

(2011) 07 KAR CK 0148
In the Karnataka High Court
Case No : MFA No. 7216 of 2007 (MV)

New India Assurance Co. Ltd.

APPELLANT

Vs

M. Prabhu and H.M. Gopl Reddy

RESPONDENT

Date of Decision : 01-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33
Motor Vehicles Act, 1988 — Section 147, 149, 66 (3)

Citation : (2011) 07 KAR CK 0148

Hon'ble Judges : Arali Nagaraj, J

Bench : Single Bench

Advocate : O. Mahesh, for the Appellant; Shripad V. Shastri, for R. 1 and Sri. G. Papi Reddy, for R. 2, for the Respondent

Judgement

1. The present appeal is by the Insurance Company. It has challenged in this appeal the legality and correctness of the impugned judgment and Award dated 13.03.2007 passed in MVC No. 5667/2006 by the MACT, Bangalore (Court of Small Causes, SCCH-15), (hereinafter referred to as the "Claims Tribunal" for short).

2. The first respondent herein viz., M. Prabhu filed his claim petition in the said MVC No. 5667/2006 seeking compensation towards bodily injuries suffered by him as a result of the accident that occurred on 19.05.2006 at about 7 a.m. while he was travelling in the Maxi Cab bearing registration No. KA-03-A-847 on Anekal-Chandapura Road near Avadadenahalli Gate within the limits of Anekal P.S.

3. The findings recorded by the Claims Tribunal that the said accident occurred on the said date, time and place and that it was caused by the driver of the said Maxi Cab by driving it in a rash and negligent manner have remained unchallenged. Further finding of the Claims Tribunal that the injured-claimant (first respondent herein) sustained bodily injuries as a result of the said accident and the said injuries resulted in his permanent disability has also remained

unchallenged. The Appellant-insurer has challenged in this appeal the findings of the claims Tribunal as to the liability of the insurer to pay compensation to the injured-claimant awarded in his favour and also the quantum of compensation.

4. I have heard the arguments of Sri. O. Mahesh, learned Counsel for the Appellant-insurer and Sri. Shripad V. Shastri and Praveen R.J.S, learned Counsel representing respectively the first and second respondents, who are claimant and the owner of the said vehicle. Perused the impugned judgment and entire material found in the records obtained from the Claims Tribunal.

5. Sri. O. Mahesh, learned Counsel for the Appellant - insurer strongly contends that the owner of the said Maxi Cab obtained permit to ply it as contract carriage, but it was plied as Stage carrier on the said date, time and place of accident and thus, the owner of the said vehicle violated the terms of the permit and therefore, the Claims Tribunal committed serious error in fastening the liability on the Appellant-insurer to pay compensation to the injured-claimant. He further contends that as could be seen from Ex. R. 1 insurance policy, it has been issued subject to condition that "policy covers use of the vehicle only under a permit within the meaning of the Motor Vehicle, 1988 or such a carriage falling under Sub-Section (3) of Section 66 of the Motor Vehicle Act 1988" and Ex.R3 permit is issued by the transport authority concerned in compliance with Section 66 of M.V. Act subject to condition No. 9 therein that "the permit does not entitle the holder to use the vehicle herein described as a stage carriage or as a goods carriage for hire" and therefore, since the owner of the said vehicle violated the terms of the said policy and permit by using the vehicle (Bus) as "stage carriage", the insurer is not liable to pay to the claimant any amount of compensation. He also contends that the Claims Tribunal committed error in awarding compensation to the injured-claimant at higher rates under various heads and therefore the quantum of compensation deserves to be reduced considerably.

6. Per contra, learned respective Counsel for the respondent Nos. 1 and 2, respectively the claimant and the owner of the said vehicle, contend that several other persons were injured in the same accident and the Claims Tribunal, while awarding compensation in respect of the said injured persons, fastened the liability on this Appellant-insurer to pay compensation to the respective injured-claimants and, in the appeal that was filed by the Appellant-insurer before this Court (MFA No. 4647/2007), this Court held that the insurer is liable to satisfy the awards and therefore, the Appellant-insurer herein cannot avoid the liability to pay compensation to the injured-claimant in this case also. They further contend that there is no consistency between the plea taken by the insurer in the statement of objections filed before the Claims Tribunal and the evidence of R.W. 1, the officer of insurer, as to the defence taken by the insurer and therefore the insurer cannot avoid the liability.

7. The plea taken by the insurer (respondent No. 2 before Claims Tribunal) as to his liability to indemnify the owner of the said vehicle, which is at para No. 8 of

the objection statement, reads as under:

However, the liability of this respondent, if any, is subject to provision of MV Act, RTO Records, permit, effective valid driving licence of the rider/driver of the offending vehicle in question involved in the accident and terms and conditions of issuance of insurance policy besides material suppression of fact regarding involvement of his/insured vehicle in the said accident.

