

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

M.A.C.M.A. No.3290 OF 2009

JUDGMENT:

The United India Insurance Company Limited, represented by its Divisional Manager, who is respondent No.2 in M.V.O.P. No.469 of 2007 on the file of the Chairman, Motor Accidents Claims Tribunal-cum-III Additional District Judge, Chittoor (for short, 'the Tribunal'), aggrieved over the order and decree dated 09.03.2009, whereby and whereunder, a compensation of Rs.10,77,686/- was awarded as against the claim of Rs.13,00,000/- laid under Section 166 of the Motor Vehicles Act, 1988 (for short, 'the Act') for the injuries sustained by respondent No.1 herein-petitioner in the original petition, preferred the present appeal.

2. Initially, the claim was laid for award of compensation of Rs.10,00,000/- and later by introducing an amendment, it was enhanced to Rs.13,00,000/-.

3. Appellant herein, who is the insurer of the crime vehicle, is respondent No.2, while respondent No.1, who is the claimant-injured, is the petitioner and respondent No.2, who is the owner of the crime vehicle, is respondent No.1, in the original petition before the Tribunal.

4. For the sake of convenience, the parties hereinafter referred to as they were arrayed before the Tribunal in the original petition.

5. The fact-situation occurring in the instant case would reveal that on 20.05.2007 at about 2-30 p.m., while the petitioner along with others was taking rest by sitting under a neem tree, a lorry bearing registration No.AP 26W 5882 driven in a rash and negligent manner came at high speed and dashed an electric pole and thereafter, the claimant and others fell on the road side, as a result, eight persons sustained grievous injuries and six others died. The petitioner claims that she was taken to Government Hospital, Sathyavedu and from there shifted to SVRRGG, Tirupati. She sustained a fracture and her left elbow joint was dislocated and injuries to left eye, left ear, left upper limb, and she lost all movements and sensation and she was initially admitted in Prasanth Hospital, Tirupati and discharged on 24.05.2007 and in Community Health Centre, Sathyavedu on 24.05.2007 and discharged on the same day and again she was admitted in Apollo Hospital, Chennai on 24.05.2007 and discharged on 28.05.2007 and again she was admitted on 12.06.2007 and discharged on 28.06.2007. According to her, on account of the injuries sustained, she is unable to attend normal activities and lost income of Rs.4,000/-. She claimed that she spent more than Rs.3,00,000/- for treatment and Rs.50,000/- towards transport charges and Rs.50,000/- towards attendant expenses. She states that

respondent Nos.1 and 2 are jointly and severally liable to pay compensation.

6. Before the Tribunal, respondent No.1-owner remained *ex parte*.

7. Respondent No.2-insurer filed counter opposing the claim and contending therein that there was no fault on the part of the driver of the lorry and the petitioner has not filed any permanent disability certificate and the driver of the lorry was not possessing valid driving licence and, therefore, sought to dismiss the claim petition.

8. Later, respondent No.2-insurer also filed additional counter stating that there was no pleading in the claim petition as to future surgery and future surgery is invented and the estimated expenses of Rs.1,00,000/- for future surgery is created to get more compensation.

9. The Tribunal basing on the aforesaid pleadings, framed four issues about the responsibility for the accident.

10. During enquiry, the petitioner examined herself as P.W.1 besides examining three doctors as P.Ws.3 to 5 and another witness as P.W.2 and marked Exs.A.1 to A.9, besides marking Exs.X.1 to X.4 through the medical officers of Apollo Hospital, Chennai. On behalf

of respondent No.2-insurer, no witnesses were examined, but a copy of insurance policy was marked as Ex.B.1 on consent.

11. The Tribunal has recorded finding on issue No.1 favouring the petitioner holding that the evidence on record would clinchingly establish that the driver of the lorry was negligent in driving the vehicle and caused the accident, resulting in injuries to the petitioner. On issue No.2, the Tribunal held that the insurance policy under Ex.B.1 would cover the risk of P.W.1 as it was validly in force on the date of accident and the insurer cannot seek exemption.

