

(2013) 12 DEL CK 0127
In the Delhi High Court
Case No : Mac. A. No. 693 of 2006

National Insurance Co. Ltd.	Vs	APPELLANT
Sh. Aman Kapur and Others		RESPONDENT

Date of Decision : 03-12-2013

Acts Referred:

Citation : (2014) ACJ 1342

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Pradeep Gaur, for the Appellant; L.K. Tyagi, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Suresh Kait, J.—The appellant/Insurance Company has assailed the impugned award dated 07.04.2006, whereby the learned Tribunal has granted compensation as under:-

Interest at the rate of 5.5% per annum was also awarded from the date of filing of the petition till its realization.

Learned counsel appearing on behalf of the appellant/Insurance Company has argued the present appeal on two grounds. Firstly, the assessment

of permanent disability for quantifying the loss of income has not been considered properly by the learned Tribunal. Secondly, the amount received

on account of Mediclaim Policy has not been deducted from the cost of treatment by the learned Tribunal.

2. Learned counsel has argued that the disability certificate Ex. PW2/30 issued by the All India Institute of Medical Sciences, New Delhi

establishes 50% disability suffered on account of the injuries received in the

accident. However, the learned Tribunal has considered the same as 100% functional disability suffered by the claimant.

3. He submitted that the learned Tribunal has wrongly presumed permanent disability to the extent of 100% ignoring the medical evidence on record. For deciding the issue of percentage of permanent disability, the law has been well settled in the case of Raj Kumar Vs. Ajay Kumar and Another, .

4. As per the ratio of the said judgment, the functional disability has to be assessed for determining the loss of earning capacity. He further submitted that there is no evidence on record which justifies the functional disability to the extent of 100% as taken by the learned Tribunal while granting the compensation. At the most, 50% disability could be considered for assessing the loss of earning capacity.

5. He further argued that on the issue of amount received under the Mediclaim Policy, this Court has dealt with the identical situation in the case of

ICICI Lombard General Insurance Co. Ltd. Vs. Swatantrata Sharma & Ors. in MAC. App. No. 427/2011 decided on 10.05.2012, wherein it is

held that the claimants would not be entitled to the medical expenditure which has been reimbursed to him under the Mediclaim Policy on the

ground of double compensation as the same is not permissible. The relevant portion of the same reads as follows:-

6. This Appeal is squarely covered by a judgment of this Court in MAC APP. 191/2010 titled Bajaj Allianz General Insurance Co. Ltd. v. Ganpat

Rai Sehgal & Ors. decided on 03.01.2012 wherein this Court noticed United India Insurance Co. Ltd. Vs. Patricia Jean Mahajan and Others Etc.

Etc., ; Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others, ; Mrs. Helen C. Rebello and Others Vs. Maharashtra State

Road Transport Corpn. and Another, ; Jitendra Jain Vs. Rahul Parihar and Others, ; and Udam Singh Sethi v. Tamal Das and Ors. MAC. APP.

No. 369/2006 decided on 26.10.2009; and held that the Claimant would not be entitled to the medical expenditure which has been reimbursed to

him under the mediclaim policy.

6. He further submitted that the learned Tribunal in Para 17 of the impugned award has clearly observed that out of the medical bill of Rs.

84596.20, the company has paid a sum of Rs. 63,000/- and for a medical bill of

Rs. 1,00,907.54/-, the company has paid a sum of Rs. 75,000/-.

Therefore, there is no dispute that a sum of Rs. 1,38,000/- has been received by the respondent No. 1/injured towards medical expenses on

account of Mediclaim Policy. If the total medical expenses are taken, i.e., Rs. 3,48,049/-, than after deducting the sum of Rs. 1,38,000/-, i.e., the

amount so received on account of Mediclaim Policy, the balance amount comes to Rs. 2,10,049/-.

7. Lastly, he argued that the aforesaid amount is liable to be deducted and even otherwise, since there is no cross-objection against the first

respondent, he is not entitled for any enhancement.

8. On the other hand, learned counsel appearing on behalf of the respondent No. 1/injured has submitted that the claimant was working as a

Textile Designer at the time of the accident and he suffered head injuries in the accident occurred on 25.12.1996. He had suffered loss of memory;

and as per the disability certificate Ex. PW 2/30 issued by the All India Institute of Medical Sciences, New Delhi, he had suffered 50% disability

on account of post traumatic brain injury sequelae with quadriparesis with difficulty in speech.

9. He further submitted that keeping in view the nature of job of the victim, which requires communication skill and mobility, he has become

completely handicapped and in those circumstances, the learned Tribunal has rightly taken the functional disability of the respondent No. 1 as

100%. The view taken by the learned Tribunal is supported with the judgment of the Full Bench of the Apex Court in the case of Pratap Narain

Singh Deo Vs. Srinivas Sabata and Another, , wherein it was held that if the victim is not able to do his job which he was doing at the time of

accident, the disability will be considered as 100%.

