
(2011) 05 SHI CK 0098
In the High Court Of Himachal Pradesh
Case No : FAO No. 436 of 2005

Miss Kiran Kumari

APPELLANT

Vs

New Jayanti Bus Service and Others

RESPONDENT

Date of Decision : 05-05-2011

Acts Referred:

Citation : (2011) 2 ShimLC 502

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Judgement

Deepak Gupta, J.—This appeal for enhancement of compensation has been filed by the claimant, Ms. Kiran Kumari.

2 It would be pertinent to mention that FAO No. 75 of 2005 arising out of the same Award was filed by the owner. In this appeal he challenged the Award of the learned Motor Accident Claims Tribunal (1), Kangra at Dharamshala (MACT) whereby the learned Tribunal had directed that the Insurance Company would satisfy the Award first, but would be entitled to recover the amount deposited by it from the owner. This appeal (FAO No. 75 of 2005) was dismissed by a learned Single Judge of this Court on 4th August, 2009 and therefore, this aspect of the matter is not being gone into. Challenge to negligence made in the said appeal has also been decided.

3. The only question which remains to be decided is the quantum of compensation to which the claimant is entitled to. Therefore, the evidence only in this behalf is being referred.

4. The claimant at the relevant time was a minor girl of 8 years. In the accident, she suffered multiple injuries. The right limb of the claimant was amputated below the knee. The Medical Board vide certificate Ext. PW1/A proved on record by Dr. Gursharan Dass Gupta, PW-1 assessed the permanent disability of the claimant at 60%. PW-3 Dr. K.K. Rattan who was the then B.M.O., CHC, Jawalamukhi also supported the case of the Petitioner in this regard.

5. PW-4 Smt. Pawna Devi mother of the claimant had stated that her daughter (claimant Kiran Kumari) suffered 60% disability as per medical certificate Ext.PW1/A. According to her an artificial limb was purchased for Rs. 56,270/- vide quotation "Mark B". She had also proved the discharge certificate "Mark A". According to her, her husband who at that time working at Dubai came back after taking leave to attend his daughter and spent Rs. 60,000-70,000/- on his visit. She also placed on record the air tickets of her husband. She had also proved the other medical expenses. PW-5 Dr. Bhanu Awasthi had also treated the claimant.

6. On the basis of the aforesaid evidence on record, the learned Tribunal awarded a sum of Rs. 8,757/- on account of medical expenses, Rs. 3,300/- for attendant charges, Rs. 1,20,000/- for purchase of artificial limbs and a global amount of Rs. 3,50,000/- under all other heads, i.e., total compensation of Rs. 4,82,057/- was awarded in favour of the claimant. The claimant by means of this petition seeks enhancement of the compensation.

7. It is well settled that in a personal injury case, injured has to be compensated under the heads (1) pain and suffering; (2) loss of amenities; (3) shortened expectation of life, if any; (4) loss of earnings or loss of earning capacity or in some cases for both; and (5) medical treatment and other special damages like transportation or traveling expenses, nutrition and food, etc. While determining compensation under the above heads, the two main elements to be borne in mind are: personal loss and the pecuniary loss. Chief Justice Cockburn in *Fair v. London and North Western Railway Co.* (1869) 21 LT 326, distinguished the above two aspects thus:

In assessing (the compensation) the jury should take into account two things, first, the pecuniary loss (the Plaintiff), sustains by accident; and secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income.

8. *McGregor on Damages*, 14th Edn., para 1157, referring to heads of damages in personal injury actions states:

The person physically injured may recover both for his pecuniary losses and his non-pecuniary losses. Of these the pecuniary losses themselves comprise two separate items, viz., the loss of earnings and other gains which the Plaintiff would have made had he not been injured and the medical and other expenses to which he is put as a result of the injury, and the courts have sub-divided the non-pecuniary losses into three categories, viz., pain and suffering, loss of amenities of life and loss of expectation of life.

9. Besides, the Court is well advised to remember that the measures of damages in all these cases "should be such as to enable even a tortfeasor to say that he had amply atoned for his misadventure". The observation of Lord Devlin that the proper approach to the problem or to adopt a test as to what contemporary

society would deem to be a fair sum, such as would allow the wrongdoer to "hold up his head among his neighbours and say with their approval that he has done the fair thing", is quite apposite to be kept in mind by the court in determining compensation in person injury cases.

10. In *Concord of India Insurance Co. Ltd. v. Nirmala Devi* 1980 ACJ 55 (SC), the Apex Court held:

The determination of the quantum must be liberal, not niggardly since the law values life and limb in a free country in generous scales.

