(2012) 04 DEL CK 0441

In the Delhi High Court

Case No : MAC.APP. 548 of 2010

National Insurance Company Ltd. APPELLANT

Vs

Ashok Tyagi RESPONDENT

Date of Decision : 10-04-2012

Acts Referred:

Citation : (2012) 04 DEL CK 0441

Hon'ble Judges : G.P. Mittal, J

Bench : Single Bench

Advocate : Manoj R. Sinha, for the Appellant; M.L. Pahwa, Advocate with Respondent in person, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mittal, J.—The Appellant National Insurance Company Limited seeks reduction of compensation of `14,19,041/- awarded to the first Respondent Dr. Ashok Tyagi for having suffered injuries in a motor accident which occurred on 09.05.2004. The first Respondent who himself is an Orthopedic Surgeon suffered posterior dislocation of the right hip with acetabular fracture. Initially, open reduction and acetabular reconstruction was performed in Batra Hospital. Subsequently, acetabular reconstruction and Dysplasia Birmingham Hip resurfacing (right) was done in Apollo Speciality Hospital in Chennai. The First Respondent remained under treatment from the date of accident i.e. 09.05.2004 till end of the year 2006.

2. A perusal of the OPD slip Ex.PW-1/12 shows that the First Respondent was permitted to walk with crutches after two months of his examination on 20.06.2005. A large number of documents Exs.PW-1/6 to PW-1/16, Exs.PW-1/21 to PW-1/24 were proved in respect of the treatment undertaken by the first Respondent in Dr. R.M.L. Hospital, Batra Hospital, Hindu Rao Hospital, Fortis Hospital, Noida, Safdarjung Hospital and Apollo Speciality Hospital, Chennai. He was issued a Disability Certificate Ex.PW-1/25 declaring him physically handicapped to the extent of 15% in relation to his right lower limb.

3. The Claims Tribunal awarded a compensation of ` 14,19,041/- under the following heads:-

Sl. No.

Compensation under various heads

Awarded by the Claims Tribunal

a)

On account of pain, shock and sufferings

`50,000/-

b)

On account of Medical Expenses

` 2,85,000/-

c)

On account of Transportation Charges

` 60,000/-

d)

On account of Misc. Expenses on Damages to Car & Loss from

` 2,11,300/-

Swimming Classes

e)

On account of Nursing Attendant

` 30,000/-

f)

On account of Disability

` 4,60,000/-

g)

On account of Loss of Amenities

` 2,00,000/-

h)

On account of Special Diet

` 30,000/-

i)

On account of Loss of Leaves

` 1,02,730/-

Total

` 14,29,030/-*

* There appears to be a clerical mistake as the Claims Tribunal totalled up the amount as ` 14,19,041/-.

4. Following contentions are raised on behalf of the Appellant Insurance Company:-

(i) The award of compensation of ` 2,00,000/- towards damage to the car was not permissible as no evidence was produced by the first Respondent to show the extent of loss. The compensation of ` 85,000/- was paid by the first Respondent''s Insurer in full and final settlement as per document Ex.PW-1/50.

(ii) There was no evidence to support that the first Respondent was advised to undertake swimming exercise to recover from the injuries. The compensation of `11,300/- under the head (d) i.e. Charges for Swimming Classes was not justified.

(iii) The compensation of `2,00,000/- towards Loss of Amenities was exorbitant and excessive.

(iv) The Claims Tribunal erred in granting a compensation of ` 4,60,000/- towards Loss of Earning Capacity on account of Disability under the head (f) as the First Respondent did not suffer any loss in earning being in Govt. service.

DAMAGE TO THE CAR

5. It is proved on record that his (Claimant) own damage claim of ` 85,800/- was settled by the Tata AIG General Insurance Company Limited and this amount was received in full and final settlement by document Ex.PW-1/50. The receipt of any amount by one''s own Insurer cannot debar a victim of a motor accident to claim compensation from the tortfeasor if the extent of the actual damage is more than what is paid by the victim''s own Insurer.

