Before Arun Kumar Tyagi, J.

UNITED INDIA INSURANCE COMPANY LTD. —*Appellant*

versus

PAWAN AND OTHERS —*Respondents*

FAO No.3820 of 2011

July 02, 2019

A. ***Motor Vehicles Act, 1988—S.147 (1) (b) (ii)—Motor accident—Claimant injured while travelling in a three wheeler—Fracture of femur—Compensation awarded by Tribunal—Appeal by insurance company claiming breach of terms and conditions of policy—Three wheeler carrying passengers more than capacity—Held, Insurance company is not exonerated from liability, though liable to pay only for the number of passengers who could have been insured under the Act—Tribunal to distribute the awarded amount proportionally among all the claimants—Leaving it for them to recover the balance from the owner—On facts, held, since only one claim petition was before court, the insurance was liable to pay—Tribunal to direct distribution of the deposited amount among all the claimants proportionately, if more are there.***

Held that, in view of the above-referred judgment of Hon'ble Supreme Court, respondent No.3-Insurance Company is not completely exonerated from its liability to indemnify the insured on the ground of breach of the terms and conditions of the insurance policy due to overloading and respondent No.3-Insurance Company is liable for payment of compensation to the passengers involved in the accident for whom insurance could be and was in fact taken under the M.V. Act. It may be observed here that in the present case there is no material on record to prove filing of claim petition and award of compensation to any other passenger and the respondent No.3-Insurance Company will be liable to pay the compensation to the claimant. In any case on deposit of the amount by the Insurance Company as per its liability under the insurance policy, it will be for the Tribunal to direct distribution of the money proportionately to all the claimants and leave all the claimants to recover the balance from the owner of the vehicle.

(Para 25)

B. ***Motor Vehicles Act, 1988—Motor accident—Fracture of femur—Pecuniary and non-pecuniary damages—Co-relation***

between permanent disability and consequent loss of future earnings—25 per cent disability—Not certified to be permanent or progressive—Claimant not proved to be incapable of earning livelihood—Held, claimant has not suffered functional permanent disability and consequent loss of future earning—Not entitled to any compensation under this head—In such cases the aspect of awarding compensation for permanent disability gets covered under the head loss of amenities—Accordingly, the Tribunal's award of compensation for functional permanent disability treated as award under the head loss of amenities.

Held that, it may also be observed here that in Disability Certificate Ex.P-6 disability of the claimant was not specifically mentioned to be permanent and it was also not certified as to whether his condition was progressive or not and whether any reassessment was recommended or not. The claimant is not proved by the Disability Certificate Ex.P-6 to have become incapable of working and earning his livelihood and the claimant could not be said to have suffered from functional permanent disability of the body and consequent loss of future earning capacity.

Further held that, in the facts and circumstances of the case, the claimant is not entitled to award of any compensation towards loss of future income on account of partial permanent disability.

(Para 19)

Further held that, it may be added here that in such cases where loss of future earnings due to functional permanent disability and consequent loss of future earning capacity is not specifically proved the aspect of awarding of compensation for permanent disability gets covered under the head of loss of amenities. In the present case, the Tribunal awarded compensation of Rs. 1,00,000/- to the claimant towards permanent disability and loss of future income due to functional partial permanent disability of the body which has to be treated to have been awarded under the head of loss of amenities. The amount of Rs. 1,00,000/- awarded towards permanent disability (treated to have been awarded under the head of loss of amenities) cannot be said to be unjust or inadequate or on the higher side.

(Para 20)

Vinod Chaudhari, Advocate
for the appellant.

Ajit Malik, Advocate
for respondent No.1

Pushpinder Kaur, Advocate for
R.D. Yadav, Advocate for
respondents No.2 and 3.

ARUN KUMAR TYAGI, J.

(1) The appellant-Insurance Company has filed present appeal seeking setting aside of award dated 15.01.2011 passed by the learned Motor Accident Claims Tribunal, Jhajjar (for short 'the Tribunal') in **MACT Case No.9 of 2010 titled as *Pawan*** versus ***Rambir and others*** whereby compensation was awarded to the claimant on account of injuries suffered by him in a motor vehicle accident, which took place on 25.01.2010.

(2) For the sake of convenience the parties are referred to by their description in the claim petition.

(3) Briefly stated, the facts which are relevant for disposal of the present appeal are that the injured-claimant filed claim petition under Section 166 of the Motor Vehicles Act, 1988 (for short 'the M.V. Act') on the averments that on 25.01.2010 he along with Parveen and Vijay was travelling in a three wheeler bearing registration No.HR-63-A-8033, owned by respondent No.2 and insured with respondent No.3 driven by respondent No.1, from village Ukhalchana to Jhajjar. When they reached near Delhi Gate, Jhajjar, three wheeler turned turtle due to its rash and negligent driving by respondent No.1. The claimant suffered multiple serious injuries in the accident. FIR No.35 dated 25.01.2010 was registered under Sections 279 and 337 of the Indian Penal Code, 1860 at Police Station Jhajjar, District Jhajjar. The claimant was aged about 19 years at the time of accident and was earning Rs. 5,000/- per month by working as tutor and agriculturist. Due to the accident he became permanently disabled. The appellant accordingly sought award of compensation of Rs. 5,00,000/- with costs and interest against the respondents No.1 to 3 jointly and severally.

