(2014) 02 CAL CK 0025

In the Calcutta High Court

Case No : F.M.A. No. 406 of 2004

Raju Bothra — APPELLANT

Vs

The Divisional Manager, New India Assurance Co. Ltd. and Others — RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Citation : (2015) 2 AnWR 522

Hon'ble Judges : Sahidullah Munshi, J;Jayanta Kumar Biswas, J

Bench : Division Bench

Advocate : Saidur Rahaman, Advocates for the Appellant; Parimal Kumar Pahari, Advocates for the Respondent

Judgement

Jayanta Kumar Biswas, J.—The claimant in MACC No. 368 of 2000 in the Motor Accidents Claims Tribunal, Jalpaiguri is the appellant in this appeal. He is aggrieved by the award of the claims tribunal dated April 9, 2003. He applied for fault liability compensation under s.166 of the Motor Vehicles Act, 1988 on November 6, 2000.

2. His case was as follows:--

"In an accident caused by a 407-truck (WB-73-6537) at 10th Mile Falakata Madari road on December 8, 1999 at about 9:00 p.m. he suffered "Multiple injuries. Shaft Hemers Radius RT (Locomotor Handicapped) Right hand permanent disable." He received treatment from Falakata Hospital from December 8, 1999 to December 9, 1999, from Paramount Hospital in Siliguri from December 9, 1999 to December 16, 1999, and from Shree Jain Hospital & Research Centre in Howrah from December 17, 1999 to March 10, 2000. From December 8, 1999 to March 10, 2000 he spent Rs. 90,000 for treatment. The vehicle was covered by a valid policy issued by the insurance company. At the date of accident he was 35 and from business he used to earn Rs. 5,000 per month. He was also an income tax assessee. The accident causing the injuries entitled him to Rs. 3 lakh compensation with 12% p.a. interest."

3. The insurance company contested the case by filing a written statement. The owner of the offending vehicle also filed written statement denying and disputing the correctness of every material fact. In proof of his case the appellant examined himself as PW1 and an eyewitness to the accident as PW2. The insurance company did not give any evidence.

4. The tribunal records reveal the following facts. PWs1&2 were examined, cross-examined and discharged on January 30, 2003. Then on that same day "FIR, written FIR, policy, Handicapped certificate, concession certificate" etc. filed by the appellant were admitted into evidence dispensing with formal proof and marked Exs1-7. On March 4, 2003 the appellant''s evidence was closed and original I.T. challan and xerox of Saral form showing payment of tax by the appellant for the assessment year 2002-2003 were marked Exs. 8 & 9.

5. The claims tribunal passed the award on April 9, 2003 holding as follows. Testimonies of PWs1&2 proved the accident and testimony of PW1 proved that he had suffered the injuries claimed by him in the accident. The handicap certificate proved that the appellant "was declared locomotor handicapped of about forty (40%) percent)." In the facts and circumstances of the case it would be just to grant the appellant Rs. 50,000 compensation.

6. Advocate for the appellant has argued as follows:--

"The claims tribunal erred in law by granting a lump sum compensation; for it was required to give the break downs. The appellant proved that from his business he used to earn Rs. 5,000 per month. Since the extent of permanent disability was 40%, the appellant was entitled to:- Rs. 24,000 x 16 = Rs. 3,84,000 (loss of future income) + Rs. 90,000 (medical expenses) + Rs. 25,000 (travelling expenses for treatment) + the non-pecuniary damages:- Rs. 25,000 (pain and suffering) + Rs. 20,000 (loss of amenities and enjoyment of life) = Rs. 5,44,000 + interest at reasonable rate, not granted by the claims tribunal."

7. Relying on the decision of the Supreme Court in Raj Kumar Vs. Ajay Kumar and Another, Mr. Das leading Mr. Pahari for the insurance company has submitted as follows. Although the claims tribunal granted compensation contrary to the principles stated by the Supreme Court in Raj Kumar, in the interest of justice the insurance company accepted the award and paid the amount. In view of the principles, the appellant not proving his medical and allied expenses, income, actual loss of income, extent of disability, loss of future earnings, was not entitled to any pecuniary damages whatsoever.

8. Raj Kumar claimed fault liability compensation. He was injured in a motor vehicle accident on October 1, 1991. He sustained fractures of bones of left leg and left radius and was under treatment from October 1, 1991 to June 16, 1992. The claims tribunal granted him Rs. 94,700 compensation with 9% p.a. interest. The components of the compensation were:- Rs. 11,000 medical expenses, conveyance and special diet + Rs. 3,600 loss of earnings during the period of treatment + Rs. 25,000 for pain and suffering + Rs. 55,080 for loss of future

earnings.

