
(2018) 02 J&K CK 0038
In the Jammu And Kashmir High Court
Case No : 87 of 2017

Reliance General Insurance Co. Ltd.

APPELLANT

Vs

Nazir Ahmed Khan

RESPONDENT

Date of Decision : 06-02-2018

Acts Referred:

Citation : (2018) 02 J&K CK 0038

Hon'ble Judges : Sanjeev Kumar

Bench : Single Bench

Advocate : T.A.Malik, Hamida Taranum

Final Decision : Allowed

Judgement

1. The appellant-Insurance Company is aggrieved of the award dated 23.05.2017 passed by the Motor Accident Claims Tribunal, Srinagar in File

No.242/2010 titled Nazir Ahmad Khan v. Showkat Ahmad Lone and others.

2. The facts in brief which are relevant for the disposal of this appeal may be noticed. On 09.06.2010, a Tata Sumo bearing registration No.JK04-

8111 while going from Srinagar to Jammu met with an accident at Kanipora, in which the respondent No.1, i.e., the claimant who was travelling in

the aforesaid vehicle suffered grievous injuries. It is alleged that the accident took place due to rash and negligent driving of respondent No.2 who

was driving the vehicle at high speed and lost control and dashed the vehicle against a wall existing on the road side. It is alleged by the claimant

that as a result of this accident, his right arm sustained multiple fractures and he was operated in the Bone and Joint Hospital where the fractured

portion of the bone of his arm was fastened by platinum plates and screws. It is claimed that the fractured arm of the claimant remained plastered

for three months and even after removal of the plaster, he could not comfortably stretch or fold his arm. He, thus, filed a claim petition before the

Motor Accident Claims Tribunal, Srinagar (hereinafter referred to as "the Tribunal") seeking just and adequate compensation for the injuries

caused to him in the accident which took place due to the sheer negligent act of the driver of the offending vehicle. The learned Tribunal after

appreciating the evidence that was led in the claim petition, came to the conclusion that the accident in which the claimant suffered injuries to his

right arm was on account of rash and negligent driving by respondent No.2 and found the claimant entitled to a compensation of Rs.9,36,480/-

along with simple interest @ 6% per annum from the date of institution of the claim petition till its final liquidation.

3. The appellant-Company has assailed the award only on the ground that the compensation awarded is unjust and exorbitant and not in

consonance with the settled legal position.

4. I have heard learned counsel for the parties and perused the record.

5. On the basis of the evidence recorded in the claim petition, the Tribunal has found that the age of the injured at the time of accident was 45

years which also finds mention in the injury memo. It has also come on record that the claimant was a carpenter by profession. The Tribunal has

also taken the income of the claimant/injured as Rs.6,000/- per month, whereas the disability suffered by the injured had been certified and proved

to be 20% permanent disablement of right arm. In view of the age of the claimant, i.e., 45 years, the multiplier applicable as per the judgment in the

case of Sarla Verma and others v. Delhi Transport Corporation and another; (2009) 6 SCC 121 would be 13 which has been rightly applied by

the Tribunal. However, the Tribunal has calculated the loss of future earning at the rate of 68% of the established income instead of 20% which is

the actual percentage of disability of the right arm suffered by the injured/claimant. The Tribunal has also awarded Rs.2,00,000/- to the claimant on

account of medical expenses, Rs.50,000/- on account of physical and mental pain and Rs.50,000/- on account of loss of amenities etc.

6. Learned counsel for the appellant finds fault with the award of the Tribunal on the ground that the learned Tribunal has arbitrarily calculated the

loss of future earning @ 68%, whereas the total disability suffered by the

claimant is only 20% and that too of the right arm only. He has invited attention of this Court to the statement of Dr. Munir Farooq who in his deposition before the Tribunal has stated that the claimant is permanently disabled to the tune of 20% of physical permanent impairment of loss of function of right whole arm and that he could do manual job which does not involve over head activities, as due to the disability suffered by the claimant, over head activities are restricted.

