

(2009) 09 CAL CK 0034
In the Calcutta High Court
Case No : F.M.A. 567 of 2003

Sri Tarak Nath Ray

APPELLANT

Vs

New India Assurance Company Limited

RESPONDENT

Date of Decision : 01-09-2009

Acts Referred:

Citation : (2009) 09 CAL CK 0034

Hon'ble Judges : Kalidas Mukherjee, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Mr. Krishanu Banik, for the Appellant; Soumendra Nath Ganguly, for the Respondent No. 1, Abhijeet Ganguly and Tanushree Dasgupta for the Respondent No. 2, for the Respondent

Final Decision : Dismissed

Judgement

Ashim Kumar Banerjee, J.—On August 28, 2000 at about 12:30 p.m. when the appellant was driving his scooter he was hit by an Andul bound Minibus from Howrah being W.B. 15/2490 because of rash and negligent driving of the driver of the Minibus. The appellant sustained serious injury all over his body. He was removed to a private nursing home where he was treated. He suffered great pain and agony. He claimed to be forty seven years old having business income of Rs. 1,21,795.00 per annum. He spent Rs. 15,000 for his medical treatment.

2. In the above backdrop the appellant filed a claimed petition, inter alia, praying for a sum of Rs. 3 lacks against the Minibus owner and the Insurance Company covering the risk. The owner did not contest the case. The Insurance Company filed a written statement denying the claim. The other Insurance Company covering the risk of the scooter also filed written statement denying its liability. The Tribunal, after considering the evidence and the rival pleadings and arguments made before it, observed that the claim was a speculative one. He did not submit any medical document to support his injury and his treatment at a private nursing home. The doctor who treated him did not come forward to give evidence. His income was also not proved as he miserably failed to disclose any

supportive document. His evidence was contradictory as he deposed that his scooter got involved in an accident of two Minibuses which was contrary to his claim petition. He also did not disclose any paper to support his age as claimed by him. He did not sustain any pecuniary loss as he continued to work in his work place. The claim was based upon the disability. Certificate issued by Dr. H.K. Mukherjee certifying him disabled to the extent of 30 per cent. The Tribunal observed that Dr. Mukherjee was not a specialised doctor in Orthopaedic. He did not treat the appellant. He did not advise better treatment, as it was not necessary.

3. In this backdrop, considering the matter taking a sum total of the evidence, the Tribunal awarded Rs. 31,000.00 as a lump sum compensation and asked both the Insurance Company to pay such compensation in equal share. The Tribunal also awarded interest at the rate of 9 per cent per annum from the date of the judgment until it was paid off.

4. Being aggrieved, the appellant preferred the instant appeal. Mr. Krishanu Banik, learned Counsel appearing for the appellant contended that once a qualified doctor certified that the claimant was disabled to the extent of 30 per cent, the Tribunal was not competent to disbelieve the same simply because he had no specialised decree or he did not treat the victim. Mr. Banik further contended that the Tribunal should have considered the evidence disclosed before it to support his income being the income tax return submitted by the appellant with the Income Tax Authority. According to Mr. Banik Tribunal fell in grave error in not relying upon the Income Tax return. On the issue of age Mr. Banik contended that the appellant's declaration of age in his Income Tax return should have been accepted by the Tribunal in absence of a positive rebuttal from the Insurance Company.

5. Opposing the appeal, learned Counsel, appearing for the Insurance Company contended that the appellant miserably failed to disclose any medical evidence to show his injury. The credibility of the doctor who certified the disability and deposed before the Tribunal was doubted by the Tribunal for the reasons recorded in the judgment and the appellate Court should not interfere with the same. He further contended that there had been no loss of income as would be apparent from the exhibits as the appellant earned more than the earlier year as would be apparent from the Income Tax return submitted prior and after the accident.

6. In support of their rival contentions the parties cited the following decisions:

i) Oriental Fire & General Insurance Company Limited v. Khudiram Dutt and Anr. reported in 1980 1 CLJ 215.

ii) North-West K.S.R.T.C. Rep. by its Chief Law Officer v. Mallikarjun Sanganabasappa Shettar and Anr. reported in 2001 1 ACC 301.

iii) Ratan Mali v. New India Assurance Company Limited and Anr. reported in

2004 3 TAC 691.

iv) Shivalinga Shivanagowda Patil and Others Vs. Erappa Basappa Bhavihala and Others, Page 333.

v) United India Insurance Company Limited v. Phurba Dorjay Lama and Anr. reported in 2004 1 WBLR 597.

vi) Barun Kumar Das v. New India Assurance Company Limited and Anr. reported in 2005 1 TAC 225.

vii) Md. Salauddin v. National Insurance Company Limited and Anr. reported in 2005 2 TAC 482.

viii) Suniti Mondal Vs. New India Assurance Co. Ltd. and Others, Page 272.

ix) The New India Assurance Company Limited v. Amitava Das and Anr. reported in 2007 WBLR 354.

x) Atanu Kumar Gosai v. National Insurance Company Limited and Ors. reported in 2007 1 TAC 164.

xi) Dharma Raj Singh Vs. National Insurance Company Limited and Another, Page 1240.

xii) Ashawar @ Ashawar Rahaman Mollah v. The Manager, Legal Cell, National Insurance Company Limited (FMA 238 2001)

xiii) Smt. Anamika Mondal v. United India Insurance Company Limited FMA 950 of 2006

xiv) Pravat Chandra Maity v. The Oriental Insurance Company Limited FMA 435 of 2004

xv) Sri Uday Kanty Pandey v. The New India Assurance Company Limited FMA 1729 of 2000

7. We have carefully perused the rival pleadings. The evidence laid before the Tribunal, both the documentary and oral and the judgment and order of the Tribunal.