10. Further, he submitted that learned counsel for the appellant has relied upon a case of Mohan Soni Vs. Ram Avtar Tomar and Others, , wherein

the Apex Court has held as under:-

10. In light of the aforesaid decisions, we find it extremely difficult to uphold the decision of the High Court and the Tribunal based on the finding

that the loss of the appellant's earning capacity as a result of the amputation of his left leg was only 50%. It is noted above that the appellant used

to earn his livelihood as a cart puller. The Tribunal has found that at the time of

the accident his age was 55 years. At that age it would be impossible for the appellant to find any job. From the trend of cross-examination it appears that an attempt was made to suggest that notwithstanding the loss of one leg the appellant could still do some work sitting down such as selling vegetables. It is all very well to theoretically talk about a cart puller changing his work and becoming a vegetable vendor. But the computation of compensation payable to a victim of motor accident who suffered some serious permanent disability resulting from the loss of a limb etc. should not take into account such indeterminate factors. Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income. The loss of earning capacity of the appellant, according to us, may be as high as 100% but in no case it would be less than 90%. We, accordingly, find and hold that the compensation for the loss of appellant's future earnings must be computed on that basis.

11. Learned counsel submitted that in view of the settled law, the learned Tribunal has rightly allowed the compensation to the respondent No.

1/claimant on account of loss of earning capacity to the extent of 100%.

12. So far as the question of deduction of Rs. 1,38,000/- received by the respondent No. 1 from the other insurer under the Mediclaim Policy is

concerned, the same has rightly not been deducted by the learned Tribunal in view of the law laid down by this Court in the case of Dr. A.C.

Mehra Vs. Behari Lal and Another, , wherein this Court has held that the reimbursement of medical expenses under Mediclaim Policy and

Personal Accident Policy can always be claimed against the tortfeasor, as the

victim had paid the premium for getting the said policies. The relevant portion of the same reads as under:-

After hearing the Counsel for the parties and perusing the authorities relied by the Counsel, I am of the opinion that the reasoning given by the

Tribunal cannot be sustained. The learned Counsel for the appellant has correctly stated that the amount paid by his Insurance Company to M/s.

Saran Motors cannot be adjusted or deducted. That was paid under a separate contract entered into by the appellant with a third party. In this

regard reference can be made to Chapter 10 of ""The Quantum of Damages"" by Kemp & Kemp--1986 Edition, where reference has been made

to various English decisions holding that completely collateral matters cannot be invoked by a tortfeasor to reduce the damages payable to the

victim of his tort. The following passage from para 10-002 which refers to case law can be reproduced for our advantage:

In an action for injuries caused by defendant's negligence a sum received by the plaintiff on an accidental insurance policy cannot be taken into

account in reduction of damages"". This is the headnote to Bradburn v. Great Western Ry. and in our view correctly summarises the effect of this

case. Two passages from the judgments in this case contain the ratio decidendi--Bramwell B. said:

In Dalby v. India and London Life Assurance Company it was decided that one who pays premiums for the purpose of insuring himself, pays on

the footing that his right to be compensated when the event insured against happens is an equivalent for the premiums he has paid; it is a quid pro

qua, larger if he gets it, on the chance that he will never get it at all. That decision is an authority bearing on the present case, for the principle laid

down in it applies, and shows that the plaintiff is entitled to retain the benefit which he has paid for in addition to the damages which he recovers on

account of the defendants "negligence. And Pigott B. said:

The plaintiff is entitled to recover the damages caused to him by the negligence of the defendants and there is no reason or justice in setting off what

the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of

an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for

the contingency; an accident must occur to entitle him to it, but it is not the accident, but his contract; which is the cause of his receiving it.

(Emphasis supplied)

6. The reading of this para clearly establish, that there is no distinctions so far as the law relating to injury is concerned. The point in issue is,

whether the amount receiver by the injured on account of his contract with third person can be deducted? The answer is definitely ""No""...

7. As already observed above the payment by the Insurance Company to M/s. Saran Motors was not on account of this accident but on account

of the contract entered into by the appellant with the Insurance Company. Therefore, it cannot be said that by claiming damages under the Act

because of the rash and negligent driving of the driver of the DTC bus and" damaging the car of the appellant, he would be debarred claiming

compensation under the Act, nor claiming such a compensation under the Act would amount to unjust enrichment. In fact the respondents i.e.

driver and owner DTC being tortfeasor cannot take this plea nor can take advantage of appellant's contract with third party. In this regard reliance

can also be placed on the decisions of an English case in the cases of Payne v. Railway Executives 1951 Vol. I All ER 1034 and 1960 Vol. I All

ER 107.

13. Learned counsel further submitted that this Court has to see whether the compensation allowed by the learned Tribunal under all the heads is

just and reasonable. As per the All India Secondary School Examination certificate, date of birth of respondent No. 1 is 15.01.1973, therefore, his

age was around 24 years on the date of the accident, i.e., on 25.12.1996.

14. He also submitted that the net business profit of the respondent No. 1 for the assessment year 1996-97 was Rs. 87,428/-, thus, his income

was Rs. 7,285/- per month, however, the learned Tribunal has taken his monthly income as Rs. 2,125/- on the basis of minimum wages for a

matriculate applicable on the date of the accident, i.e., 25.12.1996.

