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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURIDICTION
APPELLATE SIDE

FMA 452 of 2017

The National Insurance Co. Ltd.
-Vs-
Mabar Miya @ Sabar (Nabor) & Anr.

Mr. Sanjoy Paul
... for the appellant-insurance company

Mr. Tapas Kumar Sinha
... for the respondent No. 1-claimant

This appeal is preferred against the judgment and award dated 27th April, 2016 passed by the learned Judge, Motor Accident Claims Tribunal, Fast Track, 2nd Court, Alipurduar, Jalpaiguri in MAC Case No. 10 of 2015 (Old No. 07 of 2012) granting compensation of Rs. 21,60,000/- together with interest in favour of the claimant-injured under Section 166 of the Motor Vehicles Act, 1988.

The brief fact of the case is that on 10.11.2009 at about 7.30 p.m. the victim while proceeding towards Sonarpur got down from his motorcycle at Sahebpota, Baladangi Nagar to attend his nature's call and parked his motorcycle on the left side of the road at that time the offending vehicle bearing registration No. WB-70A/4752 (Tata Indica) in a rash and negligent manner dashed the victim, as a result of which he sustained multiple injuries on his person. The victims was at first taken to Subham Hospital, Cooch Behar wherefrom he was referred for better treatment and was admitted to North Bengal Nursing Home, Siliguri and his right leg was operated and subsequently, he sustained disablement. On account of injuries sustained and the subsequent disablement, the victim-injured filed application for compensation of Rs. 25,00,000/- under Section 166 of the Motor Vehicles Act, 1988.

The claimant-injured in order to establish his case examined himself and produced documents, which have been marked as **Exhibits 1** to **12** respectively.

The appellant-insurance company did not adduce any evidence.

Despite service of notice of appeal, the respondent no. 2, owner of the offending vehicle is unrepresented.

Upon considering the materials on record and the evidence adduced on behalf of the claimant, the learned Tribunal granted compensation of Rs. 21,60,000/- together with interest in favour of the claimant under Section 166 of the Motor Vehicles Act, 1988.

Being aggrieved by and dissatisfied with the impugned judgment and award, the insurance company has preferred the present appeal.

Mr. Sanjoy Paul, learned advocate for the appellant-insurance company submits that the learned Tribunal erred in considering 80% loss of earning on the basis of disability certificate which has not been proved in accordance with law by adducing evidence of its author. Until and unless, the author who has issued the disability certificate is examined, the same cannot be admitted into evidence. To buttress his contention, he relies on the decision of the Hon'ble Supreme Court passed in ***Rajesh Kumar Alias Raju versus Yudhvir Singh And Another*** reported in ***(2008) 7 SCC 305.*** He further submits that there are no evidences of loss of earning. Moreover, he submits that the learned Tribunal erroneously determined the income of the victim at Rs. 15,000/- per month on the basis of certificate issued by the office of Patlakhawa Gram Panchayat which has not been proved by adducing the evidence of issuing authority. Save and except the certificate of the Gram Panchayat, there are no other evidences of business of the victim and income earned from such business and, therefore, the determination of income of Rs. 15,000/- per month of the victim by the learned Tribunal is not sustainable. He further submits that the rate of interest on the compensation amount @ 9% per annum requires to be scaled down bearing in mind the prevailing rate of banking interest. Mr. Paul, in his usual fairness, submits that the claimant is entitled to future prospect of 40% of his annual income. In the light of the aforesaid submissions, he prays for modification of the impugned award of the learned Tribunal.

In reply to the contentions raised on behalf of the appellant-insurance company, Mr. Tapas Sinha, learned advocate for respondent no. 1-claimant submits that the disability certificate produced by the claimant-injured has been tendered into evidence without objection and, therefore, its acceptability cannot be challenged at the appellate stage. As per the disability certificate, the victim sustained 80% permanent disablement and also cannot travel without assistance of an escort and therefore, the loss of earning calculated by the learned Tribunal at 80% of the annual income of the victim-injured should be affirmed in the facts and circumstances of this case. He further submits that the oral evidence supported by the documentary evidence of income claimed by the victim has not been challenged by the insurance company. Since at the time of accident, the victim was carrying on business of supply sand and stonechips, the income of Rs. 15,000/- per month is reasonable and the learned Tribunal has rightly determined such income, which does not call for interference. In light of his aforesaid submissions, he prays that the impugned award passed by the learned Tribunal should be affirmed in the interest of justice.

