

(2014) 11 DEL CK 0364
In the Delhi High Court
Case No : MAC App. 691/2010

United India Insurance Co. Ltd.

APPELLANT

Vs

Amit and Others

RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 12 Rule 8

Citation : (2014) 11 DEL CK 0364

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : K.L. Nandwani, Advocates for the Appellant; Manish Batra, Advocates for the Respondent

Judgement

Jayant Nath, J.—The present appeal is filed by the appellant Insurance Company to impugn the award dated 18.08.2010.

2. The brief facts which led to filing of claim petition and the present appeal are that respondent No. 1 was crossing the road near ISBT when he was hit by an offending truck driven by respondent No. 3. The accident resulted in grievous injuries to respondent No. 1 and he suffered permanent disability of 85% of the right lower limb. His right leg above the thigh was amputated.

3. Based on the evidence on record the Tribunal concluded that the accident took place due to the rash and negligent driving of respondent No. 3.

4. On compensation the Tribunal awarded a total compensation of Rs. 25,52,536/-; Rs. 8,16,200/- was awarded for medical expenses; Rs. 50,000/- was awarded for diet, conveyance and attendant charges; Rs. 13,38,336/- was awarded for loss of income; Rs. 1,50,000/- was awarded for pain and suffering; Rs. 1,50,000/- was awarded for loss of amenities of life and Rs. 50,000/- was awarded for disfigurement.

5. Learned counsel appearing for the appellant has vehemently argued that the compensation awarded is on the higher side. He firstly submits that there was

contributory negligence on the part of respondent No. 1. He submits that the roads in front of ISBT are extremely busy. In addition there is a pedestrian over bridge which could have been taken by respondent No. 1 instead of negligently trying to cross the road. He states that while crossing such a busy road, respondent No. 1 should have been careful and seen the traffic properly. Learned counsel for the appellant relies upon the judgment of the Madhya Pradesh High Court in the case of *Anya v. University of Oxford*, 2001 EWCA Civ 405 (CA) to contend that passengers have to be more careful while crossing the road.

6. He secondly submits that the Tribunal has wrongly assessed the functional disability at 100% after noting that respondent No. 1 had suffered 85% permanent disability of the right limb. He further submits that no doctor was examined to show as to how the functional disability was assessed at. He submits that in the facts and circumstances of this case the functional disability should be around 45% only. His next submission is that respondent No. 1 was working as a security guard and that the Tribunal has assessed the income of respondent No. 1 for purposes of computing loss of income due to disability as per minimum wages applicable for a skilled workman whereas he submits that a security guard is an unskilled workman and the Tribunal should have used the minimum wages for an unskilled workman. He next submits that the appellant Insurance Company would not be liable as the vehicle was sold to a third party without prior permission of the appellant. Further it is submitted that despite legal notice under Order XII Rule 8 CPC having been served on the owner of the vehicle they have failed to produce the permit of the vehicle. Hence he submits that there is clear breach of insurance policy and the appellant Insurance Company is not liable.

7. I will first deal with the issue of contributory negligence argued by the learned counsel for the appellant. Reference may be had to the evidence on record i.e. the evidence of P.W.-1, the claimant, an eye witness, and the site plan.

8. P.W.-1, the claimant in his affidavit by way of evidence states that he was crossing the road and the moment he moved his first step ahead the offending vehicle driven by respondent No. 3 in a rash and negligent manner came from the side of Tis Hazari Court and knocked him down. In cross-examination by the counsel for the appellant Insurance Company he has clarified that he was standing on the road and not crossing it. He was standing on the pavement which is about a half a feet higher than the road. He admits that he did not see the offending truck before it hit him. He further confirms that the driver of the offending truck ran away from the spot leaving behind the truck.

9. The site plan prepared by the police is on record. The description is not very clear but it appears to show that respondent No. 1, P.W.-1 was crossing the road when the accident took place. The site plain does not show any pedestrian bridge in the area.

10. The chargesheet has been filed against respondent No. 3 by the Police. The

appellant Insurance Company led no evidence to show how the accident took place. Respondent No. 3 the driver of the offending vehicle did not enter the witness box.

11. This court in the case of *Anya v. University of Oxford*, 2001 EWCA Civ 405 (CA) held that where a driver does not enter the witness box, an adverse inference can be drawn against him.

12. Further this court in the case of *Anya v. University of Oxford*, 2001 EWCA Civ 405 (CA) held that where a chargesheet is filed against the driver, a tribunal can relying upon the charge sheet, FIR and other accompanying documents reach to a conclusion about the rash and negligent driving of the offending vehicle.

13. In my opinion the evidence of P.W.-1 is quite clear. Joint reading of his affidavit and cross-examination indicates that he was just about to leave the footpath when the accident took place. Even otherwise, respondent No. 3 was driving a heavy vehicle at a crowded place. It was his duty to be more careful and vigilant.