12. On issue No.3, the Tribunal, noting the injuries as described in Exs.A.3 and A.8, and the evidence of P.W.3-Orthopaedic Surgeon of Prashanth Hospital, who assessed the disability at 100% and the evidence of P.W.5-Consultant Vascular and Transplant Surgeon of Apollo Hospital, Chennai, taking monthly earnings of the petitioner at Rs.3,000/- or Rs.36,000/- per annum, the age of the petitioner as 28 years, applied multiplier factor '18' and the disability at 100% believing the evidence of P.W.3, arrived the future loss of earning capacity at Rs.6,48,000/-.

13. The Tribunal also granted Rs.25,000/- towards permanent disability, Rs.29,000/- towards pain and suffering, Rs.2,25,686/- towards medical expenses, transport charges to hospital, extra nourishment and attendant charges, and Rs.1,50,000/- towards

future expenditure for surgery, etc., and, thus, a total amount of Rs.10,77,686/- was granted with interest at 7.5% per annum.

14. The aforesaid order is under challenge in the instant appeal contending in the grounds that the quantum of compensation granted by the Tribunal is excessive and arbitrary as even in case where the amputation occurs, the maximum disability being considered as 50%, but taking the disability at 100% is highly excessive and, thus, various amounts awarded by the Tribunal under different heads have been questioned by the present appeal.

15. Heard Sri A. Ramakrishna Reddy, learned standing counsel for the appellant - insurer, and Sri T.C. Krishna, learned counsel for respondent No.1 - petitioner. Notice sent to respondent No.2, owner of the vehicle, returned unserved. However, the same makes no difference in deciding the present appeal as he remained *ex parte* before the Tribunal and suffered a decree.

16. Perused the order and the evidence on record, both, oral and documentary.

17. Evidence of PW.3, an Orthopaedic Surgeon working in Prashanth Hospital, Tirupati, would show that the petitioner came up with compound fractures to left elbow with fracture of left ulna and she was not in a position to move her left upper limb. According to him, she was operated on 22-05-2007 for her left elbow and ulna

injury and he has noticed that she was also having injury at higher level for which Neurologist opinion was taken and advised her to consult a Neurosurgeon and she was discharged on 24-05-2007. He testified that the petitioner paid the amounts of Rs.9,050/-, Rs.150/-, Rs.750/-, Rs.650/- as shown in Ex.A-6 and purchased medicines worth Rs.2,485/-. He issued disability certificate on 17-09-2008 mentioning 100% permanent disability in respect of left upper limb as in Ex.X-1. He answers to a question in his cross-examination that he has issued Ex.X-1 purely on the basis of clinical examination and he has not taken any Radiological support to issue. He affirms that the petitioner was having 100% disability because she has lost total functioning of left upper limb.

18. PW.4 is Neurosurgeon working in Apollo Hospital, Chennai. According to him, the petitioner was admitted in that hospital on 24-05-2007 and discharged on 28-05-2007, having undergone surgical intervention to the left upper limb. She was again admitted on 12-06-2007, for the repair of Brachial plexus injury and she was operated on 16-06-2007 and discharged on 28-06-2007 and discharge summary is Ex.X-2 and another discharge summary is Ex.X-3. According to him, she requires another surgery to improve functioning of left upper limbs and needs Rs.1,00,000/- for undergoing second surgery and he has issued certificate dated

07-08-2008. He testified the medical bills under Ex.A-6 and states that she would have incurred hospital expenses of Rs.50,000/-.

19. PW.5 is yet another doctor, who is working as Senior Consultant Vascular Surgeon in Apollo Hospital, Chennai. According to him, surgery was performed for repair of left upper limb artery and left brachial plexus injury, which was performed on 16-06-2008 and discharged on 28-06-2007, and after discharge she has been under his follow up as out-patient due to Neuro injury as she suffered partial Ptosis of left eye (dropping of left eye lid) and it was only a cosmetic problem and the petitioner has no movement of upper limb. In his cross-examination, nothing has been elicited to show that the petitioner could attend to normal daily activities with her left hand.

