
(2015) 05 DEL CK 0197

In the Delhi High Court

Case No : MAC. APP. 740 and 1016 of 2012

Iffco Tokio Gen. Ins. Co. Ltd.

APPELLANT

Vs

Sachin Kumar and Others

RESPONDENT

Date of Decision : 19-05-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8, Order 20A Rule 20A, 35
Motor Vehicles Act, 1988 — Section 166

Citation : (2015) 3 ACC 300

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Shantha Devi Raman and Garud M.V., for the Appellant; Munish Kumar Sharma, Advocates for the Respondent

Final Decision : Disposed off

Judgement

G.P. Mittal, J.—These two appeals arise out of the judgment dated 22.03.2012 passed by the Motor Accident Claims Tribunal (the Claims Tribunal) whereby compensation of Rs. 21,84,545/- was awarded in favour of Sachin Kumar who suffered severe injuries (resulting in traumatic Quadriplegia) in a motor vehicular accident which occurred on 06.08.2009.

2. For the sake of convenience, the Appellant in MAC.APP.740/2012 shall be referred to as the Insurance Company, whereas the Appellant in MAC.APP. 1016/2012 shall be referred to as the Claimant.

3. The compensation awarded by the Claims Tribunal is tabulated hereunder:

4. During inquiry before the Claims Tribunal, it was claimed on behalf of the Claimant that on 06.08.2009, while he was loading goods at Railway Station Badli and was standing on the road along with his colleague Toni Babu, a truck bearing No. HR-39-A-7770 which was driven by its driver at a very high speed and in a negligent manner hit against him with great force. As a result, he fell down and suffered injuries. The driver fled away from the spot. With the help of

Toni Babu, he was taken to GTB Hospital, Shahdara where he underwent surgery. He was subsequently removed to Yashoda Hospital and then to Indian Spinal Injuries Centre, Vasant Kunj. It was the case of the Claimant that even after his discharge from the Indian Spinal Injuries Centre, Vasant Kunj, he was still undergoing treatment and taking physiotherapy. It was pleaded that the Claimant would require medical treatment throughout his life and he will not be able to carry out any work and even day to day normal activities.

5. On appreciation of evidence, the Claims Tribunal found that the accident was caused on account of rash and negligent driving of the truck bearing No. HR-39-A-7770. The Claimant was pursuing Diploma in Civil Engineering from B.R. Ambedkar College, Vikaspuri. Since the Claimant was still a student, the Claims Tribunal took minimum wages of a matriculate, added 50% towards inflation and applied the multiplier of 18 to compute the loss of earning capacity. In addition to the medical expenses, a sum of Rs. 20,000/- each was awarded towards special diet and conveyance charges and Rs. 50,000/- each was awarded towards attendant charges and future medical expenses. The Claims Tribunal also awarded a sum of Rs. 2,00,000/- towards pain and suffering and Rs. 1,50,000/- towards loss of marriage prospects. A further sum of Rs. 1,00,000/- was awarded towards Counsel's fee.

6. The following contentions are raised on behalf of the Insurance Company:

(i) The Claimant failed to prove that vehicle No. HR-39-A-7770 was involved in the accident and that the accident was caused because of rash and negligent driving of its driver;

(ii) The Claimant was only a student of Diploma in Civil Engineering, thus, addition of 50% towards future prospects/inflation was not permissible.

(iii) Award of sum of Rs. 1,00,000/- towards Counsel's fee was not permissible; and

(iv) Despite notice under Order 12 Rule 8 of the Civil Procedure Code, 1908 (CPC), legible copy of driver's driving license was not produced and thus, the insured committed wilful breach of the terms and conditions of the Insurance Policy. Therefore, the Insurance Company is entitled to recover the compensation paid from the insured.

7. Per contra, the learned counsel for the Claimant urges that the Claimant was pursuing Diploma in Civil Engineering. Thus, his potential income ought to have been taken into consideration. Instead of the same, the Claims Tribunal awarded loss of earning capacity on the basis of the minimum wages of a matriculate. He further contends that the compensation of Rs. 50,000/- awarded towards attendant charges is on the lower side. Moreover, taking into consideration that the Claimant has been crippled for his life, the compensation of Rs. 50,000/- towards future medical expenses is also inadequate and paltry.

