

IN THE HIGH COURT AT CALCUTTA

(Civil Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

FMA 65 of 2017

(FMAT 885 of 2016)

National Insurance Co. Ltd (CRO-II).

Vs

Siddique Hossain & Anr.

With

COT 98 of 2024

Siddique Hossain.

Vs

National Insurance Co. Ltd (CRO-II) & Anr.

For the Insurance Company : Mr. Saswata Bhattacharjee.

For the Claimant : Mr. Jayanta Banerjee,
Mr. Sandip Bandyopadhyay,
Ms. Ruxmini B. Roy,
Mr. Argha Bhattacharjee.

Hearing concluded on : 04.07.2024

Judgment on : 24.07.2024

Shampa Dutt (Paul), J.:

1. The present **appeal** has been preferred by the Insurance Company/ Appellant and the **COT appeal** by the Respondent/Claimant/Injured being aggrieved by the judgment and award dated 06th June, 2016, passed by Judge, IXth Bench, City Civil Court, Calcutta and Motor Accident Claim Tribunal in M.A.C.C. No. 56 of 2005, **under Section 166 of the Motor Vehicles Act, 1988.**

2. **The Facts:-**

“On 21.9.2004 in between 13.00 hrs to 13.15 hrs 19.15 hrs over J.L. Nehru Road in front of premises no. 38 while the applicant having completed his official duty was in the process of returning to his barrack and was walking from north to south direction keeping extreme left flank of the road, at that relevant time and place, the offending vehicle being a private bus bearing registration no. WBS-3749 was plying along the said road in the same direction at a high speed in a rash and negligent manner and thereby when it reached the place of occurrence, losing control over the speed and direction, it dashed and knocked down the applicant causing extensive damage and injuries to his person. Immediately thereafter he was removed to and admitted to S.S.K.M. College & Hospital for treatment. It is contended that due to rash and negligent driving on the part of the driver of the bus, the occurrence took place. It is contended that at the relevant time, he was engaged as a Nayek at Kolkata Armed Police and was physically strong and mentally alert. It is contended that commuted leave, earned leave, medical leave have been encashed during the tenure of complete bed riddenness of the applicant and due to such accident, he sustained mental pain and agony and damage on account of permanent disability. It is also contended that applicant earned Rs.8000/- p.m. from his service.”

3. Written Statement has been filed by O.P. no.2/National Insurance Co. Ltd. contending, inter alia, that the claimant has got no cause of

action to file the claim application and that the defective application is not maintainable at all. O.P. has denied the contents of the claim application and also specifically denied that any accident occurred on 21.9.2004 in between 13.00 hrs to 13.15 hrs on J.L. Nehru Road near American Library or that the applicant earned Rs.8000/- p.m. O.P. has denied the several injuries over the Claimant's body including compound fracture of the right shaft (femur) and multiple fracture left humerus causing permanent disablement of the applicant and stated that the claim of Rs.2,50,000/- is unjustified. O.P. no.2 has further denied that the vehicle bearing no. WBS- 3749(bus) was involved in the accident. As per version of O.P./Insurance Company, the claim application should be dismissed with costs.

4. The Claimant examined three witnesses and relevant documents have been marked as **Exhibits 1 to 13**.
5. The Insurance Company and owner (Opposite parties) did not adduce any evidence on their behalf but cross-examined the Claimant's witnesses.
6. **The Tribunal finally granted compensation as follows:-**

"M.A.C.C. No. 56 of 2005"

Dated: 06.06.2016

Taking into account and period of treatment etc, disability to the extent of 40%. I have already stated that income of the injured was Rs.75,984/- p.a. Now 40% of Rs.75,984/- is Rs.30,394/- to be multiplied by 13. So compensation is Rs.30,394/- X 13 = Rs.3,95,122/- has and the petitioner is entitled to get this amount. Petitioner filed money receipts

against purchase of medicine etc. amounting to Rs.28, 500/- and as such he is also entitled to realize the amount i.e. in all (Rs.3, 95,122/- + Rs.28, 500/-) = Rs.4, 23,622/-.