20. The learned standing counsel for the appellant would submit that:

Though, the disability was spoken to by PW.3, who issued certificate under Ex.X-1, but it relates to only to left upper limb and the Tribunal was not right in taking 100% permanent disability for the whole person of PW.1 and thereby computing future loss of earning capacity.

Second submission is, that the Tribunal went wrong in fixing monthly earnings at Rs.3,000/- without there-being any legally acceptable evidence on record except the statements of PWs.1 and 2.

Third submission is, that the Tribunal ought not to have awarded Rs.1,50,000/- towards future surgery as there is no concrete evidence to show that she was in absolute need to go for future surgery.

These have been the main submissions made by the learned standing counsel for the appellant.

21. Per contra, the learned counsel for respondent No.1 – petitioner would submit that the Tribunal determined the compensation in accordance with the legal principles and did not go wrong in taking the partial permanent disability of 100% as the left upper limb was totally paralyzed and, therefore, cannot be faulted. Even concerning the earnings, the Tribunal has not committed any mistake as evidence of PWs.1 and 2 would clinchingly show that the petitioner was earning more than Rs.3,000/-, but the Tribunal, somehow, restricted it to Rs.3,000/- as she was running a General Store. Concerning Rs.1,00,000/- awarded by the Tribunal, it is his submission that in the presence of positive assertions made by the doctors of Apollo Hospital, Chennai, the Tribunal did not go wrong in awarding Rs.1,50,000/-, as it was in the direction of restoring the movements of left upper limb.

22. Concerning the first submission as to the Tribunal accepting disability of 100% as per Ex.X-1, when examined its contents, they run thus:

“This is to certify that Miss. K. Vijaya aged 28 yrs/F. has sustained brachial plexus injury (Lt) upper limb. She is having 100% (percent) permanent disability.”

It is no doubt true, PW.3 has referred to Ex.X-1 through whom it was marked and he was the doctor who issued it. Though, competency of PW.3 cannot be doubted to issue partial permanent disability or permanent disability certificates assessing the percentage of disability being Orthopaedic Surgeon, but Ex.X-1 does not elaborate the details as to how he has assessed the disability of 100%. No doubt, it relates to left upper limb alone, but, still, he ought to have mentioned the degrees of restriction or if there is complete whole restriction of left upper limb, ought to have clearly indicated referring to shoulder movements, elbow movements and wrist movements. When Ex.X-1 is bereft of these relevant aspects, certainly, accepting 100% partial permanent disability, that too for whole person of PW.1 by the Tribunal appears to be under a mistaken impression. Certainly, it is not a case of amputation of lower limb, where a person who is employed as a driver can be viewed as having sustained 100% permanent disability as he would not be able to pursue his occupation as a driver. Even going to the extent that PW.1 had been looking after the business of general store, certainly, the disability can be arrived at

50%, but not 100% so far as permanent disability for the whole person is considered. Therefore, 100% disability taken by the Tribunal since appears to be patently wrong, it is reduced to 50%. In the same context, when the second submission made by the learned counsel for the appellant is examined, it cannot be said that the Tribunal went wrong in fixing the monthly earnings of the petitioner at Rs.3,000/-, more particularly, when there is nothing brought out in the cross-examination of PWs.1 and 2. Therefore, when Rs.3,000/- is taken as monthly earnings of the petitioner or Rs.36,000/- as annual earnings and partial permanent disability at 50% is taken, the loss of future earning capacity would work out to Rs.18,000/- per annum. The petitioner was aged 28 years on the date of accident. The multiplier factor applied by the Tribunal was '18', which is not in accordance with the multiplier factor provided in the table formulated by the Hon'ble Supreme Court in **Sarla Verma & others v. Delhi Transport Corporation and another**¹. The relevant multiplier factor is '17' for the age group of persons 26-30 years. When multiplicand Rs.18,000/- is capitalized with the multiplier factor '17', it would work out to Rs.3,06,000/- and, therefore, the same is awarded towards future loss of earning capacity.

