

(2009) 09 CAL CK 0052
In the Calcutta High Court
Case No : F.M.A No. 2962 of 2002

Prakash Chandra Biswas

APPELLANT

Vs

New India Assurance Co. Ltd. and Another

RESPONDENT

Date of Decision : 04-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Evidence Act, 1872 — Section 145, 157
Motor Vehicles Act, 1988 — Section 140, 166, 171

Citation : (2011) ACJ 622 : AIR 2010 Cal 19 : (2010) 1 CALLT 17 : (2011) 7 RCR(Civil) 1554

Hon'ble Judges : Pranab Kumar Chattopadhyay, J; Kishore Kumar Prasad, J

Bench : Division Bench

Advocate : Krishanu Banik, for the Appellant; Parimal Kumar Pahari, for the Respondent

Judgement

Kishore Kumar Prasad, J.—This appeal is at the instance of the claimant/appellant in a proceeding u/s 166 of the M.V. Act, 1988 and is directed against the judgment and award dated 8th May, 2002 passed by the learned Judge, Motor Accident Claims Tribunal-cum-2nd Additional District Judge, Alipore in M. A. C. C. No. 59/1999 thereby dismissing the claim application on the ground that the claimant could not prove that he had sustained multiple injuries coupled with fracture on both the arms on account of road accident which occurred on 7-1-1998 at about 19.30 hours near Narendrapur Petrol Pump within the limits of Sonarpur P. S. while he was travelling in the offending Mini Bus bearing No. W. B.-19/6220 from B. B. D. Bag to Jagaddal.

2. Being dissatisfied, the claimant has come with the present appeal.

3. According to the claimant/appellant, he was involved in the said accident by which he was seriously injured and was ultimately admitted to Shri Aurobindo Seva Kendra, Jadavpur Park where he underwent an operation. After a prolonged treatment, he was discharged from the said Seva Kendra on 20-1-1998 and in

the process, he lost his initial power and function of both the arms.

4. According to testimony of Dr. P. K. Mondal (P. W. 2) and medical certificate produced on his behalf (Exhibit 7), his permanent disablement was to the extent of 30%. The claimant also produced the document showing his income to the extent of Rs. 8,293/- per month at the relevant time by production of the salary certificate by his employer Bharat Fritz Werner Limited (Exhibit 9). The claimant further produced the discharge certificate issued by Shri Aurovindo Seva Kendra (Exhibit 3), medical bills, prescriptions, money receipts (Exhibit 6 collectively) and the School Final Examination Certificate issued by the West Bengal Board of Secondary Education (Exhibit 5). The aforesaid documents also support the claims of the appellant/claimant that he was aged 49 years at the fateful time of accident; that he was admitted into Shri Aurovindo Seva Kendra for the period from 11-1-1998 to 20-1-1998 for undergoing his operation as a result of fracture and he spent more than Rs. 25,000/- towards medical treatment.

5. The genuineness of the aforesaid documents were not challenged by the Insurance Company before the Court of learned Tribunal and the said documents were marked as Exhibits before the learned Tribunal without objection. The proceedings before Tribunal are summary in nature and based on records and documents. Strict rules of evidence cannot be made applicable to proceedings before the Tribunal and while appreciating the claims, the Tribunal has the power to look into the documents and satisfy itself about the bona fides of the claim.

6. Learned Counsel appearing on behalf of the appellant strenuously contended before us that the Insurance Company and the owner of the vehicle, both having suffered an order u/s 140 of the M.V. Act and not having challenged such award and the Insurance Company having paid that amount to the appellant by issuing a cheque bearing No. 099844 dated 8-10-2001, the question of involvement of the claimant resulting fracture injury on his person arising out of the offending vehicle in question is no longer open to attack and such question cannot be answered against his client in this proceedings u/s 166 of the M.V. Act. In other words, the learned Counsel contended that the said question has already been established in the earlier proceedings u/s 140 of the M.V. Act. and such decision is res judicata in the present proceeding u/s 166 of the M.V. Act.

7. According to learned Counsel, once the involvement of the vehicle in the accident resulting fracture injury upon the appellant is established, the Insurance Company and the owner of the vehicle cannot escape their liability of making payment of compensation as the negligence of the driver of the offending vehicle has also been proved. He further submitted that in view of the evidence both oral and documentary on record specifying the extent of disablement to be 30%, his client is entitled to get compensation on the basis of annual monthly income as reflected from the salary certificate after taking into consideration the said extent of disability including the age by adopting multiplier of 13 as per structural formula contemplated by Second Schedule of the M.V. Act.

