
(2006) 05 CAL CK 0011
In the Calcutta High Court
Case No : F.M.A. No. 1945 of 2003

Atanu Kumar Ghosal

APPELLANT

Vs

National Insurance Co. Ltd. and Others

RESPONDENT

Date of Decision : 03-05-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A
Workmens Compensation Act, 1923 — Section 2(1)

Citation : (2007) 2 ACC 345 : (2007) ACJ 650

Hon'ble Judges : Kalyan Jyoti Sengupta, J;Aniruddha Bose, J

Bench : Division Bench

Advocate : Krishanu Banik, for the Appellant;Rajesh Singh, M.M. Guha and Sanjay Paul, for the Respondent

Judgement

Kalyan Jyoti Sengupta and Aniruddha Bose, JJ.—This appeal is directed against the judgment and award passed by the learned Tribunal (Additional District & Sessions Judge), Durgapur dated 16.6.2003. Being aggrieved by and dissatisfied with the quantum of compensation granted by the Tribunal, the appellant has preferred this appeal.

2. Appellant was a victim of an accident which occurred between a bus and truck. He was travelling in the bus from Siliguri and the truck which was coming from the opposite side collided face to face. It is admitted position that petitioner sustained injuries and after getting medical treatment he recovered from his injuries. However, he lost 3 fingers of his right hand, which were ultimately amputated. In order to get medical treatment, initially, he was admitted to a local hospital at Gajol and from there he was taken to the Malda District Hospital where the treatment was found to be not in commensurate to the need and as a result whereof, the victim had to be admitted to Durgapur Main Hospital where he underwent an operation and after 1 1/2 months he was sent to Christian Medical College at Vellore in the state of Tamil Nadu for better treatment, where he was given all possible treatment and there also he did not get good result and

ultimately, he had to be admitted to the SSKM Hospital where he again underwent three operations and remained under treatment for 1 1/2 years. The aforesaid facts have been proved by oral evidence and there has been no cross-examination on this point and fact of incurring expenses on account of medical treatment at the diverse hospitals, as recorded above by us.

3. The appellant's claims are as follows:

- (i) A sum of Rs. 60,000 on account of medical expenditure.
- (ii) A sum of Rs. 1,00,000 on account of pecuniary loss and physical disability.
- (iii) Pain, suffering and mental agony - Rs. 40,000.
- (iv) Loss of future income - Rs. 50,000.

Thus, the total claim of the appellant had aggregated to Rs. 2,50,000. The learned Tribunal after going through the evidence and considering the rival contentions of the claimant and the insurance companies came to the conclusion that the appellant was entitled to get an award of Rs. 40,000, which included a sum of Rs. 30,000 on account of the monies spent for medical treatment and a sum of Rs. 10,000 also for mental pain and agony.

4. Mr. Krishanu Banik, learned Counsel appearing for the appellant contends that the amount of compensation by no stretch of imagination can be said to be just and proper. Learned Tribunal did not consider the case of loss of income on account of loss of earning capacity. This should have been considered and claim on this account ought to have been awarded by the learned Tribunal applying the legal position and principle as adopted by the Act and applying formula laid down in the Workmen's Compensation Act. He contends that it is true that there has been no evidence to that effect, but by virtue of the provisions of the law, it has to be considered and granted automatically whether the victim actually lost earning capacity or not and in support of his submissions, he has relied upon a Division Bench decision of this Court in case of United India Insurance Co. Ltd. v. Phurba Dorjay Lama 2004 (1) WBLR (Cal) 597 . He has drawn our attention to para 9 of the said judgment.

5. The compensation on account of medical treatment as awarded is absolutely an absurd amount and the appellant has produced series of documents in support of his claim wherefrom one can presume safely that how much expenditure could be incurred by a patient to travel to four hospitals at different places and undergoing varieties of the treatment including surgical operation over 1 1/2 years. He contends that even the travelling expenses of the patient (the appellant) for going to Malda, Durgapur, Vellore and then Kolkata and that of his escort alone would be around Rs. 30,000, leaving aside the expenses incurred for treatment on account of medical and other expenditure.

6. As far as compensation on account of suffering of mental pain and agony, the amount is truly too meagre in the facts and circumstances of the case. The

appellant is an insurance agent. He has lost his ability and working skill and he cannot work freely after the accident.

7. Mr. Singh, learned counsel, appearing for National Insurance Co. Ltd., on the other hand contends that the award passed by the learned Tribunal, is just and proper. On his own, the appellant has stated in his evidence that he has not lost his income nor his earning capacity and as such question of loss of earning capacity, does not and cannot arise at all. He contends that whatever may be the extent of disability, one has to state and prove that he has actually lost his earning capacity. In support of his contention, he has relied upon a Full Bench decision of the High Court of Karnataka in Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, . He has also relied upon another Division Bench of the same High Court in case of New India Assurance Company Limited and Another Vs. Subhas, . He further relied upon a Division Bench decision of this Court rendered in the case of New India Assurance Company Limited Vs. Bharat Yadav alias B.P. Yadav and Another, , a decision of a Division Bench of this Court in Md. Salauddin Vs. National Insurance Co. Ltd. and Another, and a Supreme Court decision in the case of Divisional Controller, The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, .

