

(2018) 12 BOM CK 0061

In the Bombay High Court

Case No : First Appeal No. 374 Of 2007 With Cross Objection Stamp No. 32550 Of 2014

National Insurance Co.Ltd.

APPELLANT

Vs

Parvez Framroz Billimoria And Ors.

RESPONDENT

Date of Decision : 22-12-2018

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 173

Citation : (2018) 12 BOM CK 0061

Hon'ble Judges : A. S. Chandurkar, J

Bench : Single Bench

Advocate : Amol Gatne, Moinuddin Ahmed Khan, Devendranath S. Joshi

Final Decision : Dismissed

Judgement

1. This appeal under Section 173 of the Motor Vehicles Act, 1988 (for short 'the said Act') has been preferred by the insurer challenging the judgment dated 5th August, 2006 passed by the learned Member, Motor Accident Claims Tribunal, Mumbai awarding compensation of Rs. 1,23,000/- with interest at the rate 6% p.a. from 9th January, 1998 till its recovery. The original claimant has filed cross objections seeking enhancement in the amount of compensation as granted to the extent of Rs.10,37,000/-.

2. The facts in brief as pleaded in the claim application under Section 166 of the said Act are that on 17th August, 1987, when the claimant was proceeding on J.B. Road on his Scooter, a Lorry bearing No.MTT-1890 lost control and dashed the claimant's Scooter. The claimant suffered injuries as a result of said accident. The claimant was working as a Manager in an Automobile garage and as a result of the accident he suffered loss of earning due to said accident. It was pleaded that the driver of Lorry was responsible for causing the said accident. On that premise the claimant sought grant of compensation of an amount of Rs.2,00,000/-with interest. The aforesaid proceedings were filed against the New India Assurance Company Limited.

3. The Motor Accident Claims Tribunal, by its judgment dated 22nd March, 1995 granted compensation of Rs.80,000/- along with interest at the rate 15% p.a. to be payable to the claimant as compensation. The insurer, however moved an application for setting aside that order on the ground that the vehicle in question was not insured with the said insurer. On 18th September, 1995, the order dated 22nd March, 1995 was recalled and the claim petition was restored to file. Thereafter, the present appellant was impleaded as party and it participated in the proceedings before the Claims Tribunal. The parties thereafter led evidence and after considering the same the learned Member of the Claims Tribunal partly allowed the Claim Petition and awarded compensation of Rs.1,23,000/- including the amount of no fault liability to be payable with interest at the rate 6% p.a. from 9th January, 1998 till recovery of that amount.

4. Being aggrieved by the aforesaid judgment, the insurer has filed this appeal. The claimant not being satisfied with the amount of compensation as granted has filed cross objections seeking enhancement in the amount of compensation.

5. Shri Amol Gatne, the learned Counsel for the appellant submitted that the amount of compensation as awarded is on a higher side without considering the evidence on record. The disability certificate that was produced on record by the claimant dated 22nd April, 1992 had been issued merely by seeing the previous medical papers of the claimant. In that certificate it was not stated that the Doctor issuing the said certificate had again examined the claimant. Referring to the deposition of the said Doctor at Exhibit-28 it was submitted that according to said witness the fracture sustained by the claimant had recovered and he could not identify the same. No permanent disability was suffered by the claimant nor was there any functional disability. It was thus submitted that the Claims Tribunal erred in accepting the disability certificate and by holding the disability to the extent of 25%. The Claims Tribunal was not justified in awarding an amount of Rs.75,000/- to the claimant on that count. The claimant continued in his employment even after the accident and his services were not terminated on account of the said disability. In absence of any evidence with regard to the probable future loss, the amount of Rs.75,000/- awarded on that count was on a higher side. At the highest, it could be said that the claimant was entitled for some amount for a period of six months in that regard. The learned Counsel placed reliance on the decision in Raj Kumar Vs. Ajay Kumar - 2011(1) SCC 343 in support of this contention. It was further urged that the compensation could not have been directed to be paid with 6% interest inasmuch as the other Insurance Company had already deposited the amount of compensation in the Court. It was thus submitted that on a re-consideration of the evidence on record it was clear that a higher amount of compensation had been awarded by the Claims Tribunal and the same was liable to be reduced.

6. Shri Moinuddin Ahmed Khan, the learned Counsel for the respondent No.1-claimant while supporting the impugned judgment submitted that the amount of compensation as awarded was on a lower side. He submitted that the claimant

had placed on record his salary certificate and he was receiving Rs.5000/- per month before the accident. The disability certificate at Exhibit-17 was duly proved by examining the Doctor below Exhibit-28. The claimant was required to remain away from work for a period of six months. Similarly, he had to visit his Doctor on about 40 occasions and he referred to the 32 medical receipts placed on record. According to him the Claims Tribunal did not consider the aspect of loss of future income in its proper perspective. The amount awarded on various heads were on a lower side and on a proper appreciation of the evidence on record and by applying the correct legal principles, an amount of Rs. 10,37,000/- was liable to be paid towards the amount of compensation. It was thus submitted that the appeal filed by the Insurance Company was liable to be dismissed and the cross objections were liable to be allowed.

7. In the light of aforesaid submissions the following points arise for consideration :

(i) Whether the insurer has proved that the amount of compensation as granted is on a higher side?

(ii) Whether the claimant has proved that the compensation as granted is lesser than the amount of just compensation and that the amount of compensation deserves to be enhanced?