6. It is urged by the learned counsel for the first Respondent that a perusal of the Mechanical Inspection Report Ex.PW-1/49 shows that the Wagon-R car No.DL-7CB-7345 owned by the First Respondent was totally damaged in the accident as it was not fit for road test.

7. It would be appropriate to refer to the testimony of the first Respondent in his Affidavit Ex.PW-1/A. The relevant averments made in the Affidavit are extracted hereunder:-

12. I state that due to rash and negligent act of the Respondent No.1 driver the

car of the Deponent i.e. the Wagon-R bearing No.DL-7CB-7345 was badly damaged and Deponent has suffered great problem in commuting. The Registration Certificate of Wagon-R registered in the name of the Deponent is hereby Exhibited as Ex.PW-1/47. Further the Deponent has spent about ` 800/- as Crane Charges. The said receipt is hereby Exhibited as Ex.PW-1/48. Though the car was insured; but the Deponent only got ` 85,000/- from the Insurance Company; as the car was totally damaged. The mechanical inspection report of Wagon-R and Final Settlement of Insurance Claim are is hereby Exhibited as Ex.PW-1/49 to PW-1/50. Thus due to said accident the Deponent suffered loss of about 2,00,000/- (Rupees Two Lacs only). It is submitted that the Deponent was forced to purchase a new car in the month of July......

8. Thus, it would be apparent from the Affidavit Ex.PW-1/A that the Wagon-R car bearing No. DL-7CB-7345 was badly damaged in the accident. The First Respondent has not obtained any report from any motor garage or any surveyor to prove the extent of the loss to the vehicle. Thus, it cannot be said that the extent of the damage to the car was more than ` 85,000/- paid by Tata AIG. Simply because the First Respondent purchased a new car by replacing his accident ridden Wagon-R car, a compensation of `2,00,000/- could not have been granted under this head.

COMPENSATION FOR ATTENDING SWIMMING CLASSES

9. As far as grant of `11,300/- for attending swimming classes is concerned, by referring to the OPD Slip Ex.PW-1/12, it is apparent that the First Respondent was advised to continue with the swimming exercises. The receipts Ex.PW-1/31 for ` 6500/- and Ex.PW-1/32 for ` 4800/- would show that a sum of ` 11,300/- was spent on swimming pool charges and coach charges. The Claims Tribunal rightly awarded the compensation of ` 11,300/-.

LOSS OF AMENITIES

10. I have observed earlier that the Appellant underwent series of surgeries in various hospitals in Delhi and in Chennai. He was advised to walk with crutches only after six months of the accident. Only a sum of ` 50,000/- was awarded towards pain and suffering. Considering the prolonged period of treatment and the fact that the first Respondent would always feel handicapped while performing surgeries which are for longer duration and would be dependent on his associates. I would not interfere in the award of compensation of `2,00,000/- towards loss of amenities and expectations in life.

PERMANENT DISABILITY

11. A compensation of ` 4,60,000/- was awarded under this head. It is urged by the learned counsel for the Appellant that since the first Respondent''s salary and promotional avenues were not affected on account of the injuries suffered, the first Respondent was not entitled to any compensation towards permanent disability.

12. On the other hand, it is urged by the learned counsel for the first Respondent that he (First Respondent) could have sought voluntary retirement before the age of his superannuation and would have earned much more in the Private Sector being a senior Orthopedic Surgeon. It is urged that in the grounds of Appeal, the compensation awarded under this head was not challenged by the Appellant and this ground cannot be taken during the hearing.

13. While dealing with the grant of compensation towards permanent disability and future loss, the Claims Tribunal held as under:-

Disability:

Dr. Ashok Tyagi produced on record disability certificate to show that he suffered 15% disability vide Ex.PW1/25. He has further deposed that he will not be able to sit in squatting position, will have difficulty in walking and he has to attend strenuous work specially long standing as explained in Ex.PW1/24. He further deposed that he wanted to take voluntarily retirement and want to move for benefits of private sector where he would have earned much higher salary.

