IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

PRESENT:
THE HON'BLE JUSTICE BIVAS PATTANAYAK

FMA 1068 of 2017
CAN 1 of 2017 (Old No. CAN 3664 of 2017)
CAN 2 of 2017 (Old No. CAN 11164 of 2017)
National Insurance Co. Ltd.
versus
Sri Alok Kumar Sur & Anr.

For the Appellant-Insurance Company	:	Mr. Parimal Kumar Pahari, Advocate
For the Respondent No.1-Claimant	:	Mr. Hemendra Kumar Guha Roy, Advocate Ms. Sunandita Ghosh, Advocate Mr. Sujoy Guha Roy, Advocate
Heard on	:	13.07.2023, 14.07.2023, 16.08.2023, 24.08.2023
Judgment on	:	12.03.2024

Bivas Pattanayak, J. :-

1. This appeal is preferred against the judgment and award dated 20th January, 2017 passed by learned Judge, Bench XI-cum-Judge, Motor Accident Claims Tribunal, City Civil Court, Calcutta in MAC Case No. 75 of 2008 granting compensation of Rs.11,44,937/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act. 1988.

2. The brief fact of the case is that on 30.08.2007 at about 20:10 hours while the victim tried to board the bus bearing registration no. WB-23A/7293 at Acharya Jagadish Chandra Bose Road near Maidan Police Station for returning home at that time the said vehicle in order to overtake another bus of route no.230 started moving due to which the

victim fell down from the said bus and sustained multiple fracture injuries on both legs. Immediately the victim was taken to SSKM Hospital wherefrom he was shifted to the Belle Vue Clinic where he was admitted till 19th September, 2007. As a result of the injuries sustained in the said accident, the victim became permanent partially disabled to move and work as before. In relation to the injuries sustained in the said accident and the subsequent disablement, the victim filed application for compensation of Rs.7,21,395/-together with interest under Section 166 of the Motor Vehicles Act, 1988.

3. The claimant-victim in order to establish his case examined five witnesses and produced documents which have been marked as **Exhibits 1** to **19** respectively.

4. The appellant-insurance company keenly contested the claim application by filing written statement, however, it did not adduce any evidence in support of its case.

5. Respondent no.2-owner of the offending vehicle did not contest the claim application and the same was disposed of *ex parte* against him. Despite service of notice of appeal, none appeared for respondent no.2.

6. Upon considering the materials on record and the evidence adduced by the claimant, the learned Tribunal granted compensation of Rs.11,44,937/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act. 1988.

7. Being aggrieved by and dissatisfied with the impugned judgment and award of the learned Tribunal the insurance company has preferred the present appeal.

8. Mr. Parimal Kumar Pahari, learned advocate for the appellant-insurance company submitted that the doctor who treated the victim was not examined by the claimant in order to establish the extent of injury sustained by him. The claimant has examined P.W.2. Dr. P.K. Mondal who never treated the victim and has only issued a certificate noting the extent of disability in the victim of 35% after a lapse of nine years and as such the evidence of the doctor and the disability certificate is not at all reliable and has been produced only to get compensation in the present case.

He further submitted that the victim after obtaining the fit certificate from the treating doctor joined his service as a computer operator in United Bank of India and with the passage of time he got increments and promotion in his service and superannuated from service as Head Cashier and, therefore, there is no loss of earnings of the victim. In order to get compensation under the head of loss of earnings, the claimant has to establish that for the injuries sustained in the accident there has been loss of earnings to the victim, however, since the victim had no loss of earnings, he is not entitled to receive compensation on such head. The learned Tribunal erred in granting compensation towards loss of earnings taking into account the disability of 35% which is not sustainable and should be set aside. To buttress his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Raj Kumar versus Ajay Kumar and another***[1] and another decision of this Court passed in ***Dipak Kumar Sarkar versus ICICI Lombard General Insurance Co. Ltd and another***[2].

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[1] ***(2011) 1 SCC 343***

[2] ***FMA 667 of 2016 (Decision of High Court at Calcutta)***

In light of his aforesaid submissions, he prayed that the impugned judgment and award of the learned Tribunal be set aside and/or modified.

