06.02.2023
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Item No.16

FMA No. 1036 of 2022
With
CAN No. 2 of 2022
The New India Assurance Company Limited
Versus
Debasis Ray & Anr.

Mrs. Sucharita Pal
...for the appellant-Insurance Company

Mr. Amit Ranjan Roy
...for the respondents-claimants.

This appeal is preferred against a judgment and award dated 26th November 2021 passed by the learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, 7th Court, Paschim Medinipur in M.A.C Case No. 470 of 2010 granting compensation of Rs.22,12,800/-together with interest in favour of the cliamant under Section 166 of the Motr Vehicles Act, 1988.

The brief fact of the case is that on 22nd August 2006 at about 07.30 A.M. while the victim was travelling by vehicle bearing registration no. WB 29/2383 (Bus) and when the said vehicle reached near Chaityanayapur More, the driver of the said vehicle lost control of the said vehicle and it capsized on the road resulting in injuries to the victim. The victim sustained fracture of his hand and leg (patella joint) and other multiple injuries. Immediately after the accident the victim was shifted the Haldia S.D.Hospital and was subsequently transferred to Appolo Hospital, Chennai. On account of such injury sustained in the said accident the victim filed application under Section 166 of the Motor Vehicles Act, 1988 claiming compensation of Rs.5,85,800/-.

The claimant-respondent in order to establish his case examined two witnesses including himself and prove documents which has been marked **Exhibits 1 to 6** respectively.

The appellant-insurance company did not adduce any evidence.

Upon considering the materials on record and the evidence adduced on behalf of the claimant-respondent, learned Tribunal granted compensation of Rs.22,12,800/- together with interest in favour of the claimant.

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

Mrs. Sucharita Paul, learned advocate appearing on behalf of the appellant-insurance company, submits that the learned Tribunal erred in determining the income of the victim at Rs.6000/- per month which was never supported by any cogent evidence and the learned Tribunal ought to have considered notional income of Rs.3000/- per month as the income of the victim.

She further submits that though the extent of disability has been noted in the disablement certificate as 80% but the learned Tribunal considered the loss of earning capacity to 100% which is erroneous and requires to be set aside.

Furthermore, she submits that the learned Tribunal erred in granting medical expenses of Rs.4,00,000/- without any basis since such expenses has not been proved by any documentary evidence.

She further submits that since at the time of accident the victim was 38 years of age the multiplier should be 15 instead of 16 as adopted by the learned Tribunal.

Moreover, she submits that since the insurance company has deposited the entire awarded sum in terms of the order of this Court, hence, the penal interest @12% per annum imposed on the insurance company be set aside.

In light of her aforesaid submission she prays for modification of the award.

In reply to the contention raised on behalf of the insurance company Mr. Amit Ranjan Roy, learned advocate for the claimant-respondent submits that from the claim application as well as evidence of the victim it manifests that the victim at the time of accident was a qualified person holding M.Com and B.Ed. degrees and was running a coaching centre for imparting private tuitions and therefore, the income of Rs.6000/- per month of the victim assessed by the learned Tribunal should be affirmed.

Furthermore, he submits that as per the disablement certificate the victim had to travel with the assistance of escort and his left hand has been totally paralysed and therefore the functional disability is 100% and therefore the loss of future earnings assessed by the learned Tribunal holding disablement of 100% has been rightly made and does not call for interference.

He submits that since the victim was treated at hospitals in Cuttak and Chennai outside the State of West Bedngal it was not possible for the victim to prove the documents relating to medical expenses. However, considering the extent of disability the learned Tribunal assessed the medical expenses and the possible future medical expenses to the extent of Rs.4,00,000/-which does not call for interference.

So far as the amount for loss of amenities and pain & suffering are concerned, he leaves the matter to the discretion of the Court.

As regards the multiplier he concurs with the submission advanced on behalf of the appellant-insurance company that since at the time of accident the victim was aged 38 years, the multiplier should be 15 instead of 16.

By order dated 17th January, 2013 service of notice of appeal upon respondent no. 2-owner of the offending vehicle has been dispensed with.

