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

Date of decision: 08.08.2023

+ MAC.APP. 25/2019 & CM APPL. 307/2019

IFFCO TOKIO GENERAL INSURANCE CO LIMITED

.....Appellant

Through: Mr.Varun Sarin & Ms.Parul
Dutta, Advs.

versus

TRILOCHAN DASH & ORS

.....Respondents

Through: Mr.Sarfaraz Khan, Adv. for R-
1.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. The present appeal has been filed challenging the Award dated 11.05.2018 (hereinafter referred to as the 'Impugned Award') passed by the learned Motor Accidents Claims Tribunal, South District, Saket Courts, New Delhi (hereinafter referred to as the 'Tribunal') in Petition No. 75578/16 titled ***Trilochan Dash v. Ranjeet Singh & Ors.***

2. By the Impugned Award, the learned Tribunal has held that the accident in question had occurred due to the offending vehicle, that is, the vehicle bearing No. DL 1V C 0902, being driven in a rash and negligent manner by the respondent no.2 herein.

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3. The respondent no.1 herein/PW-1/the claimant, had narrated the manner in which the accident had taken place. He had stated that on 11.11.2013 at about 8:30 AM he was going to his office along with another person Sh. Bhimsen Mahapatra. When they reached near Supertech building, Section-93, Noida, Uttar Pradesh, suddenly the offending vehicle coming from the wrong side and being driven recklessly and at a high speed hit him with such force that he sustained grievous injuries. In his cross-examination, however, he stated that at the time of the accident, he was crossing the road on foot and that there was a divider in the middle of the road at the spot of the accident. He admitted that while crossing the first section of the road till the divider he had seen to his left and right, however, while crossing the other section of the road, he did not see to his left and right and was hit by the offending vehicle coming from the wrong side at a high speed when he was crossing the road.

4. The learned counsel for the appellant submits that as the claimant/PW-1 had admitted in his cross-examination, that he has not seen to the right or the left for the traffic before crossing the second section of the road, therefore, contributory negligence should have been attributed to him by the learned Tribunal for the purposes of determining the compensation payable to him. In support, he places reliance on the judgment of this Court in *Ajay Kumar v. Deepak Kumar*, 2017 SCC OnLine Del 9496.



5. On the other hand, the learned counsel for the respondent no.1 submits that the driver of the offending vehicle did not enter an appearance before the learned Tribunal. The learned Tribunal was, therefore, presented with only one version, that is, of the claimant/PW-1, as is also evident from the site plan attached with the Detailed Accident Report (in short 'DAR'). The accident had occurred when the offending vehicle, which was coming from the wrong side of the road, hit the respondent no.1/claimant, resulting in the injuries suffered by him, and it cannot be said that the respondent no. 1 was negligent and therefore, had contributed to the accident.

6. I have considered the submissions made by the learned counsels for the parties. In the absence of any other stand taken by the respondent no.2 before the learned Tribunal, and in view of the evidence of PW-1/the claimant, it stood established that the accident occurred when the offending vehicle was coming from the wrong side and at a high speed. It has also come on record that there was some barricading by the police at the site of the accident. In spite of such barricading, the offending vehicle was not only being driven at a high speed but also on the wrong side of the road. In my view, therefore, it cannot be said that the respondent no.1 had contributed in the accident in question by his own negligence.

7. In **Ajay Kumar** (supra), the Court, on the basis of the DAR, found that the offending vehicle was not being driven dangerously or at excessive speed; it was being driven in its



lane and within the permissible speed limit. The said judgment would, therefore, have no application to the facts of the present case.

8. The next challenge of the appellant to the Impugned Award is on account of the functional disability of the respondent no.1 being assessed at 80% by the learned Tribunal. The learned counsel for the appellant submits that from the statement of the Claimant/PW-1 and from the statement of Sh. Kamal Sharma, Senior Manager at M/s SMS Design Consultants Pvt. Ltd., that is, the employer of the respondent no.1/claimant at the time of the accident, it was evident that the respondent no.1 had resigned from the services of his own volition. He further submits that the Disability Certificate issued by the Medical Board at the Safdarjung Hospital and V.M.M.C. (hereinafter referred to as the 'Medical Board'), had assessed the permanent disability suffered by the respondent no.1 at 50%. He submits that, therefore, there was no occasion for the learned Tribunal to have assessed the functional disability at a higher percentage, and in any case, at 80%.

9. On the other hand, the learned counsel for the respondent no.1 submits that the petitioner had suffered 'post-traumatic brain injury sequeale-frontal lobe syndrome' as found by the Medical Board. He further submits that Dr.Abhilasha Yadav was examined as PW-2 and she stated that the respondent no.1 will have problems in doing a job that requires use of mental faculties and can only do some unskilled work, such as of



labourer, where his mental discretion would not be required. He submits that, therefore, the learned Tribunal has rightly assessed the functional disability of the respondent no.1 at 80%.

10. I have considered the submissions made by the learned counsels for the parties. From the Letter of Appointment of the respondent no.1, Ex.PW-3/B (colly.), it had been proved that at the time of the accident, the respondent no.1 was working as an 'Operation Manager-DG'. PW-2/Dr. Abhilasha Yadav, Associate Professor, Department of Psychiatric, Safdarjung Hospital, New Delhi, in her statement before the learned Tribunal, had stated as under:-

"PW-2: Dr. Abhilasha Yadav, Associate Professor, Department of Psychiatric, Safdarjung Hospital, New Delhi. On the basis of record.