(4) The petition was contested by the respondents in terms of their respective written statements. In their joint written statement respondents No.1 and 2 pleaded that the accident in question was caused by a truck coming from opposite side driven in a zig-zag manner and denied their liability. In its written statement respondent No.3 took objections as to respondent No.1-driver not having valid and

effective driving licence at the time of accident and breach of the terms and conditions of the insurance policy. Respondent No.3 also controverted the material averments made in the petition and denied its liability.

(5) The Tribunal framed Issues and recorded evidence produced by the parties and on conclusion of inquiry held that the claimant suffered injuries due to accident caused by rash and negligent driving of the three wheeler by respondent No.1 who was having valid and effective driving licence and respondents No.1 to 3 were jointly and severally liable for payment of compensation to the claimant. The Tribunal awarded amount of Rs.30,000/- on account of injuries suffered in the accident, Rs. 27,000/- towards medical treatment, lump sum amount of Rs. 1,00,000/- towards loss of amenities, Rs. 20,000/- on account of loss of earnings during medical treatment, special diet and attendant and Rs. 20,000/- on account of pain and suffering. The Tribunal awarded total compensation of Rs. 1,97,000/- and directed respondents No.1 to 3 to pay the same jointly and severally with costs and interest at the rate of 7.5% per annum from the date of filing of the petition till realization.

(6) Feeling aggrieved, the appellant/respondent No.3-Insurance Company has filed the present appeal.

(7) I have heard arguments addressed by the learned Counsel for the parties and gone through the record.

(8) Learned Counsel for the appellant/respondent No.3-Insurance Company has argued that the three-wheeler was having sitting capacity of three passengers but the three-wheeler was carrying more than 10 passengers at the time of the accident in violation of the provisions of the M.V. Act and in breach of the terms and conditions of the insurance policy. In view of the breach of the terms and conditions of the insurance policy respondent No.3-Insurance Company was exonerated from its liability to indemnify the insured respondent No.2-owner for payment of compensation to the injured. The findings given by the Tribunal are erroneous in law and are not based on proper appreciation of facts. Therefore, the impugned award may be set aside and the claim petition may be dismissed. In support of his arguments learned Counsel for the appellant has placed reliance on the judgment of Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** versus ***Anjana Shyam and others***[1].

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[1] 2007 (4) RCR (Civil) 30

(9) Learned Counsel for the appellant/respondent No.3-Insurance Company has argued in the alternative that the claimant has failed to produce medical record in respect of injuries suffered by him and failed to prove loss of future earning capacity due to permanent disability. The compensation awarded by the Tribunal is on the higher side and the same may be reduced and the award may be modified accordingly.

(10) On the other hand, learned Counsel for respondents No.1 and 2 driver and owner of the three-wheeler respectively has argued that the accident took place due to rash and negligent driving of unknown truck and did not take place due to rash and negligent driving of the three-wheeler by respondent No.1 who has been falsely implicated. In any case overloading of the three-wheeler did not contribute to the causing of the accident and respondent No.3-Insurance Company was not exonerated from its liability to indemnify respondent No.2 for payment of compensation to the extent of the sitting capacity of the three-wheeler.

(11) Learned Counsel for the injured-claimant has argued that the claimant suffered injuries in accident caused by rash and negligent driving of three-wheeler by respondent No.1. The claimant was declared by the Medical Board to have become permanently disabled to the extent of 25%. The Tribunal cannot be said to have erred in awarding compensation to the claimant. Respondent No.3-Insurance Company is liable for payment of compensation to the claimant. The impugned award did not suffer from any illegality and the appeal may be dismissed.