7. On the other hand, learned counsel for respondent No.1/claimant has placed reliance on the judgment of the Supreme Court in the case of Sri

Nagarajappa v. The Divisional Manager, The Oriental Insurance Co. Ltd.; (2011) 13 SCC 323 in which the Supreme Court, inter alia, laid down

the principles to be followed in working out the actual loss of earning capacity of the injured suffering permanent disability. On the basis of the

aforesaid judgment, learned counsel for the respondent No.1 argued that in view of the fact that the claimant is a carpenter by profession, the

disability to the extent of 20% suffered by him permanently in his right arm would necessarily hamper his efficiency in working and, therefore, the

learned Tribunal was right in calculating the loss of future earning by calculating the same @ 68% and not 20% as certified by the doctor.

8. Regarding the amount awarded on account of medical expenses, it is argued by the learned counsel for the appellant that in the absence of any

record produced by the claimant, the Tribunal could not have arbitrarily awarded a sum of Rs.2,00,000/-, particularly when the claimant had been

treated in a Government Hospital and had not incurred any expenses. Learned counsel for the appellant also tried to find fault in the award with

regard to the amount awarded on account of loss of amenities and physical and mental pain.

9. Considered the submissions made by the learned counsel appearing for the parties.

10. The learned counsel for the appellant has not seriously disputed the age and income of the injured/claimant. He, however, has disputed the

manner in which the Tribunal calculated the loss of future earning by calculating it @ 68% of the permanent disability. True it is that the permanent

disability certified by the doctor and proved by him during trial of the claim petition is 20% of physical permanent impairment of loss of function of

right whole arm. He has further clarified that due to this disability only over head activities are restricted whereas other manual job which does not

involve over head activities can still be performed by the claimant without any hindrance.

11. The injured/claimant, as is established before the Tribunal, is a carpenter by profession and the activities of the carpenter may, to some extent,

involve over head activities, though nothing in this regard has come on record in the evidence. Impairment of loss of function of right whole arm and

restriction of over head activities would definitely impede the earning capacity of the claimant. Now the question is what would be the percentage

of impairment of his earning capacity. In the absence of material on record, it would be difficult for this Court to come to any definite conclusion. It

would also not serve any purpose, if the matter is remanded back to the Tribunal to take evidence on this aspect. Therefore, with a view to do

complete justice, this Court may have to enter a little bit in the realm of speculation. Given the nature of job which is required to be performed by a

carpenter, the permanent disablement which is suffered by the claimant would necessarily impede his earning capacity if not by 68% as held by the

Tribunal but not less than 40%.

12. Though, the claimant has not come up in appeal, yet it is duty of the Court to see that victims of motor vehicular accidents are paid just and

adequate compensation. Hon"ble the Supreme Court in paragraph -56 and 59 of its judgment in the case of National Insurance Company Ltd. v.

Pranay Sethi and others; 2017 SCJ 2700, held thus:-

56. In Santosh Devi, 2012 ACJ 1428 (SC), the Court has not accepted as a principle that a self-employed person remains on a fixed salary

throughout his life. It has taken note of the rise in the cost of living which affects everyone without making any distinction between the rich and the

poor. Emphasis has been laid on the extra efforts made by this category of persons to generate additional income. That apart, judicial notice has

been taken of the fact that the salaries of those who are employed in private sectors also with the passage of time increase manifold. In Rajesh's

case, the Court had added 15% in the case where the victim is between the age group of 15 to 60 years so as to make the compensation just,

equitable, fair and reasonable. This addition has been made in respect of self-

employed or engaged on fixed wages.

57.....

58.....

