

(2008) 08 CAL CK 0061

In the Calcutta High Court

Case No : F.M.A. No. 30 of 2003 and C.A.N. 4087 of 2008

Joe D'Silva

APPELLANT

Vs

New India Assurance Company Limited and Another

RESPONDENT

Date of Decision : 08-08-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27, 11

Motor Vehicles Act, 1988 — Section 140, 163A, 166

Penal Code, 1860 (IPC) — Section 279, 338

Citation : (2008) 4 CHN 888

Hon'ble Judges : Partha Sakha Datta, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Krishanu Banik, for the Appellant; Parimal Kumar Pahari and M.R. Sarbadhikari, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—This appeal is at the instance of a claimant u/s 166 of the Motor Vehicles Act and is directed against an award dated 30th July, 2002 passed by the learned Judge, Twelfth Bench, City Civil Court at Calcutta in M.J.C. Case No. 317 of 1995 thereby dismissing the said proceeding and at the same time, directing refund of Rs. 25,000/- received by the appellant pursuant to an award passed in an earlier proceeding u/s 140 of the Act against which no appeal was preferred.

2. According to the appellant, he was involved in a road-accident by which he was seriously injured and was immediately admitted to the Medical College Hospital and subsequently, was transferred to the Woodland Nursing Home. After a prolonged treatment, he was discharged from the said Nursing Home and in the process, he totally lost his vision of the left eye. According to the medical certificate produced on his behalf, his permanent disablement was to the extent of 55 percent. He also produced the document showing his income at the relevant point of time by production of the Income Tax return. As the said Income Tax return was filed after the accident, we, on the application of the appellant under Order 41 Rule 27 of the Code of Civil Procedure, accepted the

earlier Income Tax returns for the period prior to the accident by way of additional evidence. In spite of giving opportunity of filing evidence in rebuttal, the Insurance Company decided not to give any evidence in rebuttal.

3. It appears from the award impugned that the Tribunal disbelieved the factum of the accident itself and concluded that there was no such accident based on which the claim application u/s 166 of the Act was filed. The owner of the vehicle in this case specifically stated that her Omni Bus did not ply at the relevant point of time and had never gone to the alleged place of accident on that day. It appears that police case was initiated after about two months from the date of the accident after the claimant was released from the Nursing Home. The Tribunal, therefore, disbelieved the version of the accident and thus, rejected the claim application and at the same time, directed the claimant to return the amount of Rs. 25,000/- received by him in the earlier proceeding u/s 140 of the Act.

4. Being dissatisfied, the claimant has come up with the present appeal.

5. Mr. Banik, the learned Counsel appearing on behalf of the appellant, strenuously contended before us that the Insurance Company and the owner of the vehicle, both having suffered an order of payment of Rs. 25,000/- in the earlier proceeding u/s 140 of the Act and not having challenged such award and having paid that amount to the appellant, the question of involvement of the vehicle in question in the accident is no longer open to attack and such question cannot be answered against his client in this proceedings u/s 166 of the Act. In other words, Mr. Banik contends that the question of involvement of the vehicle in question in the accident has been established in the earlier proceedings u/s 140 of the Act and such decision is res judicata in the present proceeding.

6. According to Mr. Banik, once the involvement of the vehicle in the accident is established, the owner of the vehicle and her insurer cannot escape their liability of making compensation as the negligence of the driver has also been proved. He further submits that in view of the evidence adduced by the doctor specifying the extent of disablement to be 55 per cent, his client is entitled to get compensation on the basis of annual income of Rs. 1,50,000/- as reflected from the Income Tax return after taking into consideration the said extent of disability and his age by adopting multiplier method. Mr. Banik contends that in addition, his client is also entitled to get the actual amount spent by him for the medical treatment.

7. Mr. Pahari, the learned Advocate appearing on behalf of the Insurance Company and Mr. Sarbadhikari, the learned Advocate appearing on behalf of the owner of the vehicle, have seriously disputed the aforesaid contentions of Mr. Banik and have contended that the previous finding in the proceeding u/s 140 of the Act is not binding upon the Tribunal while deciding the proceedings u/s 166 of the Act and the said decision cannot be res judicata. They maintain the reason assigned by the Tribunal that the car was not at all involved in the said accident, They disputed even the medical certificate that has been produced in support of

the alleged disability.

8. Therefore, the first question that arises for determination in this appeal is whether the learned Tribunal below erred in law in holding that the vehicle in question was not involved in the accident notwithstanding the earlier award passed in the proceeding u/s 140 of the Act against the Insurance Company and the owner of the vehicle.

