

8.1. 2024
item No.14
n.b.
ct. no. 551

FMA 464 of 2020
with
IA CAN 1 of 2019(Old No. CAN 3013 of 2019)

The New India Assurance Co. Ltd.

Vs.

Sri Tapas Chakraborty @ Tapash Chakraborty & Anr.

Mr. Sanjay Paul,
Ms. Jaita Ghosh,

..... for the appellant.

Mr. Swaswata Bhattacharya,
Mr. R. N. Basu,

..... the respondent No.1.

The instant appeal has been preferred against the judgment and award dated January 11, 2019 passed by the learned Tribunal, 14th Court, Alipore, in M.A.C. case No. 11 of 2013.

The brief fact of the case is that the present respondent being the claimant preferred an application before the learned Tribunal under Section 166 of the Motor Vehicles Act for getting compensation from the Insurance Company on the ground that He became permanent disabled by road traffic accident on 30.10.2012 due the rash and negligent driving of the offending vehicle duly insured under the policy of the Insurance Company. It is the contention of the respondent before the learned Tribunal that he became permanent disabled and he has entitled to get the compensation. The claimant's case was contested by the Insurance Company.

After hearing the parties, the learned Tribunal has awarded sum of Rs.25,21,015 towards just and proper compensation to the claimant.

Being aggrieved by and dissatisfied with the said award, the Insurance Company has preferred the instant appeal.

Learned advocate for the Insurance Company submits that the learned Tribunal has committed an error in pursuance of the impugned award in favour of the claimant. He submits that the sole point for considering in the appeal that the learned Tribunal has adopted the structured formula in assessing the compensation. The fact of the case goes to show that the respondent no.1 is a senior clerk in South Eastern Railway, Satragachi, Howrah and after such accident his service was not terminated. Moreover, he has got promotion in his office and his income was increased from Rs.30,000/- per month to Rs.50,000/- per month at the time of disposal of the claim case. The fact of the case goes to show that there were no financial loss to the respondent injured. So, in this case, the claimant is not entitled to get compensation according to the structured formula. He firmly submits that the claimant who lost his right forearm which was amputated over elbow may entitle to get compensation towards the pain and suffering and his loss of income during hospitalization. It has been specifically pleaded by the Insurance Company before the learned

Tribunal that his employment was not suffered, so, he has not entitled to get the compensation according to the structured formula. He argued, the impugned award passed by the learned Tribunal is required to set aside and modified.

In support of his contention, he cited several decisions of **Rajesh Kumar @ Raju Vs. Yudhvir Singh & Anr** reported in **(2008) SCC 305**. By citing the observation of the Hon'ble Supreme Court he argued that the Hon'ble Supreme Court has held that the author of the certificate was not examined, so the certificate cannot be believed. In this case, the disability certificate produced by the claimant has not been proved by calling any doctor or the author of the certificate. So, the disability has assessed by the learned Tribunal according to the observation of the doctors in the certificate is erroneous. He cited another decision of **The New India Assurance Co. Ltd. Vs. Sri Sankar Biswas Barman** the Hon'ble Division bench of this Court wherein followed the observation of the **Raj Kumar Vs. Ajay Kumar & Anr.** [(2011)1 SCC 343] and held the disablement as assessed by the doctor cannot be adopted. The Hon'ble Division Bench by virtue of **Raj Kumar Vs. Ajay Kumar & Anr.** has held that the disability as assessed by the doctor are the physical disability and the Tribunal has to assess the functional disability considering the entire facts and circumstances. By citing this judgment he argued in this

case, the fact goes to show that the injured has suffered nothing loss of income. So, in this case, there is no functional disability, though the disability assessed by the doctor is 70%.

He also cited another decision of Hon'ble Division Bench of this court in **Barun Kumar Das Vs. New India Assurance Co. Ltd** reported in **2005(1) TAC 225(cal)** wherein the Hon'ble Division Bench has held that the permanent partial disability as assessed by a doctor to 65% was not considered and on considering the facts and circumstances of the case Hon'ble Division Bench has held that there is no permanent loss of earning capacity, so, the claimant is not entitled to get any compensation on that head. Only the compensation in terms of his pecuniary damages was awarded. He also cited one judgment of coordinate bench of this court in FMA 667 of 2016 which dealt with the same issue and had held that there is not loss of income. The claimant is not entitled to any compensation towards the future earning.

Finally Mr. Paul, learned advocate submits that the learned Tribunal can only award the non-pecuniary damages in favour of the claimant but erroneously awarded the compensation adopting the structure formula.

Refuting the contention of the learned advocate for the appellant, the learned advocate for the respondent/claimant submits that the learned Tribunal

has committed no error in adopting the structured formula in assessing the compensation in this case. He submitted that the Hon'ble Supreme Court has adopted same view recently in **Union of India Co. Ltd. Vs. Jaginder Pal & Ors.** In the cited judgment, the Hon'ble Supreme Court has held that in the case of amputation of limb of a permanent employee, though his employment is not hampered but he is entitled to get the compensation. He has on the verge of retirement, continue occupy the same post, which he had occupied at the time when the accident had occurred.