Having heard the learned advocates for the respective parties, following issues have fallen for consideration. *Firstly*, whether the disability certificate can be admitted without the examination of the person who issued the same; *secondly*, whether the injury of claimant has resulted in 80% loss of earning capacity; *thirdly*, whether the learned Tribunal erred in determining the income of the victim; *fourthly,* whether the learned Tribunal erred in allowing interest on the compensation amount @ 9% per annum; and *lastly*, whether the claimant is entitled to future prospect of 40% of his annual income.

With regard to the first issue, it is found that the claimant-injured produced the disability certificate issued by the Alipurduar SD Hospital, which is marked as **Exhibit-10**. Mr. Paul, learned advocate for the appellant-insurance company relying on the decision of the Hon'ble Supreme Court in *Rajesh Kumar Alias Raju (supra)* has argued that without examination of the author, such document of disability is inadmissible. *Per contra*, Mr. Sinha, learned advocate for the respondent no. 1-claimant argued that since such document of disability was admitted into evidence without objection, its veracity and admissibility cannot be challenged at this stage. It is true that the disability certificate produced by the claimant-injured has been marked exhibit without any objection from the side of the insurance company. Moreover, there is nothing in the evidence to suggest that such document of disability was ever challenged or objected to at the time of cross-examination of P.W. 1 by the insurance company. To be precise, no suggestion whatsoever has been given to the witness challenging the veracity of the said document. In *Rajesh Kumar Alias Raju (supra)*, the certificate of Civil Surgeon, Faridabad was relied upon by the claimant. However, fact of the case does not reveal that the document was tendered into evidence without objection. Thus, the fact of the aforesaid case is distinguishable from the case in hand where it is found that the disability certificate has been tendered into evidence and exhibited on behalf of the claimant without any objection from the side of the insurance company. Since the document is marked as exhibit on consent without reservation, the contents are taken as admitted. In the case at hand, even if for the sake of argument it is held that the disability certificate has been exhibited not on consent but on formal proof dispensed with, the insurance company was free to examine the witness on the question of veracity thereof or even lead evidence of rebuttal. The insurance company, in the present case, has not led any evidence challenging the veracity of the disability certificate produced at the instance of the respondent no.1-claimant, therefore, having failed to take appropriate steps at the trial, the insurance company cannot contend before the Appellate Court that the contents of those documents were not proved. If such objection was raised at the trial, the respondent no.1-claimant could even examine the doctor who issued the certificate so that he could face the cross-examination of the insurance company. Thus, the argument advanced on behalf of the insurance company falls short of merit. For the aforesaid reason, the disability certificate produced by the claimant is acceptable and can be taken into consideration. I find substance in the submissions of Mr. Sinha, learned advocate for respondent no.1-claimant, in this regard.

With regard to loss of earning capacity, it is found that the learned Tribunal considered 80% disability noted in the disablement certificate as 80% loss of earning capacity. At this stage, it will be relevant to reproduce the proposition laid down by the Hon'ble Supreme Court in ***Raj Kumar versus Ajay Kumar and Another*** reported in ***(2011) 1 SCC 343*** which is reproduced hereunder:

> *"12. Therefore, the Tribunal has to first decide whether there is any permanent disability and if so the extent of such permanent disability. This means that the tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement, (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is the permanent disability suffered by the*

person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

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 ability (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 driver or a *carpenter, the actual loss of earning capacity may virtually be hundred percent, 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 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. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation…"

Bearing in mind the aforesaid proposition laid down by the Hon'ble Supreme Court, let me first assess whether the victim sustained permanent disability due to accident and if so, to what extent. The victim in his claim application in Column 11 stated that he sustained multiple injuries on several parts of his body and such injuries have resulted in traumatic deformity of right leg. The discharge certificate **Exhibit-10** also shows that the victim sustained post-traumatic deformity of right leg, which disability is permanent in nature. Now, it is to be seen whether such permanent disability actually affected the earning capacity of the victim-injured or not. Though the claimant in his evidence has stated that after the accident, he has no capacity to continue with his business activities but it is relevant to note that no medical evidence has been adduced on behalf of the claimant-victim showing his extent of injuries to have affected his earning capacity. It is trite law that the percentage of disablement in all cases cannot be equated with the percentage of loss of earning. It is the case of the claimant that his right leg was operated and the disablement certificate also shows of deformity in the right leg. Considering the aforesaid aspect, the loss of earning to my mind at best extends to 50%.