9. In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Hemendra Krishna Guha Roy, learned advocate for respondent no.1-claimant submitted that the extent of disability of the victim as deposed by the doctor (P.W.2), who upon examination of the victim assessed disability, has remained uncontroverted in cross-examination and thus there is sufficient evidence of assessment of disability by an expert which should be accepted without any plausible reason to disbelieve the doctor's evidence. To buttress his contention, he relied on the decision of this Court passed in ***Smt. Sutapa Saha versus Smt. Nivedita Biswas and Another***[3]. The claimant made an application before the learned Tribunal for a direction to appear before the Medical Board for assessment of his disability, which was kept in abeyance and was never considered thereafter by the learned Tribunal. Relying on the decision of Hon'ble Supreme Court passed in ***Salim versus New India Assurance Co. Ltd. and Another***[4], he submitted that a disability certificate issued by an expert doctor cannot be discarded if it is issued following WHO norms. Further, the unchallenged evidence on record of doctor (P.W.2) with regard to the extent of disability of the victim is very much acceptable in the absence of any other contrary evidence in such regard.

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[3] 2014 (2) T.A.C. 867 (Cal.)
[4] 2022 ACJ 526

He further submitted that the victim due to the injuries could not attend his office for almost 4 months i.e. from 31st August, 2007 to 25.12.2007, however, the learned Tribunal has granted compensation only for 36 days of privilege leave whereas it ought to have granted compensation for the entire period of absence from office.

Moreover, the Motor Vehicles Act is a beneficial legislation aimed at quick redressal to victims of accident, the attitude routinely adopted by the insurance companies to delay the grant of compensation should be deprecated. In support of his contention, he relied on the decision of Hon'ble Supreme Court passed in ***New India Assurance Co. Ltd. versus Kiran Singh and Others***[5].

Furthermore, he submitted that even though the claimant continued to be in service in the United Bank of India after the accident but his efficiency in his service as a bank employee has been compromised and thus the respondent-claimant is entitled to compensation on the head of loss of earnings. In support of his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Hari Om versus National Insurance Co. Ltd. and others***[6].

Further relying on the decision of Hon'ble Supreme Court passed in ***Abhimanyu Partap Singh versus Namita Sekhon & Another***[7], he submitted that since the victim sustained permanent disablement the multiplier method which is recognised as most realistic and reasonable should be applied for determination of the compensation.

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[5] 2004 ACJ 1176
[6] 2023 ACJ 595
[7] 2022 LiveLaw (SC) 569

Moreover, he submitted that in motor accident cases the victim suffers not only pecuniary loss but also non-pecuniary loss. Although the pecuniary loss of the victim can be measured in terms of money, yet non-pecuniary losses under pain and suffering, loss of enjoyment of life, shortening of life etc. cannot be estimated. Therefore, there has to be adequate and just compensation on the head of non-pecuniary losses. To buttress his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Jakir Hussein versus Sabir and Others***[8].

Furthermore, he submitted that the learned Tribunal erred in not granting the amount of medical expenses which has been reimbursed through Mediclaim policy. The amount which the victim gets from his mediclaim policy is the return for making payment of premiums and, therefore, to consider such return as a benefit received from other sources while determining compensation is incorrect. The learned Tribunal ought to have allowed the entire medical expenses incurred by the victim including the amount reimbursed through mediclaim policy. In support of his contention, he relied on the decision of this court passed in ***New India Assurance Co. Ltd. versus Bimal Kumar Shah and another***[9].

Relying on the decisions of Hon'ble Supreme Court passed in *Raj Kumar (supra)* and ***Jitendra Khimshankar Trivedi and others versus Kasam Daud Kumbhar and others***[10], he submitted that it is the obligation of the Courts/Tribunal to award just, fair and reasonable compensation acceptable to legal standards in terms of Section 168 of the Motor Vehicles

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[8] 2015 (2) T.A.C. 692 (S.C.)
[9] 2019 ACJ 1532
[10] 2015 ACJ 708

Act, 1988. Even though no cross-appeal is filed by the claimant, the appeal court invoking powers under Order XLI Rule 33 of the Civil Procedure Code can enhance the compensation amount which is found to be just and fair. In support of his contention, he relied on the decision of Hon'ble Supreme Court passed in ***Surekha and others versus Santosh and others***[11].

In light of his aforesaid submissions, he prayed for enhancement of compensation to the extent of just and fair amount.