Haring heard the learned advocates appearing on behalf of the respective parties, it is found that the insurance company in the present appeal has raised the following grounds, *firstly,* that the learned Tribunal erred in determining the income of the victim; *secondly,* the learned Tribunal ought to have considered the extent of disability of 80% to be the extent of loss of earnings; *thirdly,* the medical expenses assessed by the learned Tribunal is without any basis; *fourthly,* the multiplier to be adopted should be 15 instead of 16 and *lastly,* the penal interest imposed by the learned Tribunal is improper.

With regard to the first issue relating to determination of income of the victim, it is found that the learned Tribunal considered the income of the victim at Rs.6000/- per month. Such income has been challenged by the insurance company on the ground of absence of cogent evidence. It is stated in the claim petition at column 4 that the victim used to impart private tuitions and his qualification is M.Com, B.Ed. Though the victim did not produce any documents in relation to his educational qualification however he stated in his cross-examination by the insurance company that his educational qualification is M.Com, B.Ed. Thus so far as the educational qualification of the victim is concerned, it remains unchallenged. It also relevant to note that the profession of the victim has also remained unrebutted in cross-examination inasmuch as it is revealing from cross-examination that prior to the accident the victim was a private tutor and had coaching centre in his house.

Therefore, it goes without saying that from the aforestated unchallenged evidence of PW1 (victim) it manifest that the victim is a qualified person holding a degree of M.Com, B.Ed. and prior to the accident he used to run coaching centre imparting private tuitions. Accordingly, keeping in mind the qualification and profession of the victim, I am of the opinion that the income assessed by the learned Tribunal of Rs.6000/- per month of the victim does not call for interference.

So far as the second issue regarding assessment of future loss of earnings, it is found that the learned Tribunal has considered future loss of earnings to the extent of 100%. In order to appreciate the percentage of future loss of earnings one has to appreciate the extent of disability *vis-a-vis* its effect on the subsequent earnings of the victim. In column 11 of the claim application it is stated by the claimant that he sustained fracture on left hand and left patella joint and other multiple injuries. However, in his evidence-in-chief in addition to fracture injuries the victim stated of brain hemorrhage. The brain hemorrhage was never stated in the claim application. There is no medical evidence that the victim sustained brain hemorrhage due to the said accident. The only medical evidence before the Court is the oral evidence of PW2, Dr Kanchan Pathak, Medical Officer who was a member of the Medical Board which issued the disability certificate. From the oral evidence of PW-2, it is found that the victim after the accident got paralysis on the left side and his disability is found to be 80%. The disability certificate **(Exhibit-6)** shows that the victim had permanent disability to the extent 80%. PW2 in cross-examination stated that the certificate of disability has been issued after examining the victim and consulting the medical papers produced by the victim. The disability certificate further reveals that the victim cannot travel without assistance of escort. As per the statement in the claim application and evidence the claimant (victim) that he is a private tutor and runs a coaching centre at his house. Now at this stage the question crops up as to what would be the extent of future loss of earnings due to the disablement indicated in the disability certificate of 80%. Mrs. Paul, learned advocate for the appellant-insurance company has contended that the percentage noted in the disability certificate may form the basis of loss of future earnings. In ***Raj Kumar versus Ajay Kumar & Anr.*** reported in ***(2011) 1 SCC 343*** the Hon'ble Supreme Court in paragraph no.8 held that 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 and further held in the subsequent paragraph as follows:

> *"9. 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.*
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> *10. Ascertainment of the effect of the permanent disability on the actual earnings 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…”.*

Bearing in mind the aforesaid observation of the Hon’ble court and keeping in mind the aspect that since the victim was attached to the profession of teaching and running tuition classes in his house, hence his immobility in movement would not affect his loss of future earnings to the extent of 100%. Be that as it may, one cannot be oblivious to the fact that the victim has got paralysis on his left side and cannot move without assistance of escort and hence considering the same, I am of the opinion that the percentage of disablement noted in the disability certificate would effect the future earnings of the victim to the extent of 80%.

