THE HIGH COURT OF TRIPURA
A G A R T A L A

MAC APP. No.112/2013
along with
C.O(F.A) No.31/2013

a) MAC APP. No.112/2013

The Managing Director,
Kolkata State Transport Corporation,
45, Ganesh Chandra Avenue,
Kolkata – 700 013, West Bengal.
Owner of the Vehicle No.WB-04-E-0890(Bus).

.... **Appellant.**

-: Vrs. :-

Shri Amit Kumar Paul,
S/o Late Haridhan Paul,
Resident of Santi Para, Agartala,
P.S. East Agartala, District – West Tripura.

..... **Respondent.**

b) C.O(F.A) No.31/2013

Shri Amit Kumar Paul,
S/o Late Haridhan Paul,
Resident of Santi Para, Agartala,
P.S. East Agartala, District – West Tripura.

.... **Cross objector.**

-: Vrs. :-

The Managing Director,
Kolkata State Transport Corporation,
45, Ganesh Chandra Avenue,
Kolkata – 700 013, West Bengal.
Owner of the Vehicle No.WB-04-E-0890(Bus).

..... **Respondent.**

_B_E_F_O_R_E_
THE HON'BLE CHIEF JUSTICE

Counsel for the appellant : Mr. T D Majumder, Advocate.
Counsel for respondent-cross objector : Ms. M Roy, Advocate.
Date of hearing and order : 08-9-2016.
Date of pronouncement : 14-10-2016

JUDGMENT & ORDER

Both the appeal and cross-objection are directed against the judgment dated 20-6-2013 passed by the learned Member, Motor Accident

Claims Tribunal, West Tripura, Agartala in T.S. (MAC) No. 91/2012 awarding compensation amounting to □14,92,160/- together with interest @ 7% per annum with effect from the date of the claim petition in favour of the respondent/cross-objector.

2. Before proceeding, the facts of the case relevant for the purpose of disposal of the appeal and cross-objection may be briefly noticed. According to the respondent, on 20-7-2011 at about 5-30 P.M., while he along with his wife were waiting for a bus on a foot path at Shyambazar Bata stoppage, Kolkata, a vehicle bearing registration No. WB-04-E-0890 (C-21 Bus) suddenly appeared on the footpath, ran him down and severely crushed both his legs. He was immediately rushed to R.G. Kar Hospital, Kolkata, but as there was no seat available, he was then taken to Fortis Hospital, Kolkata on the same day and was treated there as an indoor patient from 24-7-2011 to 22-8-2011. Due to the accident, he sustained fracture of right femur, franture of right proximal tibia, fracture of left tibia shaft, multiple rib fracture on the right side, stable pelvic fracture and multiple abrasions of both legs. He also underwent major surgeries on his legs and some plates were fixed in the process. After discharge from Fortis Hospital, he returned to Agartala continued his treatment at TMC Hospital, Hapania, Agartala. On examination, the District Disability Medical Board, Agartala issued a certificate certifying that his disability was to the extent of 50% for a period of five years. According to the respondent, the accident was caused by the rash and negligent driving of the Bus. A police case, i.e. Shyampukar PS Case No. 240 of 2011 U/s 279/304A/337/338/427 IPC was registered in connection with the accident. He subsequently filed the claim petition for awarding him a compensation of □57,20,000/- for the disability caused to him in that accident.

3. The claim petition was resisted by the appellant-Corporation, who filed its written statement by denying the material averments made in the claim petition. The principal stance taken by the appellant is that the

respondent did not sustain any injury due to the accident involving Bus bearing registration No. WB-04-E-0890. The appellant admitted that some passengers sustained simple injuries due to the accident on that day but categorically asserted that no person including the respondent on the footpath sustained any injury in that accident. In the course of trial, the respondent examined himself as a witness and adduced some documentary evidence such as certified copies of the final report, the disablement certificate, the documents relating to his business, the documents relating to air tickets, treatment, bills, cash memos, etc. as Exbt.1 series. No evidence was however adduced by the appellant. At the conclusion of the trial, the impugned judgment was passed by the learned Motor Accident Claims Tribunal in the manner indicated earlier.

4. The Tribunal held that the appellant did not adduce any evidence to rebut the statement of the respondent in the examination-in-chief on affidavit and, therefore, until the contrary was proved, it should have to believe the evidence of the respondent. On the basis of the oral evidence, which was not shaken in the cross-examination, the contents of the FIR and the charge sheet submitted by the police, the Tribunal concluded that the accident was due to the rash and negligent driving of the driver of the offending vehicle and that the rash and negligent driving of the driver of the offending vehicle was the proximate cause of the vehicular accident, which would not have taken place had the driver been more cautious. Relying on the examination-in-chief of the respondent, which was not falsified in his cross-examination and the medical evidence and other materials on record, the Tribunal held that the respondent sustained injuries due to the said vehicular accident. As for the medical treatment expenses, the Tribunal relied on Exbt. series such as the costs of medicines, hospital charges, various tests undergone by him, physiotheraphy, the Tribunal awarded □8,40,401/- in this behalf. The Tribunal also found on the basis of the discharge certificate issued by the Fortis Hospital, Kolkata that the respondent was admitted therein on two occasions and the total number of

