

28.02.2024
SL No.2 & 3
Court No. 551
Ali

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

**FMA 2032 of 2018
With
IA No.: CAN/2/2024**

**Reliance General Insurance Co. Ltd.
Vs.**

**Kranti Kumari Ram & Anr.
With
COT 108 of 2018**

**Kranti Kumari Ram
Vs.
Reliance General Insurance Co. Ltd. & Anr.**

Ms. Gopa Das Mukherjee
..... for the appellant/Insurance Co.

Mr. Ashique Mondal
...for the respondent/claimant.

The instant appeal has been preferred against the judgment and award dated 8th May, 2018 passed by the learned Judge, Motor Accident Claims Tribunal, ADJ, 4th Court, Alipore, 24-Parganas (South), in MAC Case No. 06 of 2010.

The Insurance Company has preferred the instant appeal against the award.

The respondent No. 1 being the claimant also preferred a cross appeal against the impugned award.

Both the appeal and the cross appeal are taken up together for uniformity of the judgment.

The brief facts of the case is that on 20th August, 2009 the victim was travelling by a Motor Cycle being No. WB-01X/7255 as a pillion rider.

When the victim reached near premises No. P-43, Hide Road, Kolkata-7000 088, the offender driver of the involved Lorry bearing No. WB-41C/2435 suddenly dashed behind the Motor Cycle and the victim who was the pillion rider of the said Motor Cycle had been dashed on her waist. As a result, the victim sustained severe injuries all over her body mainly fracture pelvis, degolving injuries over pelvis and lower abdomen. The victim was a Private Tutor and she was trying to establish her career as a Private Tutor but for the unfortunate accident the victim has completely lost the use of her lower portion of the body and entire future of the victim has become break.

The respondent No. 1-victim filed an application before the learned tribunal for getting compensation under Section 166 of the M.V. Act. The 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. 8,75,566/-together with interest @ 6% per annum in favour of the victim and directed the appellant Insurance Company to pay the compensation.

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

Learned advocate Ms. Gopa Das Mukherjee, appearing on behalf of the Insurance Company submits that the learned tribunal has not considered the fact that the driver of the offending vehicle had no valid driving licence at the time of alleged accident. The Insurance Company has produced the person from licensing authority as DW-1. During his deposition the DW-1 stated that the DL possessed by the driver of the offending vehicle is not valid. She submits that the owner of the offending vehicle has violated the terms of the policy. Thus, the Insurance Company may not be liable to pay the compensation. She further submits that the disability of the victim was assessed by a private Doctor to be 80%. The learned tribunal has erroneously adopted such evidence and fixed the disability of the victim to be 80%. She submits that the observation of the learned tribunal in this case regarding the disability of the victim is not correct. The disability of the victim can be maximum assessed 40%. She further argued that the victim never appeared before the Government Hospital or Medical Board to assess her disability. Thus, the disability certificate issued by a Private Doctor cannot be taken to be true. She submits that the computation of the compensation on the basis of the 80% disability is improper. Thus, the award passed by the learned tribunal requires modification.

However, Ms. Gopa Das Mukherjee further admits that the multiplier adopted by the learned tribunal is incorrect it would be 18 considering the age of the victim within 18 years. She further argued that the victim has failed to produce any income proof certificate or any evidence to prove his income. Thus, the income adopted by the learned tribunal notionally is correct.

Learned advocate appearing on behalf of the victim Mr. Ashique Mondal submits that the learned tribunal has not framed any issue regarding the validity of the driving licence of the driver of the offending vehicle. The learned tribunal has not observed anything in the impugned judgment regarding the non-validity of the driving licence of the offending vehicle. Thus, this issue cannot be raised in this appeal. He further argued that the percentage of disability assessed by the Private Doctor and adopted by the learned tribunal is justified. The Doctor appeared before the learned tribunal as PW-5. The Doctor not only examined the victim but also had made an Xerox before his final opinion. The disability certificate was exhibited before the learned tribunal as exhibit-24.

Mr. Mondal further submits that from the crux of the case it would be revealed that initially the victim was admitted to the Ekbalpur Nursing Home after the said accident on the same day

thereafter considering her conditions he was shifted to Calcutta Medical Research Institute Hospital. Thereafter, she was admitted to Guru Tegh Bahadur M.S.C. Hospital twice and also admitted and treated as ESI Hospital. He argued that the total days of treatment undertaken by the victim is 264 days. The victim has produced all the medical papers including the discharge certificate of the all four hospitals. The opinion of the Doctor i.e. PW-5 is on the basis of the discharge certificate issued by the several Hospitals. He submits that the learned tribunal also considered the discharge certificate as well as the disability certificate issued by the PW-5 and correctly opined that the disability is 80%. He further argued that the learned tribunal has correctly assessed the disability of the victim. He further argued that the victim was a Private Tutor. She used to earn Rs. 4,000/- per month. Victim appeared before the learned tribunal and stated in her examination-in-chief that she used to earn Rs. 4,000/- per month as a Private Tutor. The evidence of PW-1 was not considered by the learned tribunal in this case the income of the injured victim must be taken to be Rs. 4,000/- per month instead of Rs.3,000/. He further argued that the Doctor has opined that the victim requires Hip replacement; learned tribunal has not awarded any compensation towards the future medical expenses. He further

