

(2012) 08 SHI CK 0017

In the High Court Of Himachal Pradesh

Case No : CMPMO. No. 68 of 2011 and FAO No. 127 of 2011

United India Insurance Company Ltd.

APPELLANT

Vs

Parkasho Devi and Others

RESPONDENT

Date of Decision : 24-08-2012

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2013) 1 ACC 326

Hon'ble Judges : Dev Darshan Sood, J

Bench : Single Bench

Advocate : Harish Behl in CMPMO No. 68 of 2011 and Mr. Atul Jhingan in FAO No. 127 of 2011, for the Appellant; Aman Sood, Advocate for the Respondent No. 1, Ex parte for the Respondent Nos. 2 to 5, Mr. Atul Jhingan, Advocate for the Respondent No. 6 in CMPMO No. 68 of 2011, Mr. Aman Sood, Advocate for the Respondent No. 1, Mr. Harish Behl, Advocate for the Respondent No. 4 and None in FAO No. 127 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

Dev Darshan Sud, J.—This petition under Article 227 of the Constitution of India and appeal have been preferred by the Insurance Companies viz. United India Insurance Company and National Insurance Company against the judgment and award of the learned Motor Accident Claims Tribunal, Hamirpur in the claim petition preferred by Smt. Parkasho Devi, aged about 45 years, who was traveling in bus No. HP-21-2872. The pleading is that on 24th May, 2006, she was traveling in this bus from Patta to Bhota. At around 2.30 p.m., when this bus reached near village Balokhar another bus No. HP-67-0963 owned by Vinay Puri and driven by Yog Raj driver came from the opposite side and crushed the right arm of the claimant. Both the buses were driven in a rash and negligent manner without any care for the safety of the passengers. Two insurance companies i.e. United India Insurance Company Ltd. and National Insurance Company Ltd., were insurer(s) of these buses. The accident occurred while pass was given by one bus to the other when both the drivers acted in a cavalier manner. The

petitioner claimed that she was earning Rs. 5,000 per month by selling milk, doing agricultural and household work. After the accident, she had been traumatized and is unable to do any work. The petition was resisted by the owners, drivers and the insurance companies on a number of grounds. Ten issues were settled before the learned Tribunal. The first one being crucial was as to whether the accident in question took place because of the rash and negligent driving of both the buses. On the question of compensation, the learned Tribunal on the evidence awarded a sum of Rs. 7,38,539 to the claimant on the finding that she had suffered 75% permanent disability according to the disability certificate proved on record as Ext. PW 6/A. The evidence on record was that she remained admitted in Regional Hospital, Hamirpur as indoor patient from May 24, 2006 from where she was referred to the PGI, Chandigarh for further treatment where she remained hospitalized from September 22, 2006 to October 3, 2006, in IGMCH Shimla from February 9, 2007 to April 5, 2007, in Sri Guru Teg Bahadur Hospital, Amritsar from May 18, 2007 to June 19, 2007. She had incurred an expenditure of Rs. 1,61,413 for medical treatment etc. The learned Tribunal also took into consideration and relied upon the evidence of PW 3 Dr. Dinesh Thakur, Ortho Surgeon at Regional Hospital, Hamirpur proving treatment and discharge slips Ext. PW 3/A. PW 4 Shri Amar Singh, Record Keeper from Sri Guru Teg Bahadur Hospital, Amritsar has proved the original record of treatment of the petitioner and discharge certificate Ext. PW 4/A. He states that the petitioner was readmitted in the hospital on May 18, 2007 and discharged on June 19, 2007 recorded in discharge certificate Ext. PW 4/B, PW 5 Tarsem Singh the Senior Clerk from the Department of Medical Record, CMC, Ludhiana proved the hospitalization of the petitioner from May 25, 2006 to June 6, 2006.

2. PW 6 Dr. Ramesh Chauhan, who was the Orthopaedic Surgeon in Regional Hospital, Hamirpur has proved disability certificate Ext. PW 6/A as he was one of the members of the Medical Board which examined the petitioner. He admitted in his cross-examination that disability pertains to the right arm/ upper limb.