11. Taking into consideration, the law laid down by the Hon"ble Apex Court, this Court in *Brestu Ram Vs. Anant Ram and Others*, , held:

It is pecuniary loss, i.e. capable of calculation in terms of money, and non-pecuniary loss i.e. loss that cannot be easily assessed with accuracy-Pecuniary loss is the loss suffered by the victim due to the loss of earnings or other profits which he had been earning and was to earn in future at the same rate or at same promoted scale. Non-pecuniary loss consists of damages awarded for pain and sufferings, loss of amenities and loss of enjoyment of life and prospects. Under non-pecuniary loss, for want of accurate assessment, a global figure could be arrived at and paid as compensation. Under pecuniary loss the assessment can be made easily by taking into consideration at least the monthly income actually earned by the victim and the difference between what he would be capable to earn on disablement.

12. It is well settled that in disablement cases, compensation has always to be higher than in cases of death since it is given to the living victim of the accident both for his personal loss and for economic loss. It can be said that the bodily injury is to be treated as a deprivation which entitles the victim to claim damages, which vary according to the gravity of the injury. Further, due to this injury, there can be loss of earnings, complete or partial due to the accident on his capacity to earn the same. Another consequence may be the loss he suffers on account of the enjoyment of life or full pleasures of living.

13. On the basis of the above legal position, the damages under various heads are assessed as follows:

14. Future loss of Income: Even though the claimant at the time of accident was 8 years old and was not earning any amount, the learned Tribunal had to make an effort to assess the income which the child may have earned in the future and the probable loss of future income. It is true, that this is not an easy task, but there are some well settled norms on the basis of which such assessment has to be made. The family background of the claimant, the opportunity the claimant would have had to earn in future, the impact which the injury may have caused on her earning capacity are the matters which have to be taken into consideration. In the present case the leg of the Petitioner was amputated below the knee. It is not clear whether the disability of 60% is in respect of the whole

body or only in respect of the right leg. Unfortunately, neither any of the doctors has spoken anything in this regard, nor counsel for the Respondents tried to elicit from the doctor what is the disability related to.

15. It is also a well settled principle of law that disability does not automatically transfer to the same loss of earning capacity. The same injury may lead to different loss of earning capacities in different people. Supposing a person is a labourer, then an injury to his limb which may be only 20% may cause 100% loss of earning capacity. If evidence is led to show that the injured has been rendered incapable of earning any amount, it can be held to cause hundred percent loss of his earning capacity. If the injured person is incapacitated to do the work which he is qualified to do, then loss of earning capacity can be much higher. Another example is of a person who is uneducated and earns his livelihood as a painter. He does not know any other work. If his hand is amputated, he suffers 100% loss of earning. On the other hand, if the same person was working as a clerk in an office and continues to do his job, the loss of earning capacity could be much lower or even nil. This will depend on the facts of each case. In the present case it has come in the evidence that the father of the injured-claimant was working in Dubai. It appears that he was a labourer. Though it is not clearly spelt out, it appears that he belongs to the labour class.

16. Be that as it may, a person who has gone abroad to earn his livelihood would normally ensure that his children get a decent education. Therefore, in such an eventuality where the evidence is missing, the loss of earning capacity will have to be worked out on the basis of some calculated guess work and conjectures.

17. The injured was only 8 years old when the accident took place in the year 2001. Now, she would be about 18 years old and almost at the stage of starting her earning. It is now that the impact will be felt on her earning capacity. The minimum wages today's are 100 rupees a day and even taking a conservative view of the matter, the child would normally have earned about Rs. 3000/- to 5000/- say Rs. 4,000/- per month. Keeping in view the nature of injuries and the fact that she had an artificial limb, it cannot be said that the child is unable to do any work. She has some ability to do other work. Supposing she becomes a teacher, her earning capacity may not be affected. Taking an overall view of the matter, I feel that interest of justice would be served, if the loss of earning capacity is assessed at 20% of the approximate income which make it about Rs. 800/- per month or Rs. 9600/- per year. Multiplier of 20 would be the appropriate multiplier. Therefore, the amount payable under this head works out to Rs. 1,92,000/-.

18. Medical expenses: - The learned Tribunal in my view has been highly conservative while awarding the medical expenses. The medical bills proved on record were to the sum of Rs. 8,757/- which alone have been awarded by the learned Tribunal. We are dealing here with people who do not get reimbursement of their medical expenses and such a person will not keep all the medical bills. The child remained admitted in the hospital for 33 days and amputation was

done. Therefore, it would not be unreasonable to assess medical expenses at Rs. 15,000/- in all.

