IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.345 of 2022
WITH
INTERIM APPLICATION NO.2357 OF 2021

Cholamandalam M.S. Insurance Co. Ltd. .. Appellant

Versus

Ajanta Mayuresh Sen @ Pawar & Anr. .. Respondents

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Mr.Rakesh Kanojiya with Ms.Sandhya Singh and Ms.Nikita Singh i/b Res Juris for the Appellant.

Ms.Rina Kundu for the Respondent No.1.

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CORAM: BHARATI DANGRE, J.
DATED : 27th APRIL, 2022

P.C. :-

1. The present appeal is filed by Cholamandalam M.S. Insurance Company Ltd., being aggrieved by the Judgment & Award delivered in M.A.C.P. No.811 of 2011, by the M.A.C.T., Mumbai on 30/06/2017, on an application for compensation under Section 166 of the Motor Vehicles Act.

The Tribunal has ordered the appellant to pay compensation of Rs.20,20,600/- alongwith interest at the rate of 9% p.a. from the date of institution of claim till it's realization, in favour of the applicant, who had instituted the claim before the Tribunal.

2. Heard Mr.Rakesh Kanojiya with Ms.Sandhya Singh and Ms.Nikita Singh i/b Res Juris for the appellant and Ms.Rina Kundu for Respondent No.1.

3. The claimant, who approached the Tribunal, pleaded that she was working as a Resident Manager in CEST-LA-VIE THE ELIGHT CLUB situated at Hill Road, Bandra (West) and in the evening hours of 21/08/2010, on completing her work, she left the office at about 7.15 p.m. and while she was on footpath, opposite to her office, received a message to return back to the office. She, therefore, turned back and had barely reached the entrance gate of the compound premises of her office, when a motor car bearing No. MH-01-AE-7149, being driven in a rash and negligent manner, dashed her and her right leg got stuck in the front wheel of the car. The bystanders gathered there and removed her leg by removing the wheel of the car. The accident resulted in fracture of right femur and CLW and abrasion injuries over her body.

She was admitted to Holy Family Hospital, Bandra for initial treatment and later shifted to Shreeji Hospital & Research Centre, Kandivali, where she was operated and continued to take treatment. Thereafter, for a considerable length of time, she was required to take treatment as an outdoor patient and, since, there was no improvement in her movements, she underwent physiotherapy for a long time. Claiming that she was required to spent an amount of Rs.5,00,000/- on her medical treatment and incidental expenses, she approached the Tribunal claiming compensation of Rs.7,00,000/- against the opposite party No.1 i.e. the owner of the vehicle and respondent No.2 i.e. the insurer of the offending motor vehicle.

4. In the claim petition, she staked her claim by stating that she has suffered permanent disablement and after the incident for about 10 months, she was on leave without pay and even thereafter, due to severe pain, she was not able to continue with her work, resultantly she lost her job and was unable to secure any suitable job, leaving her jobless.

She claimed the compensation on the basis that she was aged 35 years at the time of incident and earning a salary of 25,560/- per month.

5. Respondent No.1, the owner of the vehicle, though duly served did not appear and claim proceeded ex-parte against him.

Respondent No.2-Insurer, contested the claim by filing a written statement and raised a defence that the driver of the vehicle involved in the accident, did not possess valid driving license to drive the motor car and, therefore, there is violation of the terms and conditions of the insurance policy and the insurance company is not liable to pay the compensation. Further, the compensation was also stated to be excessive and exorbitant in the light of the disablement claimed by the claimant.

6. In support of the claim, the claimant examined herself and reiterated her contention regarding the accident and blamed the vehicle for the injuries caused to her. The Tribunal accepted her version, since no material was brought to show that the claimant was negligent, though in the cross-examination, the claimant had admitted that at the time when accident took place, there was heavy rain. The Tribunal ultimately concluded that the injuries sustained by the applicant were on account of rash and negligent driving of the driver of the motor car.

7. As far as the violation of the terms and conditions of the insurance policy is concerned, since the insurer failed to lead any oral and documentary evidence in support of it's contentions, the said issue was answered against the insurance company.

8. Coming to the expenses incurred by the claimant, on the basis of which she claimed the compensation, the claimant has placed on record the necessary documents, reflecting the treatment taken by her. By making reference to the medical certificates issued by the various doctors, the Tribunal arrived at a finding that she has proved the hospital bills and receipts to the tune of Rs.1,89,677/- and she has expended the sum of Rs.40,000/- on physiotherapy. The claimant examined Dr.N.M.Khanna, who deposed that the claimant has suffered 42% permanent partial disability and in the cross-examination, he admitted that he had an opportunity to examine the claimant again in the year 2011 and even that time also, her femur fracture was not united. The evidence of the said doctor was accepted, since not controverted by the opponent.

9. Dr.Kamlesh Nathalal Shah of Life Line Hospital was also examined to prove the bills of the hospital to the tune of

Rs.28,530/-. A Physiotherapist was also examined as witness No.4 who deposed that the claimant underwent 42 sessions of physiotherapy, which caused her to incur expenditure of Rs.29,400/-. Since all the medical papers in original were produced before the Tribunal, the amount expended towards medical expenses came to be accepted. The Tribunal relied upon the decision of the Hon'ble Supreme Court in the case of Raj Kumar Vs. Ajay Kumar and observed as under :-

> "22. As per legal ratio laid down by Their Lordships of Supreme Court in the case of **Raj Kumar Vs. Ajay Kumar, reported in ACJ 2011 page 1,** "all injuries or permanent disabilities arising from injuries, do not result in loss of earning capacity. The percentage of permanent disability with reference to the whole body of the person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability. The same permanent disability may result in different percentage of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.
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> 23. As discussed in the aforesaid paragraph the AW No.6 Dr.Khanna has issued permanent partial disablement certificate to the extent of 42% on the grounds viz. (a) Tenderness with deformity with scarring of right hip, right thigh and right knee, (b) restricted painful movements of right hip and right knee, (c) Diminished sensation of right thigh, (d) unable to squat/climb stairs, stand for long, unable to walk long distance, (e) Less active used of right limb and the fracture of right femur has not consolidated clinically and radiologically."

10. Accepting that the claimant had sustained a fracture only on right femur and no other injury was sustained by her,

her loss of earning capacity was computed as 25%, though her disability was assessed at 42%.

11. The Tribunal computed the yearly income of the claimant and considering 25% of permanent disablement resulting into yearly loss of income at Rs.75,000/- applied multiplier of 16 and worked out the future loss of earning capacity as Rs.12,00,000/-. Adding the medical expenses of Rs.4,30,598/- plus a sum of Rs.25,000/- towards physiotherapy, the Tribunal deem it appropriate to grant an amount of Rs.40,000/- towards the expenditure incurred in travelling, diet food etc.. The total compensation was computed as Rs.20,20,598/-, which was based on the actual expenditure and applying the multiplier factor in arriving a figure of 'just compensation'.

12. Perusal of the impugned judgment would reveal that the Tribunal has rationally considered each and every head under which the compensation was granted to the applicant.

Though the learned counsel for the appellant would submit that the statutory defence was raised, since the insurance company was unable to prove it before the Tribunal, the liability of payment of compensation was fastened on respondent Nos.1 and 2 i.e. the owner and the insurer.

13. Since the appellant-insurance company has failed to make out any case for interference, the impugned judgment is upheld and the First Appeal stands dismissed.

14. In view of the disposal of the First Appeal, the interim application does not survive and stands disposed off.

(SMT. BHARATI DANGRE, J.)