8. On plain reading of the above plea, it is quite clear that it does not disclose as to which of the conditions, subject to which the insurance policy Ex.R 1 came to be issued or which of the conditions of Ex.R3 permit, subject to which the same has been issued by the concerned Authority, has been violated by the owner of the said vehicle. Further, R.W. 1, the Officer of the Insurance Company, has stated in his affidavit sworn to as his examination-in-chief, as to the alleged violation of permit condition by the insured as under:

3. Respondent No. 1 used the insured vehicle for the purpose of stage carriage instead of contract carriage besides over loaded the vehicle with passenger, hence violated the insurance policy and conditions and also of the permit as such there is no liability on the insurer/respondent No. 2 to indemnify the insured under the policy produced in evidence along with the permit and charge sheet.

9. Suffice it to say that the above evidence also does not disclose as to which of the conditions, of either ExR1 insurance policy or Ex.R3 permit, has been violated by the insured. Further, it also does not establish how the said bus was plied as "stage carriage" on the relevant date, time and place of accident. R.W. 2 is the driver of the bus involved in the said accident. It is pertinent to note that this insurer, being 2nd respondent before the Claims Tribunal, has not chosen to cross-examine the said driver. If it were be so that the said bus was plied as "stage carriage" in violation of any of the conditions of either the insurance policy or the permit, nothing prevented the learned Counsel representing the insurer before the Claims Tribunal to cross-examine R.W. 2, who is none other than the driver of the said bus who drove it as on the relevant date, time and place of accident, and elicit from him how the said bus was used as "stage carriage" at the relevant time of accident.

10. From the above pleadings and evidence placed on record by the Appellant-insurer before the Claims Tribunal, it is quite clear that the insurer, besides not taking specific plea as to the alleged violation of any of the conditions of either the insurance policy or the permit, has not placed on record any acceptable evidence and thus, failed to prove any of the statutory defences available to him including the alleged violation of conditions of insurance Policy and Permit.

11. Learned Counsel for the first respondent-claimant has produced copy of the judgment in the case of New India Assurance Co. Ltd. Vs. Smt. Mahadevamma, Raju and H.M. Gopal Reddy, The said appeal was filed by this very Appellant - Insurance Company through this very same Counsel viz., Sri. O. Mahesh, Advocate, Bangalore. The Coordinate Bench of this Court has held in the said

case that if the vehicle has got a contract carriage permit and plied as stage carriage and thereby violated the terms of permit, that may be a ground for the authorities under the Act to take steps against the owner of the vehicle for cancellation of the said permit, but the same cannot be a ground for the Insurance Company to absolve from its liability to pay compensation to the third party in view of Sections 147 and 149 of the Motor Vehicles Act. The said MFA No. 4647/2007 and the present MFA have arisen from out of the same accident.

12. Having regard to the above nature of pleadings and evidence placed on record by the Appellant-insurance company before the Claims Tribunal and also in view of the decision of this Court in the case referred to supra, I have no alternative but to hold that the Appellant-insurer Company is liable to pay compensation to the first respondent-claimant.

13. As to the quantum of compensation, Sri. O. Mahesh, learned Counsel for the Appellant-insurer strongly contends that the Claims Tribunal has awarded Rs. 75,000/- under the head "Pain and Sufferings"; Rs. 1,72,800/- towards "loss of future earnings" and Rs. 15,000/- towards "loss of amenities and enjoyment and these amounts of compensation are on higher scale, having regard to the nature of the injuries sustained and the extent of permanent liability suffered by the claimant and therefore they require to be reduced considerably.

14. Per contra, learned Counsel for the first respondent-claimant strongly contends that though the Doctor has given evidence that as a result of the injuries sustained by the claimant, he has suffered 68% disability in respect of his left lower limb, 12% of disability in respect of his right upper limb and 30% of physical disability in respect of his whole body, and that by reason of the said disability, the claimant has not been able to do the same work as mason as he was doing earlier to the accident, the Claims Tribunal committed error in taking the functional disability of the claimant at 20% only while determining the loss of future earnings instead of taking the same at 60%.

15. Learned Counsel for the respondent - claimant further contends that though the claimant has not filed his own appeal or cross-objections to this appeal of the insurer seeking enhancement in the compensation awarded by the Claims Tribunal, since the quantum of compensation is questioned by the Appellant-insurer in this appeal, this Court, invoking the provisions of Order 41 Rule 33 CPC and exercising its discretionary powers, may award in favour of the claimant reasonable amount of compensation to which he is entitled, having regard to the nature of injuries sustained by him, the functional disability suffered by him as a result of the said injuries.