(12) To prove his case, the claimant appeared as PW-1 and examined co-passenger Parveen Kumar as PW-3. PW-1 Pawan has testified that the three-wheeler turned turtle due to its high speed and rash and negligent driving in zig-zag manner by respondent No.1 resulting in multiple grievous injuries to him and minor injuries to Parveen Kumar. Testimony of PW-1 Pawan is corroborated by testimony of PW-3 Parveen Kumar and also substantiated by copy of FIR lodged regarding the accident, report under Section 173(2) of the Code of Criminal Procedure, 1973 filed by the police against respondent No.1 and MLR of the claimant. Respondent No.1-Rambir appeared in the witness-box as RW-1 and averred that accident took place due to rash and negligent driving of the truck but respondents No.1 and 2 did not examine any person alleged to have witnessed the accident to corroborate his testimony. RW-1 Rambir also admitted that

FIR was registered against him and he is facing trial. Admittedly RW-1 Rambir did not make any complaint to concerned SHO or Superintendent of Police regarding his false implication. In the facts and circumstances of the case, self-serving testimony of RW-1 Rambir could not be relied upon. Over-loading of the three-wheeler is not proved to be the cause of the accident. By cogent and reliable and oral and documentary evidence it is proved that the claimant suffered injuries in accident caused by rash and negligent driving of the three-wheeler by respondent No.1 and the findings of the Tribunal in this regard do not call for any interference.

(13) It is now well settled that in personal injury cases compensation can be awarded under the following heads:-

(1) **Pecuniary damages (Special damages)**-

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food and miscellaneous expenditure;

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising

(a) Loss of earning during the period of treatment; and

(b) Loss of future earnings on account of permanent disability; and

(iii) Future medical expenses

(2) **Non-pecuniary damages (General damages)**

(i) Damages for pain, suffering and trauma as a consequence of the injuries;

(ii) Loss of amenities (and/or loss of prospects of marriage); and

(iii) Loss of expectation of life (shortening of normal longevity).

(See Raj Kumar Versus Ajay Kumar and another (2011) 1 Supreme Court Cases 343 and R. D. Hattangadi Versus Pest Control (India) Limited and others 1995 ACJ (SC) 366).

(14) It may be observed at the very outset that in the present case the claimant has not filed any appeal or cross-objections for enhancement of the compensation awarded. However, the appeal of

respondent No.3-Insurance Company involves the questions as to the propriety of the quantum of compensation awarded and liability of the respondent No.3-Insurance Company to pay the same which have to be adjudicated upon.

(15) So far as the claim of the claimant for expenses relating to treatment, hospitalization and medicines is concerned, the claimant testified as PW-1 that he suffered multiple grievous injuries and was taken to General Hospital, Jhajjar and thereafter to PGIMS, Rohtak where he admitted till 31.01.2010 and he spent amount of Rs.3,00,000/- on his medical treatment, attendant, special diet and transport.

(16) To prove the amount spent on his medical treatment the claimant produced bills Ex.P-6 to Ex.P-15 which show that the claimant has spent amount of Rs. 27,000/- for his medical treatment. The claimant has not examined the concerned doctor or chemist and has not produced any other bills to prove any further amount spent by him on his medical treatment. Therefore, the amount of Rs. 27,000/- awarded towards medical treatment cannot be said to be unjust and inadequate and the claimant is not entitled to award of any further amount towards medical treatment. The claimant did not produce any evidence to prove requirement of future medical treatment and, therefore, no compensation was required to be awarded to the claimant towards future medical expenses.

(17) The Tribunal awarded amount of Rs. 20,000/- towards loss of income, attendant and special diet. The Tribunal did not assess income of the claimant and determine the quantum of income lost by the claimant during medical treatment. Even though PW-1 Pawan did not specifically mention his income in his affidavit but in view of minimum wages of Rs. 3,914/- notified to be payable to unskilled labourer in the State of Haryana during the relevant period he must be considered to be having income of Rs. 4,000/- per month. In view of the fact that the claimant suffered from fracture of femur right side and recovery period of about three months, the claimant is entitled to award of compensation of Rs. 12,000/- towards loss of income for three months during the period of his medical treatment. Even though the claimant did not produce the bills to prove the amounts spent by him on his transportation, special diet and attendant but it is common knowledge that in such cases expenses are incurred on conveyance, attendant and special diet. In the facts and circumstance of the case, it would be appropriate to award compensation of Rs. 8,000/- towards

transportation, Rs. 15,000/- towards special diet and Rs. 15,000/- towards attendant.

(18) In **Raj Kumar** versus **Ajay Kumar and another** [2]Hon'ble Supreme Court considered in detail the correlation between the physical disability suffered in an accident and the loss of earning capacity resulting from it and in pargraphs No.10, 11 and 13 of its judgment made the following observations:-

> "10. 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.
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> 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. 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

[2] 2011 (2) RCR (Civil) 101

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. 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. Be that as it may.

11. 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 the Manual for Evaluation of Permanent Physical Impairment for Orthopedic Surgeons, prepared by American Academy of Orthopedic 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. If a Doctor giving evidence uses technical medical terms, the Tribunal should instruct him to state in addition, in simple non-medical terms, the nature and the effect of the injury. If a doctor gives evidence about the percentage of permanent disability, the Tribunal has to seek clarification as to whether such percentage of disability is the functional disability with reference to the whole body or whether it is only with reference to a limb. If the percentage of permanent disability is stated with reference to a limb, the Tribunal will have to seek the doctor's opinion as to whether it is possible to deduce the corresponding functional permanent disability with reference to the whole body and if so the percentage.