He also cited another decision of Hon'ble Supreme Court *in Mohd. Sabeer @ Shabir Hussain Vs. Regional Manager, U.P. State Road Transport Corporation* reported in 2023(1) TAC 72(S.C.) wherein the Hon'ble Supreme Court has held that in a case of scrap dealer who lost his one of his lower limb and through there is an evidence that his income was enhanced after such accident but the Hon'ble Supreme Court has awarded the compensation according to the structured formula including the future prospect.

He also cited another decision of Hon'ble Supreme Court in *Erudhaya Priya Vs. State Express Transport Corporation Ltd* wherein claimant has lost his limb though there is no evidence of his loss of income but the three judges bench of Hon'ble Supreme Court has

awarded the compensation according to the structured formula including future prospect.

Learned advocate for the respondent finally submits that that learned Tribunal has not awarded any compensation towards the future prospect but the Hon'ble Supreme Court in all cases has awarded future prospect to the claimant/respondent. Though he has not filed any cross appeal or separate appeal, but he has entitled to get the just and proper compensation on the basis of the judgment in question as a future prospect was denied. He cited the decision reported in **AIR 1999 SC 357** on that principle.

Heard learned advocates and perused the materials on record, the only question raised before this Appellate Court that whether a person who has suffered a permanent disability is entitled to get the compensation on adopting structure formuly when there is no loss of income. The Hon'ble Supreme Court in **Raj Kumar Vs. Ajay Kumar & Anr.** has discussed about the compensation in an injury case. Hon'ble Apex Court has answered to the fashion that the disability certificate issued by doctor can the physical disability of a person in considering his entire body. But in the case of compensation of the functional disability has to be assessed by the Tribunal. Considering the facts and circumstances of the case especially the occupation of the injured and how such occupation has been hampered by

such accident. The paragraph 12 **Raj Kumar (Supra)** is set out as follows:

“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: (1) 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 it affect his earning capacity.”

It is admitted case herein that the present respondent is the injured person who was a senior clerk of South Eastern Railway. His office was at Santragachi,

Howrah. After such accident, he loss his right hand over the elbow but his job was not hampered and he also received his due promotion in the service. In considering the entire facts, it is true that his service has not been effected. It cannot be denied that to perform his service, he has to take hurdle to join his service without a hand. It is not possible for a person to attend his office through taking regular course of transportation as a general person. It is further correct that he has got his due promotion in the service but it cannot be assessed, at this juncture, he may have captured his promotion earlier to the due promotion if he had not disabled. He was functioning with his one hand. It is also correct that considering the job performed by the injured that being senior clerk he use to write down the office memos/notes. Surely, it is not possible for him to perform job properly in absence of his right hand. Though, at this juncture, it would be very harsh to hold that the earning capacity of the injured has not at all suffered after such accident. However, the evidence shows earning capacity may have not effected but in considering ratio of **Raj Kumar Vs. Ajay Kumar & Anr**, the functional disability shall not be equated with the disability assessed by the Government doctors by issuing the disability certificate. I am of the view that the functional disability of the injured in this case would be 50% instead of 70%.

In considering the argument on behalf of the respondent towards the future prospect, it appears to me that the learned Tribunal has not awarded the future prospects in this case. This is a case filed according to the Motor Vehicles Act and the observation of the Hon'ble Supreme Court was in a case of civil in jurisdiction. So the observation for not filing the cross appeal and its impact thereon on a pending appeal is not applicable in toto. Furthermore, this court has decided on several occasion by virtue of decision of the Hon'ble Division Bench of this court in Smt. Sulekha Das followed by decision of Hon'ble Supreme Court that in case of non-filing of cross appeal against an award, the claimants are not entitled to get the benefit. Appeal filed by the Insurance Company. Considering the same, the award passed by the learned Tribunal need be modified as observed above.

1. Monthly income	Rs.25,133/-
2. Annual income	Rs.3,01,596/-
3. Multiplier 11	Rs.33,17,556/-
4. 50% functional disability	Rs.16,58,778/
5. Add general damages	<u>Rs.1,98,726/-</u> Rs.18,57,504/-

It appears that the Insurance Company has already deposited his earlier awarded sum amounting to Rs.34,61,733 plus Rs.25,000/- (the statutory deposits) to the office of the learned Registrar General, High Court,

Calcutta, The same amount must have accrued some interest.

The award of this case comes to Rs.18,57,504/- along with 6% interest per annum from the date of filing of claim application till this date.

The office of the learned Registrar General, High Court, Calcutta is directed to calculate the awarded amount and disburse the same in the name of the claimant within four weeks.

It appears that the amount of the Insurance Company may have some residue, the same has to be returned to the Insurance Company on usual terms and condition.

The claimants are at liberty to receive the amount subject to the ascertainment of deficit court fees, if any.

Accordingly, FMA 464 of 2020 is disposed of.

Connected applications, if any, are also disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Subhendu Samanta, J.)