

22.03.2024
SL No.17 & 18
Court No. 551
Ali

**IN THE HIGH COURT AT CALUTTA
Civil Appellate Jurisdiction**

**F.M.A. 560 of 2023
With
IA No.: CAN/1/2023**

**The New India Assurance Co. Ltd.
Versus
Narayan Chandra Saha & Anr.
With
COT 66 of 2023
Narayan Chandra Saha
Versus
The New India Assurance Co. Ltd. & Anr.**

Mr. Rajesh Singh
....for the appellant-insurance Co.

Ms. Sima Ghosh,
Mr.J.K. Mondal,
...for the respondents/claimants.

The instant appeal has been preferred against the judgment and award dated 23rd day of February, 2023, passed by the learned Judge, Motor Accident Claims Tribunal, Additional District Judge, FTC, Suri, Birbhum, in MAC Case No. 120 of 2017.

The brief facts of the case is that the present claimants/respondents, on 03.04.2017 at about 8.00 A.M. was returning home by riding motorcycle being No. WB-46A-5666 after filing petrol from the bus stand adjacent to the Petrol pump and when he reached on the left side mud portion of panagarh-Moregram highway, at that time the offending vehicle bearing No. UP78CN-2091 which was proceeding towards the Moregram side from Mallarpur side i.e. towards the same direction

dashed the victim from the back side and as such he fell down from the motorcycle and the right hand of the victim was ran over by the wheel of the offending vehicle. The victim sustained grievous injuries on his person and was admitted to the Hospital. He suffered the degloving injury at right upper limb and fracture dislocation distal radius ulna and auto amputation of right thumb. He was shifted to Rampurhat S.D. Hospital and, thereafter, he was shifted to Mission Hospital Durgapur where various kind of expensive operation and treatment were held on the victim.

The victim filed an application under Section 166 of M.V. Act before the learned Tribunal for getting compensation.

The said claim case was contested by the Insurance Company.

After hearing the parties and after receiving the evidences the learned Tribunal has awarded a sum of Rs. 34,13,602/- together with interest @ 6% per annum from the date of filing of the claim application and directed the Insurance Company to pay the compensation.

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

The claimants also preferred one cross appeal being COT 66 of 2023 against the said award

for enhancement of the compensation. Both the appeal and the cross appeal is taken up together for uniformity of the decision.

Mr. Rajesh Singh, learned advocate for the appellant/Insurance Company submits that the Insurance Company has preferred the instant appeal only on the basis of quantum of compensation.

The award is under challenged on mainly three grounds:-

Firstly:- The income of the claimant was not correctly assessed by the learned Tribunal.

Secondly: The disability of the victim as assessed by the learned Tribunal is incorrect and,

Thirdly: The non-pecuniary damages awarded by the learned Tribunal is excessive.

Mr. Mondal, learned advocate appearing on behalf of the claimants submits that the cross appeal was preferred challenging the award on the ground that the disability assessed by the learned Tribunal is not proper it should be 100% disability of the victim.

During the argument Mr. Mondal further argued that the future prospects was not considered by the learned Tribunal but it appears that, the same point was not raised in the memo of the cross appeal, thus it is not necessary to entertain this point in this appeal.

Income of the victim

It appears from the claim application that the claimant stated his occupation to be business of stone chips and the monthly income was stated to be Rs. 20,000/- per month. In his examination-in-chief he has stated that he used to run a stone chips business prior to his accident and he actually run the stone chips business by taking order and supplied the same by truck.

During the evidence before the learned Tribunal the victim has placed the ITR submitted by him for the assessment years 2015-2016, 2016-2017 and 2017-2018. Wherein the annual income of the victim was mentioned as Rs. 2,46,921/-, Rs. 2,47,500/- and Rs.2,56,250/- respectively.

The ITRs were exhibited by a person of concerned IT department who deposed as PW-4 before the learned Tribunal. The learned Tribunal after hearing the parties and after receiving the evidences of PW-4 the income appearing in the ITR held that the average annual income of the victim would be Rs.2,50,223/- i.e. Rs.20,851/- per month.