8. He further contends that there is no proof of expenditure of Rs. 60,000 having incurred on account of medical expenses. The documents were merely filed and were not exhibited before the learned Tribunal. Learned Tribunal upon his best judgment rightly awarded a sum of Rs. 30,000 as compensation towards the money spent for medical treatment and no further consideration is required to be made by this court. His contention as regards award on account of mental agony and suffering is quite just and reasonable and this has been granted by the learned Tribunal in exercise of its discretion and this discretion should not be substituted by appellate court's discretion unless, of course, it is patently irrational and illogical.

9. We have heard respective contentions of the learned Counsel and we have also gone through evidence produced before us. In our considered view the amount granted on account of medical expenses amounting to Rs. 30,000 is obviously too low and absurd. We have already observed that there is an unchallenged evidence that the appellant/petitioner had to visit four hospitals in two states and the court can take judicial notice that one had to spend a lot of money on account of travelling expenses alone from Malda and then stay at Vellore and ultimately to incur actual medical expenses there. Appellant has also incurred medical expenses in Malda District Hospital and at local hospital at Gajol. Thereafter, lastly at the SSKM Hospital he has spent for treatment. Some documents have been filed by the appellant, but these were not exhibited formally. We think this is a failure on the part of learned Counsel appearing for appellant, who should have taken steps to prove and get the same exhibited, but no attempt was made. If that was done, at least, learned Judge should have taken care of the same. We have examined the documents. We wanted to get

the said documents to be proved formally, but Mr. Singh submits that his client does not dispute the correctness of those documents. In view of the submissions made by Mr. Singh, the learned Counsel for National Insurance Co. Ltd., we refrain from getting the documents formally proved and as such, the same are collectively exhibited and the same do form part of the records of this case.

10. According to us taking into consideration the materials on record and the unchallenged evidence, we think that it would be just, fit and proper that the amount on account of medical expenses should be around Rs. 50,000 not Rs. 30,000. So, we enhance the aforesaid amount.

11. While considering the question of granting award on account of loss of earning capacity, we are of the view that in this case the appellant cannot get this amount at all because in his evidence, he has stated that he has been earning Rs. 6,000 p.m. It is his evidence that even after accident, he has been earning Rs. 6,000 p.m. It is consistent view of the judicial pronouncements of Karnataka High Court and also our court in the cases noted above by us that in order to get compensation and damages as per the statutory provision, one has to prove that he has lost his earning capacity and only then, such claim can be allowed. The victim cannot get it automatically and the statute does not empower court to do so. In a Full Bench decision of Karnataka High Court in Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, , as cited by Mr. Singh, appearing for National Insurance Co. Ltd. it has been held as a legal principle in para 25 (iii):

Determination of loss of earning capacity has to be with reference to "all the work" which the workman was capable of performing at the time of the accident resulting in such disablement and not with reference to the work which the workman was performing at the time of accident. However, this is subject to the condition that in case the workman establishes by acceptable evidence that after the injury not only he is not able to do the work which he was performing before the accident but he is not able to do any other work, the loss of earning capacity could be assessed on the basis of such evidence.

(Emphasis added)

12. This Full Bench decision came to be considered by another Division Bench judgment of the same High Court in the case of New India Assurance Company Limited and Another Vs. Subhas, . In para 45 of the aforesaid judgment the view taken by the Full Bench has been followed and reiterated and in that case it has been held as a principle of law that it has been established by proof that there has been loss of earning capacity. Two Division Bench judgments of our court have taken more or less the same view which is taken by the Full Bench of Karnataka High Court.

13. In case of New India Assurance Company Limited Vs. Bharat Yadav alias B.P. Yadav and Another, , the Division Bench of our court in para 13 observed as follows:

...In para 13 of their decision, their Lordships also viewed that unless there is any evidence as regards actual loss of earning capacity, the Commissioner was not competent to assess the loss of earning capacity of the workman....

14. Another Division Bench decision rendered in the case of Md. Salauddin Vs. National Insurance Co. Ltd. and Another, . In paras 21 and 22 after considering the series of decisions on this point, their Lordships held as follows:

(21) Upon a conspectus of all those decisions discussed above it appears that it cannot be said as an invariable rule of law that a compensation should always be awarded on account of loss of earning capacity in future because of an injury suffered by the claimant on his person in a motor accident resulting in some disability, irrespective of any loss of his earnings because of such injury or disability. The determination of compensation should be upon consideration of broad facts and circumstances of each case. Compensation for pecuniary damages such as loss of earnings or earning capacity should, therefore, depend upon such broad facts and circumstances of each case. There should not be a strait-jacket formula in each case as suggested in the Second Schedule to the Act. Loss of earning capacity for the injury suffered in motor accident depends primarily upon the nature of injury and the kind of job performed by the injured at or around the period when the accident occurred. Such loss is not to be presumed in each case irrespective of the nature of injury and the job performed by the injured in the accident. No doubt loss of earnings may be an indication to presume loss of earning capacity in future, but in the absence of loss of earnings, it would depend upon these factors and some other circumstances that would be relevant to presume a possibility of losing as much earning capacity as the injured was capable of. One of the aspects of compensating is to grant in equal value as far as practicable, the pecuniary loss that would be suffered by the injured in future. For such assessment of loss of earning capacity in future an estimate of probable future earnings, had there been no accident, has to be made. At the same time it should not be a ploy of the injured to make a profit out of it, which he would not have gained had he not faced the accident. "It should neither be punitive against whom claim is decreed nor it should be a source of profit of the person in whose favour it is awarded" as observed by the Supreme Court at para 12 of the decision in Divisional Controller, The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, .