9. After hearing the learned Counsel for the parties and after going through the materials on record, we find that in the previous proceedings u/s 140 of the Act, the Tribunal passed an award of Rs. 25,000/- against both the owner of the vehicle and the Insurance Company and such award has been accepted by not preferring any appeal and the Insurance Company admittedly paid the amount to the appellant. It is now settled by the Apex Court that an award u/s 140 of the Act is an appealable one and therefore, the parties by not preferring any appeal has accepted the position that the vehicle was involved in the accident and that the same was insured by the Insurance Company. Those two facts cannot be reopened in the proceedings u/s 166 of the Act either at the instance of the owner of the vehicle or the Insurance Company. At this stage it will be profitable to refer to the following observations of the Apex Court in the case of Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, where a Bench consisting of three Judges specifically held that even if Section 11 of the CPC is not applicable in a judicial proceedings, the principles of res judicata is nevertheless applicable:

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the Original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

10. We, therefore, find substance in the contention of Mr. Banik, the learned Advocate appearing on behalf of the appellant, that the learned Tribunal erred in law in holding that the vehicle in question was not involved in the accident.

11. Mr. Sarbadhikary, the learned Advocate appearing on behalf of the owner of the vehicle tried to convince us that the earlier proceedings was ex parte against his client and as such, the principle of res judicata would not be applicable. The

facts, that his client was party to the proceedings and that in spite of knowledge of the earlier proceedings and the existence of the award, she did not apply for setting aside the ex parte award, are sufficient to invoke at least the doctrine of estoppel and acquiescence against his client. We, thus, find no substance in the said submission of Mr. Sarbadhikary.

12. The questions, which are now required to be decided in this proceeding, are, (1) whether there was negligence on the part of the driver of the vehicle (2) what was the extent of disablement suffered by the appellant, if at all, and (3) what should be the just compensation payable if the first two questions are favourably answered in favour of the appellant.

13. Therefore, the next question is whether there was negligence on the part of the driver of the vehicle in the accident.

14. In a proceeding u/s 166 of the Act, if the negligence of the offending vehicle fully or partially is proved, the Tribunal is required to assess the damages in proportion to the negligence of the offending vehicle found by the Tribunal. In other words, if the offending vehicle is fully responsible for the injury or the death, the full compensation should be paid by the owner of the vehicle or the Insurance Company, if insured, depending upon the terms of the insurance agreement. Similarly, if more than one vehicles are involved, the damages will be divided between the owners or the insurers of those vehicles in proportion to their respective negligence. If, on the other hand, there is some contributory negligence on the part of the victim, the damages actually suffered by him would be reduced by that percentage of the contributory negligence.

15. In this case, the owner of the vehicle and the driver were examined and they simply denied that the car was involved with the accident. It appears that the owner of the vehicle in her evidence stated that she was never informed by any police officer that the vehicle was implicated in the accident in question nor was she interrogated by the police officer of the Bowbazar PS relating to the accident in question. She denied the suggestion of the claimant that a police case being Police Case No. 253 dated June 30, 1995 of the Bowbazar PS had started due to the accident or that a chargesheet had also been submitted against her driver. We, however, find that the aforesaid statements were deliberate false statement as would appear from her following statements in paragraphs 17 and 18 of her own written statements:

17. That this defendant being the owner of the vehicle WB-04/4453 was called by the Investigating Officer Mr. R.S. Maity, SI of Police P.S.T.P for a discussion to dispel the confusion about the possible involvement of this vehicle with the alleged occurrence and also called upon to bring the details of the vehicle and the driver and this defendant complied with those on the basis of the information finished by this defendant the IO submitted report perfunctorily without proper and detailed investigation.

18. That the chargesheet was submitted against the Driver u/s 279/338 IPC on

31.8.1995. But the driver did not receive any notice as yet. In case the driver could not be found, this defendant, the owner of the vehicle WB- 04/4453 could have been contacted as her address and telephone no are with the IO. This shows the collusion and conspiracy against the vehicle WB-04/4453 and its owner.

16. It is, therefore, apparent that the owner of the vehicle made false statement before the Court that the police never contacted her although such fact has been admitted in her written statement. She admitted in her evidence that she maintained the Garage Register but the same was not produced. If the same was produced, it could be shown that at the relevant point of time whether the car was really stationed in front of her house as alleged. She stated in her evidence that she had no personal garage and that she kept car in front of her house. We do not find any reason to disbelieve the statement of the claimant and another outsider, the PW.6, who took him to the medical college that the car came from the wrong side and knocked down the claimant. Therefore, the negligence of the driver has been proved particularly when the driver did not try to allege contributory negligence of the claimant and his defence that there was no accident, which is found to be a false one.

