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

Date of decision: 25th July, 2023

(11)+ MAC.APP. 184/2019 & CM APPL. 4928/2019

SBI GENERAL INSURANCE CO LTD Appellant
Through: Mr.Sameer Nandwani,
Ms.Nikita Sharma, Mr.Rohin
Singh Pande, Advs.

versus

GAURAV TANWAR & ORS Respondents
Through: Mr.S.N.Parashar, Adv.

(12)+ MAC.APP. 469/2019

GAURAV TANWER Appellant
Through: Mr.S.N. Parashar, Adv.

versus

PAPPU & ORS (SBI GENERAL INSURANCE CO LTD)
..... Respondent
Through: Mr.Sameer Nandwani,
Ms.Nikita Sharma, Mr.Rohin
Singh Pande, Advs. for R-3.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (ORAL)

1. These cross appeals have been filed by the Insurance Company and Mr.Gaurav Tanwar/claimant challenging the order dated 12.11.2018 passed by the learned Motor Accidents Claims Tribunal, Shahdara District, Karkardoom Courts, Delhi (hereinafter referred to



as the ‘Tribunal’) in MACT Case no.1410/2016, titled ***Gaurav Tanwer v. Pappu & Anr.***

2. The narration of the accident is that on 07.01.2015 at about 2.30 pm, the claimant alongwith one Dheeraj was going from Sonapat, Haryana to village Sunhera, Baghpat, Uttar Pradesh by motorcycle bearing no. UP 17-6626 being driven by him. When they reached near Chauhan Hotel, Village Goripur, Sonapat Road, PS Baghpat, UP, they had a head-on collision with one truck bearing No. HR-45B 3754 (hereinafter referred to as the ‘Offending Vehicle’). Due to the injury suffered, the claimant was removed to District Combined Hospital, Baghpat, UP, but was referred to the Fortis Hospital, where he remained hospitalized during the period from 07.01.2015 to 19.01.2015. He was thereafter referred to the Atlanta Mediworld Hospital, where he was hospitalised between 19.01.2015 to 28.01.2015, 11.05.2015 to 13.05.2015, and 20.07.2015 to 29.07.2015. He was also hospitalised in the Fortis Hospital between 12.12.2015 to 15.12.2015, and had to undergo multiple surgeries. He suffered 46% permanent disability in his right lower limb.

3. Based on the evidence on record, the learned Tribunal found the claimant to have been guilty of contributory negligence, and directed 50% deduction of the awarded amount under the head of loss of earning on this account.

4. The first challenge of the claimant is to the finding of him being found guilty of contributory negligence quantified at 50%.

5. The learned counsel for the claimant, placing reliance on the site plan of the accident, submits that the site plan shows that the



offending vehicle was being driven towards the right side of the road which was without a divider in between. He submits that as the heavy goods vehicle-truck was to be driven on the left side of the road, therefore, in the given facts, the attribution of 50% as contributory negligence of the claimant was completely unjustified, and Award to this extent is liable to be set aside.

6. On the other hand, the learned counsel for the Insurance Company submits that the site plan shows that the accident had taken place in the middle of the road. The claimant also had no reason to drive his motorcycle in the middle of the road. He submits that therefore, the learned Tribunal has rightly attributed 50% of the contributory negligence on the claimant.

7. I have considered the submissions made by the learned counsels for the parties.

8. The site plan referred to by the learned counsels for the parties clearly shows that the accident happened in the middle of the road. It is not the case of the claimant that he had to drive in the middle of the road for some reason or for the presence of any vehicle or other blockade on his left side. The road was without a divider in between and therefore, the claimant also should have been vigilant while driving his motorcycle. The learned Tribunal, placing reliance on the site plan, has observed as under:

“16.2. I have gone through the record. Insurance company has cross examined the PW1 on this aspect and put a suggestion to this effect but no further cross examination of witness has been conducted. However, injured has relied upon a certified copy of criminal record pending against the driver of the



offending vehicle and the same is containing a site plan to prove the spot of this accident. This site plan has shown the spot of accident at Point X which is in the middle of the road which was not the spot of driving of any of the vehicles. The accident in the middle of the road was definitely a head on collusion between both the vehicles and injured, who was driving his motorcycle, was also responsible for this accident and contributed to this accident. Even the law this effect is also well established. It is held in AIR 2009 SC 1951 titled Usha Rajkhowa v. Paramount Industries that the petitioners are entitled for 50% of compensation in case of head on collusion of the vehicles being a case of contributory negligence. Even similar law has been approved in Raj Rani & Ors. Vs. Oriental Insurance Co. Ltd. & Ors. (2009) 13 SCC 654, Vijay Kumar Duggal Vs. Bidya Dhar Dutta & Ors. (2006) 3 SCC 342 that 50% of award amount has to be deducted towards contributory negligence. However, this deduction is to be made only out of award amount granted loss of earning during treatment period as well as loss on account of permanent disability. However, this deduction shall not be applicable against the amount awarded under unconventional heads. As such, Respondents No. 3 is liable to pay this compensation.”

