IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.47 of 2011

==

The New India Assurance Co. Ltd., Branch Office M/s Bishwa Nath Service Station, N.H.31, P.S. K. Hat, town and District Purnea, Insurer of Sumo Car No. BR 11C/9798, represented through Sri Prabhakar Pradhan, working as Deputy Manager, and constituted attorney of The New India Assurance Company Ltd., having its Regional office at 6 and 7th Floor, Frazer Road, B.S.F.C. Building, P.S. Kotwali, Dist Patna.

... Opposite Party No. 3 ... Appellant

Versus

1. Rajendra Kumar Soncheti, son of Sri Khem Chand Soncheti, resident of Purnea City, P.S. Sadar, District Purnea.

...Claimant ... Respondent 1st set.

2. Ratan Kumar Das, son of Kedar Nath Das, resident of Bhatta Bazar, P.S. K. Hat, Dist Purnea at present residing at Rajnish Chowk, Bhatta Bazar, P.S. K. Hat, District Purnea.

Driver of Sumo Car bearing its registration no. BR-11C/9798

….. Opposite Party No. 1

3. Shyam Kumar Mandal, son of late Tirthanand Mandal, resident of Raniganj, P.S. and P.O. Raniganj, Dist Araria

Owner of Sumo Car bearing its registration No. BR-11C/9798

…… Opposite Party No. 1

4. The Divisional Manager, Oriental Insurance Co. Ltd, Divisional Office at New Market, Purnea, P.S. K. Hat, Dist Purnea.

…. Opposite Party No. 4/Respondent 2nd set.

==

Appearance :

For the Appellant	:	Mr. Shailendra Kumar, Advocate
For the Respondent No. 4	:	Mr. Bimlesh Kumar Jha, Advocate
For the Respondent No. 1	:	Mr. S.D. Sanjay, Sr. Advocate
		Mr. Alok Kumar Agarwal, Advocate
		Mrs. Priya Gupta, Advocate
		Mr. Mohit Kumar Agarwal, Advocate

==

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT
Date : 01-02-2019

Heard learned counsel for the parties.

2. This appeal has been preferred, under Section 173 of the Motor Vehicles Act, 1988, against the judgment and award dated 27.05.2010 and 20.07.2010 respectively passed by the learned 1st Additional District Judge-cum-Motor Vehicle Accident Claim Tribunal, Purnea in Compensation Case No. 66 of 2002.

3. Following two points have been raised for adjudication in this appeal against award of the Motor Vehicles Accident Claim Tribunal.

(a) Is the Tribunal justified in awarding entire liability to pay compensation against the appellant ignoring the fact that the accident was result of contributory negligence?

(b) Has the Tribunal erred in deciding just and reasonable compensation in favour of respondent no. 1! Should this Court pass any order in favour of respondent no. 1 when no appeal has been preferred by respondent no. 1 against the award?

4. Two four wheelers met with head on collision on 16.07.2001. One was a Sumo Car bearing registration no. BR-11-C/9798 insured with the appellant-New India Assurance Company Ltd. and another was a Maruti car bearing registration no. BR-11-B/0005 insured with Oriental Insurance Company Limited. Claimant Rajendra Kumar Sancheti, respondent no. 1 herein was/is a practicing Advocate, aged about 52 years. He was driving his

Maruti car and her daughter Banita Sancheti @ Bittu was also sitting in the same car. In the accident, both had sustained injury. Banita Sancheti brought Claim Case No. 21 of 2002 which was decided on 29th July, 2005 by the learned 2nd Additional District Judge-cum-Additional Claim Tribunal, Purnea and compensation was awarded. A copy of the judgment is enclosed herewith which would reveal that in para 15 of the judgment, the court recorded as follows:

> "Thus it can be gauged from the evidence of the Dafadar (who was informant of the accident) that drivers of both the vehicles were responsible for the accident. Thus, there is sufficient evidence on the record that the drivers of both the vehicles were jointly responsible for the accident on account of their composite negligence. Thus, issue is decided accordingly".

5. Accordingly, the Tribunal sacked with liability to pay 50% against insurer of each of the vehicles. The judgment aforesaid attained finality.

6. Mr. Rajendra Kumar Sancheti-respondent no. 1 filed present Compensation Case No. 66 of 2002 which was decided on 27th May, 2010 whereby the Tribunal came to the conclusion that Rs.5,15,973/- (rupees five lacs fifteen thousand nine hundred seventy three) is payable to Mr. Rajendra Kumar Sancheti for medical expenses and expenses incurred on conveyance. Rs.1,00,000/- (rupees one lac) for physical and mental agony. Rs.4,05,350/- (rupees four lacs five thousand three hundred fifty) was payable against 55% of permanent disability suffered by Mr. Rajendra Kumar Sancheti. However, the liability to pay was fixed against the appellant only which was insurer of Sumo car.