59. Having bestowed our anxious consideration, we are disposed to think when we accept the principle of standardization, there is really no

rationale not to apply the said principle to the self-employed or a person who is on a fixed 44 salary. To follow the doctrine of actual income at the

time of death and not to add any amount with regard to future prospects to the income for the purpose of determination of multiplicand would be

unjust. The determination of income while computing compensation has to include future prospects so that the method will come within the ambit

and sweep of just compensation as postulated under Section 168 of the Act. In case of a deceased who had held a permanent job with inbuilt

grant of annual increment, there is an acceptable certainty. But to state that the legal representatives of a deceased who was on a fixed salary

would not be entitled to the benefit of future prospects for the purpose of computation of compensation would be inapposite. It is because the

criterion of distinction between the two in that event would be certainty on the one hand and staticness on the other. One may perceive that the

comparative measure is certainty on the one hand and uncertainty on the other but such a perception is fallacious. It is because the price rise does

affect a self-employed person; and that apart there is always an incessant effort to enhance one's income for sustenance. The purchasing capacity

of a salaried person on permanent job when increases because of grant of increments and pay revision or for some other change in service

conditions, there is always a 45 competing attitude in the private sector to enhance the salary to get better efficiency from the employees. Similarly,

a person who is self-employed is bound to garner his resources and raise his charges/fees so that he can live with same facilities. To have the

perception that he is likely to remain static and his income to remain stagnant is contrary to the fundamental concept of human attitude which

always intends to live with dynamism and move and change with the time. Though it may seem appropriate that there cannot be certainty in

addition of future prospects to the existing income unlike in the case of a person having a permanent job, yet the said perception does not really

deserve acceptance. We are inclined to think that there can be some degree of difference as regards the percentage that is meant for or applied to in respect of the legal representatives who claim on behalf of the deceased who had a permanent job than a person who is self-employed or on a fixed salary. But not to apply the principle of standardization on the foundation of perceived lack of certainty would tantamount to remaining oblivious to the marrows of ground reality. And, therefore, degree-test is imperative. Unless the degree-test is applied and left to the parties to adduce evidence to establish, it would be unfair and inequitable. The degree-test has to have the inbuilt concept of percentage. Taking into consideration the cumulative factors, namely, passage of time, the changing society, escalation of price, the change in price index, the human attitude to follow a particular pattern of life, etc., an addition of 40% of the established income of the deceased towards future prospects and where the deceased was below 40 years an addition of 25% where the deceased was between the age of 40 to 50 years would be reasonable.

13. Following the principle with regard to future prospects laid down in Pranay Sethi's case (supra) and given the age of the claimant, i.e., 45

years, I am inclined to add 25% of the established income towards future prospects. Although the principle aforesaid was laid down in a death

case, yet there is no reason why this cannot be applied to a injury case. This is so because the income of the injured at the time of accident which is

taken into consideration for working out loss of his earning capacity due to permanent disablement would also have the prospects of increasing

with the passage of time. To the established income of Rs.6,000/- shall be added 25% as future prospects. It will come to Rs.7,500/- per month.

Loss of earning calculated @ 40% will, thus, come to Rs.3000/- per month. Thus, the annual loss of earning would come to Rs.36,000/- (3000 x

12). Applying the multiplier of 13, the total loss of future earning would come to (36,000 x 13) Rs. 4,68,000/-.

14. Regarding medical expenses, again this Court is confronted with a situation where there is no evidence brought on record by the claimant that

he actually spent Rs.2,00,000/- on medical expenses and at the same time it cannot be lost sight that given the nature of grievous injuries suffered

by the claimant, he must have incurred substantial amount of money on account of medicines etc. Again with a little bit of speculation and taking

into consideration the conspectus of circumstances of the case, the claimant/respondent No.1 is held entitled to a sum of Rs.1,00,000/- on account

of medical expenses. The amount awarded under other heads including the interest, however, would remain unchanged.

15. Consequently, the impugned award would stand modified to the following extent:-

Loss of future earning = Rs.4,68,000/-

Expenditure relating to treatment

Hospitalization, medicines, food,

Rs.1,00,000/-

Transportation and future medical expenses

Attendants.

On account of physical and mental pain

Rs.50,000/-

On account of loss of amenities and Loss of expectation of lifeRs.50,000/-

Total Rs.6,68,000/-

Consequently, the appeal is partially allowed. The Registry to release the amount of compensation in favour of the claimant/respondent No.1 after

proper identification and the excess amount, if any, be refunded to the appellant-Insurance Company.