9. In ***Usha Rajkhowa v. Paramount Industries***, (2009) 14 SCC 71, the Supreme Court has held as under:

“20. The question of contributory negligence on the part of the driver in case of collision was considered by this Court in Pramodkumar Rasikbhai Jhaveri v. Karmasey Kunvargi Tak [(2002) 6 SCC 455] . That was also a case of collision between a car and a truck. It was observed in SCC p. 458, para 8:

“8. ... The question of contributory negligence arises when there has been



some act or omission on the claimant's part, which has materially contributed to the damage caused, and is of such a nature that it may properly be described as 'negligence'. Negligence ordinarily means breach of a legal duty to care, but when used in the expression 'contributory negligence' it does not mean breach of any duty. It only means the failure by a person to use reasonable care for the safety of either himself or his property, so that he becomes blameworthy in part as an 'author of his own wrong'."

21. *This Court further relied on an observation of the High Court of Australia in Astley v. Austrust Ltd. [(1999) 73 ALJR 403] to the following effect:*

"A finding of contributory negligence turns on a factual investigation whether the plaintiff contributed to his or her own loss by failing to take reasonable care of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule. The duties and responsibilities of the defendant are a variable factor in determining whether contributory negligence exists and, if so, to what degree. In some cases, the nature of the duty owed may exculpate the plaintiff from a claim of contributory negligence; in other cases, the nature of the duty may reduce the plaintiff's share of responsibility for the damage suffered; and in yet other cases, the nature of the duty may not prevent a finding that the plaintiff failed to take reasonable care for the safety of his or her person or property. Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant,



although relevant, is one only of many factors that must be weighed in determining whether the plaintiff has so conducted itself that it failed to take reasonable care for the safety of its person or property.”

10. Applying the above principles, and in the facts of the present case, I find no infirmity in the Impugned Award on the attribution of 50% contributory negligence on the claimant.

11. The learned counsel for the Insurance Company submits that once 50% contributory negligence was attributed to the claimant, there is no reason to confine the deduction only on the head of ‘loss of earning’. He submits that deduction should have made on all the heads of compensation awarded in favour of the claimant.

12. On the other hand, the learned counsel for the claimant submits that the attribution of the contributory negligence will be relevant only towards the head of ‘loss of earning’ and not on other heads.

13. In the present case, the summary of compensation awarded to the claimant by the Impugned Award is as under:

1.	Reimbursement of medical expenses:	Rs. 15,71,063/-
2.	Pain and Suffering:	Rs. 1,00,000/-
3.	Attendant charges for 12 months:	Rs. 5,000 X 12 = 60,000/-
4.	Loss of Income during treatment period: (12 months @Rs. 8,632/- pm)	Rs. 8632 X 12 =Rs.1,03,584/- (50% to be deducted qua contributory negligence)
5.	Loss of earning capacity	Rs. 5,67,011/-

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MAC.APP. 184/2019 & MAC.APP.469/2019



	including future damages due to this disability:	(50% to be deducted qua-contributory negligence)
6.	Conveyance & special diet:	Rs. 25,000/-
7.	Compensation for mental and physical shock:	Rs. 50,000/-
8.	Loss of amenities in life:	Rs. 75,000/-
9.	Damages for inconvenience, hardship, frustration and permanent disfigurement.	Rs. 75,000/-
	Total =	Rs.26,26,658/- (Rs.22,91,360/- after deduction 50% from loss of income, rounded off Rs.22,92,000/-)

14. As is evident from the above, deduction for the reason of contributory negligence has been made by the learned Tribunal only on the head of loss of income during the treatment period, and the loss of earning capacity, including future damage due to this disability. While no deduction can be made on the compensation awarded towards the “reimbursement of medical expenses”, I see no reason why such deduction has not been made by the learned Tribunal on the other heads on the compensation awarded to the claimant. Once the claimant is attributed contributory negligence, the deduction should have been made on the other heads of the Award of compensation as well. The Impugned Award shall therefore stand modified to this extent, directing that on the amounts awarded at Serial number 2 to 9

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MAC.APP. 184/2019 & MAC.APP.469/2019



of the above table, as modified by the present order, deduction of 50% on account of attribution of contributory negligence on part of the claimant, shall be made.