Mr. Singh, learned advocate submits that the ITRs produced by the PW-4 cannot be taken for consideration as they were not valid. He submits that the PW-4 was authorized by the Suri, Income Tax Officer to depose before the learned Tribunal. One authorization letter signed by the Income Tax

Officer was also produced and it was marked. Mr. Singh pointed out the said authorization letter which was marked as exhibit-12. He also pointed out that the authorization letter disclosed that the ITR filed by the assessment year 2015-2016, 2016-2017 and 2017-2018 are invalid returns as verified from the e-filing portal. He submits that the Income Tax Return which was exhibited before the learned Tribunal and the learned Tribunal has assessed the income on the basis of which are the invalid returns. So, the returns cannot be taken to be considered as a true income of the victim. He submits that though the claimant himself stated his income to be Rs.20,000/- but the income adopted by the learned Tribunal is excessive to the prayer of the claim himself.

Mr. Mondal, learned advocate appearing on behalf of the claimants submits that the letter issued by the Income Tax Officer is invalid in the eye of Income Tax Act. The Income Tax Officer must have issued a letter if it appeared to be not verified or invalid. He submits that there must have some other reasons for the returns to be invalid, but he submits that the particular statement of the Income Tax Officer is invalid by virtue of Section 142 and 143 of the Income Tax Act as inadmissible.

Heard the learned advocates; it appears that the Income Tax Officer Suri has issued the

authorization letter in favour of the PW-4 to depose before the learned Tribunal and has pointed out that the Income Tax Return as forwarded by the office of the victim, namely, Narayan Chandra Saha for the assessment year 2015-2016, 2016-2017 and 2017-2018 have been filed with the office and it has been also informed that they are the invalid return. However, it appears to me that the returns may have invalid due to several reasons but the fact goes to show that the self assessment returns were submitted by the victim prior to the accident. Furthermore, self assessed ITR for the assessment year 2015-2016 and 2016-2017 was actually filed by the injured before his accident, stating his self assessed income. The fact of submission of ITR was proved. The merit of the ITR according to the Income Tax Act, is not the matter to be decided in a claim case under Section 166 of M.V. Act, considering the same, I find no justification to disbelieve the ITR. However, by virtue of decision of the Hon'ble Apex Court in several occasions it has been held that the last year ITR prior to the accident is required to be taken for consideration. However, in this case, the prior to the accident the victim has submitted the return for the assessment year 2016-2017 wherefrom it appears that his annual income was Rs. 2,47,500/-. So, the income appearing in the assessment year ITR of assessment year 2015-2016

has to be calculated to be the income of the victim in this case.

Disability

It appears that due to the accident the victim sustained severe injury including the fracture and auto amputation of his thumb of his right hand. During a treatment in the hospital, he has recovered and after such treatment he appeared before the Rampurhat Medical College and Hospital wherein the board of Doctors has issued disability certificate in favour of the victim stating his disability to be 80%. The learned Tribunal has also assessed the disability of the victim to be 80% and compensation was awarded by virtue of the said disablement.

Mr. Singh, learned advocate submits that the disablement assessed by the learned Tribunal in this case is very excessive. He submits that the only fracture injury was suffered by the injured and there was an amputation of the right hand thumb. Mr. Singh further argued that considering the performance in the business of the present injured the functional disability cannot be equated to be 80%. He also cited the evidence of the Doctor who appeared before the learned Tribunal as PW-3 and stated that the percentage of disability of the patient is for particular portion of the limb, the Doctor also deposed that the patient can move normally and the patient can run business by sitting a place. Mr.

Singh submits that the activity of the victim to perform the business has not hampered at all by such injuries, so the disability as assessed by the learned Tribunal is erroneous. He further submits that according to the schedule of Workmen's Compensation Act, the disability of amputation of thumb of a hand of a person is 30%. However, considering the entire facts and circumstances he argued that the disability is less than 30%.

