

9.1. 2024
item No.19 & 20
n.b.
ct. no. 551

FMA 877 of 2022
with
CAN 1 of 2022
+
CAN 2 of 20232
The New India Assurance Co. Ltd.
Vs.
Ramkrishna Samanta & Anr.
With
COT 73 of 2022
Ramkrishna Samanta & Anr.
Vs.
The New India Assurance Co. Ltd

Ms. Sucharita Paul
.....for the appellant.
Mr. Amit Ranjan Roy,
.... For the respondent.

It appears that the number of appeal was wrongly mentioned in order dated 7.12.2023 and 4.1.2024 as FMA 877 of 2018 it should be read as FMA 877 of 2022.

The instant appeal has been preferred against the judgment dated March 25, 2022 passed by the learned Judge, Motor Accident Claims Tribunal, Fast Track Court-I, Tamluk, Purba Medinipur in M.A.C Case No.92 of 2016.

The brief fact the case is that the present respondent no.1/claimant has preferred an application under Section 166 of M.V. Act before the learned Tribunal for getting compensation on the ground he sustained severe bodily injury and became permanently disabled due to the rash and negligent driving of the driver of the offending vehicle duly insured under the policy of

Insurance Company. The claim case contested by the Insurance Company by filing written statement.

After considering the parties and after receiving the evidence learned Tribunal has passed the impugned award directing the Insurance Company to pay the compensation amounting to Rs.34,10,930/-.

Being aggrieved by and dissatisfied with the said award the Insurance Company has preferred the instant appeal. The claimant also preferred a cross appeal against the same award being COT 73 of 2022. Both the appeal and the cross appeal have been taken up together for disposal.

The Insurance company has preferred the appeal only on two grounds. **Firstly**, it is the submission of the learned counsel appearing on behalf of the Insurance Company that the claimant i.e respondent no.1 was also responsible for the accident. There are contributory negligence on the part of the respondent no.1 while driving his motor cycle. Accident happened due to head on collision between two vehicles. Thus, both the drivers of the vehicles are squarely responsible for the accident. **The second point**, of argument by the Insurance Company is that the learned Tribunal has assessed the compensation on the head of loss of future income to the tune of Rs.20,00,000/-. The fact goes to show that the claimant was a dealer of fruits at the concerned market and he used to earn Rs.8,00,000/- per annum. The

income tax return would show that the income of the claimant has never been reduced or hampered due to such accident, rather the income has been increased day by day. So, at this juncture, there was no loss of income or the future income of the injured. Thus, the compensation assessed by the learned Tribunal under the head of loss of future income is erroneous.

Heard the learned advocates.

In considering the contributory negligence on the part of the claimant himself, it is the case of the Insurance Company by filing of the additional written statement that the injured claimant at the time of accident was coming from the opposite side by riding his motor cycle bearing no.WB30/9562. At that time, he was driving in a very rash and negligent manner and he also talking in Cell Phone by placing the same in between ear and shoulder. He suddenly came in front of the vehicle (Maruti Swift) bearing number WB 30N 3216 and came to the extreme left portion of the vehicle and dashed the left side of the vehicle. In support of their contention the Insurance Company has produced two witnesses. They are the P.W. 2 driver of the Maruti Swift P.W. 4, and the owner of the Maruti Swift who was sitting inside the vehicle at the time of accident. Both the D.W. 2 and D.W.4 stated that at the time of accident the injured came from the opposite side with rash and negligent manner and talking in the cell phone and suddenly came to the extreme left side of the

vehicle and dashed the left portion of the vehicle and suffered the accident.

Learned advocate for the Insurance Company submits that the police report suggests that left portion of the Maruti Swift vehicle has been dashed and front portion of the motor cycle has also been damaged. He argued that the learned Tribunal has failed to appreciate the facts and evidences adduced by the Insurance Company and passed the impugned judgment and award without considering the contributory negligence on the part of the injured.