8. I have the Trial Court record before me and have perused the same.

INVOLVEMENT OF THE VEHICLE AND NEGLIGENCE:

9. In order to prove negligence on the part of the driver of vehicle No. HR-39-A-7770, the Claimant filed his own Affidavit (Ex.PW1/A). He testified that on the intervening night of 06.07.2009 at about 12:30 A.M., he was loading goods in V.P. at Railway Station Samaipur Badli and was standing on the side of the road in front of a godown. He testified that in the meanwhile, a truck bearing No. HR-39-A-7770 being driven by Respondent No. 2 Narender Bahadur Thapa, in a rash and negligent manner struck him with great force. As a result of the impact, he fell down on the road and suffered grievous injuries. He deposed that the driver fled away from the spot along with the truck. He was removed to GTB Hospital, Delhi by his co-worker. On the other hand, the learned counsel for the Insurance Company urges that a complaint in respect of the accident was lodged on behalf of the Claimant on 24.08.2009. The FIR however, was registered only on 11.10.2009. He further referred to the testimony of PW-6 who had partly investigated the case and also to the complaint made by the father of the Claimant wherein he had stated that the accident was caused on account of negligent driving of a container bearing No. HR- 39-A-7770.

10. It may be noted that the Claimant as PW-1 categorically deposed about the rash and negligent driving of HR-39-A-7770 by its driver. This part of his testimony was not even challenged in the cross- examination. Even in the complaint dated 24.08.2009 which is relied upon by the learned counsel for the Insurance Company, the number of the vehicle i.e.HR-39-A-7770 is clearly mentioned. Simply because it is mentioned in the complaint that it was the company's container, it cannot be presumed that the vehicle belonged to the company where the Claimant was working. The only inference that can be drawn from this part of the complaint is that the container was working for the company. It is important to note that during the course of investigation, the IO had contacted the owner of vehicle No. HR-39-A-7770. Although, the owner was unable to produce the driver, nothing could be elicited in the cross-examination of PW6 which could suggest that the container bearing No. HR-39-A-7770 was not involved in the accident. It is well settled that in a claim petition under Section 166 of the Motor Vehicles Act, 1988, negligence is required to be proved only on the touchstone of preponderance of probabilities. (See *Bimla Devi and Others Vs. Himachal Road Transport Corporation and Others*, (2009) ACJ 1725 : AIR 2009 SC 2819 : (2009) 5 JT 515 : (2009) 5 SCALE 706 : (2009) 13 SCC 530 : (2009) 6 SCR 362 : (2009) 6 UJ 2709 : (2009) AIRSCW 4298 . In view of this, negligence on the part of vehicle No. HR-39-A-7770 was sufficiently established. No fault can be found with this part of the finding reached by the Claims Tribunal which I hereby affirm.

LOSS OF EARNING CAPACITY:

11. It is no longer *res integra* that in the case of a student pursuing professional course, his potential income should be taken into consideration to award the loss of dependency in case of death and the loss of earning capacity in case of

permanent disability. In this case, a reference may be made to the judgment of this Court in Meenu Tognatta and Anr. v. National Insurance Co. Ltd. and Ors, MAC.APP.238/2012 decided on 20.04.2012 where the question was gone into at great length by this Court and a number of judgments of the Supreme Court and various High Courts were relied upon.

