
(1991) 05 OHC CK 0027
In the Orissa High Court
Case No : Misc. Appeal No. 256 of 1990

Oriental Insurance Co. Ltd.

APPELLANT

Vs

Guru Charan Saren and Another

RESPONDENT

Date of Decision : 03-05-1991

Acts Referred:

Motor Vehicles Act, 1939 — Section 92
Workmens Compensation Act, 1923 — Section 4

Citation : (1992) ACJ 693 : AIR 1991 Ori 294

Hon'ble Judges : S.C. Mohapatra, J

Bench : Single Bench

Advocate : S.S. Basu, P.K. Khuntia and G.P. Dutta, for the Appellant; S.K. Mohanty, A.K. Patil and L.K. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

S.C. Mohapatra, J.—This is an appeal u/s 173 of the Motor Vehicles Act, 1988 in respect of an application u/s 110-A of Motor Vehicles Act, 1939 by the insurer. Cross-objection for enhancement of compensation has been filed by the claimant.

2. On 10-12-1987 while claimant, a coolie was going in the truck bearing registration No. ORJ 6095 in course of and arising out of his employment, the truck met with an accident in which claimant sustained injuries. Effect of the injuries is that claimant is not able to walk without assistance of a stick. On account of the injuries claimant has filed application for compensation against owner and the insurer.

3. Tribunal on assessment of evidence has awarded compensation of Rs. 44,400/- towards future loss of income, Rs. 5,000/-towards medical expenses, Rs. 1,000/- for assistance taken during the period of injury and Rs. 25,000/- towards mental shock, pain and suffering and made the insurer liable to pay the compensation.

4. Mr. S. S. Basu, learned counsel for the insurer-appellant submitted that

insurer is liable to pay only that amount which claimant would have been entitled under the Workmen's Compensation Act in view of Section 95 of the Motor Vehicles Act in absence of any additional premium for additional liability towards loss of income if it is proved that claimant was injured in the accident depending upon the percentage of disability. On the finding that the disabilities is only 25% and on account of one old fracture of hip joint, claimant is not able to walk without stick, compensation would be nil or negligible.

5. Claimant on the other hand submitted that Tribunal ought to have accepted the total claim of rupees one lakh which is the just compensation.

6. In 31 (1989) OJD 166 (The Oriental Fire and General Insurance Company Ltd. v. Labani Sahoo) it has been decided by this Court that insurer is not liable to pay compensation more than fixed by the Workmen's Compensation Act. Same view has been taken by this Court in Oriental Fire and Genl. Ins. Co. Ltd. Vs. Bidi and Others, . Later two decisions have been cited with approval by a Division Bench of this Court in the decision reported in Orissa State Road Trans. Corpn. Vs. Shankar Sahu overruling a decision of this Court reported in Govind Nayak Vs. Shyam Sundar Soni and Others, where it has been held that a claimant who is a workman has choice to approach either the Commissioner under the Workmen's Compensation Act or the Tribunal under the Motor Vehicles Act; When he approaches the Tribunal under the Motor Vehicles Act, the quantum of compensation available to him would not be limited to that which would be available under Workmen's Compensation Act. However, insurer would be liable to the extent of compensation payable under the Workmen's Compensation Act and owner would be liable to pay the balance. In determination of just compensation payable under the (Act) Workmen's Compensation Act has no relevance. This is now settled so far as this Court (is concerned).

7. Under Workmen's Compensation Act, Commissioner is to examine (i) Relationship of employer and employee; (ii) Whether employee injured in the accident is workman; (iii) Wages and age of the employee; and (iv) In case of injury which is not fatal whether the cautions given by the employer to be followed by employees were adhered to. Negligence is not a pre-condition for award of compensation under that Act. In a claim under the Motor Vehicles Act, 1939, Law of Torts in all respects are applicable except change of forum from Civil Court to the specially constituted Tribunal. Person negligent for the accident of the Motor Vehicle is principally liable. Owner of the vehicle is vicariously liable. Insurer covers the risk of the owner as per terms of the policy. Even if there is no negligence, u/s 92A limited amount is prescribed to be paid. For amount higher than the same finding of negligence in driving the vehicle is to be found out by the Tribunal to get jurisdiction to award the same. Tribunal is not an authority created to enforce contracts. While considering the wrong to a person injured or to dependants in case of fatal injury, it is given authority to fix liability either statutory or contractual on the insurer. Where a person suffered on account of his own wrong, Tribunal has no jurisdiction to make the owner liable to shift it to

the insurer which has covered the risk statutorily or by contract except to the extent limited by Section 92-A. This has not been considered by the Division Bench in Orissa State Road Trans. Corpn. Vs. Shankar Sahu where driver of the bus caused the accident which resulted in injuries to himself. A rethinking of the correctness of the Division Bench decision in this respect may be necessary. In the present case, however, such a question does not arise since a coolie suffered injuries on account of negligent driving of the vehicle by the driver and claimant was not at fault in any manner.