8. I have heard the learned Counsel for the parties at length and I have also perused the records of the case. The claimant examined himself at Exhibit-8. He deposed that while he was proceeding on Scooter a rashly driven truck dashed him resulting in an accident. He received injuries on his right hand, head, face and leg. Initially, he was admitted at Sion Hospital and thereafter he was removed to the Parsi General Hospital. He produced various bills to indicate medical expenses. He further stated that he spent Rs.1,500/- towards expenses for the purposes of Physiotherapy. He was thereafter operated for removing the plates and nails and he had also produced bills to that effect. He spent Rs.3000/- to find out details of the offending vehicle. He deposed that he was working as a Supervisor-cum-Mechanic in the workshop and he was getting Rs.1,500/- per month. On account of the accident he did not attend work for six months and hence he was not paid any salary for that period. He also lost his bonus on that account. He stated that he could not work with his right hand and relied on the disability certificate issued to him by the doctor.

In his cross examination he admitted that he was doing some local work of collecting bills and writing accounts for which he was getting Rs.2,500/- per month from the doctors. He had not resigned from his earlier job nor were his services terminated. He left service in the year 1988. Suggestion given to him with regard to the bills at Exhibit-12 was that his name was not written thereon.

9. The claimant also examined one Dr. Shahane, who was a Professor of Orthopedics. He stated that he issued a certificate at Exhibit-17 after referring to a book for determining the extent of disability. He assessed the disability as 20%

permanent partial disability. In his cross examination he admitted that he did not treat the claimant and only after going through the medical papers he had given an opinion that the disability was to the extent of 25%. He also stated that the fracture sustained by the claimant was now united and that it was described to say whether it was same fracture or not. He clarified that there was restriction of movements due to the said fractures.

10. Perusal of the evidence on record thus indicates that the claimant as a result of accident in question suffered injuries to his hand, face and leg. His right hand was fractured and after being treated for the same he had to undergo physiotherapy. As per Dr. Shahane the said fracture had been united when he examined the claimant and he could not state whether the fracture in question was the same one suffered by the claimant in the accident. After examining the medical papers he had opined that the claimant had suffered 25% permanent partial disability. The claimant was receiving an amount of Rs.1500/- per month and he did not attend his work for a period of six months and thus lost salary for that period. This fact is seen from the certificate at Exhibit-16. He, however admitted that he did not lose his job on account of the accident nor was he removed from the same. He himself left the said job in the year 1988.

11. In this regard, in Raj Kumar (supra) the Hon'ble Supreme Court has emphasised the importance of examining the Doctor who has treated an injured claimant or the Doctor who has examined the claimant subsequently to assess the extent of his permanent disability. At the same time it has been clarified that the percentage of loss of earning capacity is not the same as the percentage of permanent disability and that loss of earning capacity has to be assessed by the Tribunal with reference to the evidence in entirety.

12. In the present case, Dr. Shahane has been examined to prove the claimant's disability. Though he did not treat the claimant, he issued the disability certificate after perusing his medical papers. Even if it is accepted that the claimant suffered permanent partial disability to the extent of 25%, the claimant's own evidence indicates that he was absent from his job for a period of six months. He on his own left the job in the year 1988. Thereafter he was doing other work and was getting Rs.2,500/- per month. This evidence of the claimant indicates that he was earning more after leaving his earlier job where he was earning Rs.1,500/- per month. When all this material is taken together, it is found that the Tribunal has awarded an amount of Rs.9,000/- towards the lost salary for nine months as well as Rs.75,000/- for suffering 25% permanent partial disability. As on the claimant's own showing he was earning more after leaving his earlier job, there is factually no loss of future income of the claimant. Hence, amounts awarded on these heads is on the basis of evidence available on record not requiring interference. The medical expenses have been granted on the basis of various documents in that regard including the medical bills. The amount for pain and sufferings also appears to be reasonable. According to the claimant he had spent Rs.1,500/- for travelling when he was undergoing physiotherapy. That

amount has been also awarded. Interest at the rate of 6% per annum from 09th January, 1998 has also been rightly granted not warranting any interference.

Viewed from any angle, I find that the amount of compensation as awarded of Rs.1,23,000/- is reasonable compensation in the light of the evidence on record. Though enhancement of the amount of compensation has been sought by the claimant by filing cross objections, it is found that the evidence on record is insufficient to grant further compensation to the claimant. After re-appreciating the entire evidence on record, I am satisfied that the Claims Tribunal has granted just compensation to the claimant. The judgment of the Claims Tribunal therefore does not call for any interference. The said judgment dated 05th August, 2006 in Claim Application No.2743 of 1987 thus stands confirmed. As per the order passed on Civil Application No.3484 of 2014 on 24th October, 2016 it can be seen that the claimant had received an amount of Rs.90,000/- from New India Assurance Company Limited on furnishing bank guarantee. By the order passed by the Claims Tribunal on 18th September, 1995, its earlier judgment dated 22nd March, 1995 holding New India Assurance Company Limited liable to pay compensation stands recalled. The complainant shall therefore return that amount of Rs.90,000/- which he has received from New India Assurance Company Limited by discharging the bank guarantee. The claimant is entitled to receive the entire amount of compensation as deposited by the appellant herein along with accrued interest. The First Appeal as well as the Cross Objection stand dismissed. Parties shall bear their own costs.