7. Hence, the appellant has challenged the award in this appeal to the extent that his liability should be confined to the 50% as this was a case of contributory negligence.

8. Learned counsel appearing for respondent-Oriental Insurance Company Ltd. submits that since the claimant was himself owner-cum-driver of the Maruti car, his status was not of a third party and he is entitled to be compensated to the extent of personal liability insurance. In the present case, there was no policy covering risk of personal liability, hence, the Oriental Insurance Company is not liable to pay a single penny muchless 50% of the total compensation.

9. Learned counsel for the claimant-respondent contends that though in the FIR of the occurrence vide Ext. 1, there is averment that the accident was result of head on collision due to negligence of the driver of both the vehicles as a result whereof driver of both the vehicles were put on criminal trial. The claimant faced trial in G.R. No. 969 of 2001 which resulted in acquittal of the claimant for the reason that neither the informant supported before the criminal court that the appellant was negligent nor any other evidence came that the appellant was negligent.

10. The law is well settled that proof before the criminal court and a civil court stands on different pedestral. Before a criminal court, the prosecution has to prove its case beyond all reasonable doubts. The judgment would reveal that informant had turned hostile besides other hostile witnesses before the criminal court. In civil proceeding, the preponderance of probability of the case of the parties is to be looked into. None of the witnesses examined before the Tribunal where from amongst the witnesses before the criminal court. Therefore, on the basis of material before the Tribunal, the only conclusion in the case of head of collision of two vehicles, would be that the matter is of contributory negligence. It is a different issue that percentage of contribution has not been decided by the Tribunals which decided the claim of the present claimant or claim of the daughter of the claimant. In the case of head on collision of two vehicles, the contribution of both the vehicles cannot be explained, save and except, to the extent of percentage of contribution. Therefore, in my view, this is a case of contributory negligence in the accident, hence, the liability should have been fixed against the insurer of both the vehicles. In absence of any evidence to the contrary liability of 50% of each of the insurer was there.

11. The insurer of the vehicle of the claimant has rightly contended that it is liable to reimburse in respect of the personal injury of the owner-cum-driver, only in case of separate policy taken by the owner for personal damages. In this case, no separate policy was there. Only policy was for covering third party risk. Hence, the insurer Oriental Insurance Company Ltd. who had insured the vehicle of the claimant is not liable to pay anything to the claimant.

12. Submission of the learned counsel for the appellant is that he had already paid 50% of the awarded amount to the claimant, though without interest as directed by the Tribunal and is ready to pay interest on its liability.

Point No. (b)

13. Learned counsel for the claimant submits that the Tribunal has erred in calculating the quantum of compensation payable in the facts and circumstances of this case, though the Tribunal was of the view that this was a case of permanent disablement of respondent no. 1. Submission is that respondent no.

1 had sustained fracture of right femur and had undergone surgery for the same. Since then respondent no. 1 was/is unable to move his right leg freely and the Chief Medical Officer certified that the respondent has sustained 55% disablement. The aforesaid fact would be evident from Annexure-9 & 10. Further submission is that it has come on the record that respondent no. 1 was a practicing Advocate, aged about 52 years. As per Income Tax Return brought by him before the Tribunal, the yearly income was approximately Rs.1,00,000/- (rupees one lac) which would be evident from the copies of the return as Ext. 8 series. Submission of the learned counsel is that claim of respondent no. 1 is squarely covered by the judgment of the Hon'ble Supreme Court in case of **Sandeep Khanuja** versus **Atul Dande & Anr.** reported in **2017(3) SCC 351.** Sandeep Khanuja's case **(supra)** was also a case of fracture of both legs of the claimant resulting in 70% disablement. The claimant was a professional (Chartered Accountant) and not a salaried person, hence, the Hon'ble Supreme Court allowed compensation against future prospects also.

14. Learned counsel for the appellant contends that since respondent no. 1 has not filed any appeal for enhancement of the award, this Court cannot enhance the award in appeal filed by the appellant.

15. I do not find any merit in the objection of the learned counsel for the appellant for simple reason that Rule 33 of Order 41 of the Code of Civil Procedure adequately empowers the appellate court to pass any decree and make any order which ought to have been passed or made even in favour of all or any of the respondents, although such respondents may not have filed any appeal or objection.

16. In Sandeep Khanuja's case **(supra)**, the Hon'ble Supreme Court considered the earlier judgment in **Raj Kumar** Vs. **Ajay Kumar** reported in **2011(1) SCC 343,** wherein the principle of determination of compensation in the cases of permanent/partial disablement has been exhaustively dealt with and quoted paras 8, 10 and 11 of Raj Kumar's case **(supra)** as follows:

> "**8.** Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent

disability refers to a person's inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person's inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short). **But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation**. **(emphasis is mine)**

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. Some Tribunals wrongly

> assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced shows 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.
>
> **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."