I have gone through Exhibit 4 i.e. certificate of insurance issued by National Insurance Co. Ltd. In the instant case, occurrence took place on 21.9.2004. From Exhibit 4, it appears that offending vehicle was covered under valid certificate of insurance from 18.12.2003 to 17.12.2004. So, it is very clear that at the relevant time, vehicle was covered under Exhibit 4 issued by National Insurance Co. Ltd. As the vehicle was covered under valid certificate of insurance, owner of the vehicle is not supposed to pay the amount but insurance company is liable to pay compensation to the injured.

Sd/-
Judge, IXth Bench,
City Civil Court, Calcutta”

7. Hence, the Appeal/and the Cross-Appeals on the following grounds:-

- i) That the Learned Tribunal wrongly applied the percentage of disability **when the same was not proved by a doctor.***
- ii) That the Learned Tribunal erred in law and in fact in passing the award without considering the fact that the victim, who had been an employee of Kolkata Armed Police had been in service and **had not been terminated from his service.** He had been getting his usual salary and increment and had not suffered any monetary loss.*
- iii) That the Learned Tribunal also erred in law by passing the award without deducting the amount as per the principle of no fault under Section 140 of the Motor Vehicle Act.*

- iv) *On the other hand, the Claimant has stated that the tribunal should have granted Rs. 15,00,000 compensation in his favor.*
- v) *The tribunal did not grant reasonable compensation to the claimant towards mental pain, shock, agony, deprivation of life, loss of earning capacity even though the claimant/victim/Injured has 70% **functional disability including future prospect.***
- vi) *No loss of income was granted to the Claimant/Victim for the period of four months due to hospitalization and being completely **bed ridden for 13 months.***
- vii) *The claimant was also entitled to compensation of medical expenses of a sum of Rs. 1,00,000/-*

8. The Appellant/ Insurance Company has relied upon the following Judgments:-

- a) *In **Sudhir Bhuiya Vs. National Insurance Company Ltd., 2004 SCC OnLine Cal 834**, it was held:-*

“9. So far as the disablement certificate purportedly issued by the Medical Board of R.G. Kar Government Hospital is concerned, the petitioner did not pray for production of the certified copy of such document but wanted to mark the original as exhibit without proving its genuineness. According to the petitioner the Court should not only accept the said document as a genuine one but also should rely upon its contents without examining the doctors who allegedly issued such certificate.

***10.** According to Section 77 of the Evidence Act, if any document is a public document, in such a case, by production of certified copy, the contents of the*

document or part of the document can be proved. In the case before us, the petitioner does not want to prove those documents by production of certified copy, but he wants that those should be marked as exhibits by production of the original documents without calling the author of those documents or without proving that those were really issued by the Authority mentioned therein.

11. *In my view, if the petitioner wants to rely upon any original disablement certificate issued by doctors of any Government Hospital, such fact must be proved by competent person showing that the same was really issued by such authority. As regards the contents of the disablement certified, the same must be proved by the author of the document who had certified that the petitioner had suffered disablement.*

12. *It is now settled position of law that by merely proving the handwriting of the person who has written a document, the veracity of the statement made in the said document cannot be proved. Such person must depose before Court in support of the contents and will face cross-examination of the opponent; otherwise such document can be merely taken into consideration for the purpose of showing that such a certificate was issued, once its genuineness is proved. But whether the contents of the certificate are correct or not, such facts cannot go into the evidence unless the author of the document deposes before Court and faces cross-examination. The contents of a document without examining the author are worst pieces of hearsay evidence [See June @ Arjun Mandy v. State, 90 CWN 838 at 847 (D.B.); Sris Chandra v. Sntt. Annapurna, AIR 1950 Cal 173 (D.B.)]*

13. *As regards the two documents issued by the Durgapur Steel Authority, those must be proved by calling any competent employee of the said authority as witness."*

In the present case, the victim was admitted in hospital from 21.09.2004 to 18.01.2005 and attended

outdoor till December, 2006, for his severe injuries being multiple fractures. **(Exhibit 5 & 6 Series)**