12. In the instant case, the Claimant was pursuing Diploma in Civil Engineering from a little known institute. Moreover, his academic record was also not impressive. He simply managed to pass the Secondary Examination in IIIrd Division. In fact, he had simply managed to obtain the passing marks. In view of this, it will be difficult to say that Respondent No. 1 had good potential to earn any handsome income with the Diploma in Civil Engineering even if he managed to pass the same. At the same time, it will not be appropriate to take the income of only a matriculate to award the loss of earning capacity. Since the minimum wages of a graduate on the date of the accident i.e. 06.08.2009 was about Rs. 4,700/-, I will take the potential income of Respondent No. 1 to be Rs. 6,000/- per month. Consequently, I award a sum of Rs. 12,96,000/-(Rs. 6000/- x 12 x 18) towards loss of earning capacity. The Claims Tribunal took the minimum wages of a matriculate as Rs. 4,401/- and added 50% towards future prospects. Since neither the Claimant was in settled employment nor there was any extra material showing his good future prospects on record, there is no question of grant of any future prospects.

ATTENDANT CHARGES:

13. The Claimant suffered traumatic Quadriplegia due to fracture of C-6-7 with bladder involvement. The Discharge Summary dated 26.10.2009 (Ex.PW7/A) prepared at the time of the Claimant's discharge indicates that there was total absence of any movement in hip, knee, ankle and toes. The condition of the Claimant as to whether he can carry out any work was also indicated in the Discharge Summary issued by the Department of Occupational Therapy, Indian Spinal Injuries Centre, Vasant Kunj (Pages 207 to 209 of Trial Court record). With regard to self care, it was stated that the Claimant eats cut food using without adaptive devices. However, he will need assistance to open containers. With regard to bathing, it was mentioned that he will need little assistance to reach distant parts of his body and will be able to dress his upper part of the body partially on his own. With regard to mobility, it was stated that he will require assistance to have movement in the bed and he will also require assistance to move with wheel-chair even indoors. He will require total assistance to move outdoors. He will be dependent to turn on both sides and to maintain his position. Thus, there is no manner of doubt that the Claimant had not only 100% disability, but he will also need an attendant throughout his life.

14. It is well settled that even gratuitous services rendered by one or the other family members ought to be compensated, the same cannot be for the benefit of the tortfeasor. In this connection, a reference may be made to the judgment of this Court in Delhi Transport Corporation and Another Vs. Lalita, (1983) ACJ

253 : (1986) 59 CompCas 162 : (1982) 22 DLT 170 : (1982) 2 ILR Delhi 231 : (1982) RLR 570 . The minimum wages of an unskilled worker on 01.08.2009 were Rs. 3,953/-. I will take the value of gratuitous services rendered by family members to be Rs. 3,000/- per month and tend to award a sum of Rs. 6,48,000/- (Rs. 3,000/- x 12 x 18) towards attendant charges instead of a lumpsum compensation of Rs. 50,000/- awarded by the Claims Tribunal.

FUTURE MEDICAL EXPENSES:

15. The Claims Tribunal awarded a lumpsum compensation of Rs. 50,000/- towards future medical expenses. I have indicated earlier the Claimant's condition at the time of his discharge. He was advised to practice/exercise his lower limbs, do strengthening exercise of his upper limbs and to continue with mat exercise. Therefore, the Claimant will need to consult physiotherapist and orthopedic surgeon from time to time and he will also have to undertake physiotherapy. Hence, the lumpsum compensation of Rs. 50,000/- awarded under this head by the Claims Tribunal seems to be on the lower side. I venture to make a guess work and increase the same to Rs. 1,50,000/-.

16. The overall compensation towards special diet and conveyance charges is also raised from to Rs. 20,000/- each to Rs. 50,000/- each.

17. The compensation is hence, recomputed as under:

18. The overall compensation is thus, enhanced from Rs. 21,84,545/- to Rs. 31,69,102/-.

19. Hence, the compensation is enhanced by Rs. 9,84,557/- which shall carry interest @ 7.5% per annum from the date of filing of the claim petition till its payment.

COUNSEL'S FEE:

20. The Claims Tribunal awarded a sum of Rs. 1,00,000/- towards Counsel's fee. This Court in ICICI Lombard General Insurance Co. Ltd. v. Kanti Devi and Ors., MAC APP No. 645/ 2012, decided on 30.07.2012 had gone into the question of granting Counsel's fee and concluded in Para 32 as under:

"32. To sum up, it is directed:-

(i) The Claims Tribunal is empowered to award costs in a Claim Petition in terms of Section 35 read with Order XXA of the Code.

