

(1986) 01 OHC CK 0002
In the Orissa High Court
Case No : Misc. Appeal No. 191 of 1981

Jagabandhu Mohanty

APPELLANT

Vs

Hadibandhu Swain and Another

RESPONDENT

Date of Decision : 30-01-1986

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110D

Citation : (1986) 01 OHC CK 0002

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : S.S. Basu and S.S. Rao, for the Appellant; S.C. Rautray, J.P. Mishra, J.R. Das, P.K. Misra and Ramanath Das, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—Owner is the Appellant in this appeal u/s 110-D of the Motor Vehicles Act, 1939 (in short "the Act"). Claimant u/s 110-A of the Act has also preferred cross-objection for enhancement of the compensation awarded.

2. Claimant is a villager. His wife, child and old mother depend on him. For the purpose of collection of eggs and vegetables to supply them at Bhubaneswar for earning his livelihood, he was moving round on a cycle from village to village. On 9.7.1976, the claimant was returning back from Bhubaneswar on his cycle to his village after making the supplies. At about 6 p.m. near Uttara Chhak when a bus was standing on the extreme left flank of the Bhubanes-war-Puri Road, which he was crossing, a truck bearing registration No. ORU 1663 came from his front and dashed against him. As a result of sustaining injuries he became senseless and had to be removed to the Capital Hospital. His left leg below the knee had to be amputated. An artificial limb was fixed. The claimant having sustained pecuniary and non-pecuniary losses, filed a claim petition before the Motor Accidents Claims Tribunal, Puri u/s 110-A of the Act claiming compensation of Rs. 96,000/-. In the petition, he assessed his claim as follows:

- (a) For mental shock and physical pain Rs. 6,000/-
- (b) For loss of pleasure in life Rs. 15,000/-
- (c) Towards expenses incurred in treatment etc. Rs. 5,000/-
- (d) Future probable expenses Rs. 5,000/-
- (e) Loss of earning calculated for 45 years after giving discount for uncertainty and deduction on account of getting the money in lump sum Rs. 65,000/-

3. During enquiry, the claimant adduced oral evidence of three witnesses and produced some documents in support of the medical expenses and the fixation of an artificial limb.

The owner and the insurer neither led oral evidence nor produced any document.

4. The Tribunal, assessing the material available on record, determined the compensation at Rs. 56,260/- on the following heads:

- (a) For mental shock and physical pain Rs. 2,000/-
- (b) For loss of pleasure in life Rs. 5,000/-
- (c) Towards medical expenses Rs. 300/-
- (d) For loss of income calculated for 34 years deducting 20% towards uncertainties and lump sum payment Rs. 48,960/-

The Tribunal apportioned the compensation between the insurer and the owner. It directed the insurer to pay Rs. 50,000/- and the balance to be paid by the owner.

5. Mr. S.S. Basu, the learned Counsel for the owner, submitted that the claimant is responsible entirely for the injuries sustained by him and there was no negligence in driving the truck. In the minimum the insurer should have been directed to pay the entire compensation. Mr. Misra, the learned Counsel for the claimant submitted that the determination of compensation by the Tribunal is unjust.

6. There is no dispute that the claimant sustained the described injuries as a result of the truck dashing against him. The driver of the vehicle would have been the best person to explain the circumstances under which the truck dashed against the claimant. No explanation has been offered as to why the driver has not been examined. In the circumstances, the finding of the Tribunal on the basis of evidence of the claimant and eye-witnesses to the occurrence that the accident was on account of the negligence in driving the truck is justified. The owner is thus, vicariously liable for the negligence of the driver.

7. The claimant assessed the compensation at Rs. 5,000/- on account of expenses for medical treatment and Rs. 5,000/- for future expenses. The claimant on oath has stated that he spent about Rs. 1,400/- to Rs. 1,500/- in all

including the artificial limb. This statement has not been challenged in cross-examination. Apart from this, the documents clearly show that the claimant was first admitted to the Capital Hospital where his left leg was amputated and thereafter he had to move to the Olatpur Hospital for fixing an artificial limb. Merely because vouchers worth Rs. 100/- were filed, the Tribunal ought not to have determined the compensation at Rs. 300/- in spite of the statement of the claimant that he has all the vouchers with him. Taking the nature of injuries, duration of hospitalisation and treatment in different hospitals, the amount of compensation awarded is grossly inadequate. The just compensation on this account would be Rs. 1,000/-. However, there being absolutely no material in support of future expenditure, the Tribunal was justified in refusing the claim of Rs. 5,000/- made by the claimant.

8. The claimant assessed the compensation for physical pain and mental shock at Rs. 5,000/- and for loss of future pleasure of life at Rs. 15,000/-. The Tribunal has awarded compensation of Rs. 2,000/- for physical pain and mental shock and Rs. 5,000/- for loss of pleasure of life. There can be no doubt that the claimant has suffered physical pain. Mental shock in such a case is its companion. A person physically disabled on account of the accident is not only deprived of his earning but also suffers in mind and body on account of the failure to lead a normal life. Throughout the rest of his life, he would suffer from the mental agony that he is no more a normal man and would not be able to enjoy the amenities of a normal life. He would find himself handicapped in the company of others. That he would not be able to move freely with others would be a permanent mental torture to him. Thus, the physical pain and mental agony in this case is intermixed with the loss of future pleasure in life. In the absence of any material to indicate that he would also suffer some other pleasure in life, a separate compensation for loss of pleasure of life in future is not justified. The determination on this count by the Tribunal is not supported by any reason. Rs. 5,000/- as determined by the Tribunal on this account is not just. Taking into consideration, the long period of 45 years, the Petitioner is likely to live and suffer, a sum of Rs. 4,500/- on both the counts, would be just.

