
(2020) 06 J&K CK 0027

In the Jammu And Kashmir High Court

Case No : CMAM No. 111 Of 2010, IA No. 01, 402 Of 2010

National Insurance Company Ltd

APPELLANT

Vs

Bilal Ahmad Mir And Others

RESPONDENT

Date of Decision : 30-06-2020

Acts Referred:

Motor Vehicles Act, 1988 — Section 3, 181

Citation : (2020) 06 J&K CK 0027

Hon'ble Judges : Sanjay Dhar, J

Bench : Single Bench

Advocate : J.A. Kawoosa, B.S. Bali

Final Decision : Disposed Off

Judgement

Sanjay Dhar, J

1. The instant appeal has been filed by the appellant against the Award dated 15.03.2010 passed by the Motor Accidents Claims Tribunal, Srinagar (hereinafter referred to as 'the Tribunal') in a claim petition filed by respondent No. 1 herein, Bilal Ahmad Mir against the owner, driver and insurer of the vehicle (Bus) bearing Registration No. JKB-4051.

2. As per the case of the claimant on 14.07.2004, while he was travelling in the aforesaid vehicle from Srinagar towards Tral, the said vehicle met with an accident on reaching Sempora, as a result of which, he suffered serious injuries, resulting in amputation of his right arm. The claimant sought compensation in the sum of Rs 29.00 lacs (Rupees Twenty Nine Lacs) from the owner, driver and the insurer of the offending vehicle.

3. Respondent No. 2 herein, the driver and respondent No. 3, the owner did not contest the claim petition and they were set ex-parte, whereas the appellant-insurance company contested the claim petition by filing its reply, whereby it admitted the currency of the policy of insurance of the offending vehicle with it at the time of the accident, but denied the occurrence. The insurance company

further contended that there was breach of policy condition inasmuch as the driver of the offending vehicle was not holding a valid driving licence at the time of the accident. The Tribunal vide its order dated 28.04.2007, on the basis of the pleadings of the parties, framed the following issues:-

i. Whether on 14.07.2004, Imtiyaz Ahmad Bhat, respondent No. 1 was plying bus bearing registration No. JKB-4054 rashly and negligently as a result of which at Sempora it hit Bilal Ahmad Mir, petitioner who sustained serious injuries due to which his right arm was amputated which has rendered him permanently disabled and handicapped? OPP

ii. Whether the respondent No. 1, i.e., driver of the offending vehicle was not holding a valid driving licence on the date of the accident and the vehicle was without valid RP and other relevant documents as such the insurance company cannot be saddled with any liability because injured has committed breach of police stipulations? OPR-3

iii. In case issue No. 1 is proved in affirmative, to what amount of compensation the petitioner is entitled to, from whom and in what proportion? OPP

iv. Relief.

4. After recording the evidence, the Tribunal came to the conclusion that the injured had suffered the injuries as a result of the accident, which is subject matter of the case and that there was no breach of any policy condition. Accordingly, a sum of Rs 15,10,000/- (Rupees Fifteen Lacs and Ten Thousand) was awarded as compensation in favour of the injured with a direction to the appellant-insurance company that the awarded sum along with interest @ 6% per annum from the date of institution of the claim petition till final realization of the awarded sum be paid by it within a period of two months, failing which the awarded sum shall be recoverable with enhanced interest @ 9% per annum from the date of the default.

5. Aggrieved by the aforesaid award, the insurance company has filed the instant appeal on the grounds that the driver of the offending vehicle was booked for offences including the one under Section 3/181 of the Motor Vehicle Act, which shows that he was not carrying a valid driving licence at the time of the accident, but inspite of this, the Tribunal concluded that there was no breach of the policy condition on the part of the insured; that the amount of compensation awarded by the Tribunal is exorbitant, excessive and unjust and that for about two years, the claimant did not prosecute the matter before the Tribunal, but even then the interest for this period has been awarded in favour of the claimant; that neither the penal interest nor the interest on loss of future income could have been awarded by the Tribunal.

6. The contention of the claimant (respondent No.1 herein) on the other hand is that the insurance company did not lead any evidence to prove that the offending driver was not holding a valid driving licence at the relevant time and

that the amount awarded by the Tribunal in favour of the injured is just and reasonable.

7. I have heard learned counsel for the parties. I have also gone through the impugned award, the grounds of the appeal and record of the Tribunal.