Refuting the contention of the Mr. Paul, learned advocate for the injured/claimant. Mr. Roy, learned advocate submits that the evidences of injured(P.W.1) and the eye-witnesses i.e. P.W. 5 is glaring to decide the matter. P.W.5 is the eye-witnesses of the accident and he has also charge-sheeted witnesses. His version cannot be disbelieved. He submitted that the claimant was standing on the extreme left portion of the road oks the morum portion with his. motor cycle, at the time the offending vehicle, which was running in rash and negligent manner dashed the injured along with motor cycle. The investigation of the police also noted in charge-sheet where the driver of the Maruti Swift was cited as an accused of this case. He further argued the learned Tribunal has considered the plea of the Insurance Company and is of opinion that the owner and the driver

of the offending vehicle are the interested witnesses. So, their witness cannot be believed. The observation of the learned Tribunal is not at all perverse and it is a speaking order. So the plea of the Insurance Company before this appellate court regarding contributory negligence has no leg to stand upon.

Heard the learned advocates and perused the entire facts of the case, it is true that the four persons are said to be eye-witnesses of the accident. The claimant and the P.W. 5 is the witnesses supported the case of the claimant and D.W. 2 and D.W.4 are the witness supporting the case of the insurance company. The learned Tribunal has dealt with the matter in inner page 12 of the impugned judgment and is of opinion that the version of the owner and the driver of the offending vehicle cannot be belived.

At this juncture, the learned advocate appearing on behalf of the Insurance Company has cited the judgment Hon'ble Divison Bench passed in **Mita Samanta** wherein it has been observed that the owner of the offending vehicle is a valuable witness. In considering the observation of the learned Tribunal, it appears to me that the evidence of O.P.2 and O.P.4 were cannot be belived. Moreover, the learned Tribunal has considered, the Insurance Company has failed to produce any independent eye-witnesses to contradict the case of the claimant regarding contributory negligence. In considering the entire fact of the case, it appears that two

witnesses of either side deposed before the learned Tribunal regarding the fact contradictory to each other. Learned Tribunal has placed his reliance upon the fact stated by the injured himself and the eye-witnesses. The eye-witness is also cited as a witnesses of charge-sheet. The investigation of the police is ended in charge-sheet against the driver of the Matuti Swift. However, considering the observation of the learned Tribunal it appears to me that the observation is a speaking observation basis on the facts and circumstances of the case. The observation cannot be wiped out on the either way. It is true, when there is a head on collusion between two vehicles, the front portion or right portion of each vehicle must be damagaed. In this case the left portion of the offending vehicles got damages. Thus, the plea of Insurance Company cannot be velived. Thus, I find no material to believe the argument on behalf of the Insurance Company. Accordingly, the plea of contributory negligence cannot be considered at this stage.

In considering the second point of loss of future income, it appears that IT return of the injured was filed before the learned Tribunal since the assessment year 2014-15 to the assessment 2017-18. The IT return was filed for the assessment 2014-15 was filed prior to the date of accident i.e. 27.9.2015. The IT return suggest that the income of the claimant has been increased regularly. The case of the claimantly is that, due to such accident,

he became permanent disabled and he has to engage some employees to conduct his business. His business appears to be enhanced day by day. It is submission of the learned advocate for the Insurance Company that loss of future income of the claimant cannot be considered. He also argued that the injury sustained by the injured is not in permanent in nature and the injury certificate suggests that the injury never cause percentage of disablement. So the present condition of the injured may have been better. He further argued that the injured is the wholesale fruit seller and it requires no manual work. So, he is not entitled to get the compensation under the head loss of future income.

The claimants has filed the cross appeal on the ground that the learned Tribunal has only assessed Rs.20,00,00/-toward the loss of future income. In this case the structured formulae was not adopted. The learned Tribunal has only assessed the functional disability to be 50 per cent instead of 70 per cent and only five years loss of income was given. The method applied by the learned Tribunal is beyond law. So it need be set aside

In support of his contention, he cited decision of Hon'ble Supreme Court in ***Md. Sabeer @ Shabir Hussain Vs. Regional Manager, U.P. State Road Transport Corporation*** wherein the Hon'ble Supreme Court has held that in case of injury, the loss of earning capacity due to

functional disability has to be calculated according to the structure formula. He also cited a decision of three judges Bench in ***Erudhaya Priya Vs. State Express Transport*** wherein the Hon'ble Supreme Court has observed that in the case of Injury the loss of earning has to be assessed according to the structured formula.

Learned advocate for the cross objector also cited a decision of Hon'ble Supreme Court passed in ***D. Sampath*** wherein the Hon'ble Supreme Court has observed that court has the discretion to accept either total or partial or reject the certificate so produced but it must have assigned the cogent reason of such order.

