disability. In the instant case, the claimant was running the R.T.O. Agency and according to him, he was also running the transport business. Learned counsel for the claimant submitted that after the accident, his earning capacity was affected and he had sustained the loss of earning capacity. Admittedly, capacity is related to potentiality of the concerned, the claimant though have claimed that he had

sustained 15% permanent disability but he has not adduced any evidence on record to show that how and what manner his working capacity is affected and he has sustained the loss due to the loss of earning capacity. Even if, the contention of the claimant is taken into consideration, he had sustained the disability then also he can run his business by performing managerial and administrative functions. It is not only the physical capacity which is required to run the said business. Therefore, it was necessary for the claimant to have produce some evidence to show that his physical permanent disability has also affected adversely his mental power which resulted into the loss of earning capacity in equal percentage as his physical permanent disability. Such type of evidence has not been adduced by the claimant. On the contrary, the evidence of PW.3 Dr. Mehta shows that the patient if was in such profession can do his such work and PW 3 Dr. Mehta has not assessed his functional disability. Therefore, it has to be held that due to permanent disability mental power of the claimant have not been affected equally. In the absence of any evidence produced on record by the claimant showing to what extent his working capacity has been affected by his permanent disability, I do not think that the conclusion recorded by the learned Tribunal can be held to be perverse and completely erroneous. It is well settled that functional disability which is disability to earn need not be same as permanent disability. The claimant must adduce specific evidence and shows how disability suffered by him has affected his profession and may be even future earning capacity.

19. The learned Tribunal had considered the evidence on record and observed that the doctor has not been examined to prove that the petitioner is unable to attend his work and thereby suffered loss in the business. The learned Tribunal further observed that there is no evidence to show that the working capacity of the claimant was affected. He has sustained loss in the business and his earning capacity was reduced. Though his evidence shows that Dr. Satish Kale performed surgery on his fracture injury but Dr. Satish Kale is not examined by the claimant. The learned Tribunal had considered the evidence on record and awarded the compensation at the rate of Rs.55,000/-. The learned Tribunal had also taken into consideration loss of Rs.10,000/- for the treatment period. The learned Tribunal has awarded Rs.15,000/- towards the medical treatment and Rs.5,000/- towards special diet. The learned

Tribunal has awarded Rs.10,000/- towards treatment and his deformity. After appreciating the evidence on record, admittedly, the claimant was under treatment for 14 days. He had sustained the injury which is in the nature of malunited fracture of neck humerus with restriction of shoulder. Taking into consideration, the nature of the injuries it can be assessed on the basis of guess work that claimant was not able to attend his work for six months and by considering the same, he is entitled to receive compensation towards loss of earning during the treatment period by taking into consideration, his monthly income at the rate of Rs.5,000/-. So, he is entitled to receive Rs.5,000/- X 6 it comes to Rs.30,000/-. The claimant has also undergone pain and sufferings due to the said injuries, as there was restriction on his shoulder movement, therefore the amount granted by the learned Tribunal under the pain and suffering i.e. Rs.10,000/- is very meagre amount. So, claimant is entitled to additional Rs.15,000/- towards the pain and sufferings and special diet. As claimant was treated in the hospital in the Nagpur itself, therefore his contention that he is entitled to receive the amount towards conveyance is not sustainable. The amount of medical bill is already granted by the learned Tribunal. Thus, the claimant is entitled to receive additional Rs.30,000/- towards the enhancement of the compensation. Considering the evidence on record, and there is no evidence that claimant is required future treatment. In absence of evidence, the future loss of income cannot be taken into consideration. In view of that, additional Rs.15,000/- towards loss of income and additional Rs.15,000/- towards pain and sufferings. Thus, claimant is entitled to receive additional Rs.30,000/- towards the final compensation amount as enhanced amount of compensation, which is just and proper.

20. In view of the above discussion, I hold that appeal deserves to be allowed partly. Hence, I proceed to pass following order.

(i) The First Appeal is partly allowed.

(ii) In addition to the compensation granted by the Motor Accident Claims Tribunal, Nagpur, respondent Nos.1 and 2 jointly and severally liable to pay compensation of Rs.15,000/- to the claimant/appellant. Similarly, the respondent Nos.4 and 5 are jointly and severally liable to pay Rs.15,000/- as compensation amount to the claimant/ appellant.

(iii) The respondent Nos.1 to 5 shall pay interest at the rate of Rs.7.5% per annum on the respective shares from the date of application till realization of the amount.

(iv) Award be drawn up accordingly.

(URMILA JOSHI-PHALKE, J.)

Sarkate.