8. The first contention that has been raised by the appellant-insurance company is with regard to the validity of the driving licence of the driver of the offending vehicle. It is urged that the file relating to criminal case that was summoned by the Tribunal during the proceedings before it, clearly shows that the driver was booked for offence under Section 3/181 of the Motor Vehicle Act, meaning thereby that the driver was not holding a valid driving licence at the time of the accident.

9. A perusal of the record of the Tribunal reveals that vide seizure memo dated 04.07.2004, a number of documents relating to the offending vehicle appear to have been seized by the Investigating Officer, which include the driving licence of Imtyaz Ahmad Bhat bearing No. 8374/MVD/RTO-J with its validity up to 20.04.2006. Though it is written in the challan that the driving licence of the driver of the offending vehicle was invalid, yet the nature of the invalidity of the driving licence of the offending driver, has remained shrouded in mystery. This mystery could have been unraveled by the Investigating Officer, who has stepped into the witness box as a witness for the claimant but no questions have been put to the witness on this aspect by the counsel for the insurance company. Admittedly, the insurance company has led no other evidence on this aspect of the case. The copy of the driving licence is not on record of the Tribunal and the insurer, on whom the burden of proof of breach of policy conditions lay, did not produce any evidence. In fact the insurer missed the opportunity of extracting evidence in its favour by not examining the Investigating officer on this aspect of the case.

10. It is a settled law that onus of proving breach of policy condition is upon the insurer. The Hon'ble Supreme Court in the case titled, "National Insurance Company Ltd. Vs. Swaran Singh and others, reported as (2004) 3 SCC 297" has made it clear by observing as under:-

"110 (iii). The breach of policy condition e.g., disqualification of driver or invalid driving licence of the driver, as contained in sub-section (2)(a)(ii) of section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time."

11. From the above, it is clear that it was for the appellant-insurance company to

prove before the Tribunal that the offending driver was not holding a valid driving licence at the time of the accident. The mere assertion in the police challan that the driver of the offending vehicle was not holding a valid driving licence, will not amount to discharging of burden by the insurance company, particularly when, as per the seizure memo, the driving licence of the offending driver had been seized by the police during the investigation of the case but no effort was made by the insurance company to unravel before the Tribunal the exact nature of the seized driving licence of the offending driver. The insurance company has not even examined any witness to prove the condition of the insurance policy regarding which the appellant-insurance company is claiming the breach.

12. In the aforesaid circumstances, it cannot be stated that the insurance company has discharged its burden of establishing breach of policy condition on the part of the insured. Therefore, the finding of the Tribunal that there was no breach of policy condition in the instant case cannot be interfered with.

13. That takes us to the quantum of compensation that has been awarded by the Tribunal in this case. The main ground urged by the appellant is that the Tribunal has, while computing the loss of future income of the injured, taken the functional disability of the injured as 100% though the disability of the injured pertains to a particular limb only, i.e., the right upper limb. According to the appellant, even if the injured was rendered incapable of performing the job of a carpenter, he could well perform any other job with less remuneration and as such, the Tribunal was not justified in computing the compensation by taking the functional disability of the injured as 100%. It has also been urged that the future attendant charges could not have been awarded in favour of the injured.

14. If we have a look at the impugned award, the Tribunal has taken the income of the injured as Rs 4000/- (Rupees Four Thousand) per month. There is a finding of the Tribunal that the injured was a carpenter by profession and he would earn Rs 200/- (Rupees Two Hundred) per day as wages. In spite of this, the Tribunal has taken the monthly wages of the injured as Rs 4000/- only. Even if we take into account the government notified minimum rate of wages of a skilled worker at the relevant time, the monthly wages of a carpenter could have been easily taken as ₹ 6000/- per month and after making allowance for one holiday per week, it would come to around ₹ 5000/-.

15. It is correct that the disability of the injured as assessed by the doctor is pertaining to his right upper limb and not of his whole body, but one has to take into account the fact that the injured has lost his right upper limb in the accident, which is the normal working limb of a human being. Though it is shown in the cross-examination of the doctor, who has issued the disability certificate that the injured can run a shop with the assistance of a helper, yet after taking into account the expenses that may be incurred in hiring the services of a helper and the poor financial status of the injured, the actual earning of the injured by performing the job of a shopkeeper will be peanuts as compared to his earlier income.