3. On the other issues raised by the Insurance Companies regarding the maintainability, valid driving licence, and violation of the terms of the policy, the learned Court did not find any evidence on record. The learned Tribunal while computing the loss of earnings, fixed the income of the petitioner at Rs. 3,000 per month. It holds that a sum of Rs. 2,250 per month or say Rs. 27,000 per annum would be a fair estimate of the loss incurred. The multiplier adopted by the learned Court was 13 and the total loss calculated at Rs. 3,51,000. On the question of hospitalization and treatment the learned Tribunal holds that it was established on record that she remained hospitalized in different hospitals for 114 days. The learned Tribunal assessed a sum of Rs. 13,680 as the claim for loss of earning during hospitalization, Rs. 2,09,168 as medical expenditure, in addition a sum of Rs. 1,011 for traveling, etc. For shock, pain and suffering and loss of amenities, the learned Tribunal awards a sum of Rs. 1,50,000, in all a sum of Rs. 7,38,539 has been awarded.

4. Learned Counsel appearing for the Insurance Companies urges that the loss assessed is unrealistic. He places reliance on the judgment of the Supreme Court in *Arshada Banu Vs. New India Assurance company Ltd. and Another*, where the claimant had suffered amputation of right hand above elbow joint, remained hospitalized for 15 days. She was performing the work of tailor. The Hon'ble Court on the evidence awarded Rs. 2,88,000 under the head of loss of earning capacity. In conclusion, the Court held:

5. We have heard learned Counsel for the parties and perused the documents on record. Looking to the fact that appellant was working in a very small village and according to the evidence on record and other factors, we take that her annual income was Rs. 18,000 from tailoring. In the facts and circumstances of the case, we think that the proper multiplier should be 16. The High Court had granted Rs. 84,000 under the head "loss of service to the family" vide para 17 of the impugned order. Therefore, in place of Rs. 84,000, Rs. 2,88,000 has to be substituted under the head "loss of earning capacity". The award under other different heads except the amount calculated regarding income of the appellant would remain the same. (at p. 1229)

5. He then submits that in *Yadava Kumar Vs. The Divisional Manager, National Insurance Co. Ltd. and Another*, the Hon'ble Supreme Court was dealing with the case where the appellant was a painter by profession, aged 30 years, who sustained crippling injuries in the accident. The Hon'ble Court accepted the income of the injured as Rs. 3,000 per month as reasonable and annual income on this basis as Rs. 36,000 and calculated the total loss at Rs. 6,12,000, by adopting multiplier of 17. Since the percentage of disability was 20%, the loss of future earnings was assessed at Rs. 1,22,400 and by taking the compensation provided by the High Court in other categories, the total amount of Rs. 2 lacs plus 8% interest was awarded. In *Swaran Singh v. Achhar Singh and Others*, 1 (2012) ACC 269 : 2011 ACJ 773, this Court was dealing with the case of amputation of right arm from the shoulder joint of a daily waged labourer who was aged about 45-50 years and was hospitalized for 4 days. His earnings were considered as Rs. 250 per day. Considering the totality of the facts and circumstances of the case, this Court awarded a sum of Rs. 3,21,000 in all. This Court considered the total disability of the petitioner as 50% on the loss of earning capacity which assessed at Rs. 1,500 per month or Rs. 18,000 per annum and the total loss was assessed at Rs. 2,34,000 after adopting the multiplier of 13. In addition, Rs. 18,000 for pain and suffering and Rs. 17,000 for loss of amenities and total compensation of Rs. 3,21,000 was awarded after enhancing the amount as awarded by the learned Tribunal. Interest at the rate of 9% was also awarded.