Learned advocate Mr. Mondal appearing on behalf of the claimants submits that the victim suffered a severe injury at the entire body and there is a fractural injury in right ulna as well as the entire right hand. Victim was undergone a long and costly operation for his treatment and, after the treatment he became permanently disable he cannot perform his business. Accordingly, his business was shut down. He submits that considering the entire facts and circumstances the disability assessed by the learned Tribunal i.e. 80% is not proper it should be 100%.

In support of his contention he cited some decisions of Hon'ble Apex Court passed in ***Ankur Kapoor Versus Oriental Insurance Company Ltd.*** reported in ***2018 SAR (Civil)566 and Jakir Hussein Versus Sabir and Others*** reported in ***2015 (2) T.A.C. 692 (S.C.)***

Mr. Mondal by citing the ratio of Hon'ble Apex Court passed in **Jakir Hussein** has submitted that the one person has lost his hand, though the Tribunal has assessed the compensation to be 30%, but the Hon'ble Apex Court has assessed the functional disability 100%.

By citing **Ankur Kapoor** Mr. Mondal submits that the appellant before the Hon'ble Supreme Court had only some deformity in his right hand, but in that case, the Hon'ble Apex Court has considered the disability to be 50%.

In considering the disability of a person in a motor accident case, the observation of Hon'ble Supreme Court in **Raj Kumar Vs. Ajay Kumar** reported in **2011 (1) SCC 434** is a guiding principle. In **Ankur Kapoor** the Hon'ble Apex Court has followed the principle of **Raj Kumar and Ajay Kumar**. The paragraph 12 and 13 of **Raj Kumar and Ajay Kumar** is set out as follows:

“12. The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give ‘ready to use’ disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted medical Boards, they may be accepted subject to evidence regarding the genuineness of such

certificates. The Tribunal al may invariably make it a point to required the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificates or discharge Certificate will not be proof on the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross-examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed 14 local Hospitals/medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

13. we may now summarize the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) The doctor who treated an injured-claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard the extent of permanent disability. The loss of earning capacity is

something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors”.

In the above ratio, the Hon’ble Apex Court has specifically held that the opinion of Doctor regarding the disability of a victim cannot be assessed entirely to determine the functional disability of a victim in a particular case. The Hon’ble Apex Court has guided that initially it has to be assessed that where the victim sustained the injury and how far the injury became permanently disable the particular portion of the limb and, thereafter, whether such limb if became permanently disable is made the victim disable functionally considering the each and every cases of earning and occupation of the victim.

In this case, in following the ratio of Hon’ble Apex Court in ***Raj Kumar (supra)*** it appears that the victim has lost the right thumb of his right hand. The Doctor opined that there are some deformity and stiffness at the right hand of the victim. Obviously, the Doctor has specifically observed that the percentage of disability is in respect of the portion of the limb. Thus, it construed that 80% disability in respect of the limb i.e. in

respect of the right hand of the victim. The occupation of the victim is order supplier of a stone chips business. He himself stated that he used to run the Stone chips business by accepting order and supplying the Stone Chips through truck.

It has been specifically argued that by Mr.; Mondal that to run the business the mobility of the victim is very much required. He argued that the victim has specifically stated before the learned Tribunal that he moved only through his motor cycle to run the business. By the lost of his thumb in the right hand and also by the deformity in the right hand, he could not run the business by plying the motor cycle.