16. The Hon'ble Supreme Court has, in the case titled, "Raj Kumar Vs. Ajay Kumar and Another, reported as (2011) 1 SCC 343" vide illustration (c) given in the said judgment relating to a case of amputation of right hand, taken the functional disability of the injured as 70%. In the instant case, the injured has lost whole of his right upper limb and permanent disability of the said limb is 100%, therefore, the functional disability of the injured, in the facts and circumstances of the case, can easily be taken as 80%. By applying this formula and taking the monthly income of the injured as Rs. 5000/- the monthly loss of future income of the injured will come to Rs 4000/-. After applying the multiplier of 17, the loss of future income to the injured will come to Rs 4000/- X 12= Rs 48,000/- X 17= Rs 8,16,000/-. The Tribunal has also assessed the same amount as loss of future income to the injured.

17. The other ground urged by the appellant is that the injured has been awarded a sum of ₹ 1,44,000/- as attendant charges for the next twelve years by taking the attendant charges of ₹ 4000/- per month, which according to the appellant, could not have been awarded.

18. In my opinion, the Tribunal has been justified in awarding the future attendant charges in favour of the attendant, because from the statement of the doctor who examined the injured, it is clear that during the period of hospitalization, such patients need constant attendant and further an attendant is needed for such patients for whole of their lives as they are unable to perform their daily routine duties and have to depend upon the services of attendants for whole of their lives. The doctor has clearly stated that the injured cannot go for an artificial limb because his right limb has been amputated from the shoulder joint. There is no cross-examination of the doctor on this aspect of the case and his statement in this regard has remained un-rebutted.

19. In the face of the above evidence, it is clear that the injured needs an attendant throughout his life. A person, who has lost his working limb, cannot perform even his daily chores and he would usually need assistance of another person. Therefore, to argue that the Tribunal was not justified in awarding attendant charges in favour of the attendant is wholly misconceived. The Tribunal has awarded the attendant charges in favour of the injured only for twelve years, whereas the multiplier applicable to the age of the injured is 17. Since, the injured has not filed any cross appeal, therefore, I leave it there, but one thing is clear that the attendant charges awarded by the Tribunal in favour of the injured are not exorbitant.

20. The appellant has challenged the quantum of compensation under non-pecuniary heads like 'pain and suffering', 'deprivation of pleasures of life' and 'loss of marriage prospects'. The amount awarded by the Tribunal under head 'pain and suffering' is ₹ 2.50 Lacs (Rupees Two Lacs and Fifty Thousand). As per the statement of the doctor, the injured was admitted to hospital on 14.07.2004. He was operated upon on 21.07.2004 and his right upper limb was disarticulated from shoulder joint. The doctor has further stated that the type of wound that

the injured has suffered, would take it three months to heal and such patients have to live with pain in the limb constantly, which is known as "Phantom pain". Thus, there is material on record to show that the injured has suffered a lot of pain and suffering on account of the injuries suffered by him. Therefore, the Tribunal was absolutely justified in awarding a sum of ₹ 2.50 lacs as compensation under this head.

21. The injured with the kind of disability which he has suffered, will certainly not be able to live a normal life and he will certainly be dependent on others for routine functioning like putting on clothes, eating food etc. Further for the injured the chances of getting a bride of his choice have almost vanished. Therefore, the compensation awarded by the Tribunal in favour of the injured under other non-pecuniary heads is also wholly justified.

22. So far as the award of interest on loss of future income and award of penal interest at enhanced rate of 9% is concerned, the contention of the appellant is justified. It is a settled law that no interest can be awarded in respect of income, which is yet to be earned and it is also a settled law that the Tribunal is not statutorily competent to award penal interest on the awarded sum. Therefore, the Tribunal was not justified in either awarding interest on loss of future income or in awarding the interest at enhanced rate of 9% per annum in case of default. The impugned award to this extent deserves to be set aside.

23. Before parting, I would like to observe that the Tribunal has not assessed the compensation in favour of the injured under all the available heads inasmuch as the compensation for loss of earning during the period of treatment has not been assessed and awarded by the Tribunal. Further, medical expenses have not been awarded in favour of the injured, though there is overwhelming evidence on record that the injured has incurred expenses during his treatment and he is likely to incur expenses for his future treatment, which he will have to undergo throughout his life, as per the medical evidence on record. However, since no cross appeal has been filed in the instant case by the injured, as such the enhanced compensation under the above heads in favour of the injured cannot be awarded in his favour.

24. For what has been discussed herein before, while upholding the amount of compensation awarded by the Tribunal, the impugned award is modified to the extent that the awarded sum under the head 'loss of future income' shall not carry any interest and the direction with regard to payment of penal interest at the enhanced rate of 9% is also set aside. The appeal is disposed of, accordingly.