The disability certificate was duly considered by the tribunal and accepted, which the Insurance Company has challenged by relying upon the judgment in **(Sudhir Bhuiya Vs. National Insurance Company Ltd., (Supra))**. **The disability certificate shows that the victim now has 50% permanent partial disability.**

b) In ***The New India Assurance Co. Ltd. v. Amitava Das & Anr., 2007 ACJ 2058*** it was held:-

“17. Mr. Banik, learned advocate, has referred to the Judgment passed in the case of Govind Kana v. Mana Tida Makaria, reported in 1989 ACJ 210. This Judgment is not applicable in the instant case as, in the said case the medical certificate of disability was accepted by the parties. Here in the instant case the Medical Officer who issued the certificate, himself deposed that the physical disability assessment was done excessively and it was not a right assessment. Hence there is no scope to apply this Judgment as referred to.”

9. In the present case, the victim even after several surgeries failed to retrieve body balance, for there has been shortening of his right thigh and for which he cannot squat, nor walk or stand properly without help of an aid and always feels pain on his right leg. **He was hospitalized for about four months** and was under treatment for 13 months.

10. The Supreme Court in :-

- i) **Janabai WD/O Dinkarrao Ghorpade & Ors. Vs. M/S. I.C.I.C.I. Lambord Insurance Company Ltd., Civil Appeal No. _____ OF 2022 (Arising out of SLP (Civil) No. 21077 of 2019), held:-**

“10. We find that the rule of evidence to prove charges in a criminal trial cannot be used while deciding an application under Section 166 of the Motor Vehicles Act, 1988 which is summary in nature. There is no reason to doubt the veracity of the statement of appellant No. 1 who suffered injuries in the accident. The application under the Act has to be decided on the basis of evidence led before it and not on the basis of evidence which should have been or could have been led in a criminal trial. We find that the entire approach of the High Court is clearly not sustainable.”

- ii) **Raj Kumar Vs. Ajay Kumar, (2011) 1 SCC 343, held:-**

“Assessment of compensation

24. In this case, the Tribunal acted on the disability certificate, but the High Court had reservations about its acceptability as it found that the injured had been treated in the Government Hospital in Delhi whereas the disability certificate was issued by a District Hospital in the State of Uttar Pradesh. The reason given by the High Court for rejection may not be sound for two reasons. Firstly, though the accident occurred in Delhi and the injured claimant was treated in a Delhi hospital after the accident, as he hailed from Chirori Mandi in the neighbouring district of Ghaziabad in Uttar Pradesh, situated on the outskirts of Delhi, he might have continued the treatment in the place where he resided. **Secondly, the certificate has been issued by the Chief Medical Officer, Ghaziabad, on the assessment made by the Medical Board which also consisted of an orthopaedic surgeon. We are therefore of the view that the High Court**

ought not to have rejected the said disability certificate.”

11. At the time of the accident, the victim was aged **47 years** and was posted as Nayek (armed constable) with Kolkata Armed Police (4th Battalion). **He was given lighter job after the accident and not given promotion.**
12. P.W. 3 is the Reserved Officer of 4th Battalion of Kolkata armed police and has deposed that due to such accident and injuries/surgeries, the Claimant was **given light duty like operating pump**, though he was given his increment. But there is nothing stated about his **future prospects** in service.
13. **Admittedly, he was shifted from being a constable (armed) to being a pump operator.**
14. His salary at the time of accident was **Rs. 7277/-** per month and after deduction was **Rs. 6332/- Per Month** (In August 2004).
15. **The Opposite Party/Claimant has relied upon the following Judgments:-**

a) ***United India Insurance Co. Ltd. Vs. Joginder Pal & Ors.,***

Civil Appeal No. 6214 of 2016, (Para 6):-

*“6. Having noted the contentions as put forth, we are clear in our mind that **normally the employment which is available to the injured claimant is to be kept in view while taking into consideration the disability and thereafter assessing the compensation which would depend on the facts emerging in each case.** However, in the present facts the evidence would reveal that due to the nature of the*

injuries suffered and the amputation of the right upper limb, the disability to the limb was 80 % and it was assessed to the whole body at 40 to 45 % which certainly is an impediment in performance of his duty when he is stated to be a class IV employee.