10. Mr. Pahari, learned advocate for appellant-insurance company, in reply, to the proposition raised on behalf of respondent-claimant that the award passed by the learned Tribunal can be enhanced without there being any cross-appeal for enhancement by the claimant, submitted that it is now settled proposition of law that there cannot be enhancement of compensation in an appeal filed by the insurance company without there being any cross-appeal by the claimants for enhancement. An appellant cannot be worse off for filing an appeal should there be no cross-objection there against and award of the claims Tribunal attains finality on claimant accepting the same without carrying it higher up. Thus, the argument advanced on behalf of respondent-claimant in this regard is not sustainable.

11. Having heard the learned advocates for respective parties following issues have fallen for consideration:

Firstly, whether the learned Tribunal erred in considering the disability certificate issued by P.W.2, Dr. P. K. Mondal.

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[11] 2020 ACJ 2156

Secondly, whether the learned Tribunal erred in granting compensation under the head of loss of earnings.

Thirdly, whether compensation can be enhanced in the absence of cross-objection been filed by the claimant.

Issue No.1: Whether the learned Tribunal erred in considering the disability certificate issued by P.W.2, Dr. P. K. Mondal.

12. With regard to the first issue, it is found that the learned Tribunal while assessing the extent of disablement has considered the disability certificate issued by P.W.2, Dr. P. K. Mondal. Mr. Pahari, learned advocate for the appellant-insurance company has submitted that since P.W.2 has never treated the victim and has issued the certificate noting the extent of disability of the victim of 35% after a lapse of nine years, hence such disability certificate cannot be considered. *Per contra*, Mr. Guha Roy, learned advocate for respondent no.1-claimant submitted that the evidence of P.W.2, Dr. P. K. Mondal has remained uncontroverted. Relying on the decision of *Salim (supra)* and *Smt. Sutapa Saha (supra),* he submitted that the evidence of an expert doctor regarding the extent of disability cannot be discarded in the absence of contrary evidence.

12.1. It is a fact that the disability certificate has been issued by P.W.2, Dr. P. K. Mondal on 2nd December, 2016 which after a long lapse of more than 8 years. Be that as it may, the respondent no.1-claimant has adduced the evidence of Dr. P. K. Mondal as P.W.2 who proved the disability certificate marked as **Exhibit 15**. The materials on record suggest that the victim did not appear before any medical board for issuance of disability certificate. The claimant-victim made an application

before the learned Tribunal for sending him before the Medical Board for assessment of his disability which was kept at abeyance by the learned Tribunal. Be that as it may, P.W.2, Dr. P. K. Mondal in his evidence-in-chief has deposed that after making clinical examination and taking into account the discharge certificate of the concerned hospital, other medical papers and old x-ray plates, he assessed permanent disability of the victim to the extent of 35%. Such evidence of P.W.2 has remained uncontroverted in cross-examination. At this juncture, the question arises whether the disability certificate issued by P.W.2, Dr. P. K. Mondal can be accepted. The Hon'ble Supreme Court in *Salim (supra)* observed as follows:

> *"4. We find that the entire reasoning of the High Court suffers from patent illegality. As per Dr. Sangayya, the disability of 45 per cent was assessed after going through ALMCOI and WHO manuals. Such medical studies are not restricted to the advanced countries but in respect of the entire world.*
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> *5. Therefore, reducing the extent of disability on the ground that the WHO norms are for the advanced countries and not in respect of India, is patently not sustainable."*

12.2. This Court in *Smt. Sutapa Saha (supra)* observed as follows:

> *"**4.** There is no dispute that the appellant/claimant sustained injuries due to motor accident on 1st August, 2003 and was treated in the hospital initially at Durgapur and thereafter at SSKM Hospital, Kolkata. It is also not disputed that the appellant used to earn ₹ 5,000/- per month i.e. ₹ 60,000/- per annum from her business as reflected in the income tax return submitted by the appellant. The further admitted position is that the appellant was aged about 45 years at the time of*