days spent therein was 31 days. According to the Tribunal, the respondent might have engaged one attendant to attend to his needs and, therefore, awarded □7,750/- @ □250/- per day. He also awarded a sum of □20,000/- as incidental costs including fooding and lodging and another sum of □20,000/- was awarded conveyance allowance. The Tribunal found that the respondent was young and energetic and was running a shop under the name and style of "MAHATMAYA ENTERPRISE' at HGB Road, Agartala and came to the conclusion that it would be reasonable to assess his income at □12,000/- as against the claim of □20,000/- made by the respondent. For his long treatment following the injuries sustained by him, the Tribunal awarded □12,000/- per month for twelve months which comes to □1,44,000/-. Since the District Disability Board certified him to be physically disabled to the extent of 50% for five years, the Tribunal held that the respondent lost 50% of his earning capacity for five years and accordingly awarded □12,000x12x5=□7,20,000/- as compensation for the said period. The Tribunal further awarded □1,00,000/- for pain and sufferings, etc. Thus, the total amount of compensation so awarded came to □14,92,160/-. The Tribunal fastened the liability to satisfy the award upon the appellant as the driver of the Bus was guilty of rash and negligent driving and the offending vehicle was insured with it.

5. Assailing the impugned judgment, Mr. T.D. Mazumder, the learned counsel for the appellant, submits that the Tribunal arbitrarily awarded □7,750/- as attendant charge for 31 days when no personnel attendant was allowed or required for indoor patient at Fortis Hospital, Kolkata, which is a private hospital, and the same cannot be sustained in law. He further submits that for awarding □57,400/-, □33,234/-, □1,40,750/- and □1,91,000/- under the heads of room tariffs, pharmacy, investigation, miscellaneous, consumables and basic hospital charges, no supporting documents were exhibited by the respondent; compensation cannot be awarded on the basis of surmise and conjecture. It is also the contention of the learned counsel that a sum of □20,000/- and another sum of

□20,000/- were awarded by the Tribunal without any vouchers or bills, which cannot be sustained in law. According to the learned counsel for the appellant, there is no evidence to show that the business premises of the respondent were closed for twelve months warranting the award of □1,44,000/- as professional loss. In the absence of any evidence to show that 50% physical disability of the respondent resulted in his functional disability to the extent of 50% up to 5 years, the Tribunal has committed illegality in awarding □6000x12x5=□3,60,000/- to the respondent. The learned counsel finally reminds this Court that compensation should neither be bonaza nor a source of profit nor a pittance but should be just and proportionate to the loss sustained by the victim and submits that such exorbitant and arbitrary award passed by the Tribunal is not sustainable in law and is liable to be set aside or suitability modified to ensure justice to the appellant; public money cannot be wasted when not warranted by the facts on record.

6. Per contra, Ms. M. Roy, the learned counsel for the respondent/cross-objector, supports the findings of the Tribunal with respect to the nature of disability sustained by the respondent and the awards made under the heading of medical expenditures incurred by him, but assails the findings with regard to the income of the respondent, which should have been assessed at □20,000/- as he was running a registered shop prior to the accident and of the loss of earning capacity only for five years when his earning capacity is lost forever without any chance of regaining his former condition. She, therefore, strenuously urges this Court to modify the impugned award by re-assessing the compensation awarded on the basis of the annual income of the respondent at □20,000/- per month and on the basis of total lost of earning capacity forever without confining it to 50% and only for five years.

7. On perusing the impugned judgment and after hearing the learned counsel appearing for both the appellant and respondent, I am of the view

that there is absolutely no basis for awarding any amount under the heads of miscellaneous charge, consumables in the Hospital bills of Fortis Hospital, Kolkata submitted by the respondent. This shall have to be deducted in the compensations to be awarded hereafter. In so far as the income of the respondent is concerned, there is no evidence to establish the nature of business run by him in his shop under the name and style of "MAHATMAYA ENTERPRISE"; no whisper of statement was made by the respondent in that behalf. Therefore, it is difficult to assess his monthly income from this "enterprise" operated by him. No other witness was produced by him to corroborate his statement. The Tribunal cannot, without first ascertaining the nature of business run by the respondent, conclude that he was earning □12,000/- per month merely on the basis of surmise and conjecture; the self-serving statement of the respondent, even in the absence of cross-examination, cannot be used as the basis for determining the income of the respondent. Secondly, it is also not understood as to how the Tribunal could come to the conclusion that the physical disability of the respondent to the extent of 50% correspondingly resulted in the loss of his earning capacity to the extent of 50%. No medical evidence or corroborative evidence, except the self-serving evidence of the respondent, was adduced by the respondent to prove that the locomotor disability suffered by him totally incapacitated him from continuing his business before the accident. In my opinion, locomotor disability cannot be confused with functional disability. For example, in the case of locomotor disability, his capacity to earn from his existing business may not necessarily impaired at all. Moreover, in fairness to the respondent, the Disability Board certified that his condition is progressive, yet it also recommended re-assessment after 5 years by indicating that the validity of the certificate was up to 15 May 2018 as if there is room for curing his locomotor disability in future. These factors required to be thoroughly enquired into by the Tribunal for awarding just and proportionate compensation to the respondent. This reminds of the proposition of law laid