15. This now brings me to the other challenges of the claimant to the Impugned Award.

16. The learned counsel for the claimant submits that the claimant in his affidavit of evidence stated that he was a graduate in Bachelor of Arts from Chaudhary Charan Singh University, Meerut, UP. A certificate in this regard was also placed on record by the claimant before the learned Tribunal. Instead of relying on this evidence, the learned Tribunal, in its Impugned Award, wrongly observed that no evidence of the educational qualification of the claimant has been produced on record. Based on such erroneous finding, the learned Tribunal held that the loss of income is to be assessed based on the Minimum Wages prevalent in Delhi for an unskilled labour. The learned counsel for the claimant submits that as the claimant is a graduate, the minimum wages as applicable to a graduate should have been taken into consideration.

17. I find merit in the submission made by the learned counsel for the claimant. The claimant, in his affidavit of evidence, had clearly stated that he has passed the Bachelor of Arts from the Chaudhary Charan Singh University, Meerut, Uttar Pradesh. He has also placed on record the marksheet for the final examination for the said course. The learned Tribunal, in spite of said evidence on record, held that the claimant has not placed on record any documents of his educational qualification. The said finding is, therefore, erroneous on the face of



the record.

18. The claimant is, accordingly, held entitled to determination of his loss of income on basis of the minimum wages prevalent in Delhi on the date of the accident for a graduate.

19. The learned counsel for the claimant submits that on the date of accident such minimum wages were notified as Rs.11,414/- per month. As this is not disputed by the learned counsel for the Insurance Company, it is directed that for the loss of income during the treatment period and for the future loss of income, the assessment shall be made taking the income of the claimant as Rs.11,414/- per month. The Award shall stand modified to this extent.

20. The next challenge to the Impugned Award is on the account of compensation awarded under the heads of pain and suffering, attendant charges, conveyance & special diet, compensation for mental and physical shock, loss of amenities in life, damages for inconvenience, hardship, frustration and permanent disfigurement. The learned counsel for the claimant submits that looking into the injuries suffered by the claimant, the quantification of the compensation on the above heads is highly inadequate and is entitled to enhancement by this Court.

21. On the other hand, the learned counsel for the Insurance Company submits that in the absence of any evidence, the learned Tribunal has rightly awarded the compensation on the above heads, and the same deserves no interference from this Court.

22. I have heard the submissions made by the learned counsels for the parties.

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18:29:54

MAC.APP. 184/2019 & MAC.APP.469/2019



23. The history of hospitalization of the claimant has been mentioned by me hereinabove. The claimant in his affidavit of evidence also describes the injuries suffered by him as under:

*“4. I say that I have received permanent disability due to sustained injuries i.e. **RTA WITH POLY TRAUMA (MANDIBLE FRACTURE), FRACTURE SHAFT RIGHT FEMUR, FRACTURE ACETABULUM RIGHT, FRACTURE RIGHT PATELLA (LOWER POLE) FRACTURE PROXIMAL PHALYNX LITTLE TOE, FRACTURE PELVIS, FRACTURE LEFT ILIAC BONE AND BLUNT ABDOMINAL.** I will apply for disability certificate and I will submit before this Hon’ble Court as and when I will obtain it.”*

24. Taking into account the nature of injuries suffered by the claimant due to the accident, and the history of his hospitalization, including multiple surgeries undergone by him, in my view, the quantification of the compensation awarded to the Claimant on account of pain and suffering, conveyance & special diet, and compensation for mental and physical shock (Sl. No.2, 6 and 7 of the table reproduced above) are highly inadequate. They are accordingly enhanced to Rs.5,00,000/-, Rs.1,00,000/- and Rs.2,00,000/- respectively. The Award shall stand modified accordingly.

25. As far as the quantification of the compensation on the head of the attendant charges is concerned, in view of the judgment of the Supreme Court in **Kajal v. Jagdish Chand & Ors.**, (2020) 4 SCC 413, said charges are to be determined on the basis of minimum wages notified for the unskilled workers by the Government of NCT of Delhi. As is evident from the Award itself, the minimum wages for



unskilled worker is Rs.8,632/- per month. Accordingly, the compensation towards the attendant charges shall be enhanced and re-calculated at Rs.8,632/- per month for the period of 12 months, equivalent to Rs.1,03,584/- (Rs. 8,632/- x 12).

26. As regards the compensation on account of loss of amenities of life and damages for inconvenience, hardship, frustration and permanent disfigurement, I do not see any reason to enhance the same, especially taking into account the enhancement granted hereinabove.

27. The last challenge of the claimant to the Impugned Award is on account of deduction in the functional disability.

28. The learned counsel for the claimant submits that it had come on record that the claimant had suffered 46% permanent disability in his right lower limb. The nature of the injuries has been described hereinabove. He submits that in view of the injuries suffered, and the hospitalization that the claimant had to undergo, the learned Tribunal has erred in taking the functional disability of the appellant as only 23% towards his whole body.