> *accident. It appears from the impugned judgment that learned Judge of the Tribunal disbelieved the evidence that the appellant suffered permanent partial disablement to the extent of 38% and as such the Tribunal awarded ₹ 60,000/- only as pecuniary loss of the appellant for one year. The appellant has stated in her evidence in chief that she suffered permanent partial disablement to the extent of 38% and no suggestion is given to the appellant by the respondent Insurance Company in this regard during her cross-examination. Moreover, the doctor who examined the appellant for assessing permanent partial disability has also deposed before the Tribunal and faced cross-examination by the respondent Insurance Company. Learned Advocate for the appellant submits that the appellant has adduced sufficient evidence before the Tribunal including the evidence of the expert for holding that the appellant suffered permanent partial disablement to the extent of 38% due to injuries sustained by her in the accident. No cogent explanation is forthcoming to disbelieve the evidence of the expert who assessed permanent partial disablement of the appellant to the extent of 38%. In view of the above findings, this Court can safely hold that the appellant suffered permanent partial disablement to the extent of 38%."*

12.3. Bearing in mind the above proposition, since the evidence of P.W.2, Dr. P. K. Mondal is not challenged by any contrary evidence or controverted in cross-examination, hence being a doctor and an expert, his evidence with regard to disability is to be accepted in the absence of any contrary evidence to disbelieve the evidence of the expert. This Court finds substance in the submission of Mr. Guha Roy, learned advocate for the respondent no.1-claimant that in the absence of any contrary evidence, the

findings of the expert regarding the disablement should be accepted. Accordingly, the disability certificate **(Exhibit 15)** is acceptable and can be taken into consideration for assessment of the extent of disability.

Issue No.2: Whether the learned Tribunal erred in granting compensation under the head of loss of earnings.

13. In order to appreciate the above issue, it would be apposite to refer to the principles laid down by the Hon'ble Supreme Court in the decision of *Raj Kumar (supra)* which is reproduced hereunder:

> *"**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:*
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> *(i) whether the disablement is permanent or temporary;*
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> *(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;*
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> *(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 found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.*
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> ***15.*** *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. …"*

13.1. Bearing in mind the aforesaid principles laid down by the Hon'ble Supreme Court, let me first decide whether the victim sustained any permanent disability due to the accident and, if so, to what extent. The victim in his claim application at column 11 stated that the he sustained multiple fractures on both legs. The discharge summary of Belle Vue Clinic shows multiple fractures on both lower limbs. Dr. P. K. Mondal (P.W.2) in his evidence-in-chief deposed that as per the discharge summary and certificate of the Belle Vue Clinic dated 19th September, 2007, he found the following injuries (i) fracture neck of femur right, (ii) fracture both bones right leg, (iii) fracture 3rd and 4th metatarsal right foot, (iv) fracture left

femur, (v) fracture tibial condyle left leg, (vi) lateral malleolus fracture right, (vii) fracture tibial condyle Soulter's Grade VI. The above injuries have been noted by P.W.2, Dr. P. K. Mondal in his medical certificate issued to the respondent no.1-claimant on examining the discharge summary and certificate of Belle Vue Clinic. Dr. P. K. Mondal, P.W.2 has also deposed in his evidence that upon examination of the victim, he assessed permanent disability to the extent of 35%. The disability certificate issued by P.W.2 also shows that the permanent disablement has been assessed to the extent of 35%. The assessment made by the medical expert (doctor) of such extent of disablement has not been controverted and/or challenged either in cross-examination or by producing any other witness. This Court finds force in the submission of Mr. Guha Roy, learned advocate for the respondent no.1-claimant relying on *Salim (supra)* and *Smt. Sutapa Saha (supra)* that in the absence of contrary evidence, the opinion of the expert should not be discarded. Thus upon consideration of the evidence of P.W.2, Dr. P. K. Mondal, who issued the certificate upon examination of the victim, and the discharge summary and certificate of the Belle Vue Clinic, it is found that the injured sustained permanent disablement to the extent of 35%.

13.2. Now it is to be ascertained as to what would be the effect of such permanent disablement on the actual earning capacity of the victim. Admittedly, at the time of accident, the claimant-victim was in service at United Bank of India as a computer operator. From the cross-examination of the claimant Alok Kumar Sur (P.W.1), it is found that he joined the service after the accident on the basis of fitness certificate issued by the

doctor. He further deposed in cross-examination that on the date of accident on 27th July, 2007, his salary was Rs. 25,000/- and at the time of retirement, he used to get salary of Rs. 65,000/-. In his examination in chief, he stated that he retired from service on 31st August, 2016 as a Head Cashier. Thus from the above evidence, it goes without saying that after the accident, the victim continued in his service in the bank. He was promoted to the post of Head Cashier and in consequence of such promotion his salary has increased from Rs. 25,000/- to Rs. 65,000/- till the date of retirement. There is no case that due to such injuries, the victim was demoted in his service. The materials as indicated above clearly shows that there was escalation in the earnings of the victim after the accident with promotional benefits and as such there was no such loss of earnings. This Court in *Dipak Kumar Sarkar (supra)* has followed the observation in *Raj Kumar (supra).*