down by the Apex Court in ***Raj Kumar v. Ajay Kumar, (2011) 1 SCC 343***, which are 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.
>
> *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."

8. Before examining a medical expert, the Tribunal must, however, keep in mind the observations of the Apex Court in para 22 and 23 of the same decision, which are as follows:

> *"22.* We may in this context refer to the difficulties faced by the claimants in securing the presence of busy surgeons or treating doctors who treated them, for giving evidence. Most of them are reluctant to appear before the Tribunals for obvious reasons either because their entire day is likely to be wasted in attending the Tribunal to give evidence in a single case or because they are not shown any priority in recording evidence or because the claim petition is filed at a place far away from the place where the treatment was given. Many a time, the claimants are reluctant to take coercive steps for summoning the doctors who treated them, out of respect and gratitude towards them or for fear that if forced to come against their wishes, they may give evidence which may not be very favourable. This forces the injured claimants to approach "professional" certificate givers whose evidence most of the time is found to be not satisfactory.

> *23.* The Tribunals should realise that a busy surgeon may be able to save ten lives or perform twenty surgeries in the time he spends to attend the Tribunal to give evidence in one accident case. Many busy surgeons refuse to treat medico-legal cases out of apprehension that their practice and their current patients will suffer, if they have to spend their days in Tribunals giving evidence about past patients. The solution does not lie in coercing the doctors to attend the Tribunal to give evidence. The solution lies in recognising the valuable time of doctors and accommodating them. Firstly, efforts should be made to record the evidence of the treating doctors on commission, after ascertaining their convenient timings. Secondly, if the doctors attend the Tribunal for giving evidence, their evidence may be recorded without delay, ensuring that they are not required to wait. Thirdly, the doctors may be given specific time for attending the Tribunal for giving evidence instead of requiring them to come at 10.30 a.m. or 11.00 a.m. and wait in the court hall. Fourthly, in cases where the certificates are not contested by the respondents, they may be marked by consent, thereby dispensing with the oral evidence. These small measures as also any other suitable steps taken to ensure the availability of expert evidence, will ensure assessment of just compensation and will go a long way in demonstrating that courts/Tribunals show concern for litigants and witnesses."

9. Statutory provisions, observed the Apex Court in ***State of Haryana v. Jasbir Kaur, (2003) 7 SCC 484***, clearly indicate that the compensation must be "just: and it cannot be a bonanza; not a source of profit; but the same should not be a pittance either. The Courts and Tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What should be a just compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal

consideration. Though by use of the expression “which appears to it to be just” a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. The expression “just” denotes equitability, fairness and reasonableness, and non-arbitrary. If it is not so, it cannot be just. In other words, Determination of compensation must be just and reasonable i.e. proportionate to the damage in the real sense.

10. For what has been stated in the foregoing, both these appeal and cross-objection are disposed of with the following directions:

(a) The impugned judgment dated 20-6-2013 is hereby set aside;
(b) The case is remanded to the learned member, Motor Accident Claims Tribunal (Court No. 4), West Tripura, Agartala for fresh trial at the stage of examination of medical expert and other witnesses to substantiate the case of the claimant-cross-objector with respect to the extent of his functional disability vis-à-vis his physical disability and also the nature of his business and his monthly income thereon prior to the accident keeping in mind the decisions of the Apex Court cited above.
(c) The Tribunal must take a pro-active role in the course of trial for just determination of the compensation payable to the claimant/cross-objector and, if necessary, by asking searching questions to the witnesses being examined; after all, the ultimate responsibility for arriving at just compensation lies upon him and not upon the counsel appearing for the parties.
(d) More efforts should also be made by the learned counsel for the insurer for better cross-examination of the witnesses produced by the claimant so that the interest of the insurer is effectively represented by him/her.
(e) Since the accident took place as early as 2011, an attempt shall be made by the Tribunal to conclude the trial and dispose of the same within four months from the date of receipt of this judgment.
(f) Both the parties are directed to appear before the Tribunal on 3-11-2016 at 10-30 AM for further proceedings.

(g) Transmit the L.C. record forthwith.

CHIEF JUSTICE