23. The amount of Rs.25,000/- granted by the Tribunal towards permanent disability, certainly, cannot be allowed. However, viewing that the left upper limb has become totally dysfunctional, the amount

¹ (2009) 6 SCC 121

of Rs.29,000/- granted by the Tribunal towards pain and suffering is enhanced to Rs.50,000/-. The amount of Rs.2,25,686/- granted by the Tribunal towards medical expenses since based on the documentary evidence, the same has to be maintained and accordingly upheld. The amount of Rs.1,50,000/- granted by the Tribunal towards future surgery cannot be withheld for the reason the evidence of PWs.4 and 5 would clearly show that the petitioner was required to undergo a surgical intervention. Therefore, the same is also maintained.

24. The Tribunal has not granted any amount towards extra nourishment and, therefore, a sum of Rs.15,000/- is granted. Towards transport charges, as seen from the evidence on record, since the petitioner travelled to Chennai as she was admitted in Apollo Hospital at Chennai and undergone surgical interventions, which fact is proved through the evidence of PWs.4 and 5, certainly, she is entitled to a sum of Rs.25,000/- towards transport charges including follow-up treatment as out-patient. Towards attendant charges, taking into consideration the hospitalized period, a sum of Rs.3,000/- is granted. The petitioner is also entitled to Rs.18,000/- towards loss of past earnings @ Rs.3,000/ per month for a period of six (6) months. Thus, in all, the petitioner is entitled to Rs.7,92,686/- as compensation.

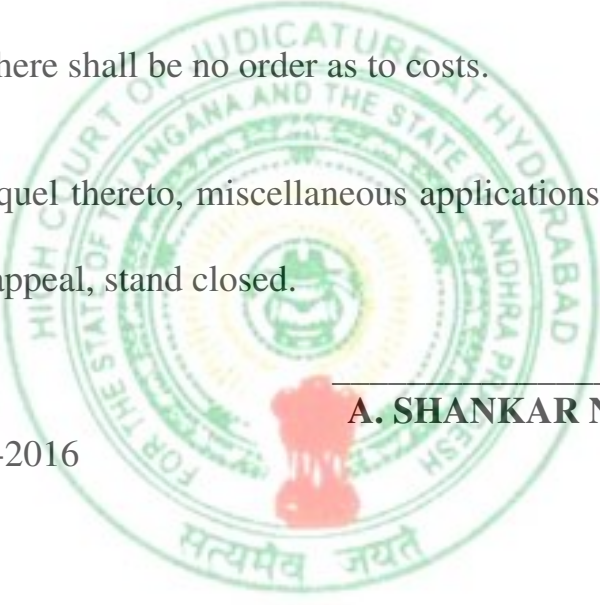
25. So far as the rate of interest is concerned, the Tribunal has granted 7.5% per annum. The same is maintained as it is in tune with

the decision of the Hon'ble Supreme Court in **Rajesh and others v. Rajbir Singh and others**².

26. Accordingly, the instant appeal is allowed in part and the order and decree, dated 09-03-2009, in M.V.O.P. No.469 of 2007 passed by the Tribunal are modified by reducing the compensation to Rs.7,92,686/- (Rupees seven lakhs ninety two thousand six hundred and eighty six) from Rs.10,77,686/- granted by the Tribunal with interest at 7.5% per annum thereon from the date of petition till realization. There shall be no order as to costs.

As a sequel thereto, miscellaneous applications, if any pending in the instant appeal, stand closed.

DATE: 25-11-2016
siva/Mgr


A. SHANKAR NARAYANA, J

² 2013 ACJ 1403