So far as the medical expenses are concerned, it is found that the claimant has not proved such medical documents showing expenses. Learned Tribunal, however, granted approximately medical expenses incurred as well as probable future medical expenses to the extent of Rs. 4,00,000/-. In column 13 of the claim application the victim stated that he incurred medical expenses of Rs.60,000/- from the date of accident till filing of the claim application on 20th December, 2010. It is also fact that the medical expenses incurred by the victim have not been proved. Be that as it may, there is oral evidence of the victim that he was treated at Sevasadan Nursing Home, Cuttak and Apollo Hospital, Chennai for undergoing operations. Considering the nature of injury and the victim having been treated at hospitals outside the State of West Bengal, it is imperative that he has definitely incurred medical expenditures. In my considered view, medical expenses of Rs.2,00,000/- lakhs will be appropriate in the facts and circumstances of the case. From the disability certificate since it appears that the victim sustained permanent disability of 80% and cannot travel without assistance of escort, hence, an amount of Rs.1,00,000/- lakh towards future medical expenses be taken into account for calculation of just compensation.

With regard to the pain and suffering, it is found that the learned Tribunal granted Rs.2,00,000/- lakhs. Considering the disablement as well as the treatment stated by the victim and as the evidence of the doctor shows that he suffered from paralysis on the left side I am of the opinion that the amount granted towards loss of amenities and pain & suffering by the learned Tribunal does not call for any interference.

With regard to the multiplier since at the time of accident the victim was aged about 38 years hence following the observations of the Hon'ble Supreme Court passed in ***Sarla Verma and others versus Delhi***

Transport Corporation and another reported in ***(2009)6 SCC 121*** the multiplier should be 15 instead of 16.

The other findings and factors of the learned Tribunal have not been challenged.

Bearing in mind the aforesaid factors the calculation of compensation is made hereunder –

Income		Rs.6,000.00 p.m.
Future prospect 40%	+	Rs.2,400.00 p.m.
		Rs.8,400.00 p.m.
		X 12
Annual Income		Rs.1,00,800.00
		X 15
Multiplier		Rs.15,12,000.00
		==============
80% disability/loss of earning capacity		Rs.12,09,600.00
Add : Medical Expenses (Incurred + Future)		Rs. 3,00,000.00
		Rs.15,09,600.00
Add: Non-pecuniary damages already awarded by the learned Tribunal		Rs. 2,00,000.00
		Rs.17,09,600.00

Thus, the claimant is entitled to compensation of Rs.17,09,600/- along with interest @ 6% per annum from the date of filing of the claim application (i.e 20.12.2010) till deposit. It is informed that the insurance company has deposited a sum of Rs.22,12,800/- vide OD Challan no. 359 dated 2nd May, 2022 in terms of the order of this Court dated 25th April, 2022 and has also deposited statutory amount of Rs.25,000/- vide OD Challan No. 2114 dated 18th February, 2022 with the Registry of this Court. Both the aforesaid deposits along with accrued interest be adjusted against the entire amount of compensation.

Since the appellant-insurance company has deposited the entire awarded sum in terms of the order of this Court dated 25th April, 2022 accordingly the penal interest of 12% per annum imposed by the learned Tribunal is set aside.

The appellant-insurance company is directed to deposit the balance amount of compensation, if any, together with interest @ 6% per annum from the date of filing of the claim application till the date of deposit by way of cheque before the learned Registrar General, High Court, Calcutta within a period of six weeks from date.

The respondent no. 1 claimant shall deposit *ad valorem* court fees on the compensation amount, if not already paid.

Upon deposit of balance amount of compensation, if any, by the appellant-insurance company, learned Registrar General, High Court, Calcutta shall release the amount of compensation and the interest as indicated above in favour of the claimant upon satisfaction of his identity and payment of *ad valorem* court fees, if not already paid.

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

All connected applications, if any, stands disposed of.

Interim order, if any, stands vacated.

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

(Bivas Pattanayak,J)