

(2006) 02 KAR CK 0078

In the Karnataka High Court

Case No : M.F.A. No. 3381/05 a/w CROB 200 of 2005

New India Assurance Co. Ltd.

APPELLANT

Vs

Papamma and Another

RESPONDENT

Date of Decision : 07-02-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 166, 168

Citation : (2006) 3 ACC 492 : (2007) ACJ 13 : (2006) 4 KarLJ 585

Hon'ble Judges : V. Gopala Gowda, J;Jawad Rahim, J

Bench : Division Bench

Advocate : O. Mahesh and Veena O. Mahesh, for the Appellant; V.N. Madhava Reddy, for Respondent R1, for the Respondent

Judgement

Jawad Rahim, J.—These two miscellaneous First Appeals are directed against the Judgment and Award dated 4-1-2005 passed by the Additional Motor Accidents Claims Tribunal, Srirangapatna in M VC No. 188/2004 awarding a compensation of Rs. 3,90,000/- regarding sufferance of injury in road traffic accident.

2. While in MFA No. 3381/95 the insurer has assailed the award as high and excessive, in the cross-objection the claimant has described it as irrational and inadequate. Hence, both the appeals are taken up for disposal by this common judgment at the stage of admission itself as requested by both the counsel.

3. As regards the cross objection is concerned, it has been dismissed for non-prosecution. An application seeking its restoration has been filed. We have heard the said application and considering the circumstances explained, we are satisfied that the appeal needs to be restored. Accordingly, I. A.III/2005 is allowed and the order dated 27.10.2005 dismissing the appeal for default is recalled and the filed is restored.

4. Before we advert to the grounds urged in the appeals, a brief references to the facts which are relevant for consideration is necessary. The optimization of the case of both sides is that, a woman by name Smt. Papamma was on her way

after fetching water on 1 -10-2003 at 11 -00 am. When she reached Channarayapatna Road, an Ambassador car bearing registration No. KA-09-0139, driven rashly and negligently, crossed the road from K.R. Pet side. It was at such high speed that the driver lost control and dashed against her. She fell down and suffered grievous injuries to her waist and lower limbs. Immediately she was shifted to the hospital where first aid was provided and then the treatment continued for long time with no positive results. The accident was witnessed by one person called Kotegowda. She could not recoup her health. She approached the jurisdictional Tribunal and tendered evidence. She examined herself and an eye witness as also Dr. B.G. Sagar who treated upon her. Also, she relied on the documents which were filed as Exs. P-1 to P-5. In her evidence she reiterated the petition averments stating that she suffered injuries in the road traffic accident which was totally due to the rash and negligent act of the driver of the car. Holding him responsible for such act, she claimed in all a sum of Rs. 3,91,000/- During such evidence she spoke about the difficulties she faced, particularly with regard to the functioning disability resulting from the injuries to her bones, hip and leg. As regards loss of income, she claimed that she had regular income but after the accident she lost it. As usual, the expenses towards medical treatment, nourishment, attendant charges were also claimed by her. The Tribunal, taking into consideration the physical condition of the petitioner, weighed her evidence with the evidence of P W-3 Dr. Sagar, who, in his evidence has described the treatment given to her and spoke about the fracture of the left thigh bone, fracture of left leg and also about the functional disability. He had examined her even in the month of October 2004 and assessed the physical disability after treatment. According to his evaluation, she could not walk independently without support and she was brought to the hospital even on 6-10-2004 with the assistance of two attendants. Her Knee joints movement are grossly restricted. There was shortening of her left lower limb by 5.5 Cms. She cannot squat, cannot kneel down. He has opined that she suffered 65% permanent functional disability to her left lower limb. The total disability to whole body suffered by her is 50%. The Tribunal took into consideration all these and weighed with the evidence of PW-1 and concluded that she had established that she has suffered permanent physical disability. Keeping that in mind, it embarked to consider the loss of future income. He referred to the evidence of the doctor who has mentioned that the petitioner, who earlier earned her bread eking livelihood as a coolie, could not do that work any more. She has suffered 100% permanent disability to her earning capacity. Then, the Tribunal proceeded to determine what would be her loss of income. The Tribunal felt that she would be entitled to Rs. 3,000/- and not Rs. 5,000/- as claimed by her as monthly income. Calculating at Rs. 3,000/- per month and annually Rs. 36,000/-, the Tribunal awarded to her Rs. 3,24,000/- applying the Multiplier 9 on the basis of her age was 65 years. It followed the principle laid down in Trilok Chandra's case to chose the multiplier. To the said loss of future income fixed at Rs. 3,24,000/- the Tribunal awarded Rs. 10,000/- towards shortening of life, Rs. 5,000/- towards future medical expenses, Rs. 5,000/- towards future attendant charges, and