8. Learned Counsel further contended that in addition, his client is also entitled to get Rs. 25,000/-, the actual amount spent by him for medical treatment and Rs. 5,000/- towards pain and sufferings.

9. Learned Counsel appearing on behalf of the Insurance Company (New India Assurance Company) disputed the principal contention of the learned Counsel for the appellant and contended that the previous finding in the proceeding u/s 140 of the M.V. Act is not binding upon the Tribunal while deciding the proceedings u/s 166 of the Act and the said decision cannot be res judicata.

10. Learned Counsel for the Insurance Company did not dispute about the genuineness of the medical certificate, medical bills, prescriptions, money receipts that had been produced before the learned Tribunal in support of the claim application.

11. After hearing the learned Counsel for the parties and after going through the materials on record, we find that in the previous proceeding u/s 140 of the Act, the Tribunal passed an award of Rs. 25,000/- against both the owner of the vehicle and the Insurance Company and such award has been accepted by not preferring any appeal. The Insurance Company admittedly paid the awarded amount to the appellant by issuing cheque bearing No. 099844 dated 8-10-2001.

12. It is now settled by the Apex Court that an award u/s 140 of the Act is an appealable one and therefore, the parties by not preferring any appeal has accepted the position that the vehicle was involved in the accident and that the same was insured by the Insurance Company. Those two facts cannot be reopened in the proceedings u/s 166 of the Act either at the instance of the owner of the vehicle or the Insurance Company. At this stage it will be profitable to refer to the following observations of the Apex Court in the case of Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another, where a Bench consisting of three Judges specifically held that even if Section 11 of the CPC is not applicable in a judicial proceedings, the principles of res judicata is nevertheless applicable (Para 7 of AIR):

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, when a matter - whether on a question of fact or a question of law - has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in Section 11 of the CPC but even where Section 11 does not apply, the principle of res judicata has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the Original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

13. We, therefore, find substance in the contention of the learned Counsel appearing on behalf of the appellant that the learned Tribunal erred in law in holding that the vehicle in question was not involved in the accident for which the appellant as one of the passengers of the same had sustained fracture injury on his person.

14. The admitted facts appearing on record are sufficient to invoke at least the doctrine of estoppel and acquiescence against both the Insurance Company and the owner of the vehicle in question.

15. Apart from the aforesaid consideration, the learned Tribunal in the instant case ignored the oral evidence coupled with corroborative documentary evidence which were really available on record. The learned Tribunal is expected to adjudicate a case on the basis of the evidence produced in the case without giving too much importance to the outcome of the criminal case. The claimant is required to establish that he met with an accident due to rash and negligent driving of the vehicle in question. Once this fact is established, the burden shifted on the respondent to show that the accident did not happen in the way alleged by the claimant. It is to be remembered that in a motor accident claim case, the claimant is not required to prove his case beyond shadow of reasonable doubt. It would suffice, if he has proved his case on the basis of preponderance of probabilities.

16. A bare perusal of the judgment impugned reveals that the conclusion drawn by the learned Tribunal is based on the progress of criminal case which was initiated on the basis of initial F.I.R. lodged by one Swami Deveswarananda on behalf of Secretary, Ramkrishna Mission Ashram, Narendrapur mentioning therein only that the vehicle in question was driven rashly and negligently on the date of fateful accident and in consequence thereof the boundary wall of the Ramkrishna Ashram was broken.

17. The claim of the appellant could not have been dismissed merely because the name of the appellant did not find place in the F.I.R. as well as in the relevant column of the witness list of the charge sheet. From such omission, on the part of the investigating officer in criminal case, an inference cannot be drawn that the claim petition is baseless and frivolous. The object of the F.I.R. from the point of view of the informant is to set the criminal law in motion. The F.I.R. does not constitute substantive evidence. It can be used only for the purpose contemplated u/s 157 or Section 145 of the Evidence Act that is for corroborating or contradicting its maker only and not of other witnesses.