(ii) The Claims Tribunal is entitled to award the Counsel's fee in accordance with Rule 1 read with Rule 1A and Rule 9 of Chapter 16 Volume I of the Rules extracted earlier.

(iii) In case of compromise/settlement of the claims, the Claims Tribunal is not entitled to go beyond the settlement reached between the parties. If the settlement does not provide for payment of any Counsel's fee, it shall not be within the domain of the Claims Tribunal to award the Counsel's fee.

(iv) If the compensation is awarded on the basis of DAR in pursuance of the legal offer made by the Insurer, the Claims Tribunal is not empowered to award any costs unless it forms part of the legal offer.

(v) The counsel fee can be directly paid to the counsel only when a specific agreement is filed and the Claimant requires payment of fee directly to the counsel because only then the Claimant would be liable to reimburse the fee or part thereof in case the award is set aside or varied."''

21. It was thus, held that instead of awarding Counsel's fee, the claim petition ought to be allowed with costs and Counsel's fee be paid only in accordance with Rules 1, 1A and 9 of Chapter 16 Vol. I of the Delhi High Court Rules and Orders.

22. At the most, the Claims Tribunal can decree the claim petition with costs. Consequently, the order of grant of Counsel's fee is modified and it is ordered that the claim petition was deemed to decreed with costs.

LIABILITY:

23. The learned counsel for the Insurance Company has urged that a notice under Order 12 Rule 8 of the Civil Procedure Code, 1908 (CPC) was issued to the insured to produce legible copy of the driving license possessed by the driver. It is urged that the genuineness of the driving license of the driver could not be verified as the number on the driving license was not legible. I have the Trial Court record before me. It is well settled that the initial onus is on the Insurance Company to prove that the insured committed wilful and conscious breach of the terms and conditions of the insurance policy. The driving license containing all the particulars including the validity of the driving license is available on record as photocopy Mark "A". Of course, the right top portion containing the licence number could not be properly photocopied but then the Insurance Company could have summoned the record of the Licensing Authority, Mathura in respect of the driving licences which were issued on 23.12.2008, as the period of validity of the driving license has been clearly mentioned. All the more, the legible copy of the driving license could have been summoned from the SHO of the concerned Police Station because it appears that while making a photocopy of either the original license or of another photocopy, left top portion could not be properly photocopied. It is however, urged by the learned counsel for the Insurance Company that the record from the Licensing Authority, Mathura could not be summoned as the Licensing Authority was sealed. Even if this contention is accepted, it will not show that there was any lapse or breach of the terms and conditions of the insurance policy on the part of the insured. In view of this, I am of the opinion that the Insurance Company failed to prove willful and conscious breach of the terms and conditions of the insurance policy and therefore, it cannot avoid its liability to pay the compensation under the policy of insurance.

24. The enhanced compensation of Rs. 9,31,745/- along with interest as indicated above shall be deposited by the Insurance Company with UCO Bank, Delhi High Court Branch, New Delhi within six weeks, failing which, the Claimant

shall be entitled to interest @ 12% per annum after the expiry of the stipulated period.

25. It is stated by the learned counsel for the Insurance Company that a sum of about Rs. 28,00,000/- was deposited with the Claims Tribunal, Rohini in March, 2014. The balance enhanced amount shall be deposited with UCO Bank, Delhi High Court Branch, New Delhi as indicated above.

26. It is directed that out of the amount awarded, 25% of the amount shall be released in favour of the Claimant forthwith. Balance 75% shall be held in Fixed Deposit in equal proportions for a period of five, ten, fifteen, twenty and twenty five years respectively. On the amount so held in Fixed Deposit, the Claimant shall be entitled to earn quarterly interest. The principal amount shall be released on maturity.

27. Both the appeals are disposed of in above terms.

28. Pending applications, if any, also stand disposed of.

29. Statutory amount, if any, shall be refunded to the Insurance Company on deposit of the enhanced compensation and filing a certificate in this regard.