9. The Tribunal has assessed the daily pecuniary loss of earning to be Rs. 5/- and taking 34 years to be the working life has assessed the gross loss of income at Rs. 61,200/-. Deducting 20% towards uncertainties and lump sum payment, he determined the lump sum amount on this count at Rs. 48,960/-. The learned Counsel for the Respondent assailed this determination on the grounds that the future prospect has not been taken into consideration, and the daily loss of income has been contrary to the evidence on record. There are some decisions where deduction on account of uncertainty and lump sum payment was not permitted as future prospect was not taken into consideration. [See *Kailash Wati and Another Vs. State of Haryana and Another*, : *Punjab State Vs. Hardeep Kaur and Others*, , *Sood and Company Vs. Sorjit Kaur and Others* and *Damyanti Devi and Others Vs. Sita Devi and Others* These decisions are, however, distinguishable on facts. In *Kailash Wati and Another Vs. State of Haryana and*

Another, the injured were a law student and a chemical engineering student, aged about 21 years each. The age and education were the basis of future prospect. In Punjab State Vs. Hardeep Kaur and Others, the deceased, aged 25 years was employed in England which circumstance was taken into consideration as the basis of future prospect. In Sood and Company Vs. Sorjit Kaur and Others the victim was a mechanic in the Railway Department having time scale of pay and having prospect of future rise in the income. In Damyanti Devi and Others Vs. Sita Devi and Others the deceased was having a prosperous business. The further prospect in business was taken into consideration. In the present case, however, the claimant is a rustic villager whose educational qualification is not known, the collection of vegetables and eggs and supplying the same to the shopkeepers at Bhubaneswar would not be such prospective to earn higher income of an appreciable amount. This is to be remembered that the compensation to be awarded should neither be penal to the person made liable nor should it be the source of profit to the person who is to be compensated. Besides, the lump sum amount if invested by purchase of National Saving Certificates would become double within six years. That can be taken to be equal to the prospect of the claimant in vending vegetables and eggs. Therefore, deduction on account of uncertainty and lump sum as a principle is not unjustified.

10. The claimant has stated that he was earning 15 to 20 rupees a day at the time of accident. In cross-examination, it was suggested to him that he was a daily wage earner and earning Rs. 5/- a day. It was also brought out in evidence that he was earning Rs. 5/- per day by running a vegetable shop in his house. Any of the shop owners at Bhubaneswar and any person from whom vegetables or eggs were being collected by the claimant has not been examined. PW 2 though a co-villager of the claimant stated that the injured after amputation of his leg was doing nothing. This is directly contrary to the statement of the claimant. PW 3 belongs to a different village and has not disclosed the source of his knowledge of the earning of the claimant. In this background, the determination of Rs. 5/- to be the daily income of the claimant before the accident is not unjust.

11. Mr. Misra, the learned Counsel for the Respondent submitted that the average expected longevity in India is now accepted to be 70 years and the Tribunal ought to have determined the compensation for loss of income for 44 years. The claimant was earning by moving on cycle from village to village and to Bhubaneswar. The earning has been reduced because of his loss of mobility on cycle. A normal person would have such mobility to take physical strain till the age of 60 years whereafter in every likelihood age factor would predominate over the physical strain. The Tribunal is thus, justified to assess the working life of the claimant for 34 years which cannot be said to be unjust.

12. While accepting the gross loss of income at Rs. 61,200/- and deduction on account of lump sum payment, I am of the view that 20% deduction is not

justified. In the decision of the Division Bench reported in Oriental Fire and General Insurance Co. Ltd. Vs. Mrs. Kamal Kamini Das and Others, following the decision reported in Rajinder Kaur and Others Vs. Union of India (UOI), one sixth of the total amount was deducted. In Sabite Pati and Others Vs. Rameshwar Singh and Another Orissa Road Transport Co. Ltd. Vs. Sibananda Patnaik and Others, and Smt. Archana Nayak and Another Vs. State of Orissa and Others, , also one sixth was deducted by this Court towards uncertainty and lump sum payment. In view of the long standing rate of deduction, the just deduction would be 1/6th of Rs. 61,200/-. The claimant is thus, entitled to Rs. 51,000/- towards loss of earning capacity.

13. In conclusion, the claimant is entitled to the following compensation:

(a) For medical expenses Rs. 1,000/-

(b) For physical pain, mental agony and loss of pleasure in life Rs. 4,500/-

(c) FOFJOSS of earning Rs. 51,000/-

Total: Rs. 56,500/-

14. The insurer has admitted its liability to indemnify the owner. In case, the insurance policy containing the terms would have been filed, it would have been possible to find out whether the insurer would be liable to the extent of statutory liability only. In the absence of the policy, an inference can safely be drawn that production of policy would have attracted wider liability of the insurer. In the circumstances, the insurer shall pay the entire compensation.

15. Mr. Das, the learned Counsel for the insurer submitted that the insurer has already paid Rs. 50,000/- with interest as per the direction of the Tribunal. In that view of the matter, the insurer shall not be liable to pay interest on the balance amount, if the same is paid on or before 30.4.1986. In case of failure to pay the same, the unpaid amount shall carry interest at 10% per annum from 1.5.1986 till date of payment.

16. In the result, the appeal and the cross-objections are allowed in part. No cost.