I am a summoned witness. I was one of the members of the Disability Board constituted at Safdarjung Hospital. After examination, disability certificate was issued to the petitioner. As per the disability certificate he is a case of post traumatic brain injury sequeale-frontal lobe syndrome and he has 50% permanent in relation mental capabilities. The disability certificate is Ex.PW2/A. It bears my signature at point 'A'

Xxxxx by Sh. Varun Sarin Ld. Counsel for the insurance company.

It is correct that the disability certificate does not state that the 'disability is likely to improve or not. (Vol.) The nature of disability is permanent in nature. It is correct that the petitioner has not suffered any physical impairment as such he can stand



independently, he can speak properly, he can sit properly. The petitioner will have problem in a job which requires use of mental faculties but he can pursue other vocations which do not require much use of the mental faculties such as remembering things, learning new things, problem in executive functioning and decision making. As per my opinion he can only do some unskilled work such as like a labourer where his mental discretion is not required to such an extent. There is very less likelihood that he may be appointed in some private vocation.”

11. In **Raj Kumar v. Ajay Kumar and Another**, (2011) 1 SCC 343, the Supreme Court has laid down the principles for determining the functional disability in case of a permanent disability being suffered due to a motor accident, as under:-

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



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 per cent, 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 be 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.

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16. The Tribunal should not be a silent spectator when medical evidence is tendered in regard to the injuries and their effect, in particular, the extent of permanent disability. Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an enquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so



that it can assess the “just compensation”. While dealing with personal injury cases, the Tribunal should preferably equip itself with a medical dictionary and a handbook for evaluation of permanent physical impairment (for example, Manual for Evaluation of Permanent Physical Impairment for Orthopaedic Surgeons, prepared by American Academy of Orthopaedic Surgeons or its Indian equivalent or other authorised texts) for understanding the medical evidence and assessing the physical and functional disability. The Tribunal may also keep in view the First Schedule to the Workmen's Compensation Act, 1923 which gives some indication about the extent of permanent disability in different types of injuries, in the case of workmen.

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19. *We may now summarise the principles discussed above:*

(i) *All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.*

(ii) *The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).*

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard 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 entirety.

(iv) The same permanent disability may result in different percentages of loss of



earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.”

12. The learned Tribunal has considered the above judgment of the Supreme Court, and the statement of PW-2, and has held that the functional disability of the respondent no.1 can be assessed as 80%. I see no reason to disagree with the above opinion of the learned Tribunal, especially keeping in view the statement of PW-2/Dr. Abhilasha Yadav. The challenge to the Impugned Award to this extent is also rejected.

13. The next challenge of the appellant to the Impugned Award is on the ground that the respondent no.1 had failed to prove the salary being drawn by the respondent no.1 at the time of the accident, based whereon the claim for loss of income and other relief could be assessed.

14. The learned counsel for the respondent no.1, however, placing reliance on the statement of PW-3/Sh. Kamal Sharma, and also on the Letter of Appointment (Ex.PW-3/B), submits that it had been proved that the respondent no.1 was drawing a consolidated salary of Rs.27,500/- per month plus mobile reimbursement of Rs.750/- per month and a conveyance charge of Rs.3 per kilometre, at the time of the accident, from his employer. He submits that the learned Tribunal, therefore, has rightly assessed the claim of damages of the respondent no.1 taking the salary of the respondent no.1 as Rs.27,500/- per

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15. I have considered the submissions made by the learned counsels for the parties. Ex.PW-3/B clearly states the salary of the respondent no.1. Though it is correct that the claimant or the PW-3/Sh. Kamal Sharma could not produce further evidence in form of his Income Tax Returns to prove the salary, the onus of proof in an 'inquiry' under the Act is of 'preponderance of probabilities'. In this regard, statement of PW-3/Sh. Kamal Sharma could not be disregarded, who proved the salary being paid to the respondent no. 1. The appointment letter shows the salary drawn by the respondent no.1 from his employer and the same has been rightly considered by the learned Tribunal for assessing the compensation to be awarded to the respondent no.1. I, therefore, find no merit in this challenge of the appellant as well.

16. The last challenge of the appellant to the Impugned Award is on the ground that the learned Tribunal has erred in not deducting the Income Tax payable by the respondent no.1 on his salary income. The learned counsel for the respondent no.1 does not dispute the above challenge. He submits that if any Income Tax is to be deducted from the total compensation, as applicable on the salary of Rs.27,500/- as assessed by the learned Tribunal, the same can be deducted while determining the compensation.

17. The learned counsel for the respondent no.1/claimant submits that as per the relevant tax rates for the Financial Year 2013-14, a tax of Rs.11,330/- per annum would have been



payable by the respondent no.1 on his salary/income assessed at Rs.27,500/- per month.

18. Keeping in view the above, the challenge of the appellant to the impugned Award to this limited extent succeeds. The amount of tax payable should have been deducted while determining the loss of income awarded to the respondent no.1/claimant by the learned Tribunal. Accordingly, the amount awarded by the learned Tribunal towards Loss of Income/Future Loss of Income in favour of the respondent no. 1 shall stand modified as under:-

$$\{(27500 \times 12) - 11330\} \times 15 \times 80\% =$$

$$\text{Rs.} 38,24,040/-$$

19. The appeal is partially allowed.

20. In view of the above, the excess amount deposited by the appellant shall be released to the appellant along with the proportionate interest accrued thereon. The remaining amount that is deposited by the appellant pursuant to the order dated 08.01.2019 of this Court, shall be released by the learned Tribunal to the respondent no.1/claimant along with interest accrued thereon in, the manner prescribed in the Impugned Award.

21. The statutory amount deposited by the appellant shall also be released to the appellant along with interest accrued thereon.

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22. The appeal along with the pending application is disposed of in the above terms.

NAVIN CHAWLA, J

AUGUST 8, 2023/rv/AS