

(2006) 11 CAL CK 0045
In the Calcutta High Court
Case No : F.M.A. No. 474 of 2005

The New India Assurance Co. Ltd.

APPELLANT

Vs

Amitava Das and Another

RESPONDENT

Date of Decision : 27-11-2006

Acts Referred:

Motor Vehicles Act, 1988 — Section 100, 163A, 166, 170, 174
Workmens Compensation Act, 1923 — Section 2

Citation : (2007) ACJ 2058 : (2007) 2 CALLT 398

Hon'ble Judges : Sankar Prasad Mitra, J;Pratap Kumar Ray, J

Bench : Division Bench

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

Final Decision : Allowed

Judgement

Pratap Kumar Ray, J.—Heard the learned advocates appearing for the parties.

2. This appeal has been preferred by the Insurance Company assailing the Judgment and order passed on 21st June, 2004 by the learned Judge, Motor Accident Claims Tribunal, 11th Court, Alipore, District South 24-Parganas in M.A.C. Case No. 252 of 2003. The main grievance of the appellant herein who got leave u/s 170 of the Motor Vehicles Act, 1988 to contest the matter on all the points as available to the owner of the offending vehicle, is on the issue of wrong fixation of the compensation amount holding 25% physical disability is directly proportionate to identify the 25% loss of the income and also on the point of wrong application of multiplier u/s 163A of the Motor Vehicles Act.

3. The factual scenario of the matter in short is to this effect.

4. The claimant suffered injury due to the motor accident. Before accident the claimant was working in the post of Sergeant of the Traffic Department in the Calcutta Police. The claimant immediately got treatment in the outdoor department of S.S.K.M. Hospital, Calcutta wherein the expert Doctors opined

that he would be able to resume normal work after one week as it appears from the endorsement dated 14th April, 2003 in the outdoor ticket as issued by the Hospital authority. On 21st April, 2003 there was a further endorsement in the outdoor ticket which was exhibited before the learned Tribunal that the gentleman could resume normal duty. In the claim application it is the case of the claimant while claiming compensation to the tune of Rs. 5,00,000/- that the accident as happened on 15th March, 2003 has made him handicaps as he could not walk as normal human being and he had suffered strength in the left leg etc. In the deposition the claimant deposed that at the time of accident his monthly income was Rs. 9,000/- due to his service in the rank of Inspector in Calcutta Police and that due to the injury of left leg he had suffered permanent partial disability which practically had debarred him to lead a normal life. However, in the cross-examination the gentleman deposed that even after the accident, upon submitting a fit certificate issued by the appropriate authority, he joined in the duty of Sergeant and he was still working. One Dr. P.K. Mondal came to depose in favour of the claimant. It is his version that after long year of the accident he clinically examined the gentleman and found that though there was no bony injury in the left ankle, but the X-ray report of 9th April, 2003 which was done immediately after the accident had shown fracture injury in the head of the fibula, hence he opined that there was 25% permanent partial disability as the claimant patient had complained painful stiffness in left knee joint, pain on walking, squatting, inability to run, pain on climbing stairs and unable to drive motor bike. Though the claimant in his deposition categorically deposed that after he became, physically fit, he joined the service and was working as Police Sargent as usual with usual salary, allowance and benefits, but from the Medical certificate which was exhibited, issued by a private Doctor on 25th April, 2004 the claimant complained that he was unable to drive the motor bike and that he was suffering from stiffness of left knee joint, pain on walking, squatting, inability to run, pain on climbing stairs etc. The deposition of both the two witnesses, namely, the claimant himself and his Doctor are self contrary as it appears by mere scanning of the evidence on record which the learned Tribunal below did not notice. The Medical Officer who deposed in support of the claimant's case in the Cross-examination categorically deposed "I have found the patient as fit at present. I have found percentage of disability assessed by me is high and excessive." Despite the evidence on record to that effect which practically made the case of the claimant, so far his suffering from physical disability is concerned, as false, learned Tribunal accepted such physical disability as genuine one to cast a liability u/s 166 of the Motor Vehicles Act by holding that the driver of the offending vehicle was negligent in driving the vehicle. Learned Tribunal while considering the application u/s 166 of the Motor Vehicles Act to award compensation identified the physical disability of 25% as deposed by Dr. P.K. Mondal in favour of the claimant, though said Doctor deposed that the assessment of percentage of disability was high and excessive. Considering the income learned Tribunal below identified the loss of income and thereafter multiplied the same with the multiplier 18 following the structured formula u/s