16. As to the enhancement of the compensation. Sri. O. Mahesh, learned Counsel for the Appellant-insurer strongly contends that the claimant has not chosen to file his appeal nor has he chosen to file his cross-objections seeking enhancement in the compensation, he cannot be awarded any amount of compensation over and above what has been awarded by the Claims Tribunal

even if this Court declines to reduce the compensation awarded by the Claims Tribunal.

17. In the case of Oriental Insurance Co. Ltd., Bangalore v. Smt. Lakshmi Bai and Anr. fin MFA No. 11371/2005) disposed of by me on 27.10.2010, which is reported in AIR 2011 Kar 908, following the decision of Hon"ble Supreme Court in the case of Delhi Electric Supply Undertaking Vs. Basanti Devi and Another, and also following earlier decision of Division Bench of this Court in the case of The Oriental Insurance Co. Ltd. Vs. Akkayamma and Others, I have taken the view that the Appellate Court would be justified in enhancing the compensation by invoking its discretionary powers under Order 41 Rule 33 CPC despite the claimant not filing his own appeal or cross-objections to the appeal of the insurer, if the quantum of compensation is questioned by the insurer in his appeal. Therefore, following the same, I hold that the first respondent-claimant, though has not filed his own appeal or cross-objections to the present appeal, since the Appellant-insurer has questioned the quantum of compensation awarded by the Claims Tribunal in favour of the first respondent-claimant, this Court would be justified in examining whether the claimant is entitled to any enhancement in the compensation. On proper appreciation of the evidence on record, if the respondent - claimant is found entitled to enhancement in the compensation to any extent, the same has to be awarded in his favour over and above what has been awarded by the Claims Tribunal.

18. It is recorded by the Claims Tribunal that as a result of the said accident, the claimant sustained the following injuries:

- a) Fracture shaft left femur
- b) Fracture medial condyle of left humerus
- c) Fracture left iliac crest
- d) Fracture of right elbow and some other minor injuries

Further, it is also borne out from the records that the claimant was treated as in-patient from 22.11.2006 to 27.11.2006 and that during the said period, he was operated upon his left lower limb and left upper limb for the said fractures.

19. Learned Counsel for the respondent - claimant strongly contends that since the claimant was aged 21 years as on the date of the accident the amount of Rs. 15,000/- awarded by the Claims Tribunal under the heads "loss of enjoyment and amenities" is quite inadequate and therefore, the same deserves to be enhanced. Having regard to the above nature of the injuries suffered by the claimant as a result of the said accident, the nature of permanent disability which he has to suffer throughout his life, the age of the claimant as on the date of accident, being 21 years, I am of the opinion that sum of Rs. 15,000/- awarded by the Claims tribunal towards loss of enjoyment and amenities is not adequate. Therefore I hereby award in his favour an additional sum of Rs. 15,000/- towards the same.

20. Towards loss of future income/reduction in earning capacity of the claimant, the Claims Tribunal has awarded a sum of Rs. 1,72,800/- taking his income at Rs. 4,000/- per month and taking permanent disability at 20%. It is not in dispute that injured-claimant, being a mason, is not a skilled labourer. In other words, he has been an unskilled manual labourer. It is well settled that in cases of personal injuries of serious nature, as in the instant case, resulting in permanent disability, while determining the loss of future income or reduction in earning capacity of the injured in terms of money, besides the nature and extent of physical disability, the effect of such physical disability of his/her earning capacity in terms of money, i.e., "functional disability" of the injured, has to be considered.

21. The Division bench of this Court has observed in the case of K. Narasimha Murthy v. The Manager, Oriental Insurance Company Limited, Bangalore and another reported in 2004 (3) KLJ 288 (DB) as "if a person is disabled for work he was doing before accident and has no skill or talent for any other work, loss of earning capacity has to be taken as 100% and he has to be compensated on the basis of total loss..."

22. Further, it is also observed by this Court in the case of R. Venkatesh Vs. P. Saravanan and Others, , at para No. 9 of the judgment as under:

para 9. As a result of amputation, the claimant had been rendered a cripple. He requires the help of crutches even for walking. He has become unfit for any kind of manual work. As he was earlier a loader doing manual work, the amputation of his left leg below knee, has rendered him unfit for any kind of manual work. He has no education. In such cases. it is well settled that the economic and functional disability will have to be treated as total, even though the physical disability is not 100%.