29. The learned counsel for the Insurance Company, on the other hand, submits that it was the own case of the claimant that the claimant was earning his livelihood through giving tuition. Due to his disability suffered, there would have no loss of income. He submits the learned Tribunal has, therefore, rightly assessed the functional disability at 23% towards whole body. I am in agreement with the submission made by the learned counsel for the Insurance Company.

30. The Supreme Court in *Raj Kumar v. Ajay Kumar and Anr.*, (2011) 1 SCC 343, has laid down the principle for assessment of



functional disability as under:

“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 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.

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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."

31. In the present case, it was the own case of the claimant that the claimant was providing tuition for earning his livelihood. Of course, on completing his education, he could have taken some other job,

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MAC.APP. 184/2019 & MAC.APP.469/2019

Page 13 of 16



however, the claimant has failed to show how his injury in any case affects his ability to perform his job or affects his means of earning livelihood. The learned Tribunal in the Impugned Award has held as under:

“13. Lose of disability: Petitioner is entitled for compensation under this head as he has suffered 46% disability as per disability certificate Ex.PW3/A in his right lower limb. Ld. Counsel for the respondents have argued that injured is not entitled for compensation as per the percentage of disability certificate as his earning capacity has not been suffered by this disability and he can very well perform all his day to day work due to he is not entitled for compensation for disability. However, the purpose of disability certificate is to determine the actual as well as functional disability on account of accident. It is not disputed that the functional disability is also to be determined by Schedule I of the Workmen's compensation Act, 1923 in terms of section of Section 143 M.V. Act. It has held in Oriental Insurance Co. Ltd. V. Mohd. Nasir (2009) 6 SCC 280 that, both the statutes provide for the mode and manner in which the percentage of loss of earning capacity is required to be calculated. They provide the amount of compensation in cases of this nature would be directly relatable to the percentage of physical disability suffered by the injured vis-a-vis the injuries are specified in the First Schedule of the 1923 Act. Indisputably where injuries are specified in the First Schedule, the mode and manner provided for the purpose of calculating the amount of compensation would be applicable. The 1923 Act would also be applicable to the claims applications arising out of the use of motor vehicles in terms of the provisions of the 1988 Act for the purpose of determination of the amount of compensation where the victim of the accident suffers from disability in the cases coming within the purview of thereof.



The note appended to the Second Schedule of the 1988 Act raises a legal fiction, stating that "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 Workmen's compensation Act, 1923". Permanent disability, therefore, for certain purposes have been co-related with functional disability. In fact, the disablement and loss of earning capacity are two different and not substitute to each other, however functional disability, thus, has a direct relationship with the loss of limb. As per disability certificate Ex.PW3/A, it is 46% but his functional disability must be definitely less than it. Ld. Counsel for the injured has argued that the injured was taking tuitions and has suffered 100% functional disability for his work and cannot do his work again, but no document has been proved to the effect that he was doing any work. However, it is not disputed that the efficiency of the injured must have gone down, but it is also not disputed that he has not become defunct by this accident and even his work of tuition is involving only sitting work which is not going to affect by this injury. In view of the facts, I determine the functional disability of injured as 23% towards his whole body."

32. I find no reason to disagree with the above finding of the learned Tribunal. Accordingly, the challenge of the claimant to the Impugned Award in this head is rejected.

33. No other challenge has been raised by the parties to the Impugned Award.

34. The Impugned Award shall accordingly stand modified to the above extent.

35. The learned Tribunal shall re-assess the compensation payable



to the claimant on the basis of its Award as modified by the present order. In case the amount already deposited by the Insurance Company is found to be inadequate, the Insurance Company shall deposit the additional amount within a period of four weeks of the assessment. In case the amount deposited by the Insurance Company is found to be in excess, the excess amount shall be refunded by the learned Tribunal to the Insurance Company along with proportionate interest thereon.

36. The parties shall appear before the learned Tribunal on 13th September, 2023.

37. The learned counsel for the claimant submits that certain amount has already been released in favour of the claimant. The learned Tribunal shall release the balance amount to the claimant in terms of the schedule prescribed in the Impugned Award.

38. The statutory amount deposited by the Insurance Company shall be released to the Insurance Company alongwith interest accrued thereon.

39. The appeals, along with the pending application, are disposed of in the above terms.

40. The Trial Court Record be sent back to the concerned Tribunal.

NAVIN CHAWLA, J

JULY 25, 2023/Arya/ss

Click here to check corrigendum, if any

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MAC.APP. 184/2019 & MAC.APP.469/2019