13.3. In ***The New India Assurance Co. Ltd. versus Amitava Das & Anr.***[12], this Court considering that the victim became fit and joined in the service with proper medical fitness certificate set aside the quantification of compensation amount on account of loss of income. Mr. Guha Roy, learned advocate for the respondent-claimant relying on *Hari Om (supra)* tried to impress upon the Court that the efficiency in the service of the victim in the Bank has been compromised due to such disablement and hence he is entitled to loss of earnings. It is found that in the cited decision the victim is a constable whose efficiency was found to be

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[12] (2007) 2 WBLR (Cal) 354

seriously compromised whereas in the case at hand, the victim has been promoted in his service at the bank with enhanced pay structure. Hence, the cited decision is distinguishable.

13.4. Bearing in mind the aforesaid, the loss of earning assessed by the learned Tribunal of 35% of the annual income of the victim stands set aside and quashed.

13.5. Since there is no loss of earnings, the question of adopting multiplier method for assessment of loss of earnings as argued on behalf of respondent no.1-claimant relying on *Abhimanyu Partap Singh (supra)* does not arise.

Issue No.3: Whether compensation can be enhanced in the absence of cross-objection been filed by the claimant.

14. As regards the instant issue, it is pertinent to note that in the present appeal the respondent no.1-claimant has not filed any cross-objection for enhancement of the compensation. Mr. Guha Roy, learned advocate for the respondent no.1-claimant relying on the decision of Hon'ble Supreme Court passed in *Surekha (supra)* submitted that the Claims Tribunal as well as the Courts under Section 168 of the Motor Vehicles Act, 1988 is obligated to grant just and fair compensation and, therefore, the enhanced compensation can be granted in favour of the claimant without there being any cross-objection filed by him invoking powers under Order XLI Rule 33 of the Code of Civil Procedure. *Per contra*, Mr. Pahari, learned advocate for appellant-insurance company submitted that in the absence of cross-objection by the claimant for enhancement, the compensation amount

cannot be enhanced taking recourse to Order XLI Rule 33 of the Code of Civil Procedure.

14.1. For the convenience of discussion Rule 33 of Order XLI of Civil Procedure Code is reproduced hereunder:

> *"**33. Power of Court of Appeal.**–The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection, and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees……"*

14.2. The aforesaid provision deals with the power of the court of appeal to pass an appropriate order in the case regardless of the fact that the appeal is only with respect to a part of the decree or that the appeal is filed only by some of the parties and such power may be exercised in favour of all or any of the respondents or parties although such respondents or parties may not have filed any appeal or objection. Now the question which requires consideration is whether the compensation amount can be enhanced in the absence cross-objection.

14.3. In ***Oriental Insurance Co. Ltd. versus R. Swaminathan and Ors.***[13], the claimant filed an application for compensation of Rs.10,000,000/- for injury suffered by him in accident. A sum of Rs.4,50,000/- was awarded as compensation by the Claims Tribunal. In appeal filed by the insurer before the Single Judge of the High Court the compensation was reduced to 3,00,000/-. The Hon'ble Division Bench of the High Court enhanced the compensation to Rs. 7,44,000/-. In such enhancement, the Division Bench assigned the following reasons:

> *"In this connection, we may observe that we are aware of the fact that we are enhancing the compensation even though the injured has not claimed it. But, the question is covered by catena of decisions justifying enhancement of compensation even in cases where the injured has not preferred an appeal, provided the circumstances of the case warrants the same."*

The aforesaid decision of the Division Bench of the High Court was challenged before the Hon'ble Supreme Court. The issue was whether the Division Bench of the High Court was justified in increasing the compensation amount beyond the amount awarded by the Claims Tribunal despite the fact that the award has not been challenged by the claimant. The Hon'ble Supreme Court while dealing with the aforesaid issue held as follows:

> *"We called upon the learned Counsel on both sides to show us at least one case (out of the catena of judgments referred to in the impugned judgment) in support of this proposition. Learned Counsel frankly confessed that there was none. On the other hand, the*

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[13] ***2006(1) T.A.C 965 (SC)***

> *learned Counsel for the appellant drew our attention to the judgment of this Court in Banarsi v. Ram Phal reported in (2003) 9 SCC 606, which supports the proposition that in an appeal filed by the defendant laying challenge to the grant (sic of) a small relief, the plaintiff as a respondent cannot seek a higher relief if he had filed an appeal on his own or had not taken any cross-objection. In the present appeal it would appear that the claimant neither appealed against the Award of compensation passed by the Tribunal, nor filed any cross-objection in the first appeal filed by the Insurance Company. This (sic thus), we are satisfied that the Division Bench of the High Court wholly erred in increasing the compensation amount beyond the amount awarded by the Tribunal in the appeal filed by the Insurance Company."*

14.4. In ***Ranjana Prakash and Others versus Divisional Manager and Another***[14], the award of Rs. 24,12,936/- with interest @ 9% per annum was allowed in favour of the claimants by the Claims Tribunal. The High Court in appeal by the insurer while upholding findings in regard to income and calculation of compensation held that the Claims Tribunal ought to have deducted 30% of the annual income towards income tax and it reduced the compensation to Rs.16,89,055/- with interest @ 9% per annum. The said order was under challenge before the Hon'ble Supreme Court at the instance of the claimants. It was contended that the High Court erred in reducing the amount of compensation and sought for restoration of the compensation awarded by the Claims Tribunal. The insurer before the High Court contended in the absence of any evidence as

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[14] (2011) 14 SCC 639

to the actual income tax paid, the Claims Tribunal ought to have deducted 30% of the income towards income tax. The claimants, on the other hand, contended before the High Court that as the deceased was holding a permanent job under a statutory body, with assured increments and career progression and was aged between 40 and 50 years, as per the decision in ***Sarla Verma (Smt) and Others versus Delhi Transport Corporation and Another***[15] the income ought to have been increased by 30% keeping in view the future prospect. If the income is increased by 30% towards future prospect and thereafter there is deduction of 30% towards income tax, virtually the income as assessed by the Claims Tribunal remains undisturbed and, therefore, the monthly income as computed by the Claims Tribunal as Rs.23,134/- without any deductions did not call for any interference. Considering the above contention, the Hon'ble Supreme Court proceeded to hold as follows:

> *"6. … Therefore, in an appeal by the owner/insurer, the appellant can certainly put forth a contention that if 30% is to be deducted from the income for whatsoever reason, 30% should also be added towards future prospects, so that the compensation awarded is not reduced. The fact that the claimants did not independently challenge the award will not therefore come in the way of their defending the compensation awarded, on other grounds. It would only mean that in an appeal by the owner/insurer, the claimants will not be entitled to seek enhancement of the compensation by urging any new ground, in the absence of any cross-appeal or cross-objections.*

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[15] (2009) 6 SCC 121

7. This principle also flows from Order 41 Rule 33 of the Code of Civil Procedure which enables an appellate court to pass any order which ought to have been passed by the trial court and to make such further or other order as the case may require, even if the respondent had not filed any appeal or cross-objections. This power is entrusted to the appellate court to enable it to do complete justice between the parties. Order 41 Rule 33 of the Code can however be pressed into service to make the award more effective or maintain the award on other grounds or to make the other parties to litigation to share the benefits or the liability, but cannot be invoked to get a larger or higher relief. For example, where the claimants seek compensation against the owner and the insurer of the vehicle and the Tribunal makes the award only against the owner, on an appeal by the owner challenging the quantum, the appellate court can make the insurer jointly and severally liable to pay the compensation, along with the owner, even though the claimants had not challenged the non-grant of relief against the insurer. Be that as it may.