With regard to the third issue pertaining to income of the victim, it is found that the learned Tribunal assessed the income of the victim to be Rs. 15,000/- per month on the basis of certificate issued by the office of Patlakhawa Gram Panchayat (**Exhibit-9**). The victim-claimant in his claim application as well as in his evidence in chief has stated his income of Rs. 15,000/- per month. Save and except, the certificate of the Gram Panchayat (**Exhibit-9**), there are no other documents relating to the business of the victim. On perusal of the certificate issued by the Gram Panchayat (**Exhibit-9**), it is found that such certificate bereft of the basis upon which the determination of income of Rs. 15,000/- has been made. Further the aforesaid certificate has not been proved by the issuing authority. The victim-claimant did not adduce any other evidence of his business. In the aforesaid premises, the determination of income of the victim at Rs. 15,000/- per month on the basis of certificate issued by the Gram Panchayat by the learned Tribunal is not sustainable.

In the case of ***Sri Ramachandrappa versus The Manager, Royal Sundaram Alliance Insurance Company Limited*** reported in ***(2011) 13 SCC 236***, the Hon'ble Supreme Court observed as follows:

> *"14. …We hasten to add that in all cases and in all circumstances, the Tribunal need not*

> *accept the claim of the claimant in the absence of supporting material. It depends on the facts of each case. In a given case, if the claim made is so exorbitant or if the claim made is contrary to the ground realities, the Tribunal may not accept the claim and may proceed to determine the possible income by resorting to some guesswork, which may include the ground realities prevailing at the relevant point of time…"*

Bearing in mind the aforesaid observations of the Hon'ble Supreme Court, since the income claimed by the victim-claimant is exorbitant, hence some guesswork may be resorted to determine the income. Keeping in mind the economic factors and prices of essential commodities prevalent in the year 2009, an income of Rs. 4,000/- per month would be appropriate in the facts and circumstances of this case.

With regard to the fourth issue, it is found that the learned Tribunal has granted interest @ 9% per annum on the compensation amount. Bearing in mind the prevalent rate of banking interest, the compensation amount would carry interest @ 6% per annum from the date of filing of the claim application till payment.

Coming to the last issue with regard to future prospect, since at the time of accident, the victim was 36 years of age and self-employed, following the observations of the Hon'ble Supreme Court made in

National Insurance Company Limited versus Pranay Sethi and Others reported in ***2017 ACJ 2700***, the claimant is entitled to an amount equivalent to 40% of his annual income towards future prospect.

Since the claimant-victim had to undergo operative measures, hence I am inclined to grant Rs.50,000/- towards medical expenses and Rs.50,000/- towards pain and sufferings.

The other factors have not been challenged in this appeal.

Bearing in mind the above, the calculation of compensation is made hereunder:

Calculation of Compensation

Monthly income	Rs.4,000/-
Annual income (Rs.4,000/- x 12)	Rs.48,000/-
Add : 40% of the annual income towards future prospect	Rs.19,200/-
	Rs.67,200
50% loss of earning capacity	Rs.33,600
Multiplier 15 (Rs.33,600/- x 15)	Rs. 5,04,000/-
Add: Pain and sufferings	Rs.50,000/-
Add: Medical expenses	Rs.50,000/-
Total amount	Rs.6,04,000/-

Thus, the respondent no. 1-claimant is entitled to compensation of Rs.6,04,000/- together with interest @ 6% per annum from the date of filing of the claim application till payment. It is found that the appellant-Insurance Company has deposited Rs. 30,50,881/- vide OD Challan No. 2787 dated 10th January, 2017 and has also deposited the statutory amount of Rs.25,000/-

vide OD Challan No. 1548 dated 8th September, 2016 with the registry of this Court. Both the aforesaid deposits together with accrued interest shall be adjusted against the entire compensation amount.

The respondent no.1-claimant is directed to deposit *ad valorem* court fees on the compensation amount assessed, if not already paid.

Learned Registrar General, High Court, Calcutta, shall release the aforesaid amount of compensation together with interest in favour of the respondent no.1-claimant upon satisfaction of his identity and payment of *ad valorem* court fees, if not already paid.

Upon full satisfaction of the compensation amount, if any amount is left over, the same shall be refunded to the appellant-Insurance Company.

With the aforesaid observations, the appeal stands disposed of. The impugned judgment and award of the learned Tribunal stands modified to the above extent. No order as to costs.

All connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

Let a copy of this order along with the lower court records be sent to the learned Tribunal in accordance with rules.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of necessary legal formalities.

(**Bivas Pattanayak, J**.)