
(2015) 08 CAL CK 0008
In the Calcutta High Court
Case No : F.M.A. 172 of 2005

United India Insurance Co. Ltd.

APPELLANT

Vs

Binod Singh and Others

RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A, 173
Penal Code, 1860 (IPC) — Section 279, 339

Citation : (2016) 1 ACC 349

Hon'ble Judges : Rajiv Sharma, J;Shivakant Prasad, J

Bench : Division Bench

Advocate : Kamal Krishna Das, for the Appellant; Krishanu Banik, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Shivakant Prasad, J—The United India Insurance Co. Ltd. preferred this appeal under Section 173 M.V. Act, 1988 challenging the judgement impugned and award passed on 25th February, 2003, by Learned Judge M.A.C. Tribunal, XI Court, 24 Parganas (S), Alipore in MAC case No. 573 of 1997, on the grounds, inter-alia, that the Learned Tribunal has wrongly directed payment of interest on default clause as per the provision of the Motor Vehicles Act, 1988 and rules framed there under and that the award has not been assessed in terms of the provision of the Workmen's Compensation Act, 1923, read with provisions of M.V. Act, 1988.

2. Brief facts leading to the instant appeal is that on 22.06.1997 at about 3.00 P.M. respondent met an accident by a taxi and suffered severe injuries including fracture in his right hand resulting in permanent disability for which he could not lead his normal life. Over the said incident Barasat P.S. Case No. 201 dated 22.06.1997 under Sections 279/339 Indian Penal Code was started against the driver of the offending taxi. Accordingly, respondent as petitioner before the claim Tribunal prayed for compensation amounting to Rupees Five Lacks Forty

thousand (Rs. 5,40,000/-) from the Opposite Parties viz. the owner of the offending vehicle O.P. No. 1 and the Insurer United India Insurance Limited Company O.P. No. 2.

3. The appellant as Opposite Party No. 2 contested the claim case by filing written statement denying and disputing the fact of injury with permanent disablement allegedly suffered by the respondent and also disputed the involvement of vehicle in the accident and accordingly the opposite party No.-2 prayed for dismissal of the case.

4. After framing of issues, the Ld. Claim Tribunal allowed the claim application on contest against the Opposite Party No. 2 the appellant herein and ex-parte against the Opposite Party No. 1 awarding an amount of Rupees Four Lacks Thirty-five thousand (Rs. 4,35,000/-) as compensation directing the opposite party No. 1 by issue of an account payee cheque in favour of the claimant within two months from the date of the order in default the amount of compensation shall carry an interest at the rate of nine per cent from the date of filing the application i.e. on 07.11.1997 till payment.

5. Learned Counsel for the appellant has mainly challenged the impugned judgment on the score that the Learned Tribunal while awarding the compensation considered the evidence of Dr. A. Chowdhury P.W.-2 who after examining the petitioner/respondent, clinically with the history of road traffic accident on 22.06.1997 concluded that the respondent had suffered permanent disability to the extent of 60% on the basis of the certificate (Exhibit-6) issued by the said doctor in favour of the claimant and considering his age being 27 years old at the time of accident, compensation was computed on the basis of multiplier 18 as per the Schedule-II of Section 163A of M.V. Act by further applying the extent of disability to 60%.

6. The Learned Counsel for the appellant has invited our attention to out-door ticket (Exhibit-2) with the history of R.T.A. involving the vehicle No. WMT-5252 which shows that the claimant had suffered fracture injury in right hand for which he was admitted under Doctor A. Bandopadhyay on 23.06.1997 and was discharged on 24.07.1997 as per (Exhibit-3) wherefrom it is revealed that the diagnosis relates to fracture of bone in right forearm and the treatment and operation undertaken was plating and bone grafting for arm which improved after treatment and the patient was advised to attend O.P.D. after ten days. Now, it is pointed out that Dr. Amarendra Chowdhury an M.B.B.S. (Cal) F.R.C.S. has no authority to issue such a certificate relating to permanent partial disablement (Exhibit-2) to the extent of sixty per cent issued on 05.04.2002 who is not an Orthopaedic Surgeon. He simply examined documents clinically with the following observations-

1. There is angular deformity of the right forearm with shortening about 1/1/2 inches with one depressed scar with keloid on the lateral aspect of the right forearm measuring about 6 inches long and another scar on the said forearm at

the posterior aspect measuring about 7 inches long.

2. The movement of the right elbow joint were restricted to 90"" flexion and 25"" short of full extension with loss of pronation and supination.
3. Demonstrable loss of movement of hand to mouth as in eating with his right hand.
4. Weakness of the muscles of the arm, forearm and the wrist resulting in further restriction of the movements of the right hand as in gripping.
5. There is star shaped depressed scar at the front of the forehead measuring about 1 and 2 inches.

Dr. Chaudhury opined that on perusal of medical documents, X-ray films he gave report on clinical examination to this effect that that the person suffered partial permanent disability to the extent of 60% (sixty per cent) due to partial permanent loss of upper extremity specially wrist, forearm and elbow joint of right side resulting loss of working capacity.