I have considered the evidence on record. Dr. Ashok Tyagi is presently in government hospital and due to 15% disability and strenuous work of surgery will not bring any financial loss in terms of salary etc. Being in government hospital the work is flexible and is shared by number of other medical persons. However, this 15% disability would certainly result in his performance capability when he undertakes private employment after his retirement and will also contribute to inconvenience and loss of amenities. However, he can be compensated for the loss of 15% disability in terms of his present salary loss. Salary certificate Ex.PW1/26 shows that he was drawing Rs.41,092/-pm. He suffered 15% disability. Loss of income comes to Rs.34,929/-. He was aged 48 years. Appropriate multiplier applicable to his age is 13. Thus, total loss of income due to disability comes to Rs.4,54,077/-. I award him Rs.4,54,077/- rounded off to Rs.4,60,000/- on account of loss of income due to disability.

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Future loss:

Ld. Counsel for the petitioner has claimed that petitioner wanted to take voluntarily retirement for going to private sector where he would have earn salary of about Rs.1,50,000/- to Rs.2,00,000/-pm. He would have continued service till 65 years and he would have earned in that time sum of Rs.3,24,00,000/-. Being in government department he would be getting Rs.88,56,000/-. Therefore, he states that petitioner is entitled to balance of Rs.2,35,44,000/- I have considered the submission. This claim is based on conjectures. As already stated by Hon''ble Supreme Court in the case of C.K. Subramania Iyer Vs. T. Kunhikuttan Nair, the claim of Rs.2,35,44,000/- is in the nature of recovery of amount due, after serving for a particular period on particular salary. However, keeping in view probabilities, improbabilities and uncertainty of life, such conjecture on leaving the government job, getting the private job, desired salary and continued life till 65 years are in the realm of speculation which cannot be allowed. The life is uncertain, the physical fitness is subject to various other consideration and decision which may intervene and cut short the life. In my view such speculated losses are not admissible, as any sound basis of claim argued by counsel for petitioner.

14. I would agree with the learned counsel for the first Respondent that in the absence of any challenge to the award of compensation under this head in the grounds of the Appeal, the Appellant cannot be permitted to urge this ground. Otherwise also, although the factum of the first Respondent seeking voluntary retirement and joining private sector may be said to be speculative as held by the Claims Tribunal, yet, it cannot be lost sight that the first Respondent would have taken some gainful employment after working as a specialized Orthopedic Surgeon in a big Govt. hospital in Delhi and the award of compensation of ` 4,60,000/- towards loss of future income on account of the permanent disability cannot be faulted.

15. The overall compensation is thus recomputed as under:-

Sl. No.

Compensation under various heads

Awarded by the Claims Tribunal

Awarded by this Court

a)

On account of pain, shock and suffering

`50,000/-

`50,000/-

b)

On account of Medical Expenses

` 2,85,000/-

` 2,85,000/-

c)

On account of Transportation Charges

` 60,000/-

` 60,000/-

d)

On account of Misc. Expenses on Damage to Car & Loss from Swimming Classes

` 2,11,300/-

` 11,300/- (for swimming classes only)

e)

On account of Nursing Attendant

` 30,000/-

` 30,000/-

f)

On account of Disability

` 4,60,000/-

` 4,60,000/-

g)

On account of Loss of Amenities

` 2,00,000/-

` 2,00,000/-

h)

On account of Special Diet

` 30,000/-

` 30,000/-

i)

On account of Loss of Leaves

` 1,02,730/-

` 1,02,730/-

Total

` 14,29,030/-

` 12,29,030/-

16. The compensation stands reduced from `14,29,030/- to ` 12,29,030/-. which shall carry interest @ 8% per annum (as awarded by the Claims Tribunal) from the date of filing of the Petition till the date of payment.

17. The excess amount of `2,00,000/- along with proportionate interest and the interest accrued, if any, during the pendency of the Appeal shall be refunded to

the Appellant Insurance Company. Rest of the amount lying deposited with the Registrar General of this Court shall be released to the first Respondent along with interest accrued if any, during the pendency of the Appeal.

18. The Appeal is allowed in above terms. The statutory amount of ` 25,000/- shall also be refunded to the Appellant Insurance Company.