awarded in all Rs. 4,61,200/-from all heads. But, as the claimant claimed only Rs. 3,91,000/- the Tribunal scaled it down to the amount claimed by the claimant and allowed the petition as prayed for.

5. The Award of the Tribunal is assailed by the insurer of the vehicle on the following grounds:

- a) That the avocation of the claimant as coolie was not established;
 - b) That her income at Rs. 5,000/- was not established much less Rs. 3,000/-per month;
 - c) That the multiplier adopted by the Tribunal was incorrect;
 - d) That the rate of interest fixed at 8% was also on the higher side.
- 6) The Award is assailed by the claimant on the ground that the Tribunal having determined the fair compensation at Rs. 4,61,200/-erred in reducing it and awarding only Rs. 3,90,000/-

7) We shall now consider the grounds urged by both sides. In support of contentions, Learned Counsel for the insurer appellant referred to the full Bench decision of this Court Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, He drew our attention to paragraph 25 wherein the Full Bench has made the following observations:

(iii). Determination of the loss of earning capacity has to be with reference to "all the work" which the workman was capable of performing at the time of the accident, resulting in such disablement and not with reference to the work which the workman was performing at the time of the accident However, this is subject to the condition that in case the workman establishes by acceptable evidence that after the injury not only he is not able to do the work, which he was performing before the accident but he is not able to do any other work, the loss of earning capacity could be assessed on the basis of such evidence.

It is his contention that in the instant case that the medical evidence itself established that the claimant had suffered physical disability of 65% and in relation to the whole body the functional disability is evaluated at 50%. Therefore, the Tribunal ought to have considered this aspect and in fact, this should have been the basis to determine the loss of future income. Instead, the Tribunal erred in proceeding further nationally to fix the functional disability at 100% and granting to the claimant compensation towards loss of future income as if she is incapable of engaging herself gainfully in any other mode of earning or avocation. The thrust of his argument is that the loss of future income shall have to be determined only on the basis of functional disability which the victim has suffered. In other words, the determination of future loss of income shall be to such extent as the physical disability has visited the claimant.

8. The above aspect needs to be tested with the main principle that govern for grant of compensation. We feel it proper to make reference to the words of

Windeyer J, of the Australian High Court extracted in paragraph 10 in the case of H.T. Bhandary Vs. Muniyamma, . The observations are:

10. xxxxxx "The generalisation that there must be a "scaling down" for contingencies seems mistaken. All "contingencies" are not adverse; All "vicissitudes" are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the possible buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balanced or even outweighed the risk of bad. xxxxxx.

It would also be gainful to refer to the principle enunciated in the doctrine relating to grant of compensation by Charlesworth and Percy on "negligence" extracted in paragraph 11 of the same decision as under:

11. xxxxx"...Much of the calculation necessarily must be in the realms of hypothesis "and in that region arithmetic is a good servant but a bad master" since there are so often many imponderables. In every case "It is the over-all picture that matters" and the Court must try to assess as best as it can the loss suffered by each dependant having regard to all the circumstances but subject to the fact that "it is the wood that has to be looked at, and not the individual trees....