19. While awarding Rs. 1,20,000/- for artificial limbs, again in my view the learned Tribunal erred. One limb itself at that stage cost about Rs. 55,000/-. Inflationary factors have to be taken into consideration and this Court can take judicial notice of the fact that an artificial prosthetic limb has to be changed as the child grows and an artificial limb may to be changed after every 2 years. Therefore, at least three limbs would be required to be changed till the child attained the age of 16 years. Taking into consideration the inflationary factors and also the need to have more advanced artificial limbs, it would be appropriate to award a sum of Rs. 1,85,000/- under this head, i.e. Rs. 2,00,000/- in all as medical expenses.

20. Attendant charges: The learned Tribunal has awarded attendant charges of Rs. 3,300/- for 33 days for hospitalization. In government hospitals more than one attendant is required and especially when a child is admitted more than one attendant is required 24 hours of the day. The tortfeasor has to compensate for the gratuitous services rendered by family members. Therefore, even if two family members were staying, the attendant charges would have to be increased. This Court also cannot be oblivious to the fact that even after the child was discharged from hospital, she would have required an attendant for some further time. Taking into consideration all these factors, in my opinion it would be reasonable to award a sum of Rs. 10,000/- on this count.

21. Traveling expenses of the father: The mother while appearing in the witness box had claimed that the father had spent about Rs. 60,000/- 70,000/- to travel from Dubai to India and that he had back to India only to visit the mother. The learned Tribunal held that this claim is very remote and cannot be awarded. In my view it cannot be said that this claim is remote or has no concern with the case. The mother in no uncertain terms stated that her husband came back to India from Dubai and had to stay for two months in India to look-after the minor child. She produced the original boarding card and ticket of the husband which shows that the husband came to India on 26th May and returned to Dubai on 24th July. He therefore, remained in India for almost two months. The value of this ticket is 1600 dirhams. The wife has also placed on record the pay slip of her husband which has been marked "D". No doubt, this has not been proved in accordance with law, but it is apparent that the husband was earning not less than 15,000/- per month. The father of the child came to India 3 days after the accident and it is apparent that he came to meet and look after his daughter. He went back after she had been discharged from hospital and recovered from her illness. It is more than obvious that his visit was directly connected with the accident. The learned Tribunal was erred in holding that the claimant was not entitled to these expenses. Taking all these factors into consideration a sum of Rs. 50,000/- is awarded under this head.

22. Pain and suffering: The claimant remained hospitalized for 33 days. Her leg

was amputated. She was a young girl aged only about 8 years. One cannot even imagine the pain and suffering which she had undergone. In fact, no amount of compensation can ever compensate for the loss of limb or the pain and suffering undergone by her, but the Act requires and the Tribunal and this Court have to make a fair and just assessment of such loss. Keeping in view the nature of the injuries, in my opinion it would be appropriate to award Rs. 75,000/- under the head of pain and suffering.

23. Loss of amenities and future disability: This is another head for which compensation has to be enhanced. Here is a child who cannot run and play like other children. While her classmates must have been enjoying in the playing field, she might have been sitting in one corner unable to join her friends in their fun and folic. This aspect of the matter must also be looked into while awarding compensation. In future also she will face problems. She is disabled and maimed for life. In Indian society, it is almost like a stigma which has been cast upon her, and her entire future shall always be overcast by the injuries suffered by her. Keeping in view the fact that she is a girl and being aware of the gender bias existing in this country an award in the case of a girl child should be on higher side under this head. Therefore, I feel it appropriate to award her a sum of Rs. 1,50,000/- on account of loss of amenities, future disability etc.

24. Loss of marital prospectus: This again is a head which the learned Tribunal has totally overlooked. The impact of such injury on the future marital prospectus of a girl can never be overstated. This is bound to affect her future life and also the chances of her marriage. Therefore, it would not be inappropriate to award a sum of Rs. 50,000/- under this head.

25. In view of the above discussion, the compensation works out is Rs. 7,27,000/- in all. However, the claimant shall not be entitled to any future interest on Rs. 1,92,000/- awarded as loss of future earning. Therefore, the Award of the learned Tribunal is modified and it is held that the claimant is entitled to compensation of Rs. 7,27,000/-. She shall be entitled to interest on a sum of Rs. 5,35,000/- at the rate of 9% per annum from the date of filing of the claim petition i.e. 22.11.2002 till deposit/payment of the amount and on the amount of Rs. 1,92,000/- she shall be entitled interest 9% per annum, if the enhanced amount is not paid by the owner on or before 30th September, 2011.

26. No doubt, in this case the learned Tribunal has held the owner liable to pay compensation and had further directed that the insurance company would first satisfy the Award and thereafter recover the amount from the insured owner. The appeal filed by the owner has already been dismissed. This Court cannot ignore the later judgments of the Hon'ble Supreme Court in which it has been repeatedly held that the insurance company cannot be forced to satisfy the Award. Therefore, as far as the enhanced amount is concerned, the insured alone shall be liable to pay the same. The appeal is disposed of in the aforesaid terms. No costs.