163A of the said Act to quantify the compensation amount and by this process compensation amount on account of the loss of income was fixed to the extent of Rs. 4,50,000/-.

5. Learned Advocate for the appellant has vehemently argued that there was no finding of the learned Tribunal below to this effect that 25% physical disability practically made the loss of income to the extent of 25%. It is further contended that there was no proper finding at all so far as the loss of income is concerned and accordingly learned Tribunal was wrong to identify the compensation amount following the structured formula. It has been further submitted that structured formula had no applicability in the instant case.

6. Learned advocate appearing for the respondent/claimant, however, intended to satisfy this Court by relying some judgments that the loss of income should be construed in a hypothetical manner by holding hypothetical loss of income, but not the actual loss of income.

7. Having regard to the submission of the respective parties, now the issue is to be considered.

8. Before advertng to the main issue of the appeal, legal aspects of the different provisions are required to be looked into. There is no doubt that in the application u/s 166 of the Motor Vehicles Act to quantify the compensation, it is safer to follow the structured formula u/s 163A of the Motor Vehicles Act. But there is a rider in such proposition of law, namely, that in an application u/s 163A of the Motor Vehicles Act, it is required to prove the pecuniary loss as well as non-pecuniary loss and more particularly the pecuniary loss. On such proof only the structured formula could be applied on principle as structured formula having been constituted and worked out on taking into factors, namely, the pecuniary loss as well as non pecuniary loss. Besides such, there is also another issue to be considered as to whether Section 163A of the Motor Vehicles Act and its principle could be applied in adjudicating an application u/s 100 of the Motor Vehicles Act if it appears that the income of the injured person and/or the victim of the accident was above, Rs. 40,000/- per annum. Section 163A of the Motor Vehicles Act has been incorporated by the Legislature in the statute under a welfare scheme to provide benefit to the family of the victim and/or injured person falling within the income group to the extent of Rs. 40,000/- per annum. The Legislatures inserted Section 163A of the Motor Vehicles Act, 1988 for the purpose of granting relief to a specified section of the Society whose income range is limited to the extent of Rs. 40,000/- per annum. In Section 163A there is an exemption clause that the claimant need not to prove negligent and rash driving of the offending vehicle as cause of accident, only provide relief to the family members of the low income group. Statutory provision of Section 163A is limited to its applicability only in respect of the cases wherein the income of the victim or the income of the injured person due to any motor accident is limited to the extent of Rs. 40,000/- per annum. In the instant case it is an admitted position that the claimant before the accident and after the accident remained in

the employment and is drawing salary of Rs. 9,000/- per month working as Sergeant of Calcutta Police under the Traffic Department which reaches to the figure of Rs. 1,08,000/- per year which is much higher to figure Rs. 40,000/-. Having regard to the statutory provision of Section 163A and its limited application, this Court is of the view that the finding of the learned Tribunal below quantifying the compensation amount following the structured formula u/s 163A of the Motor Vehicles Act was contrary to the will of the legislatures. Furthermore it appears that though the learned Tribunal below applied Section 163A of the said Act and its structured formula but failed to notice about the relevant provision of the said statute, namely, note 5 of the Second Schedule to the structured formula which reads to this effect.

5. Disability in non-fatal accidents:

The following compensation shall be payable in case of disability to the victim arising out of non-fatal accidents:

Loss of income, if any, for actual period of disablement not exceeding fifty two weeks.