(22) In the case in hand there is no material to establish that the claimant has suffered any loss of earnings since after the accident. So far as the partial permanent disablement of the victim is concerned, the certificate showing permanent partial disablement to the extent of 50 per cent has been issued by a stock doctor. As observed earlier we do not feel confident to rely upon such disablement certificate. The claimant has not said a single word in his deposition as to the nature of his partnership business and the job and/or functions required to be performed by him for carrying on his partnership business. Therefore, the essential elements upon which a presumption could be drawn for

loss of earning capacity of the claimant, are absolutely missing. We are, therefore, of the view that the claimant is not entitled to a compensation either on account of loss of earnings or earning capacity in future.

15. Another Division Bench of this Court in the case of United India Insurance Co. Ltd. v. Phurba Dorjay Lama 2004 (1) WBLR (Cal) 597, has of course taken a different view from the aforesaid consistent views taken by the Full Bench of Karnataka High Court and the Division Bench of the same High Court as well as the Division Bench of our court. In para 9 of this judgment their Lordships were pleased to rule as follows:

(9) Where disablement is permanent, u/s 2(1)(g) of the Workmen's Compensation Act, 1923, made applicable by the explanation of Section 163A of the Motor Vehicles Act, 1988, the loss of earning capacity is to be assessed not on the basis of actual loss in actual employment, but on the basis of any possible hypothetical loss in any possible hypothetical employment. This is quite in line with common law and common sense; if an accountant is earning Rs. 10,00,00,000 and he loses a leg that might force him to work more and earn Rs. 15,00,00,000 but that does not mean he is disentitled from receiving compensation.

This judgment nowhere says as principle of law that no proof is required.

16. Even if we assume this judgment inferentially lays down rule of dispensing with proof by applying the principle of hypothetical loss in hypothetical employment, with great respect, we are unable to follow the aforesaid ratio of their Lordships in view of the consistent pronouncements of the Full Bench and Division Bench of Karnataka High Court and our court as discussed above which were not placed before their Lordships nor the same were considered.

17. In the factual aspect, we are of the view that even going by a hypothetical loss there is no possibility of losing earning capacity. Appellant is an insurance agent, thus self-employed. He is not in employment under any employer. Appellant being insurance agent while acting as such effectively needs his speaking and visionary power and also good physique, power of mobility. His movement, power of speech, hearing power and vision are not impaired. By dint of his persuading capacity in his avocation, he has to collect business indeed he is doing admittedly and, therefore, by any stretch of imagination, it cannot be said that an insurance agent has lost his earning capacity.

18. Moreover, the income of an insurance agent is almost secured regarding the past business, as and when premiums are deposited by or on behalf of assured, commission at prescribed rate is paid instantly. He has not stated in his evidence anywhere that he has lost clients because of his loss of three fingers. In a business of this nature carried on by the appellant the proposal forms signed by the persons, who want to be insured, and he being the agent is just to be a middleman between the insurance company and the persons concerned and put his signature as an agent. Nowhere he has stated that he has lost his power of

signing and writing. In such circumstances, even applying the hypothetical theory as enunciated by the Division Bench of this court, it is difficult for us to hold that the appellant has lost his earning capacity. We are unable to accept the contention of Mr. Banik and as such hold that the learned Tribunal was not in error in not considering this aspect of the matter. His contention is accordingly not acceptable to us.

19. We, however, agree with Mr. Banik, that the amount of the award on account of mental agony of the appellant is slightly low as the learned Tribunal should have considered that appellant had undergone treatment for 1 1/2 years and even after recovery he is still facing mental incapacity. As such, we think a sum of Rs. 15,000 should be allowed on account of mental agony and stress. So, we enhance Rs. 5,000 (rupees five thousand) only on this head.

20. Thus, the appellant is entitled to get Rs. 25,000 more. Hence, the appeal is allowed to the extent as indicated above. There will, however, be no order as to costs.

21. The enhanced amount should be deposited with learned Tribunal within 60 days from the date of receipt of the lower court records and copy of this judgment and the learned Tribunal is to disburse the amount to appellant upon actual verification. The enhanced amount is apportioned in equal share between the two insurance companies.

22. We find that the learned Tribunal has not granted statutory interest. The same should be granted at the rate of 9 per cent per annum from the date of filing of the application till the date of the deposit already made. However, for the time being interest is not allowed on this enhanced amount. If the enhanced amount is not paid within the time prescribed above, then the amount will carry interest at the rate of 9 per cent per annum from the date of making of the application.

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