17. The next question is whether the appellant has proved any permanent physical disability due to the accident.

18. The fact that the appellant was seriously injured due to the road accident has been well proved by sufficient amount of documentary evidence. First, he was admitted in the Medical College Hospital and thereafter, he was removed to the Woodland Nursing Home. It has been at least established that he, due to the accident, has lost one of his eyes.

19. As pointed out by the Apex Court in the case of R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, the mode of assessment of compensation in a non-fatal case should be as follows:

Broadly speaking while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (in) other material loss. So far non-pecuniary damages are concerned, they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv)

inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

20. The said principles have been further clarified by a decision of a Bench consisting of three Judges in the case of *Lata Wadhwa and Others Vs. State of Bihar and Others*, in the following terms:

In examining the question of damages for personal injury, it is axiomatic that pecuniary and non-pecuniary heads of damages are required to be taken into account. In case of pecuniary damages, loss of earning or earning capacity, medical, hospital and nursing expenses, the loss of matrimonial prospects, if proved, are required to be considered. In the case of non-pecuniary losses, loss of expectation of life, loss of amenities or capacity for enjoying life, loss or impairment of physiological functions, impairment or loss of anatomical structures or body tissues, pain and suffering and mental suffering are to be considered. But for arriving at a particular figure on each of the aforesaid head, the claimant is duty bound to produce relevant materials, on the basis of which, a determination could be made, as to what would be the best compensation.

21. The only instance where the Apex Court has applied multiplier method in case of a non-fatal injury is the one in the case of *New India Assurance Co. Ltd. Vs. Charlie and Another*, where the victim suffered 100% disablement and the Apex Court was of the opinion that "in case, where the injured has suffered 100%, the logic applicable to a deceased can, in appropriate cases, taking note of all relevant factors be reasonably applied." Moreover, in that case, the annual income of the victim was Rs. 18,000/- as would appear from paragraph 4 of the judgment and as such, there was no bar of application of the Second Schedule of the Act by treating the application as one u/s 163A of the Act.

22. Therefore, apart from the cases where the injured applicant is successful in bringing his case under the purview of Section 163A of the Act, there is no scope of application of the Second Schedule of the Act in assessing the compensation of damages for the injury suffered. In the case before us, the claimant has asserted that his annual income is much higher than Rupees forty thousand and thus, there is no scope of application of the Second Schedule to the facts of the present case.

23. After going through the materials on record, we find that the appellant has produced various documents relating to his treatment arising out of the accident and has also filed huge number of receipts granted by doctors or Nursing Homes but only few of them have been marked exhibits. Various medical examination reports are although filed, those were not marked as exhibits. It appears that the doctor's report assessing his disability was based on not only the physical examination of the appellant but also partly on those reports. In our opinion, the Court, however, cannot safely rely upon the opinion given by the doctor if the same is even partly based on other medical reports, which are not exhibited in the proceedings. The doctor proceeded as if those papers submitted to him by

the appellant were all genuine and that those related to the treatments of the appellant. In such circumstances, unless the appellant proves those documents relied upon by the doctor in his report as the ones really related to his treatment in accordance with law in this proceeding, it will cause prejudice to the respondents. They can reasonably complain that an opinion based on various documents cannot be binding upon them unless it is established that those documents really pertained to the treatment of the appellant.

24. For arriving at the conclusion as to the extent of disablement and the consequent loss suffered by the appellant in accordance with the principles enunciated by the Apex Court as mentioned above, in our view, the matter should be remanded back to the Tribunal for giving opportunities to the parties to give further evidence and counter-evidence. As the Tribunal had improperly disbelieved the involvement of the vehicle of the respondent, it did not seriously enter into the other questions regarding extent of disability and the damages suffered by the appellant.

25. We, therefore, hold that for the negligent driving of the vehicle owned by the respondent which was covered by the insurance of the concerned Insurance Company, the appellant has definitely become is abled to some extent and has also suffered loss but the extent of loss and the disability should be arrived at by the Tribunal on the basis of further evidence that may be adduced by the parties.

26. Since, the matter is pending for a long time, we direct the Tribunal below to arrive at such conclusion and to assess the compensation based on our observations mentioned above positively within three months from the date of communication of this order. The matter, thus, is remanded back for deciding only those limited points.

The award impugned is, thus, set aside and the appeal is allowed to the extent indicated above. In the facts and circumstances, there will be, however, no order as to costs.

P.S. Datta, J.

27. I agree.