18. Since the appellant's testimony on oath before the Tribunal on the factum of accident has not been demolished, there is no cogent reason for not believing the claimant that he met with an accident due to rash and negligent driving by the driver of the vehicle in question and as a result of such accident he sustained fracture injury on his person resulting permanent disability to the extent of 30%. Therefore, the reasoning of the learned Tribunal in dismissing the claim

application is lopsided and the same cannot be sustained since we find inherent infirmity in the judgment and order of the learned Tribunal.

19. In view of the observation herein-above, the judgment of the learned Tribunal is perverse and the reasoning adopted by the learned Tribunal in recording the order of dismissal is based on incorrect appreciation of evidence on record and the same is, therefore, set aside.

20. The fact that the appellant was seriously injured due to rash and negligent driving of the vehicle in question has been well proved by the evidence. First, he was taken to the chamber of Dr. S. N. Das and thereafter he was removed to Shri Aurobindo Seva Kendra where he underwent an operation and after a prolonged treatment, he was discharged from thereafter a considerable period of 9 days.

21. It has been at least established that the claimant, due to the accident, has lost his initial power and function of both the arms and his permanent disablement was to the extent of 30%. It has also been established that the said claimant was aged about 49 years on the fateful time of accident; that he used to get gross emoluments of Rs. 8,293/- per month besides 20% bonus on basic, D. A. and service weightage as an employee under Bharat Fritz Werner Limited; that he spent more than Rs. 25,000/- towards his medical treatment and on account of his disability to move around to the prospective customer of the employer he was compelled to leave the job while he had still 9 years to retire.

22. In the aforesaid circumstances, we hold that the appellant was employed at a monthly salary of Rs. 8,000/-. Therefore, the annual income of the claimant would come to Rs. 8,000 x 12 = Rs. 96,000/-.

23. Having regard to the percentage of disability, if 30% is deducted as loss of income, the proportional loss of earning capacity per year would come to the tune of Rs. 96,000 x 30/100 = 28,800/-. As per age of the victim at the fateful time of accident (49 years) the multiplier of 13 as per structural formula contemplated by Second Schedule of M.V. Act would be just and proper for the purpose of calculating the amount of compensation. So, after applying the multiplier of 13, the amount of compensation would come to Rs. 28,800 x 13 = 3,74,400/-.

29. Having regard to the proved materials on record we also think that a sum of Rs. 25,000/- towards medical treatment and further a sum of Rs. 5,000/- towards pain and sufferings should be allowed. So, we award Rs. 25,000/- + 5,000/- towards the aforesaid heads.

25. Thus, the actual amount of compensation payable to the claimant comes to Rs. 3,74,400 + 25,000 + 5000 = Rs. 4,04,400/-.

26. The Insurance Company (New India Assurance Company Limited) has admittedly paid a sum of Rs. 25,000/- to the claimant/appellant as per award in connection with the proceeding u/s 140 of the M.V. Act. Therefore, after

adjusting the aforesaid amount, the appellant is now entitled to Rs. 4,04,400 - 25,000 = Rs. 3,79,400 towards compensation.

27. It is not the case of the Insurance Company that the claimant was responsible for the delay in disposal of the claim application. Therefore, in view of the clear provision of Section 171 of the M.V. Act and having regard to the totality of the facts and circumstances of the present case, we hold that the claimant/appellant is also entitled to receive simple interest at the rate of 6% per annum from the date of filing of the claim application that is from 1-2-1999 till the date of deposit of amount of compensation as awarded by us.

28. The respondent (New India Assurance Company Limited), the insurer of the offending vehicle is directed to pay the aforesaid quantum of compensation that is Rs. 3,79,400/- together with simple interest at the rate of 6% per annum on the awarded amount from the date of filing of the claim application till the date of deposit for making payment to the appellant through the Tribunal within a month from date of receipt of the Lower Court Records and copy of this judgment. The learned Tribunal is to disburse the amount to the appellant upon actual verification and subject to deposit the deficit amount of court fees, if any.

29. The appeal is accordingly allowed to the extent as indicated above.

30. There will, however, be no order as to costs.

31. Lower Court Records with the copy of the judgment to go down forthwith to the Court of learned Tribunal for information and necessary action.

32. Urgent xerox certified copy of this judgment, if applied for, be supplied to the learned Advocate appearing for the parties upon compliance of all formalities.

Pranab Kumar Chattopadhyay, J.

33. I agree.