PLUS either of the following:

(a) In case of permanent total disablement the amount payable shall be arrived at by multiplying the annual loss of income by the Multiplier applicable to the age on the date of determining the compensation, or

(b) In case of permanent partial disablement such percentage of compensation which would have been payable in the case of permanent total disablement as specified under item (a) above.

Injuries deemed to result in Permanent Total Disablement/Permanent Partial Disablement and percentage of loss of earning capacity shall be as per Schedule I under Workmen's Compensation Act, 1923.

9. On a bare reading of the said Schedule it appears that in the case of permanent partial disablement, a percentage of compensation amount could be payable on the basis of quantification of annual loss of income multiplying with the multiplier as mentioned in structured formula. It is further provided in the statute that injuries deemed to result permanent partial disablement, percentage of the loss of earning capacity should be as per Schedule I of the Workmen's Compensation Act, 1923. On a bare reading of the said Schedule it appears that only Schedule I of the Workmen's Compensation Act has been incorporated in the statute, namely, under the Motor Vehicles Act which under the statutory interpretation is termed as incorporated statutes. Save and except Schedule I of the Workmen's Compensation Act, no other provision of the Workmen's Compensation Act has been incorporated in the Motor Vehicles Act. This Court is not unmindful of the fact that Schedule is part and parcel of the statute and full effect is to be given about interpretation of such Schedule. Reliance may be placed to the judgment passed in the case of Ujagar Prints Vs. Union of India

(UOI), and also in the case of Aphali Pharmaceuticals Ltd. Vs. State of Maharashtra and Others, wherein the Apex Court held "the schedule is as much a part of the statute and thus is added towards the end and their use is made to avoid encumbering the sections in the Statute with matters of excessive detail." Having regard to the said provision of law, this Court is of the view that the Second Schedule in terms of Section 163A of the Motor Vehicles Act is a part of the statute, namely, the Motor Vehicles Act, 1988 and the Workmen's Compensation Act, 1923 so far as its Schedule I is concerned, only was incorporated in the Motor Vehicles Act by treating the same a part of the said Schedule. Save and except that, no other provisions of the Workmen's Compensation Act was incorporated and/or inserted in the M.V. Act itself. On a bare reading of the said Schedule I of the Workmen's Compensation Act, it appears that legislatures at their wisdom identified the loss of earning capacity by mentioning the percentage on describing the respective injury of the workmen concerned. On a bare reading of the said Schedule I of the Workmen's Compensation Act, 1923 it appears that Part I of it relates to list of injuries deemed to result in permanent total disablement which are not applicable in this case. Part II of the said Schedule I provides list of injuries deemed to result in permanent partial disablement. Under this heading different categories of injuries are mentioned vis-a-vis about percentage of loss of earning capacity by mentioning the injuries, namely, the amputation of upper and lower limbs, injury of the eyes, injuries of the fingers, loss of fingers, loss of toes on the foot etc. Hence it appears that the injuries mentioned in Part II in the list of injuries deemed to result in permanent partial disablement under the Act, 1923 only relate to injury where there was a loss of any part of the body either upper limb, lower limb or of eyes, fingers or toes. Save and except those, no other injuries have been mentioned in this Schedule I. In the instant case it appears that admittedly there was no injuries of any parts of body either upper limbs or lower limbs or toes or foot or fingers etc. Hence we are of the view that Schedule I of the Workmen's Compensation Act, 1923 got no applicability to quantify the compensation amount in the present case. Furthermore on a bare reading of the said provision it appears that the annual loss of income is required to be identified in terms of Second Schedule u/s 163A of the Motor Vehicles Act, 1988. As such until and unless loss of income is identified, there is no question of applicability of Schedule I of the Workmen's Compensation Act, 1923. Hence, under this facts of the case, assessment of the loss of income could not be done under structured formula of Section 163A.