8. At the outset, we observe that when the Income Tax return was disclosed before the Tribunal one of which was submitted prior to the date of the accident the Tribunal should not have discarded the same without any cogent reason. Similarly, the voluntary disclosure of the date of birth of the appellant in his Income Tax return should not have been disbelieved in absence of a definite assertion from the opposite party. We feel on these two counts, Tribunal went wrong.

9. We rather approach this problem going to the very root of the matter. The most fundamental question involved herein as to whether the appellant sustained any injury in the subject accident or not and, if so, whether he was disabled by

such accident permanently or not?

10. To decide this question let us first examine the police report. As per the letter of complaint made by one Rabindranath Jana, an eyewitness, two Minibuses being

11. W.B. No. 11 / 4020 and W.B. No. 15 / 2490 were proceeding from Howrah through Andul road and the one was trying to overtake the other. When a couple was alighting from bus No. 4020, bus No. 2490 hit the gentlemen from behind causing serious damage on his head and thereafter hit the house of Kadon Das adjacent to the road. The passengers of both the busses received minor injuries. The informant also received injury. He also informed the police that during the accident one of the buses also hit a scooter causing injury to the driver and the pillion rider. On the basis of such complaint the police registered a case. Altogether six persons were injured, one of whom was the appellant named in the said report. Both the drivers of the said two Minibuses were charge-sheeted as per the police report. Hence, from the police report it appears that the appellant was involved in the said accident causing him injury.

12. Let us now consider whether such injury disabled the claimant or not. On perusal of the evidence it appears that the appellant miserably failed to disclose any medical document which would support his case. His entire claim was based upon a certificate from Dr. H.K. Mukherjee, a common phenomena in motor accident cases and his oral evidence. As per the evidence the claimant was admitted in the hospital for about ten days. He did not name the nursing home where he was admitted. He claimed that his left leg was fractured. No X-ray report was submitted. No medical bill was disclosed. Hence, it would be difficult to come to a definite conclusion that he was permanently disabled by the said accident.

13. Let us now come to the evidence of the doctor. Doctor Mukherjee gave a certificate on June 24, 2002 approximately two years after the accident. He claimed that on clinical examination he found injury on the right wrist and as such he could not carry heavy weight. He certified that he had permanent partial disability to the extent of 30 per cent. While making oral deposition he supported his certificate. According to him, he found fracture over lower part of the shaft of the left radius bone etc. In cross-examination he deposed that he issued the certificate after examining medical papers and X-ray plates dated August 28, 2000. Pertinent to note, those papers were not disclosed before the Tribunal. He also deposed that he never treated the appellant. He did not advise for better treatment as it was not necessary. He also deposed that he did not advise the appellant to do any new X-ray as it was not necessary. This evidence, in our view, cannot be relied upon to hold that the appellant had permanent partial disability due to such accident. The unreported decision in the case of Ashawar @ Ashawar Rahaman Mollah (Supra) was relied upon by Mr. Banik. In the said case the claim was based upon a disability certificate issued by Dr. P.K. Mondal, another common phenomena in Motor Accident Cases. Dr. Mondal in the said case deposed that upon clinical examination of the claimant and his medical

records being X-ray plates, Citi Scan report etc. he certified permanent disability to the extent of 32 per cent. In this backdrop the Division Bench considered the Apex Court decision in the case of R.D. Hattangadi (Supra) and discarded the contention of the Insurance Company expressing doubt on the medical certificate. The Division Bench observed that once such certificate was admitted in evidence without any objection such belated plea could not be acceded to. The Division Bench also observed that apart from the actual financial loss the victim should get non-pecuniary damage on account of discomfort, inconvenience, mental stress and loss of expectation of life and awarded further compensation on that score. In the instant case even if we consider the certificate of Dr. H.K. Mukherjee and give full credence to the same it would, at best, carry an opinion of an expert without any documentary corroboration. Evidence of Dr. Mukherjee categorically suggests that he considered X-ray plates and other medical documents before giving the certificate. Those documents were concealed and the Tribunal was deprived of considering those medical evidence. Once the appellant deliberately concealed those documents and deprived the Tribunal from considering those documents, adverse inference must be drawn as against the appellant on that score.

14. Similarly, in the case of Smt. Anamika Mondal (Supra), non-pecuniary damage was awarded by another Division Bench relying on a disability certificate. We fully agree that if an accident is caused the victim not only sustains actual damage but also mental stress and agony which cannot be compensated by actual assessment in financial terms. We are rather on a more fundamental issue. To come within the four corners of the Motor Vehicles Act, 1988, to make a claim for compensation one must prove that he was involved in the accident caused by a motor vehicle covered under the insurance policy and such accident disabled him permanently either partial or full. Unless such hurdle is not crossed question of assessment of damage or awarding of pecuniary or non-pecuniary damage cannot arise.

15. In the instant case the Tribunal already awarded Rs. 31,000.00, taking a lenient view. We do not wish to make any comment on the same. We hold that the Tribunal correctly assessed this situation and dealt with the matter accurately which deserves no interference by the Court of appeal.

16. Appeal fails and is, hereby, dismissed.

17. There would be no order as to costs.

18. Urgent xerox certified copy would be given to the parties, if applied for.

19. I agree.