*7. In the present circumstance, though he was employed we had secured information through the learned counsel for the respondent about his present status. He is on the verge of retirement, but continues to occupy the same post which he had occupied at the time when the accident had occurred. **Therefore, in the instant facts it is noticed that the injuries suffered in fact has affected his service prospects as there was no progression. Further, since he is on the verge of retirement, he would not be in a position to engage himself in any other occupation to substitute his earnings subsequent to his retirement.***

- b) In ***Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343, (Para 9 to 13, 25):-***

“9. The percentage of permanent disability is expressed by the doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body cannot obviously exceed 100%.

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. **The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity.** In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation. **(See for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Co. Ltd. [(2010) 10 SCC 254 : (2010) 3 SCC (Cri) 1258 : (2010) 10 Scale 298] and Yadava Kumar v. National Insurance Co. Ltd. [(2010) 10 SCC 341 : (2010) 3 SCC (Cri) 1285 : (2010) 8 Scale 567])**

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.**

25. *The Tribunal has proceeded on the basis that the permanent disability of the injured claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to the left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the **functional disability** of the body nor could it be assumed to result in a corresponding extent of loss of earning capacity, as the disability would not have prevented him from carrying on his avocation as a cheese vendor, though it might impede in his smooth functioning. Normally, the absence of clear and sufficient evidence would have necessitated remand of the case for further evidence on this aspect. However, instead of remanding the matter for a finding on this issue, at this distance of time after nearly two decades, on the facts and circumstances, to do complete justice, we propose to assess the permanent functional disability of the body as 25% and the loss of future earning capacity as 20%.”*

16. In the present Case, the victim still having about 13 years of service was given job of a **pump operator instead of being a constable (armed). Due to his disability, he was removed from active work and this proves that he suffered functional disability.**

17. Thus, considering the said materials and evidence on record and the judgment in ***Sidram Vs The Divisional Manager, United India Insurance Co. Ltd. and Anr., Civil Appeal No. 8510 Of 2022.*** The **“Just Compensation”** in this case would be as follows:-

<i>Rs.6332 x 12 x 13 x 50%</i>	<i>Rs. 4,93,896/-</i>
<i>Medical expenses (bills)</i>	<i>Rs. 28,500/-</i>
<i>Loss of earning due to hospitalization and use of all kind of leave due, being in police service.</i>	<i>Rs. 25,000/-</i>

<i>Non-Pecuniary damages</i>	<i>Rs. 20,000/-</i>
<i>Loss of earning due to disability (functional).</i>	<i>Rs. 50,000/-</i>
	<i>Rs. 6, 17, 396/-</i>
<i>Future Prospect 30%</i>	<i>Rs. 1,85,218.8/-</i>
Total amount:-	Rs. 8,02,614.8/-
Total amount (Round Off):-	Rs. 8,02,615/-

18. Accordingly, the claimant is now entitled to the **total amount of compensation of Rs. 8, 02, 615/- together with interest at the rate of 6% per annum from the date of filing of the claim application till deposit, on the total compensation amount.**
19. Taking into consideration, the amount already deposited by the Appellant/Insurance Company, the Insurance Company shall now deposit the balance amount along with the interest on the total compensation amount, with the learned Registrar General, High Court, Calcutta, within a period of six weeks, who shall release the **total amount of Rs. 8,02,615/- along with interest** in favour of the Claimant, upon satisfaction of his identity and payment of *ad-valorem* Court fees, if not already paid.
20. **The appeal being FMA 65 of 2017/FMAT 885 of 2016 along with COT 98 of 2024 accordingly stand disposed of. The impugned judgment and award of the learned Tribunal under appeal is modified to the above extent.**
21. No order as to costs.

- 22.** All connected applications, if any, stand disposed of.
- 23.** Interim order, if any, stands vacated.
- 24.** Copy of this Judgment be sent to the Learned Tribunal, along with the trial court records, if received.
- 25.** Urgent Photostat certified copy of this Judgment, if applied for, be given to the parties on usual undertaking.

(Shampa Dutt (Paul), J.)