17. After considering the aforesaid pronouncement in para 14 of Sandeep Khanuja's case **(supra)**, the Hon'ble Supreme Court observed as follows:

"**14.** The crucial factor which has to be taken into consideration, thus, is to assess as to whether the permanent disability has any adverse effect on the earning capacity of the injured. In this sense, the MACT approached the issue in right direction by taking into consideration the aforesaid test. However, we feel that the conclusion of MACT, on the application of the aforesaid test, is erroneous. A very myopic view is taken by MACT in taking the view that 70% permanent disability suffered by the appellant would not impact the earning capacity of the appellant. MACT thought that since the appellant is a Chartered Accountant, he is supposed to do sitting work and, therefore, his working capacity is not impaired. Such a conclusion was justified if the appellant was in the employment where job requirement could be to do sitting/table work and receive monthly salary for the said work. An important feature and aspect which is ignored by MACT is that the appellant is a professional Chartered Accountant. To do this work efficiently and in order to augment his income, a Chartered Accountant is supposed to move around as well. If a Chartered Accountant is doing taxation work, he has to appear before the assessing authorities and appellate authorities under the Income Tax Act, as a Chartered Accountant is allowed to practice up to Income Tax Appellate Tribunal. Many times Chartered Accountants are supposed to visit their clients as well. In case a Chartered Accountant is primarily doing audit work, he is not only required to visit his clients

> but various authorities as well. There are many statutory functions under various statutes which the Chartered Accountants perform. Free movement is involved for performance of such functions. A person who is engaged and cannot freely move to attend to his duties may not be able to match the earning in comparison with the one who is healthy and bodily abled. Movements of the appellant have been restricted to a large extent and that too at a young age. Though the High Court recognised this, it did not go forward to apply the principle of multiplier. We are of the opinion that in a case like this and having regard to the injuries suffered by the appellant, there is a definite loss of earning capacity and it calls for grant of compensation with the adoption of multiplier method, as held by this Court in *Yadava Kumar v. National Insurance Co. Ltd.* **2010(10) SCC 341**."

18. Apparently, the claimant herein who was a practicing Advocate is supposed to appear in different Courts/Tribunal etc. during the same Court hours to attend cases of different client. If his free movement is fettered it would certainly affect his performance in the manner which he was giving before the accident.

19. As per Section 2(t) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which was applicable on the date of accident. The term person with disability "means a person suffering from not less than forty per cent of any disability as certified by a Medical Authority."

In the present case, the Medical Authority has certified that respondent no. 1, due to the aforesaid accident, suffered 55% of disability. In view of the observation in Raj Kumar's case **(supra)** even the temporary permanent disability would entitle to the respondent no. 1 to get a just and reasonable compensation.

20. In the present case, the Tribunal has observed that the respondent no. 1 sustained permanent disablement, however, has wrongly deducted $1/3^{rd}$ of the total income for personal expenses of the injured. There is no dispute at the bar that such deduction is not permissible in the case of injury and permanent disablement. Such deduction is permissible in the case of death only when compensation is claimed by the dependents of the deceased. Therefore, the claimant-respondent is entitled to Rs.1,00,000/- (rupees one lac) (his yearly income) multiplied with multiplier eleven according to age of the claimant as 52 years without any deduction of $1/3^{rd}$ or otherwise. Thus, the amount payable comes to Rs.11,00,000/- (rupees eleven lacs) against claim for permanent disablement.

21. Further the Tribunal has erred in assessing the economic loss to the claimant in terms of percentage of disablement i.e. 55%, rather the Tribunal should have awarded 55% more as loss of future prospect in view of the settled principles discussed above.

22. In the result, the impugned judgment and award stands set aside to the extent that it has fixed whole liability against the appellant to pay compensation to respondent no. 1. It is directed that appellant is liable to pay 50% of the total payable compensation amount after deducting whatever the appellant has already paid to the claimant.

23. The impugned judgment and award stands set aside to the extent of calculation reached by the Tribunal. Now the claimant would get as follows:

Head	Awarded by MACT Amount (in Rs)	Now payable amount (in Rs.)
Medical and Transport Expenses	5,15,973/-	5,15,973/-
Loss of income	Nil	1,00,000/-
Mental and physical agony	1,00,000/-	1,00,000/-
Permanent disability to some extent + Loss of future earning	4,05,350/-	17,05,000/- (i.e. 11 lakhs + 55% on that)
Total	10,21,323/	24,20,973/-

24. Out of total payable amount of Rs.24,20,973/- (rupees twenty four lacs twenty thousand nine hundred seventy three), the appellant shall pay 50% only after deducting the paid amount along with 6% interest awarded by the Tribunal from the date of filing of the application.

25. Accordingly, this appeal stands partly allowed and partly dismissed.

26. Let the Registry remit back the statutory amount in the name of claimant-respondent no. 1.

(Birendra Kumar, J)

Kundan/Rajan

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	04.02.2019
Transmission Date	04.02.2019