[Emphasis supplied by me]

23. Following the above decisions, I have taken a view in MFA No. 929 of 2008 c/ w MFA CROB No. 238/2008 disposed of on 3.11.2010 as under:

19. I am of the further opinion that loss of future income or reduction in earning capacity of an injured by reason of the permanent physical disability suffered by him as a result of the injuries sustained in the accident has to be assessed taking into consideration "functional disability" i.e., extent of the effect of his "physical disability" on his earning capacity having regard to his age, avocation etc., also, besides considering the extent of his physical disability. The reason, for this is, the percentage of "functional disability" need not always be the same as the percentage of "physical disability" which the injured suffers. In a given case, though physical disability suffered by an injured may be hardly 10% or 20%, the functional disability i.e. the extent of the effect of his physical disability on his earning capacity, having regard to his avocation, may be more than the Physical Disability, it may even be 100%. For instance if an injured person, who is vocalist (Singer) by profession suffers permanent disability in his vocal chord, though his

physical disability with respect to his whole body cannot be more than the extent of disability with respect to vocal chord, reduction in his earning capacity may be even to the extent of 100% as he would not be able to sing. On the other hand, if such an injured happens to be an unskilled manual labourer, the extent of reduction in his earning capacity may be even less than his physical disability. Therefore, it is clear that while determining loss of future earnings/reduction in earning capacity of the injured claimant suffering permanent physical disability, the extent of "functional disability" having regard to his avocation, has to be considered.

24. Further, in its recent decision in the case of Raj Kumar Vs. Ajay Kumar and Another, the Hon"ble Supreme Court has held at para Nos. 5 to 6 and 9 to 12 of its judgment as under:

Para 5 The provision of the Motor Vehicles Act, 1988 ("Act" for short) makes it clear that the award must be just, which means that compensation should, to the extent possible, fully and adequately restore the claimant to the position prior to the accident. The object of awarding damages is to make good the loss suffered as a result of wrong done as far as money can do so, in a fair, reasonable and equitable manner. The court or tribunal shall have to assess the damages objectively and exclude from consideration any speculation or fancy, though some conjecture with reference to the nature of disability and its consequences, is inevitable. A person is not only to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

Para 6 The heads under which compensation is awarded in personal injury cases are the following :

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been

injured, comprising :

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses. Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii)(a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii)(b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future 5 medical expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life.

Para 9 The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

Para 10 Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

Para 11 What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of

permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for example, the decisions of this Court in Arvind Kumar Mishra v. New India Assurance Co. Ltd. -and Yadava Kumar v. D.M., National Insurance Co. Ltd.

Para 12 Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence:

- (i) whether the disablement is permanent or temporary;
- (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement,
- (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the person.

[Emphasis supplied by me]

25. In the light of the above principles laid down by this Court and also Hon''ble Supreme Court in the cases referred to supra, I am of the considered opinion that the claimant in the instant case, being unskilled manual labourer, does not know any skilled work other than masonry work, he has become unfit to do the same masonry work with the same efficiency as he was doing earlier to the accident. Therefore, the ends of justice would be met with if "functional disability" of the claimant is taken at 40% if not at 60% as claimed by his learned Counsel. It is not in dispute that the injured-claimant was earning a sum of Rs. 4,000/- p.m. In fact, loss of income during the laid up period is calculated at this rate and the same has remained unchallenged. Therefore, annual loss of future income of the claimant comes to Rs. 19,200/- (Rs. 4000 X 40% X 12 = Rs. 19,200/-). In view of the undisputed fact that the claimant was aged about 21 years as on the date of accident, the multiplier to be adopted as per the ratio laid down by the Hon''ble Supreme Court in the case of Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, would be "18". If this annual loss of income of Rs. 19,200/- is multiplied by "18", the total loss of future income/reduction in earning capacity of the claimant in terms of money comes to Rs. 3,45,600/- as against Rs. 1,72,800/- awarded by the Claims tribunal resulting in enhancement to the extent of Rs. 1,72,800/- and the same is rounded off to Rs. 1,73,000/- and awarded as enhanced compensation under the said head.

In the result, the first respondent-claimant herein shall be entitled to total enhanced compensation of Rs. 1,88,000/- (Rs. 15,000/- towards loss of enjoyment and amenities plus Rs. 1,73,000/- towards loss of future earnings) with interest thereon at the rate of 6% p.a. from the date of petition till the actual payment payable to him by the Appellant-Insurer within eight weeks from the date of the modified award.

After the said amount of compensation is deposited by the insurer as aforesaid, the Claims Tribunal shall cause a sum of Rs. 1,50,000/- invested into Fixed Deposit Account in the name of the claimant without any Nationalised Bank of his choice with directions to the Banker that -

(i) the said deposit shall be initially for a period of 10 years and it shall be renewed once in five years for further period during his life time,

(ii) interest shall be paid to the claimant once in a quarter,

(iii) he shall not be permitted to withdraw the said amount of deposit or any part thereof nor shall he be permitted to raise any loan thereon without the prior permission of the Claims Tribunal.

Balance of enhanced compensation along with the interest accrued on the total enhanced compensation shall be paid to the claimant. Award shall be modified in the above terms.

The present appeal filed by the insurer stands disposed of in the above terms. No order as to costs in this appeal.