6. Learned Counsel appearing for the claimant relied upon the decision in *Sri Nagarajappa Vs. The Divisional Manager, The Oriental Insurance Co. Ltd.*, . In particular, learned Counsel emphasizes that the Court has laid down the guidelines for assessment of loss. He submits that in this case, the appellant was

working as a coolie and claimed monthly income of Rs. 4,500 per month. The Tribunal assessed the disability to the extent of 23% to the whole body and awarded a sum of Rs. 20,000 for loss of amenities, Rs. 30,000 for pain and suffering, Rs. 30,000 for medical expenses and Rs. 2,000 for future medical treatment. The claimant had remained as indoor patient for 55 days. The Tribunal in absence of any proof assumed the income at Rs. 3,000 per month and Rs. 9,000 was awarded for this period. For computing the loss of future earnings, the learned Tribunal assessed the loss of Rs. 79,200. The High Court enhanced this amount to Rs. 93,600. The Hon"ble Supreme Court holds;

7. Having gone through the records, we are of the opinion that Rs. 2,22,600 awarded by the High Court is inadequate considering the nature of injuries suffered by the appellant and the consequent adverse effect it has on the performance of his avocation.

8. In reaching our decision, we are drawn to, if we may so, a very well-considered judgment of this Court in Raj Kumar Vs. Ajay Kumar and Another, , wherein the Bench, comprising Hon"ble Raveendran and Gokhale, JJ., has propounded the law on compensation in motor accident claims cases resulting in disability in a comprehensive manner. The relevant portions of the judgment are extracted below-- (SCC pp. 349-51, paras 10-11, 13-14 and 16)

10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability.....

11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may, however, note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation, (See, for example, the decisions of this Court in Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and Another, and Yadava Kumar Vs. The Divisional Manager, National Insurance Co. Ltd. and Another,

12. * * *

13. 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 disability (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.

14. 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 diver or a carpenter, the actual loss of earning capacity may virtually be hundred per cent, 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 be 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.

15 * * *

16.... Sections 168 and 169 of the Act make it evident that the Tribunal does not function as a neutral umpire as in a civil suit, but as an active explorer and seeker of truth who is required to "hold an inquiry into the claim" for determining the "just compensation". The Tribunal should therefore take an active role to ascertain the true and correct position so that it can assess the "just compensation". While dealing with personal injury cases, the Tribunal should preferably equip itself with a medical dictionary and a handbook for evaluation of permanent physical impairment....

We are in complete agreement with the above mentioned judgment.

9. On perusal of the doctor's evidence with respect to the nature of injuries suffered by the appellant, the appellant was found, inter alia, to be suffering

from the following disabilities as a result of the accident-- gross deformity of the left forearm, wrist and hand, wasting and weakness of the muscles of the left upper limb and shortening of the left upper limb by 1 cm. As a result, the doctor stated that the appellant could not work as a coolie and could not also do any other manual work. The doctor assessed permanent residual physical disability of the upper limb at 68% and 22-23% of the whole body.

10. The appellant is working as a manual labourer, for which he requires the use of both his hands. The fact that the accident has left him with one useless hand will severely affect his ability to perform his work as a coolie or any other manual work, and this has also been certified by the doctor. Thus while awarding compensation it has to be kept in mind that the appellant is to do manual work for the rest of his life without full use of his left hand, and this is bound to affect the quality of his work and also his ability to find work considering his disability. Hence, while computing loss of future income, disability should be taken to be 68% and not 20% as was done by the Tribunal and the High Court. Our view is supported by the ratio in Raj Kumar's case (*supra*), and from the fact that the appellant is severely hampered and perhaps forever handicapped from performing his occupation as a coolie.

11. Thus, loss of future income will amount to Rs. 3,18,240 (Rs. 3000 x 12 x 13 x 68/100). We also enhance the amount awarded for loss of amenities to Rs. 40,000, as against Rs. 30,000 awarded by the High Court. We also enhance the amount awarded for future medical expenses to Rs. 30,000, as against Rs. 10,000 awarded by the High Court. We are satisfied by the amount awarded under the remaining heads awarded by the High Court and sustain the same.