10. On a bare perusal of the Judgment under appeal it appears that the learned Tribunal below after identifying the monthly present income of the claimant and following the earlier income before the accident divided the same by percentage of 25% and came to a figure of the loss of income to that extent. There is no determination of the loss of income otherwise. Even there was no evidence before the learned Tribunal about such loss of income. The claimant did not admit about the loss of income anywhere but on the contrary the claimant

deposed categorically that after the accident he became fit and joined in the service with the proper medical fitness Certificate. From the Exhibit, namely, the outdoor ticket issued by S.S.K.M. Hospital on 21st April, 2003, it appears that the claimant became fit to join as Police Sergeant in the Police Department. It is quite known to us that a Police Sergeant requires a physical fitness in the true sense. Once the gentleman deposed that he became fit and joined the service, it presupposes that the gentleman became physically fit in all respects otherwise the employer, namely, the Traffic Department, Lalbazar Police Station, surely would not have allowed the claimant to maintain law and order situation in a big city, Calcutta. Having regard to such state of affairs, it appears that the learned Tribunal below quantified the compensation amount which is per se arbitrary and contrary to the statutory provision. In that view of the matter, the quantification of the compensation amount on account of loss of income as fixed to the extent of Rs. 4,50,000/- stands set aside and quashed. However, this Court is not finding any fault with reference to the award on medical expenses as mentioned therein.

11. Before parting with the matter, we have to analyse the Judgments as referred by the learned Advocate for the respondent. Mr. Banik, learned Advocate, has referred to the Judgment of Division Bench of the Calcutta High Court passed in the case of Calcutta Licensed Measurers Bengal Chamber of Commerce Vs. Md. Hossain, . On a bare reading of the said Judgment it appears that this was a case filed by the workman. In paragraph 11 of the said Judgment the Court held that the loss of physical capacity is not co-extensive with the loss of earning capacity. In paragraph 13 of said report, the Court relying upon the Judgment passed by Chakrabarti, Chief Justice in the case of Kali Das Ghosal Vs. S.K. Mondal, , held that the determination of loss of income and loss of earning capacity depends upon factor of working disabilities. The relevant portion of the said report is quoted hereinbelow:

It has to be determined by taking into account the diminution or destruction of physical capacity as disclosed by the medical evidence and then it is to be seen to what extent such diminution or destruction could reasonably be taken to have disabled the affected workmen from performing the duties which a workman of his class ordinarily performs. Therefore, medical evidence, as to physical capacity or diminution of physical capacity is an important factor in the assessment of loss of earning capacity.

12. From the aforesaid findings and observation it appears that the determination of loss of earning capacity is dependent upon the factors, namely, diminution or destruction of the physical capacity and its effect on performing the duties which ordinarily a workman performs. Considering that Judgment as relied upon, this Court is of the view that this Judgment practically supports the case of the appellant that there is no proper determination lawfully made about loss of income, but the learned Tribunal was hasty to identify the loss of income as 25% on basis of 25% physical disability as certified by the Doctor, one Dr. Mondal who

himself deposed otherwise that such assessment was highly excessive.

13. Mr. Banik, learned advocate, further has relied upon the Judgment of Calcutta High Court passed in the case of United India Insurance Company Ltd. v. Phura Dorjay Lama and Anr. reported in (2004) 1 WBLR (Cal) 597 (DB). We have no doubt about the principle of law as settled in the said Judgment because for adjudicating the compensation cases, hypothetical income and hypothetical employment are required to be considered in many cases where there is no cogent evidence and materials on record about such factors itself, namely, the real loss of income and the real loss of employment etc. This Judgment is not applicable as it was under Workmen's Compensation Act and factually therein the claimant deposed that after the accident he was unable to perform the heavy work which was being previously done by him and considering the said fact that the workman was dependent only on manual labour, the Court considered that issue for determining loss of earning capacity. Furthermore under the Workmen's Compensation Act, partial disability has been identified which have reduced the earning capacity of workman. As already discussed, the Workmen's Compensation Act, 1923 was not incorporated in its totality in the Motor Vehicles Act, 1988, but only Schedule I of the said Act, 1923 has been incorporated and the definition of partial disablement as appearing in Section 2(g) of the said Act, 1923, cannot be applied in the case of motor accident claim case controlled and guided by the Motor Vehicles Act, 1988, where u/s 163A of the Motor Vehicles Act, the legislature categorically has used the word "loss of income" and not the "loss of earning capacity".