8. Where an appeal is filed challenging the quantum of compensation, irrespective of who files the appeal, the appropriate course for the High Court is to examine the facts and by applying the relevant principles, determine the just compensation. If the compensation determined by it is higher than the compensation awarded by the Tribunal, the High Court will allow the appeal, if it is by the claimants and dismiss the appeal, if it is by the owner/insurer. Similarly, if the compensation determined by the High Court is lesser than the compensation awarded by the Tribunal, the High Court will dismiss any appeal by the claimants for enhancement, but allow any appeal by the owner/insurer for reduction. The High Court cannot obviously increase the compensation in an appeal by the

> *owner/insurer for reducing the compensation, nor can it reduce the compensation in an appeal by the claimants seeking enhancement of compensation."*

14.5. The aforesaid ratios laid down by the Hon'ble Supreme Court has been considered by the Division Bench of this Court in ***National Insurance Company Limited versus Smt. Sulekha Das & ors.***[16] which accepted the position of law that an appellant cannot be worse off for filing an appeal and the award of the Claims Tribunal attains finality on the claimant accepting the same without carrying it higher up. With greatest humility, it is seen that the decision of Hon'ble Supreme Court cited on behalf of the respondent no.1-claimant passed in *Surekha (supra)* has not considered the previous decisions of the Division Bench of the Hon'ble Supreme Court passed in *R. Swaminathan (supra)* and *Ranjana Prakash (supra).* The proposition in this regard as laid down in *R. Swaminathan (supra)* and *Ranjana Prakash (supra)* has not been overruled and it holds the field. In view of the proposition laid down by the Hon'ble Supreme Court in *R. Swaminathan (supra)* and *Ranjana Prakash (supra)*, it is needless to state that there cannot be enhancement of compensation amount in an appeal filed by the insurance company challenging the compensation granted by the learned Tribunal in the absence of cross-objection of the claimants. This Court in ***National Insurance Company Limited versus Tapas Kumar Ghosh & Others***[17] has taken a similar view.

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[16] ***FMA 3903 of 2015 (Decision of High Court at Calcutta)***

[17] ***FMA 1534 of 2017 (Decision of High Court at Calcutta)***

14.6. Likewise in the absence of cross-objection by the claimant, the argument for enhancement of compensation on the head of non-pecuniary damages relying on *Jakir Hussein (supra)*, on the ground of just and fair compensation relying on *Raj Kumar (supra)*, *Jitendra Khimshankar Trivedi (supra)* and on the ground of erroneous deduction of medical expenses received through mediclaim policy relying on *Bimal Kumar Shah (supra)* and claim of loss of income due to four months of leave cannot be considered.

15. The decision in *Kiran Singh (supra)* is not applicable to the facts of this case since no material has been placed to show of deliberate and/or intentional act of appellant-insurance company to delay the grant of compensation.

16. In view of the above discussion, the calculation of compensation is made hereunder:

Calculation of Compensation

Medical expenses	Rs. 95,709/-
36 days Privilege leave	Rs. 10,000/-
Pain and sufferings	Rs. 8,000/-
Future anticipated treatment	Rs. 1,00,000/-
Dietary food or for purchase of any scientific device	Rs. 10,000/-
Total compensation	Rs. 2,23,709/-

17. Thus, the claimant is entitled to compensation of Rs. 2,23,709/- together with interest at the rate of 5% per annum from the date filing of the claim application till payment.

18. It is found the appellant-insurance company has made statutory deposit of Rs. 25,000/- vide OD Challan No. 64 dated 10th April, 2017 and

has also deposited a sum of Rs. 16,65,025/- vide OD Challan No. 1172 dated 7th August, 2017 in terms of order of this Court dated 25th July, 2017. Both the aforesaid deposits together with accrued interest shall be adjusted against the entire compensation amount and the interest thereon.

19. Respondent no.1-claimant is directed to deposit deficit court fees, if any.

20. Learned Registrar General, High Court, Calcutta shall release the aforesaid amount of compensation together with interest in favour of the respondent no.1-claimant, upon satisfaction of his identity and payment of deficit court fees, if any.

21. After full and final satisfaction of the award, if any amount is left over, the same shall be refunded to the appellant-insurance company.

22. With the above observation, the appeal stands disposed of. The impugned judgment and award of the learned Tribunal is modified to the above extent.

23. There shall be no order as to costs.

24. All connected applications, if any, stand disposed of.

25. Interim order, if any, stands vacated.

26. Let a copy of this judgment along with the lower court records be forwarded to the learned Tribunal in accordance with rules.

27. Urgent photostat certified copy of the judgment, if applied for, be given to the parties upon necessary compliance of legal formalities.

(Bivas Pattanayak, J.)