12. The break-up of compensation is as follows:

13. Accordingly, total compensation payable to the appellant amounts to Rs. 4,77,640, which we round off to Rs. 4,77,000. The same shall be payable at an interest of 6% from the date of claim petition till realization. We direct the respondent to calculate the amount and deposit the same by way of bank or demand draft in the Motor Accident Claims Tribunal, Bangalore and the Presiding Officer of the Tribunal will deposit the same in the bank account of the appellant. If there is no such bank account one shall be opened in a nationalized bank and the demand draft will be deposited there." (at pp. 326-328)

(Emphasis supplied)

Adverting to the evidence on record, the learned Tribunal while assessing the loss sustained by the claimant, holds that Ext. PW 6/A proves that she sustained 75% disability of right elbow. The evidence of the claimant is to the effect that she remained admitted in the Regional Hospital, Hamirpur from 24.5.2006 and thereafter she was referred to PGI, Chandigarh and then to various hospitals. She spent a sum of Rs. 1,61,413 for the treatment. She used to sell milk as she was rearing buffaloes and also looking after her family/household affairs. After the accident, she was unable to work normally. The learned Tribunal took her

income to be Rs. 3,000 per month and with the disability to the extent of 75%, calculated the loss of her earning capacity to the tune of Rs. 2,250 per month or say Rs. 27,000 per annum. Multiplier of 13 was adopted and an award of Rs. 3,51,000 was made on this count. The learned tribunal holds that her hospitalization was for 114 days which was proved on record vide Ext. PW 3/ A, Ext. PW 4/A, Ext. P-W4/B and Ext. PW 5/A, for which she was awarded a sum of Rs. 13,680 calculated at the rate of Rs. 120 per day being the daily wages payable in the State. Rs. 2,09,168 as expenditure for medicines. Since she was suffering the trauma of living without a limb, which could not be used for the rest of her life, a sum of Rs. 1,50,000 was awarded under the head of pain, suffering and shock. Total sum of Rs. 7,38,539 was awarded.

7. Adverting to the various heads under which the award has been made, I find that the learned Tribunal has not been remiss in awarding a sum of Rs. 3,51,000 for the loss on account of diminished earning capacity. On the question of treatment, the learned Tribunal held that Rs. 2,09,168 have been incurred by the petitioner, but in fact the expenditure was only Rs. 1,61,413 as claimed by her. Adverting to the precedent as noticed by me above, especially in Nagarajappa's case, the award is not in consonance with law. When the claimant herself asked for Rs. 1,61,413 as a total claim of medical expenditure, which is her evidence, I do not see any justification for the Tribunal awarding Rs. 2,09,168. In these circumstances, I hold award Rs. 1,70,000 in all as reasonable for medical expenditure.

8. On the other aspect, as to whether she was totally disabled from performing any work or not, there was only her evidence on record. What I find from the evidence is that since her right arm has become useless for any work, the learned Tribunal was not wrong in assessing the loss sustained by her. The award of Rs. 1,50,000 has been made for loss of amenities of life, pain, suffering and shock, which I find to be excessive. In this event, the amount is reduced to Rs. 60,000. The petition CMPMO No. 68 of 2011 is accordingly allowed to the limited extent and the award of the Tribunal is modified as under:

Therefore, a sum of Rs. 5,95,000 in all is awarded to the claimant. The award shall carry interest as granted by the learned Tribunal. Award modified accordingly.

Adverting to the appeal (FAO No. 127 of 2011) filed on behalf of the National Insurance Company challenging the award, I find that evidence on record clearly establishes the case of the respondent-claimant. It was urged that the liability could not be fastened on the appellant as there was no contributory negligence. There were 11 issues settled before the learned Tribunal. On the first issue, as to whether the accident was caused because of the rash and negligent driving of two bus Nos. HP-21-2872 and HP-67-0963, the learned Tribunal holds on the evidence that such negligence is clearly established on record. The statement of the claimant was clear and unequivocal on the manner in which the accident occurred. The learned Tribunal also relied upon the evidence of PW 1 H.C.

Ravinder Kumar who proved on record the First Information Report Ext. PW1/A which corroborated the factual narration as stated by the appellant. Thus there is no merit in this appeal, which is dismissed.