14. The reliance of the learned counsel for the appellant on the judgment of *Mangilal v. M.P.S.R.T.C. & Ors.* (supra) is misplaced. That was a case where on facts the Tribunal had come to a conclusion that the claimant has gone to the right side of the road for making some enquiries from AW-3 Ambaram and thereafter he tried to go to him from the left side without caring as to whether any motor bus is coming from behind and the accident took place at that stage. It was into those facts that a finding was recorded about the contributory negligence of the claimant. Hence, there is no merit in the first contention of the learned counsel for the appellant.

15. The next contention is regarding functional disability. The Tribunal noted that respondent No. 1 had suffered 85% disability due to amputation of the right leg above thigh region. The Tribunal noted the he was a sports person and wrestler and assessed the functional disability at 100% holding that respondent No. 1's ability to work as a Nakerdar is lost though he may be able to work in other fields.

16. The Supreme Court in the case of *Raj Kumar v. Ajay Kumar*, (supra) culled out the methodology for determining functional disability in paragraph 14 held as follows:--

"14. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and

functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of "loss of future earnings", if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

17. P.W.-1 in his affidavit has said that on account of the accident he has been completely handicapped and disabled for the rest of his life. He points out that he was a born sportsman and a state level professional wrestler. He was 18 and had recently been hired by a Toll-Tax collection agency. He states that he was also working with Guru Badri Vyayaamshala, Subzi Mandi, Clock Tower Chowk where he was earning "Guru-Dakshina". He further states that now he is on the mercy of others for even performing smallest activities and other routine acts.

18. The amputation certificate issued by the Chief Medical Officer, Baghpat reads as follows:--

"On examination it was found that he is a case of post traumatic amputation right lower limb through upper 1/3 level thigh and he comes in the category of physically handicapped.

He has got 85% (eighty five percent) disability."

19. Respondent No. 1 in his evidence on the effect of disability on his functioning

in the job etc. is very sketchy. Though he states that he was a professional wrestler earning large amount from wrestling bouts, gurudakshina and endorsement but no proof of these earnings whatsoever has been filed. Even P.W.-3 Hemant Likwar, Manager with M/s. P.K. Hospitality Services Pvt. Ltd. who is said to be the employer of respondent No. 1 gives no details in his evidence regarding the nature of duty performed by the claimant. Keeping in view the sketchy evidence placed on record by respondent No. 1. I reduce the assessed functional disability from 100% to 60%. Loss of income on account of disability would hence be Rs. 8,41,882/- (Rs. 6,196/- x12 x18 x60%).

20. The other submission of the learned counsel for the appellant was regarding the assessment of the income of respondent No. 1 as a skilled workman. It is submitted that the Tribunal has assessed the income based on minimum wages for a skilled workman whereas respondent No. 1 was working as a chowkidar and a chowkidar is described in Minimum Wages Act as an unskilled workman. Hence, it is submitted that the wages should be assessed based on the salary of an unskilled workman.

21. This submission is completely without any merit. The Tribunal has assessed the income of respondent No. 1 based on minimum wages for a matriculate and not for a skilled workman. The matriculate certificate of respondent No. 1 is on record filed by respondent No. 1 which is exhibited P.W.-1/T. This certificate is issued by Baghpat Board of High School and Intermediate Education, U.P. In the light of the above, there can be no reason to differ with the findings recorded by the Tribunal assessing the income based on the salary for matriculate.

22. The total compensation now payable would be as follows:--

23. The next contention of the learned counsel is regarding the liability of the appellant. As far as the sale of the vehicle is concerned, the Tribunal has noted that respondent No. 2 is the insured, respondent No. 4 is the owner of the offending vehicle indicating that the insured and the owner are different. However, from the award it appears that this point was not argued before the Tribunal. Even the sole witness for the appellant R4W1 does not deal with this issue.

24. On the issue of permit, a perusal of the award shows that the Tribunal has already concluded that the owner of the offending vehicle was not possessing any valid or effective permit. However, the Tribunal noted that the established proposition of law is that the appellant Company has to show a direct relationship between the alleged violation and accident in question. As the appellant failed to show the same, the Tribunal disallowed the claim of the appellant on this count.

25. Respondents No. 2 to 4 have not appeared before the Tribunal or before this court and produced the necessary permit. Accordingly the conclusion would be that the offending vehicle did not have a valid permit. Hence, there is enough evidence on record to show that the said respondents are guilty of the breach of the terms and conditions of the Insurance Policy.

26. However, as per the interim orders of this court dated 21.10.2010 the appellant was directed to deposited the entire award amount with up to date interest. Vide order dated 28.01.2011, 50% of the award amount was directed to be released to the claimant.

27. In the light of the above, especially keeping in view the fact that the appellant do not dispute the insurance policy, I grant recovery rights against respondents No. 2 to 4.

28. All interim orders including interim order dated 28.01.2011 stand vacated.

29. The balance amount as directed by this order along with accumulated proportionate interest be released to respondent No. 1. The balance amount with accumulated proportionate interest be refunded to the appellant.

30. Statutory amount, if any, be refunded to the appellant.

31. The appeal stands disposed of.