13. 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 percentage of loss of earning capacity is the same as 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 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.

(19) To prove his permanent disability and consequent loss of future earnings, the appellant examined Dr. S.S. Chauhan, Medical Officer, General Hospital, Jhajjar as PW-2 who testified that vide Disability Certificate Ex.P-6 the Medical Board assessed the claimant to be 25% disabled on account of operated case of shaft of femur right

side with inter-locking nail with mild stiffness of right knee with wasting and weakness of right lower limb with malunited fracture ulna left side. In his cross-examination PW-2 Dr. S.S. Chauhan stated that with the passage of time and recovery of injury the claimant could do routine work depending upon the healing of the fracture. It may also be observed here that in Disability Certificate Ex.P-6 disability of the claimant was not specifically mentioned to be permanent and it was also not certified as to whether his condition was progressive or not and whether any reassessment was recommended or not. The claimant is not proved by the Disability Certificate Ex.P-6 to have become incapable of working and earning his livelihood and the claimant could not be said to have suffered from functional permanent disability of the body and consequent loss of future earning capacity. In the facts and circumstances of the case, the claimant is not entitled to award of any compensation towards loss of future income on account of partial permanent disability.

(20) It may be added here that in such cases where loss of future earnings due to functional permanent disability and consequent loss of future earning capacity is not specifically proved the aspect of awarding of compensation for permanent disability gets covered under the head of loss of amenities. In the present case, the Tribunal awarded compensation of Rs. 1,00,000/- to the claimant towards permanent disability and loss of future income due to functional partial permanent disability of the body which has to be treated to have been awarded under the head of loss of amenities. The amount of Rs. 1,00,000/- awarded towards permanent disability (treated to have been awarded under the head of loss of amenities) cannot be said to be unjust or inadequate or on the higher side.

(21) So far as the non-pecuniary general damages towards pain and suffering are concerned, the Tribunal awarded amount of Rs.20,000/- towards pain and suffering as a consequence of the injuries and the amount awarded by the Tribunal for pain and suffering cannot be said to be unjust or inadequate or on the higher side. Since, the injuries suffered by the claimant are not proved to have shortened the longevity of life and resulted in loss of expectation of life, the claimant is not entitled to any compensation for the same.

(22) It follows from the above discussion that the compensation awarded by the Tribunal to the claimant is just and adequate and is not on the higher side and no modification of the award is warranted.

(23) Admittedly the sitting capacity of the three-wheeler was three persons besides driver. In his cross-examination PW-1 Pawan has admitted that the three-wheeler in question was occupied by 8/9 passengers. By the material on record it is proved that the three-wheeler was carrying passengers more than its capacity.

(24) In ***National Insurance Co. Ltd.*** versus ***Anjana Shyam and others***[3] it was held by Hon'ble Supreme Court that an Insurance Company insuring the passengers carried in a vehicle in terms of Section 147(1)(b)(ii) of the M.V. Act can only insure such number of passengers as are shown in the certificate of registration. The Insurance Company can be made liable only in respect of number of passengers for whom insurance can be taken under the M.V. Act and for whom insurance has been taken as a fact and not in respect of the other passengers involved in an accident in a case of overloading. On deposit of the amount by the Insurance Company as per its liability under the insurance policy, it will be for the Tribunal to direct distribution of the money proportionately to all the claimants and leave all the claimants to recover the balance from the owner of the vehicle.

(25) In view of the above-referred judgment of Hon'ble Supreme Court, respondent No.3-Insurance Company is not completely exonerated from its liability to indemnify the insured on the ground of breach of the terms and conditions of the insurance policy due to overloading and respondent No.3-Insurance Company is liable for payment of compensation to the passengers involved in the accident for whom insurance could be and was in fact taken under the M.V. Act. It may be observed here that in the present case there is no material on record to prove filing of claim petition and award of compensation to any other passenger and the respondent No.3-Insurance Company will be liable to pay the compensation to the claimant. In any case on deposit of the amount by the Insurance Company as per its liability under the insurance policy, it will be for the Tribunal to direct distribution of the money proportionately to all the claimants and leave all the claimants to recover the balance from the owner of the vehicle.

(26) It follows from the above discussion that the claimant is entitled to payment of amount of Rs. 1,97,000/- from the respondents No.1, 2 and 3 jointly and severally with costs and interest at the rate of 7.5% per annum from the date of institution of the petition till

[3] 2007 (4) RCR (Civil) 30

realization and the appeal being devoid of any merit is liable to be dismissed.

(27) Accordingly, the appeal is dismissed with costs of Rs.11,000/- payable by the respondent No.3-Insurance Company to the claimant.

Tribhuvan Dahiya