9. The Supreme Court was examining whether the principles adopted by the claims tribunal for assessing the compensation were erroneous and whether it was necessary to increase the amount of compensation. The Supreme Court examined the principles applicable to a fault liability claim made by a victim injured in a motor vehicle accident in detail and in the process it referred to its previous decisions and also to a decision of the House of Lords.

10. Relevant parts of para.5 of the report are quoted below:-

"5. The heads under which compensation is awarded in personal injury cases are the following:

"Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalisation, 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 earnings 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)."

11. After specifying the several heads, the Supreme Court said, "Assessment of pecuniary damages under item (i) and item (ii)(a) do not pose much difficulty as they involve reimbursement of actuals and are easily ascertainable from the evidence." The Supreme Court then said, "What usually poses some difficulty is the assessment of the loss of future earnings on account of permanent disability - item (ii)(b)."

12. After clarifying that the percentage of permanent disability cannot always be the percentage of loss of future earnings, the Supreme Court said, "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)."

13. In Raj Kumar the Supreme Court very lucidly stated the procedure that the

claims tribunal should follow while deciding a claim case filed by a victim injured in a motor vehicle accident; one principle is:- If it is found that the claimant is not entitled to any compensation for loss of future earnings, he may be granted compensation for loss of amenities; but when compensation is granted for loss of future earning capacity above 50%, compensation should not be granted separately for loss of amenities or loss of expectation of life.

14. Dealing with the question of proof of disability the Supreme Court said, "Mere production of a disability certificate or discharge certificate will not be proof of the extent of disability stated therein unless the doctor who treated the claimant or who medically examined and assessed the extent of disability of the claimant, is tendered for cross-examination with reference to the certificate." Referring to the duty of the claims tribunal to make inquiry, the Supreme Court, however, said, "in cases where the certificates are not contested by respondents they may be marked by consent, thereby dispensing with the oral evidence."

15. In Raj Kumar the Supreme Court indicated the distinction between the disability and its effect on the victim''s future earning capacity and in the process gave several illustrations and said that two identical injuries would not necessarily affect the respective victim''s same percentage of earning capacity. The Supreme Court said that the question should be decided on the basis of evidence and keeping in mind the profession, occupation, etc. of the victim.

16. Examination-in-chief of PW1 in the case is quoted below:--

"My name is Raju Bothra. I am petitioner of this case. I am at present 38 years. I am engaged in clothe business. My monthly income is Rs. 5,000/-. I pay income tax. The accident took place on 8-12-99, at about 8.30/9.00 p.m. At the relevant time I was going to bus stand (10th Mile) from Uma Charanpur. From back one mini truck No. WB 73/6537 came and dashed me. After dashing me the vehicle turned round. As a result of dashing by the vehicle I suffered injury on my right hand and on my forehead. At first I was taken to Falakata P.H.C. and from there I was referred to Siliguri Paramount Hospital and from there I went to Jain Hospital and Research Centre, Howrah. From 9-12-99 to 16-12-99 I was at Siliguri Paramount Hospital. From 17-12-99 to 10-3-2000 I was treated at Jain Hospital and Research Centre Howrah. At that time I spent Rs. 90,000/- for my treatment, even today I am under treatment. I cannot do any work with my right hand. I pray compensation of Rs. 3,00,000/- (Rupees three lacs). I have received Rs. 25,000/- (Rupees twenty-five thousand) as interim compensation amount."

17. Cross-examination of PW1 is quoted below:--

"I am engaged in clothe business. My family members are also engaged in clothe business. At present that business is running. I was released from Falakata P.H.C. after being administered first aid. At Falakata P.H.C., doctors asked me to go to Siliguri Hospital immediately. At Siliguri I was admitted to Paramount Hospital. At Paramount Hospital I was released after preliminary treatment. Not a fact that I was released from paramount Hospital after being administered first aid. On 9-12-99, at 1.00/1.30 a.m., I reached at Paramount Hospital, Siliguri from Falakata. Not a fact that I was not admitted in Paramount Hospital just after I reached from Falakata Hospital. It is not a fact that I did not sustain injury on my right hand as a result of alleged accident. Not a fact that the injury upon my right hand was not due to the accident as stated my me. Not a fact that I did not suffer financial loss as a result of the accident."