It appears that the victim requirements of his right hand is only to drive the motor cycle. The victim is used to run the occupation by taking orders and by supplying the stone chips through truck. The said performance of the business as conducted by the victim can be well performed by sitting in an office and by using a mobile phone. So, at this juncture, the argument of Mr. Mondal that by such accident and by such deformity his entire business has been collapsed, appears to me not a good argument. However, considering the facts and circumstances of this case and considering the observation of Hon'ble Supreme Court it appears to me that in **Ankur Kapoor (supra)** the Hon'ble Apex

Court has calculated the functional disability of appellant to be 50% only while his entire occupation of claimant in Merchant Navy as “Dec cadet trainee” has been lost; in ***Jakir Hussein*** the right hand of the driver has been amputated in the accident. Consequently, the driver has lost his job. Thus, the learned Tribunal has assessed the functional disability to be 100%. The ratio of law laid down in ***Jakir Hussein*** as well as ***Ankur Kapoor*** cannot be equated in the present facts and circumstance of this case. So, in my view, the functional disability of the victim assessed by the learned Tribunal appears to be excessive.

In considering the facts and circumstances of this case the functional disability would be not more than 25%.

Non-pecuniary damages

It appears that the learned Tribunal has awarded Rs. 2,00,000/- for pain and suffering and Rs.2,00,000/- for loss of amenities of life. The learned Tribunal is of view that the victim after the accident has admitted to the Hospital and had undergone a long surgery. So, he allowed Rs. 4,00,000/- of compensation towards the non-pecuniary heads.

From the evidence of PW-1 as well as the Medical papers annexed with the paper books it appears to me that initially after the accident the

right hand of the victim was run over under the wheel of the offending vehicle and he sustained fracture dislocation distal radius ulna and auto amputation of right thumb; thereafter, he shifted to Rampurhat Hospital and, thereafter, he was shifted to Mission Hospital, Durgapur. It has been stated by the claimants that he was admitted for a considerable period of Mission Hospital, Durgapur. Discharge certificate of Mission Hospital Durgapur disclosed that the victim was admitted there on 3.04.2017 and discharged there from on 04.05.2017. During his admission he has undergone different operation. However, it appears that the disability of the victim at his right hand and there are discomfort which shall persist during entire his life. So, considering the all aspects, the non-pecuniary damages awarded by the learned Tribunal is not appears to me excessive.

The learned advocate for the claimants has submitted that the future prospects was not decided by the learned Tribunal. However, it was not raised by the claimant by filing separate ground in cross appeal thus it cannot be considered at this stage.

Accordingly, the award passed by the learned Tribunal appears to me not justified and it has been modified accordingly.

The just and proper compensation of this case assessed as hereunder:-

Calculation of compensation

1. Annual Income	:Rs.2,47,500/-
2. 25% disability (Loss of Income)	:Rs.61,875/-
3. Multiplier 13 (Rs.61,875/- X 13)	:Rs.8,04,375/-
4. Add: Non-pecuniary Expenses	:Rs.4,00,000/-
	:Rs.12,04,375/-
5. Add: Medical Expenses	:Rs. 4,11,398
Compensation	:Rs.16,15,773/-

After calculation the award comes to Rs. 16,15,773/-. The award shall carry interest @6% per annum from the date of filing of the claim application i.e. from 15.05.2017 till the payment. It appears that the insurance company has deposited the entire awarded sum through the office of the learned Registrar General, High Court Calcutta firstly Rs.25,000/- on 05.06.2023 and thereafter Rs.46,51,728/- on 20.07.2023. The office of the learned Registrar General, High Court Calcutta is directed to calculate the instant award together with interest and disburse the same in the name of the respondent/claimant within four weeks. After such disbursement, there may have some residue in the account of the Insurance Company, that may be refunded to the Insurance Company alongwith accrued interest on regular prayer.

Payment of compensation is subject to ascertainment of payment of deficit Court Fees, if any.

The office of the learned Tribunal shall act upon the certified copy of this order to receive the deficit court fees, if any.

The office is directed to return the LCR at once.

The instant **FMA 560 of 2023** along with **COT 66 of 2023** is disposed of.

All connected applications, if any, stand disposed of.

Interim orders, if any, stand vacated.

Parties to act upon the server copy and urgent certified copy of this order be provided on usual terms and conditions.

(Subhendu Samanta, J.)