7. Learned Counsel of the appellant submitted that the injured claimant/respondent did not suffer any pecuniary loss of income. Reference to a case of The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another, (2003) ACJ 1775 : AIR 2003 SC 4172 : (2005) 139 PLR 6 : (2003) 6 SCALE 16 : (2003) 7 SCC 197 : (2003) 2 SCR 14 Supp : (2004) 1 UJ 44 : (2003) AIRSCW 3797 : (2003) 5 Supreme 266 : (2003) 8 Supreme 279 is made wherein the Hon"ble Apex Court held thus--

"The damages for vehicular accidents are in the nature of compensation in money for loss of any kind caused to any person. The main principles of law on compensation for injuries were worked out in the 19th century, where railway accidents were becoming common and all actions were tried by the jury. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance with the injury. An injury may bring about many consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The normal expectation of life is impaired. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by

precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just", a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness."

8. It is also contended on behalf of the appellant that Dr. Chaudhury did not treat the injured claimant/respondent for the injury he sustained. He only issued the certificate showing percentage of permanent partial disablement which should not have been accepted by the learned Tribunal and therefore, the award of compensation on account of future loss of earnings ought not have been given.

9. To fortify his argument reference has also been made to a decision of United India Insurance Company Limited Vs. D.C. Rajanna and Another, (2001) 1 ACC 673 : (2001) ACJ 425 : (2000) ILR (Kar) 3443 : (2000) 6 KarLJ 638 : (2000) 3 KCCR 2343 wherein it has been held thus--

"It has to be borne in mind, while awarding compensation for future loss of earnings, there must be evidence to show that as a result of injury, the income was reduced or there was loss of earnings or he was removed from service on account of disability or he is incapable of doing any work."

10. Learned counsel for the appellant also relied on the case of The New India Assurance Co. Ltd. Vs. Sri Sankar Biswas Barman & Ors. FMA 185 of 2006 decided on 05.8.2005 by this court which in our opinion is distinguishable on the ground that admittedly the injured claimant who was Deputy Manager, Legal Cell of BSNL, got promotion with increase in his salary.

11. The learned Counsel for the respondent on the other hand submitted that the multiplier 18 (eighteen) has been correctly applied by the learned Tribunal considering the age of the claimant and the income of the claimant at the time of accident as provided in second schedule of Section 163A of M.V. Act. and relied upon the Hon"ble Apex Court decision of A.P.S.R.T.C. rep. by its Chief Law Officer Vs. M. Pentaiah Chary, (2007) ACJ 2468 : AIR 2007 SC 3141 : (2007) 10 JT 491 : (2007) 10 SCALE 495 : (2007) 13 SCC 625 : (2007) 9 SCR 607 : (2007) AIRSCW 5687 : (2007) 6 Supreme 237 , wherein it has been observed at Paragraph 5 that application of multiplier in a structural form was provided in the second Schedule appended to the Motor Vehicles Act benefit of applying such a structured formula was considered by the Hon"ble Court in General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Mrs. Susamma Thomas and others, (1994) ACJ 1 : AIR 1994 SC 1631 : (1994) 107 PLR 1 : (1993) 4 SCALE 643 : (1994) 2 SCC 176 .

12. In respectful consideration of the cited decision, we observe that the ratio of decision is not well nigh within the facts and circumstances of the instant case inasmuch as claimant in the cited case, while riding two wheelers met with the

accident having been hit by a bus belonging to appellant and he became permanently disabled and lost his earning capacity. But in this case, the claimant has sustained simply fracture injury on his right hand and with the passage of time the injury must have been healed up. It would not be out of the context to mention here that in order to ascertain the extent of injury sustained by the claimant/respondent, we proposed during hearing of this case that the claimant be produced before Medical Board but, the learned Counsel for the respondent/claimant declined to accept our proposal. In the circumstances we are of the considered view that the certificate issued by Dr. A. Chowdhury as to the permanent partial disability to the extent of sixty percent cannot be accepted by us. There is no evidence suggesting that the claimant/respondent has become dis-bodied and infirm and unable to pursue any job for his livelihood. The cited decision, therefore, is not apposite to the facts and circumstances of the instant case because the respondent/claimant has not suffered permanent disablement rather he suffered fracture injury.