15. Hence, the learned Tribunal has not considered the future enhancement on the said income to the extent of 50% and if this Court enhances the

income by 50%, the average monthly income of the respondent No. 1/claimant would be Rs. 3,187.50/-, whereas the learned Tribunal has

calculated the compensation for loss of future earning by taking average income

at Rs. 2,500/- per month, which is incorrect.

16. He further argued that since the respondent No. 1/claimant was 24 years old at the time of the accident, therefore, following the dictum of Smt.

Sarla Verma and Others Vs. Delhi Transport Corporation and Another, , the appropriate multiplier would be 18. Despite that, while calculating the

loss of income the learned Tribunal has taken 17 as multiplier.

17. To support his submissions, the learned counsel has relied upon a recent judgment delivered by the Full Bench of the Apex Court in the case of

Rajesh and Others Vs. Rajbir Singh and Others, , wherein it is held that in the case of self-employed or persons with fixed wages, in case, the

deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects.

18. He submitted that Order LXI Rule 33 CPC confers power upon this Court to enhance the compensation in favour of the respondents/claimant,

if while deciding the appeal filed by the appellant/Insurance Company this Court comes to the conclusion that the compensation allowed by the

learned Tribunal is on a lower side and the just/adequate compensation payable to the respondents/claimants would be much more than the one

allowed by the learned Tribunal though there is no cross-objection filed on behalf of the respondent/claimant.

19. I have heard the learned counsel for the parties and perused the record.

20. Firstly, the issue regarding the deduction of other benefits from the compensation amount can be receivable on account of injury or death, as

the case may be, was the subject matter in the case of Vimal Kanwar and Others Vs. Kishore Dan and Others, , wherein the Apex Court has held

as under:

The first issue is ""whether Provident Fund, Pension and Insurance receivable by claimants come within the periphery of the Motor Vehicles Act to

be termed as ""Pecuniary Advantage"" liable for deduction.

The aforesaid issue fell for consideration before this Court in Mrs. Helen C. Rebello and Others Vs. Maharashtra State Road Transport Corpn.

and Another, . In the said case, this Court held that Provident Fund, Pension, Insurance and similarly any cash, bank balance, shares, fixed

deposits, etc. are all a ""pecuniary advantage"" receivable by the heirs on account of one's death but all these have no correlation with the amount

receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor

Vehicles Act to be termed as "pecuniary advantage" liable for deduction. The following was the observation and finding of this Court:

35. Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during

the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured,

is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz.,

accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his

contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise

than the accidental death. No correlation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the

insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if

he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to the heirs, again in terms of the

contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the

insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed

deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no correlation with the

amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the

Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. When we seek the principle of loss and gain, it has to be between

them and not to which there is no semblance of any correlation. The insured (deceased) contributes his own money for which he receives the

amount which has no correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As

aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it,

then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor

Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor

Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual.

21. In view of above, the amount received on account of mediclaim insurance by the respondent no. 1/injured is not liable to be deducted from the compensation amount.

22. Secondly, whether the assessment of functional disability is proper or not?

23. In this context, I note the observation made by the Id. Tribunal in the impugned award as under:-

I have personally observed the petitioner and talked with him and found that he cannot rise from the chair and walk without support. His speech is incoherent and he takes time to understand the question put to him.

24. The Id. Tribunal has taken the judicial notice of the same and the functional disability has been assessed as 100%. It is important to note the fact that injuries caused to respondent no. 1 resulted into physical and mental disability as well. In the facts and circumstances of this case, the Id.

Tribunal very rightly assessed the functional disability as 100%. I do not find any reason to interfere in the assessment of functional disability.

25. Lastly, whether the respondent/injured is entitled for enhancement of compensation?

26. The various factors such as the selection of multiplier and the future prospects for assessing the "just" compensation have been settled by the

Apex Court in Sarla Verma (Supra) and Rajesh (Supra). In the case in hand, age of the victim was 24 years on the date of accident. Therefore,

depending on the age of the injured, the multiplier is to be taken as 18, whereas the Tribunal has wrongly applied the multiplier as 17.

27. In the present case, the monthly income has been assessed as Rs. 2,125/- depending on the educational qualification; and granted the future

prospects for an amount of Rs. 375/-. Thus, the Id. Tribunal has assessed the monthly income as Rs. 2,500/-. I am of the considered opinion that

the amount that had been granted towards future prospects is on lower side, therefore, in view of the dictum of Rajesh (Supra), 50% is granted on

account of future prospects.

28. Thus, the loss of income on account of disability would be Rs. 6,88,608/- (Rs. 3,188 x 12 x 18).

29. The compensation amount is enhanced to Rs. 1,78,608/- accordingly.

30. The respondent/claimant is entitled to the enhanced compensation amount with 5.5% interest per annum from the date of filing of the petition till realization.

31. The appellant/insurance company is directed to deposit the enhanced compensation amount before the Registrar General of this Court within four weeks from today.

32. On deposit, the Registrar General is directed to release the compensation amount in favour of the claimant on taking steps. Accordingly, appeal is disposed of on above terms.