9. The above quoted extracts are broad principles laid as a guide for determination of compensation in fatal accidents which also indicates what should be the approach of the tribunal while considering "negligence" resulting in unfortunate situation compelling the destitutes to seek compensation. More particularly in the cases of personal injury, the law evolved is based on many vital aspects as the miseries of the victim do not end after the occurrence but it is the beginning of his agony, pain and suffering. It may occasion tremendous loss monetarily and also visit him with many social handicaps. This has been noticed by the Division Bench of this Court in the case of Basavaraj Vs. Shekhar and Others, . We have examined the impugned judgment and award giving credence to the evidence it deserves.

The law as to general nature of damages is ascertainment of the considerations which will make good to the sufferer, as far as money can do, the loss which he/she has suffered as a natural result of the wrong done. If the sufferer cannot be restored to the original position as in this case of personal injury, as it cannot obviously be, the law has to endeavour to give at least reasonably a fair equivalent in terms of money, so far as the money can be thought of as an equivalent to make good the loss. It is classified therefore as damages. In the words of Lord Morris of Borthy Gest:

To compensate in money for pain and for physical consequences is invariably difficult but... no other process can be devised than that of making a monetary assessment.

This Court has, in its earlier decisions, held damages in personal injury actions "are not punitive", still less a reward. They are simply compensation." Damages must be full and adequate and as Field. J., said in *Phillips v. South Western Railway Co.* 1874(4) QBD 406:

You cannot put the plaintiff back again into his original position, but you must bring your reasonable common sense to bear, and you must always recollect that this is the only occasion on which compensation can be given. (The plaintiff) can never sue again for it. You have, therefore, now to give him compensation, once and for all. He has done no wrong; he has suffered a wrong at the hands of the defendants, and you must take care to give him full fair compensation for that which he has suffered.

We are conscious of the fact that there are difficulties and uncertainties that attended the task of assessment. They should not preclude an assessment as best as can, in the given circumstances. In the *Mediana*, Lord Halsbury said:

Of course the whole region of inquiry into damages is one of extreme difficulty. You very often cannot even lay down any principle upon which you can give damages; nevertheless, it is remitted to the jury, or those who stand in place of the jury, to consider what compensation in money shall be given for what is a wrongful act. Take the most familiar and ordinary case; how is anybody to measure pain and suffering in money counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact amount of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident.... But, nevertheless, the law recognises that as a topic upon which damages may be given.

Relevant for this case would be the observations of Chief Justice Cockburn in the decision reported in *Fair v. London and North Western Railway Co.* [1869] 21 LT 326 which reads thus;

In assessing (the compensation the jury should take into account two things, first, the pecuniary loss (the plaintiff) sustains by accident secondly, the injury he sustains in his person, or his physical capacity of enjoying life. When they come to the consideration of the pecuniary loss they have to take into account not only his present loss, but his incapacity to earn a future improved income.

Having considered what is the basis for determination of compensation in the personal injury cases, we shall now once again refer to observations of Full Bench of this Court in the case of *Shjvalinga Shivanagowda Patil v. Erappa Basappa Bhavihala*(Supra) extracted above. The Full Bench, while considering this aspect, has no doubt observed that;

Determination of the loss of earning capacity has to be with reference to "all the work" which the workman was capable of performing at the time of the accident resulting in such disablement and not with reference to the work which the workman was performing at the time of the accident.

The Full Bench has also observed;

However, this is subject to the condition that in case the workman establishes by acceptable evidence that after the injury not only he is not able to do the work which he was performing before the accident but he is not able to do any other work. The loss of earning capacity could be assessed on the basis of such evidence.

10. It therefore indicates clearly that what has to be considered is whether the claimant is capable of doing any other work for his/her sustenance even after he/she is incapable of doing the work which he/she was doing at the time of unfortunate accident.

11. All that emerges from the above observations is that there cannot be any rigid rule of application in the matter of determining the future loss of earning capacity. For clarity, it would be proper to give two illustrations. One would be, take a case of a professional Singer. If he were to suffer damages to his Vocal Chord resulting in loss of speech, there is a direct loss of earning capacity in totality. But, in terms of medical science, his physical disability in relation to whole body would be only 10 to 15%. Similar will be the case of a Vascular Surgeon who lost thumb of the right palm. In medical parlance the physical incapacity would be valued only between 5 to 10% of the whole body. But, when it comes to his earning capacity, he loses the entire practice as a Vascular Surgeon and there is, therefore, loss of total future earning capacity as Vascular Surgeon. In such case it cannot be said that even if he cannot work as such, can earn by any other avocation. The answer is, we have to consider the source and the income which the victim had at the time of accident keeping in mind the contingencies as referred to in the quotations extracted above and his capacity to do any other work.

