28.08.2023
Ct. 654
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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURIDICTION
APPELLATE SIDE

F.M.A. 927 of 2022

The New India Assurance Co. Ltd.
-Vs-
Rohit Mallick & Anr.

Mr. Sanjay Paul
… For the appellant-insurance company.

Mr. Ashique Mondal
… For the respondent no.1-claimant.

This appeal is preferred against the judgement and award dated 28th April, 2022 passed by Learned Additional District Judge cum Judge, Motor Accident Claims Tribunal, Fast Track 1st Court, Diamond Harbour, 24 Parganas (South) in M.A.C. Case No. 23 of 2020 granting compensation of Rs.13,24,881/- 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 9th December, 2019 at about 1 P.M. while the victim and his uncle's son was going to Sirakole from Amtala More by riding a motor cycle bearing registration no.WB-20AT/6585 and when they reached near Gangarampur More at that time the offending vehicle bearing registration no. WB-19H/7653 which was coming from opposite direction in a rash and negligent manner dashed the motor cycle on which the victim was proceeding. As a result of such accident, the victim sustained severe injuries all over his body especially on his head. Immediately the local people shifted the victim to Amatala Rural Hospital for his treatment. Thereafter due to serious condition of the victim he was transferred to Kolkata for better treatment. The victim was admitted to Shankarnath Dialysis Centre and Nursing Home on 09.12.2019 and discharged on 21st December, 2019. Due to injuries received in the said accident the victim sustained permanent disablement. On account of injuries sustained in the said accident and subsequent disablement, the injured-victim filed application for compensation of Rs.15,00,000/- together with interest under Section 166 of the Motor Vehicles Act, 1988.

In order to establish his case the claimant-injured adduced the evidence of five witnesses and produced documents which have been marked as **Exhibit 1** to **27** respectively.

The appellant-insurance company did not adduce any evidence.

By order dated 10th November, 2022 service of notice of appeal upon respondent no.2-owner of the offending vehicle has been dispensed with since it did not contest the claim application.

Upon considering the materials on record and the evidence adduced on behalf of the claimant-injured the learned Tribunal granted compensation of Rs.13,24,881/- together with interest in favour of claimant-injured under Section 166 of the Motor Vehicles Act, 1988.

Being aggrieved by and dissatisfied with the impugned judgement and award of the Learned Tribunal, the insurance company has preferred the present appeal.

Mr. Sanjay Paul, learned advocate for the appellant-insurance company submits that the doctor, who issued disability certificate holding that the patient was suffering from Neuropathy problem, was not specialized in Neuropathy and also did not treat the patient at any point of time. Therefore, the disability to the extent of 45% assessed of the victim by the said doctor is not acceptable. Moreover such extent of disablement cannot be the extent of future loss of earnings, however, the learned Tribunal determined loss of earnings at 45% which is flawed. He further submits that the learned Tribunal erred in granting general damages on different heads without any basis and therefore the amount granted on such heads needs to be scaled down. In light of his aforesaid submission, he prays for modification of the impugned judgement and award.

In reply to the contention raised on behalf of the appellant-insurance company Mr. Ashique Mondal, learned Advocate for respondent no.1-claimant (injured) submits that the disability certificate was proved by the doctor who clinically examined the patient and considered the medical documents produced before him and further the disability certificate has been exhibited without objection and therefore the assessment of disability to the extent of 45% in the victim is an admitted position. As far as general damages are concerned, he submits that the learned Tribunal has rightly allowed the said amount bearing in mind the facts and circumstances of the case. He submits that the impugned judgement and award of 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 learned Tribunal erred in determining the loss of earnings at 45% of the annual income of the victim and *secondly,* whether the learned Tribunal erred in granting general damages under different heads.