18. The handicap certificate is Ex4. It was recorded therein that on June 20, 2000 the petitioner was found a 40% locomotor handicapped. It reveals that a medical board of Alipurduar SD Hospital examined the appellant. The certificate was issued by the superintendent of the hospital. The concession certificate Ex5 was also issued by the same hospital. It is dated July 10, 2000 and the nature of handicap mentioned therein is:- "Accident Fracture (Write hand) Permanent disability" and as to "Causes of loss of functional capacity" it mentioned:-"Locomotor 40% (Forty)."

19. The appellant did not examine the doctors treating him or the medical board doctors examining him for ascertaining the extent of his physical disability caused by the accident in question. The handicap certificate was not admitted into evidence by consent of the insurance company. The certificate by itself could not and actually did not prove the effect of the disability of the limb on the appellant''s whole body. The appellant did not give any evidence whether the disability affected his future earning capacity.

20. As to income, the appellant, except saying that he was engaged in cloth business, and that his monthly income was Rs. 5,000, did not give any evidence in proof of his business and income therefrom. In cross-examination he said, "I am engaged in clothe business. My family members are also engaged in clothe business. At present that business is running."

21. On March 4, 2003 when his evidence was formally closed, he informally filed in the claims tribunal his income-tax challan showing payment for tax for the assessment year 2002-2003 and a xerox of the Saral form concerned. The two documents were admitted into evidence and marked Exs. 8 & 9. While the challan showed payment of Rs. 343 tax, the Saral form showed Rs. 16,600 income from business or profession and Rs. 36,831 from other sources.

22. Exs. 8 & 9 even if accepted as properly admitted pieces of documentary evidence could not and actually did not prove that on December 8, 1999 the appellant was in the cloth business, or that from his business he was earning Rs. 5,000 per month. They could not and actually did not prove either that the permanent physical disability the accident caused to his right hand affected his income in any manner. Therefore the tax documents proved nothing concerning the loss of future earnings issue.

23. The foregoing analysis of the evidence leads to the conclusion that the business in which the appellant was engaged and in proof of his income wherefrom he did not give any convincing evidence, was running without any

noticeable change even after he suffered 40% permanent disability the accident caused to his right hand. This means that the disability did not affect the appellant''s earnings at all. Hence we are unable to accept that the claims tribunal committed any error by not granting compensation for loss of future earnings.

24. As to Rs. 90,000 medical expenses claimed in the application and Rs. 25,000 transportation, etc. expenses claimed before us, the amounts could be and can be granted only by way of reimbursement of actuals; for this is the clear Raj Kumar principle.

25. According to the provisions of the statutory application form, the appellant was required to produce with his application the documents in support of his Rs. 90,000 medical expenses claim. He did not produce any document with the application; nor did he produce any document when he was testifying in the claims tribunal. In fact, he is claiming the two amounts without producing any document showing that he actually incurred the expenses.

26. In our opinion, in the absence of proof of the expenses, he was not entitled to any amount for medical expenses reimbursement and is not entitled to any amount for transportation, etc. expenses.

27. There can be no doubt that the injury caused by the accident happening due to rash and negligent driving of the offending vehicle was bound to cause the appellant physical and mental pain and suffering. The claims tribunal did not specify any non-pecuniary damages under this head, and before us the appellant has claimed Rs. 25,000. The appellant has also claimed Rs. 20,000 for loss of amenities and expectation of life.

28. Since we have found that the appellant was not entitled to damages for loss of future earnings, in view of Raj Kumar principle, he should get damages for loss of amenities (if the disability affected his marriage prospects) and loss of expectation of life (if the disability was likely to shorten his normal longevity). There is no evidence of these facts. We are, therefore, unable to hold that the appellant was entitled to damages for loss of amenities and loss of expectation of life.

29. The foregoing discussion leads to the conclusion that the appellant was entitled to non-pecuniary damages for physical and mental pain and suffering only. Before us Rs. 25,000 has been claimed for this.

30. The claims tribunal granted the appellant Rs. 50,000 compensation. Rs. 25,000 was paid as no fault liability compensation. Hence the insurance company was to pay only Rs. 25,000. In view of our findings the appellant has to refund Rs. 25,000. But we do not think it will be just and proper to ask him to refund the amount; for the insurance company accepted the award.

31. Since we have decided not to ask the appellant to refund the excess Rs. 25,000, it is not necessary to grant him any interest on Rs. 25,000 that was paid

as no fault liability compensation. Interest even if granted at 9% p.a., will not exceed the excess Rs. 25,000 he has been paid under the award.

32. For these reasons, we dismiss the appeal. No costs. Certified xerox.