12. Gain could also be had if we make reference to the decision of the Division Bench of this Court K. Narasimha Murthy Vs. The Manager, Oriental Insurance Company Limited and Another, . In paragraph 42 what Lord Reid in Baker v. Willoughby (1969) 3 ALL ER 1528] has stated, is extracted hereunder:

A man is not compensated for the physical injury; he is compensated for the loss which he suffers as a result of that injury. His loss is not in having a stiff leg; it is in his inability to lead a full life, his inability to enjoy those amenities which depend on freedom of movement and his inability to earn as much as he used to earn or could have earned....

In the instant case, the glaring facts surfacing are that, a woman Papamma at the age of 65 years was eking out her livelihood as a coolie. She claimed she was earning Rs. 5,000/- per month. But, the Tribunal, keeping in mind exaggeration, took her income as Rs. 100/- per day. The insurer found fault with such determination. According to the insurance company, it should have taken 50% of that earning. But the evidence on record shows Papamma could not appear before the Tribunal to tender her evidence. She had to be examined on

commission due to physical disability and infirm condition. She could not be brought even on stretcher. The Court Commissioner recorded her evidence. The Tribunal has taken note of this fact which is borne from the records to conclude that she is virtually a dead wood and leading a life on total dependency. She, is literally INVALID. It is therefore very harsh to contend that the said woman can still continue with the avocation to

earn 50% of what she was earning. We are therefore constrained to reject this contention as totally untenable not only on facts and circumstances but also on the ground that the proportion loss of income should be directly proportionate only in proportion to the extent of physical disability, as a rigid rule in application in all cases.

13. We may also mention that the decision the Learned Counsel relied upon was rendered by this Court while dealing with the issue pertaining to Workmen's Compensation and not under the motor vehicles claim laws. The issue that came up for consideration before the Court was what would be the established mode of determination of compensation under the Workmen's Compensation Act to a person who still can continue to carry on his manual job. But, in the accident claims, as in this case, the determination has to be done as provided under the provisions of Section 166 of M.V. Act and such determination must be just compensation as required u/s 168 of the Act. For determination of what would be the just compensation there is not fanciful mathematical calculations but it should be reasonable, fair and justified considering the circumstances established by acceptable evidence. The circumstances are, the nature of injury, the resultant physical incapacity and the impact which it has on the victim's earning capacity. Therefore, though it is a general principle that physical disability will have bearing on earning capacity, this cannot be a hard and fast rule. Earning capacity has to be adjudged considering the evidence about loss of the real earning capacity, which again depends upon the nature of job or avocation.

14. We find on such assessment that in the instant case the claimant has lost total earning capacity and she needs to be compensated on that count. The reasoning of the Tribunal taking the income of the injured at Rs. 100 per day and applying the multiplier 9 is well-founded, just and also equitable. It can safely be concluded as a just compensation granted to her u/s 168 of the Act. But, the fault we find with the Tribunal is reduction of the total compensation to the amount claimed by her in the petition. Law requires grant of "Just" compensation and therefore the Tribunal was unjust in restricting the grant to the claim made by the claimant to Rs. 3,90,000/-

15. As regards rate of interest is concerned, we have noticed, that in the given circumstances it is reasonable. Hence we confirm the same.

16. For the reasons discussed above, the cross objection appeal shall succeed and the appeal filed by the insurer must fail. We order accordingly.

17. The Award of the Tribunal is confirmed but the order passed by it reducing

the compensation amount to Rs. 3,90,000/- is set aside. The claimant will be entitled to the entire amount determined by the Tribunal at Rs. 4,61,2000/- To this extent her Appeal is partly allowed.

Office is directed to draw the Award accordingly.