8. Effect of the accident in this case is that claimant is not able to walk without a stick. It is well known that a person who walks only with assistance of a stick cannot be employed as coolie in a truck. Thus, in relation to his employment, he is totally disabled. It is true that he can have other profitable avocation of life which is sedentary in nature and require no strain on muscles. Under Workmen's Compensation Act, possibility of engaging him otherwise profitably is not a consideration to determine the compensation. Disability qua his employment under the owner is the only consideration. Under Workmen's Compensation Act, a totally disabled person as the claimant is, would be entitled to compensation of Rs. 55,343/-. Under the Motor Vehicles Act even if claimant is totally disabled, he can have other avocations of life to engage him profitably. Thus, compensation of Rs. 44,400 / - on materials available in this case would be just compensation on account of loss of future income.

9. Mr. Basu submitted that an amount of Rs. 5,000/- towards medical expenses determined by the Tribunal is arbitrary having no nexus to the materials on record. It is true that no evidence of expenditure incurred is available except oral evidence. Therefore, from the nature of injuries and specially when claimant had an old healed up injury which aggravated the effect, treatment of the injuries sustained is to be kept in mind and a guess work is to be made. I am inclined to hold that claimant must have spent Rs. 3,000/- towards the treatment which is payable to him as compensation.

10. Mr. Basu submitted that insurer is liable to pay compensation under the Workmen's Compensation Act. Medical expense is not a consideration for determination under that Act. Only consideration is the percentage of disability. Accordingly, this amount may be paid by owner and not the insurer.

11. Mr. Basu is correct in his submission that there is no material to draw an inference that claimant had any mental shock or mental pain though he might have some physical pain. A Civil Court without further materials could not have awarded any compensation on this evidence. It is true. However, a Tribunal under the Motor Vehicles Act has scope to make a reasonable guess work depending on his judicial experience. In this case, in absence of any material, I am inclined to determine the compensation at Rs. 12,000/- taking the injuries sustained and its effect into consideration.

12. In absence of any acceptable evidence that claimant had paid for services of

another for helping him during treatment, I am not inclined to accept Rs. 1,000/- paid by the Tribunal on that account.

13. Just compensation in this case payable to claimant is Rs. 44,400/- towards disability, Rs. 3,000/- towards medical expenses and Rs. 12,000/- towards physical and mental pain and shock which comes to Rs. 59,400/-. I bring it to a round figure of Rs. 60,000/-. In case, a claimant would have sought for compensation under the Workmen's Compensation Act, he would have been awarded Rs.55,343/- which the insurer would have paid. Without leaving the claimant to take steps for realisation of a paltry sum of less than Rs. 5,000/- from the owner, I direct the insurer to pay the entire compensation in a round figure of Rs. 60,000/-leaving liberty to insurer to realise the balance amount from owner in appropriate forum.

14. Claimant is entitled to interest at the rate of 12% per annum from the date of application till the payment. During pendency of appeal, insurer has deposited Rupees 55,000/- in this Court. Accordingly, I direct that in case balance amount with interest and cost of Rs. 500/- awarded by Tribunal are deposited within two months from today, insurer shall be entitled to a rebate of 3% on the interest. In case balance amount is not paid or deposited before the Tribunal within two months, Insurer shall pay interest at the rate of 12% per annum from the date of application till payment or deposit. Amount deposited in this Court shall be deemed to be payment to claimant on the date of deposit for the purpose of calculation of interest.

15. Amount which has been deposited in this Court shall be paid to the claimant through his lawyer. Entire balance amount to be paid or deposited in the Tribunal shall be invested in long term deposit to the nearest round figure for ten years to earn maximum profit. Claimant shall be entitled to annual interest only. Such investment cannot be encumbered in any manner during the entire period. Tribunal, however, can permit release of portions if it is satisfied that necessity of claimant requires release of the amount. While so releasing, it shall take into consideration that a huge amount of Rs. 55,000/-has been paid at a time to the claimant and the same has not been ill spent or others have not taken undue advantage from the claimant to take chances out of the money received.

16. In the result, appeal is allowed in part. Cross-objection is dismissed. No costs.