14. Further Mr. Banik, learned Advocate, has referred to the Judgment passed in the case of Executive Engineer, Nawarangpur Electrical Division Vs. Istapan Gonda (and after him) Krupamani Gonda and Others, . The same is not applicable in the instant case in view of the fact as already discussed. We have also no doubt about the principle as enunciated therein because loss of earning capacity should be identified on the basis of the hypothetical employment. In the instant case there is no scope to enter into that arena. There is no evidence at all to that effect.

15. Mr. Banik, learned advocate, has further referred to the Judgment passed in the case of Union of India (UOI) Vs. Oswald Anthony Athayde and Others, . This Judgment has also no applicability in the instant case. In the aforesaid case, consideration of the issue was the future prospect of the injured who suffered an accident and as a resultant effect became permanently disabled and considering the fact claimant, a qualified Chartered Accountant, was working as Accounts Manager, the Court held that on aspect of future prospect he should be awarded compensation by identifying the loss of earning capacity. But in the instant case there is no evidence on record that the claimant would suffer to avail in future the promotional avenue due to such accident or due to such physical disability. Furthermore there is no evidence that the claimant could obtain a more better job in other organisation, had there been no suffering from such accident. In

view of absence of material evidence on record there is no question of applicability of this Judgment.

16. Mr. Banik, learned advocate, has also referred to the Judgment passed in the case of A.P.S.R.T.C. Managing Director, Hyderabad v. S. Dhanamjaya Reddy reported in 2002(1) T.A.C. 417 (A.P.). In this Judgment the Court considered future promotional chance on the basis of the material evidence on record. In the instant case, as already discussed, there is no such material evidence to that effect. Furthermore, as per submission made by the learned Advocate for the appellant, in the working place of the claimant also there is no further promotional avenue of the claimant from the post of Sergeant because a police Sergeant retires as Sergeant. Hence there is also no factual foundation to apply this Judgment as referred to.

17. Mr. Banik, learned advocate, has referred to the Judgment passed in the case of Govind Kana Vs. Kana Tida Mokaria, . This Judgment is not applicable in the instant case as in the said case the medical certificate of disability was accepted by the parties. Here in the instant case the Medical Officer who issued the certificate, himself deposed that the physical disability assessment was done excessively and it was not a right assessment. Hence there is no scope to apply this Judgment as referred to.

18. Mr. Banik, learned advocate, after this Judgment is delivered, has prayed for remanding the matter back for fresh adjudication about loss of earning capacity. We cannot agree with such prayer because there is no material evidence to that effect on the part of the claimant that he suffered any loss of earning capacity on the basis of the hypothetical income and hypothetical employment. Had it been a case that due to the injury as sustained in the accident he had suffered the scope of future employment in any other organisation or due to such injury, ability of earning was reduced to certain extent, surely we would have referred the issue on "loss of earning capacity" considering the hypothetical income and hypothetical employment in terms of the Judgment as referred to by Mr. Banik.

19. In that view having regard to the findings and observation, this appeal is accordingly allowed. Impugned order and award is set aside and quashed, except the award on medical expenses.

20. From the records it appears that already Rs. 2,00,000/- has been withdrawn by the claimant, hence he is directed to return the same to the Insurance Company within two months from this date and failing which the Insurance Company shall be at liberty to realise the money by filing necessary application before the learned Tribunal u/s 174 of the Motor Vehicles Act, 1988.

21. Since balance amount of award is already lying with the High Court Registry, Registrar General is directed to refund the amount to the Insurance Company with the interest thereon as, accrued.

22. Failure to deposit Rs. 2,00,000/- within the time stipulated, interest at the

rate of 12% the added on that amount.

Let the Lower Court Records be sent back forthwith by Special Messenger at the cost of the appellant and such cost be deposited within a week from date.

Urgent xerox certified copy of this order, if applied for be given.

Sankar Prasad Mitra, J.

23. I agree.