13. Be that as it may, we are of the view that the claimant would be entitled to compensation under the head non-pecuniary loss in view of the guidelines of the Hon"ble Apex Court in decision of R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, (1995) 1 ACC 281 : (1995) ACJ 366 : AIR 1995 SC 755 : (1995) 1 JT 304 : (1995) 110 PLR 298 : (1995) 1 SCALE 79 : (1995) 1 SCC 551 : (1995) 1 SCR 75 : (1995) 1 UJ 407 . relevant guidelines given in the cited decision is reproduced as under--

"While fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages and special damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned; they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

14. Learned counsel of the claimant/respondent reiterated that due to the said accident, he received injuries on his person, the learned Tribunal has rightly awarded the compensation by application of the multiplier 18 (eighteen) considering the disablement certificate issued by Dr. A. Chowdhury to which the appellant did not raise any objection. Learned counsel fortified his argument

referring to decision of D. Sampath Vs. United India Insurance Company Ltd. and Another, (2011) ACJ 2466 : AIR 2012 SC 544 : (2011) 4 RCR(Civil) 550 : (2011) 10 SCALE 429 : (2011) 11 SCR 420 : (2011) 4 TAC 459 : (2012) AIRSCW 287 , wherein it has been clearly observed that the Court has to accept the disability certificate produced by the claimant. The Court has the discretion to accept either totally or partially or reject the certificate so produced and marked in the trial but that, can be done only by assigning cogent and acceptable reasons. As we have considered the conduct of the claimant/respondent that he declined to undergo assessment of his disability before Medical Board and further hold that Dr. A. Chowdhury had no authority to issue disablement certificate because he neither treated the patient nor was a member of the Medical Board, Ergo, we reject the certificate issued by Dr. A. Chowdhury because the same can be issued only by a duly constituted Medical Board under the provision of The Persons with Disabilities (Equal opportunities, Protection of rights and Full Participation) Act 1995.

The learned Counsel for the appellant has relied on a decision of the Hon''ble Supreme Court in case of Raj Kumar Vs. Ajay Kumar and Another, (2011) ACJ 1 : (2011) 2 RCR(Civil) 101 : (2010) 12 SCALE 265 : (2011) 1 SCC 343 : (2011) 1 SCC(Cri) 1161 : (2011) 1 TAC 785 wherein the principles have been laid down in Paragraph 19 in regard to assessment of compensation in respect of injury claim cases and the Hon''ble Apex Court has enshrined the following principle:

"(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put in differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability.)

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

15. The aforesaid assessment of compensation has not been made in accordance with the decision of the Hon''ble Supreme Court in the case of Raj Kumar Vs. Ajay Kumar and Another, (2011) ACJ 1 : (2011) 2 RCR(Civil) 101 : (2010) 12 SCALE 265 : (2011) 1 SCC 343 : (2011) 1 SCC(Cri) 1161 : (2011) 1 TAC 785 cited above. It is submitted that learned tribunal has passed an award of Rs.

4,35,000/- in favour of the claimant on account of injury sustained by him while going to Calcutta by driving his taxi, and all on a sudden the said taxi dashed against a tree. No other vehicle was involved in the accident. So he was himself negligent in driving the taxi.

16. Test to determine in assessing compensation in cases of permanent partial disablement, the Court has got to see the fact as to whether the earning capacity of the workman has been reduced in every employment which he was capable of undertaking at the time of the accident and not merely the particular employment in which he was engaged at the time of the accident resulting in the disablement. Hence, where the claimant a taxi driver who suffered fracture injury in his right hand cannot be held to be a disabled person from performing his duties of a driver; the court should have considered as to whether he has been incapacitated from undertaking any other employment.

17. In the case in hand there is no evidence to show that there has been future loss of earnings as a result of injury and the claimant was incapacitated from any other employment. There is no evidence to show pecuniary loss. However, we are of the view that the claimant must have incurred medical expenses on account of his treatment. Besides, he may be entitled to non pecuniary damage on the heads viz, (i) damages for mental and physical shock, pain and suffering, already suffered during his hospitalisation; (ii) damages for the loss of amenities of life such as, on account of injury the claimant may not be able to lift and carry heavy weight with the help of his right hand resulting in inconvenience, hardship, discomfort, disappointment, frustration and mental stress.

18. We, accordingly, determine compensation of Rs. 1,00,000/- on account of mental and physical shock, pain and suffering; Rs. 50,000/- for inconvenience, hardship, discomfort, disappointment, frustration and mental stress and further sum of Rs. 50,000/- on account of treatment undergone and for future treatment under the heading pecuniary damages. Thus, the claimant/respondent shall be entitled to a sum of Rs. 2 lacs as a compensation award together with interest @ 9% thereon from the date of filing of the claim petition.

19. The claimant/respondent has already received the entire amount of Rs. 4,35,000/- as awarded by learned Claim Tribunal by way of an order of attachment of the Bank Account of the Appellant. A sum of Rs. 25,000/- deposited by the appellant in terms of section 173 of the M.V. Act 1988 lying with the Registrar General, High Court be refunded to the Appellant/Insurance Co.

20. Therefore, the balance amount shall be refunded by the respondent to the appellant/Insurance company within a period of six weeks from the date hereof in default the appellant is at liberty to realise the same by execution before the Claim Tribunal. Let the Lower court Record along with a copy of judgement be sent down to the Learned Court below.

21. Appeal is thus, partly allowed.

22. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

Rajiv Sharma, J.

I agree.