On the other hand, the learned advocate for the Insurance Company has cited the observation of the Hon'ble Supreme Court passed in ***Raja Kumar Vs. Ajay Kumar & Anr.*** wherein it has been specifically observed that in case of disablement due to injury, norms has to be followed that the compensation has to be awarded towards the functional disability only not the basis of the disability certificate issued by the doctor.

Heard the learned advocate and perused the observation of the Hon'ble Supreme Court. On the basis of dictum of the Hon'ble Supreme Court in ***Md. Sabeer @ Shabir Hussain*** as well as the ***Erudhaya Priyait*** it has held that the structured formula has to be adopted in assessing the compensation in case of injury. In this case, the learned Tribunal has adopted a formula which is

not the structured formula is guided by the Hon'ble Supreme Court in different cases. In considering the observation of the Hon'ble Supreme Court in ***Raja Kumar Vs. Ajay Kumar & Anr.*** the para 12 is required to set aside.

"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.”

So, by virtue of decision of Hon’ble Supreme Court in ***Raja Kumar Vs. Ajay Kumar & Anr.***, the functional disability has to be assessed by the learned Tribunal. The learned Tribunal assessed the functional disability to be 50% instead of permanent disability certificate, which was issued to 70%. The learned Tribunal has not assigned any reason why the 50% functional disablement was adopted denying the medical disablement of 70%. In considering such issue, it appears to me that the discharge summary of the present claimant has suggest the following injury:

1. Fracture Acetabulum left.
2. Ipsilateral intertrochanteric fracture left femur with fracture distal femur.
3. Fracture patella left(open)
4. Fracture proximal phalanx 5th toe.
5. Abrasions over right forearm.

The discharge summary also suggests that several operations were done at the left including lower and upper limb of the injured. The advice was made at the discharge summary that not to lift any weight and knee has to be take rest. The disability certificate issued by the Superintendent District Hospital, Purba Medinipore suggests that the claimant has sustained disability of weakness at left liner limb.

Considering the medical reports and considering the injury sustained by the insured and also considering the fact that the injured has appeared before the learned Tribunal but personally has seen the injured as P.W. 1. The facts suggest that the claimant is whole sale fruit seller with several employees. So, employee may have working under him to do the manual work. However, it is true that the injured has sustained severe injuries due to such accident and he has suffering the weakness at the left lower limb and which is persisting after several years his accident.

Considering the same, the functional disability, according to my view would be 40% instead of medical disability of 70% in this case. It is true that the learned Tribunal has awarded sum of Rs.20,0000/- towards the loss of future income which is the guess work and beyond the statute. Accordingly, the claimant is entitled to get the loss of future income according to the structured formula.

Considering the entire aspect, I am of the view the award passed by the learned Tribunal requires modification. Yearly income is Rs.8,00,000/-. 40% of such functional disability appears to 3,20,000/-. The claimant is within the age group of 45. The applicable multiplier 14. After adding the multiplier it comes to Rs.44,80,000/-. I find no necessary to interfere with the observation of the learned Tribunal on the other heads. Considering the same, the total award comes to

Rs.44,80,000-+

67,000+11,03,930+60,000+50,000+1,00,000+30,000.

After all adding the award comes to Rs.58,90,930/-. The award shall carry 6% interest per annum from the date of filing of the claim application i.e. from 29.6.2016. The Insurance Company has already deposited a statutory sum of Rs.25,000/- and thereafter a sum of Rs.46,39,986 with the office of the learned Registrar General, High Court, Calcutta. The amount must have carried some interest.

The officer of the learned Registrar General, High Court, Calcutta is directed to disburse the same to the respondent no.1 according to the relevant rules within four weeks. After receiving such amount, the claimant shall inform the Insurance Company regarding the amount he has received from the office of the learned Registrar General, High Court, Calcutta. After receiving such information, the Insurance Company shall deposit the rest amount with the office of the learned Registrar General, High Court, Calcutta within six weeks thereafter. Therefore, the amount of compensation is to be received by the claimant/respondent no.1 subject to the ascertainment of payment of deficit court fees if any.

The LCR be returned immediately through the Special Messenger cost borne by the respondent no.1/claimant within a week.

Accordingly, the FMA 877 of 2022 along with COT 73 of 2022 are 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.)