With regard to the first issue it is found that the claimant in order to establish the extent of disablement the victim has examined Dr. Minoti Das, as P.W. 3 who proved disablement certificate marked as **Exhibit 20**. It is true that the doctor P.W.3 has assessed disability to the extent of 45% in the victim observing that the victim suffered painful stiffness of right shoulder joint and elbow joint with right sided Brachial Plexopathy and Ulnar Neuropathy at wrist, atrophy of all arm muscles and shoulder girdle muscles and weakness of right arm. The extent of disablement assessed by the doctor P.W.3 has been challenged on the ground that the said doctor did not have the authority to issue disability relating to Neuropathy. The disability certificate **Exhibit-20** shows that the said doctor is specialised in Orthopaedics. Be that as it may, one cannot be oblivious to the fact that while issuing disability certificate the said doctor has taken note of the prescription issued from the School of Physical Medicine dated 26th January, 2021 and 2nd August, 2021 wherein it is noted that the victim suffered right Brachial Plexopathy and Ulnar Neuropathy at wrist. The disability certificate has been exhibited without objection. It is trite law that if a document is marked as exhibit on consent without reservation the contents are not only evidence but 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 witnesses on the question of veracity thereof or even lead evidence of rebuttal. It appears from the record that the insurance company has not led any evidence challenging the veracity of the disability certificate produced at the instance of the respondent no.1-claimant. Therefore, challenge thrown to the disability certificate by the insurance company does not hold good. Thus, the disability of 45% in the victim has noted by the Doctor **(PW-3)** in the disability certificate is acceptable. Now, it is to be assessed as to what would be the effect of such disablement on the future earnings of the victim. In order to deal with the aforesaid issue, it would be apposite to refer to the observation of the Hon'ble Supreme Court made in ***Raj Kumar versus Ajay Kumar & Anr.*** 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 principles as above laid down by the Hon’ble Court, let me examine the material on record to determine the point of issue. The discharge certificate of the victim **(Exhibit-23)** of “*Shankarnath Dialysis Centre and Nursing Home”* shows polytrauma, head injury with hemorrhagic contusion in right postero parietal region, fracture of right clavicle and right scapula.

P.W.3 doctor, who issued disability certificate, upon examination, found the followings:

i. Loss of abduction, extension & flexion of right shoulder and elbow joint.
ii. Internal rotation & External rotation of right shoulder restricted.
iii. Atrophy of all U/arm muscles.
iv. Atrophy of supraspinatus, shoulder girdle muscles.
v. Weakness of right hand.

vi. Difficulty in doing personal job by right hand.

vii. Difficulty of right clavicle at lat part.

Considering the injuries sustained and the notings as above, it precisely appears that the injuries have led to weakness of right hand of the victim. There is no evidence that due to such injury and disablement the victim cannot work at all. In my opinion, such disablement affected the earnings of the victim to the extent of 35% of the annual income.

So far as general damages are concerned, it is found that the learned Tribunal has granted compensation on general damages under the following heads namely loss due to pain and sufferings, future medical expenses, loss of amenities of life and transportation. Since the victim sustained injuries in the said accident and had to be treated as indoor patient for more than 15 days and thereafter had to attend hospital for further treatment an amount of Rs.80,000/- towards pain and sufferings should be just and appropriate in the facts and circumstances of this case. The medical expenses of Rs.1,40,361/- has not been disputed. Considering the weakness of right hand, the loss of amenities of life is allowed at Rs.50,000/-. So far as future medical expenses and transportation are concerned, the victim is entitled to Rs.30,000/- each on such heads.

The other factors have not been challenged in this appeal.

Bearing in mind the above factors, calculation is made hereunder:

Calculation of Compensation

Monthly income	Rs.6,500/-
Annual income (Rs.6,500/- x 12)	Rs.78,000/-
Add: 40% of the annual income towards future prospect	Rs.31,200/-
Total income	Rs.1,09,200/-
Loss of earnings: 35% of the total income	Rs.38,220/-
Multiplier 18 (Rs.38,220/- x 18)	Rs.6,87,960/-
Add: Medical expenses	Rs.1,40,361/-
Add: Pain & suffering	Rs.80,000/-
Add: Future medical expenses	Rs.30,000/-
Add: Transportation	Rs.30,000/-
Add: Loss of amenities of life	Rs.50,000/-
Total	Rs.10,18,321/-

Thus, the claimant is entitled to compensation of Rs. 10,18,321/- together with interest @ 6% per annum from the date of filing of claim application (01.02.2020) till payment.

It is found that the appellant-insurance company has deposited an amount of Rs.14,93,277/- vide O.D. challan no.1328 dated 26th July, 2022 as well as Rs.25,000/- vide O.D. challan no. 1124 dated 6th July, 2022. Both the aforesaid deposits together with accrued interest be adjusted against the entire compensation amount and the interest thereon.

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

The learned Registrar General, High Court, Calcutta is directed to release the aforesaid amount of compensation and interest as indicated above in favour of the respondent no.1-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 judgement and award is modified to the above extent. No order as to costs.

All the connected applications, if any, stand disposed of.

Interim order, if any, stands vacated.

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

(Bivas Pattanayak, J.)