argued that learned tribunal was erroneous in awarding non pecuniary damages in this case. The learned tribunal has only awarded Rs. 2,00,000/-, Rs.1,00,000/- for pain and suffering and Rs.1,00,000/- for loss of marriage prospects. The learned tribunal must have awarded other heads of non-pecuniary damages such as future medical treatment, transportation, loss of amenities etc. He further submits that the victim is entitled to get the future prospects i.e. 40% of his establish income according to the observation of Hon'ble Supreme Court in ***National Insurance Company Limited Vs. Pranay Sethi.***

In support of his contentions Mr. Mondal cited some decisions reported in (i) ***D. Sampath Versus United India Insurance Company Limited and Another (2011) 15 SCC 160*** (ii) ***Dodul Paul Versus United India Insurance Company Ltd (2015) SCC OnLine Cal 496*** and (iii) ***Raj Kumar Vs. Ajay Kumar and Another*** reported in ***(2011) 1 SCC 343.***

By citing all those observation of Hon'ble Supreme Court and the Division Bench of this Court Mr. Mondal submits that in all the cases that disability certificate issued by the Private Doctor was considered to be true by the Hon'ble Apex Court. He also referred the paragraph 19 (III) of observation of Hon'ble Supreme Court in ***Raj Kumar Vs. Ajay***

Kumar wherein the Hon'ble Supreme Court has fixed the principle regarding the disability certificate of the Doctor who treated the injured.

Heard the learned advocates perused the materials on record also perused the LCR. It appears that initially the matter was heard by the Division Bench of this Court at the time of considering the prayer of stay by the appellant Insurance Company. The Division Bench of this Court has passed an order on 11th September, 2018, whereby the stay of all further proceedings of impugned order was granted subject to payment of 50% amount amounting to Rs. 4,37,783/- to the victim and rest portion i.e. Rs.4,37,783/- was secured with the office of the learned Registrar General, High Court Calcutta. By the said order, the Hon'ble Division Bench has directed the Vice Principal-cum-Medical Superintendent, Calcutta Medical College & Hospital, Kolkata to constitute a medical board of three doctors to examine the physical condition of the claimant to assess the disability whether she suffers from 80% or 40%. However, the disability certificate was not placed with this record. The victim respondent No. 1/cross objector filed one application being CAN 2 of 2024 containing, inter alia, that by virtue of order of the Division Bench of this Court, the Medical Board was formed by the Vice Principal-cum-Medical Superintendent,

Calcutta Medical College & Hospital, Kolkata and the victim was directed to appear before the Board on 27.11.2018.

Mr. Mondal submits that in pursuance to the said letter dated 19.11.2018 issued by the Medical Superintendent. The victim appeared before the Board and she was examined.

However, it appears that no report has been reached to this Court from the Superintendent, Medical College Hospital.

It appears that the victim has suffered the accident in the year 2009 since then the matter is pending; to avoid the further delay in this matter, I think it necessary to proceed to hear the appeal on the available documents and medical papers on record.

Firstly, let me consider whether the Insurance Company has successfully proved the ground that the driver of the offending vehicle had no valid DL at the time of alleged accident. The Insurance Company by filling written statement has taken the ground which is available to the Insurance Company according to the statute. To substantiate the pleadings, the Insurance Company has produced one witness, namely, Subrata Pal (DW-1), who is one of the employee of Motor Vehicles Department, Government of West Bengal, Beltala and duly authorized by Special Officer, License

Department, Motor Vehicles Department, Govt. of W.B. He deposed that he searched the computer regarding the alleged number of the driving licence used by the driver of the offending vehicle but nothing could be found in the computer. He produced the searching obtained from the computer. During his cross examination, he ascertained that the computerization of driving licence in the office was done since 2004. He also deposed that, some of the driving licences prior to 2004 has been computerized time to time as and when it was renewed. He further deposed they used to maintain manual records of the driving licence in the year 2002. From the evidence of DW-1 it appears that the driving licence issued by the concerned department has been computerized since the year 2004. Alleged driving licence is issued in the year 2002; it is the admission of DW-1 that the driving licences for the year 2002 were not all computerized. He also stated before the learned tribunal that they used to maintain manual record of driving licence in the year 2002. The concerned department has not manually searched the validity of the driving licence of the driver of the offending vehicle bearing licence No. WB-01/2002/416693. Thus, considering the evidence of PW-1 it appears to me that the plea of fake driving licenece alleged by the Insurance Company before this appellate Court has not

properly substantiated. Thus, I find no merit in the ground of fake driving licence as alleged by the appellant Insurance Company.

In considering the disability of the victim it appears that, the PW-5 (Doctor) has deposed, who issued the disability certificate stating that the disability of the victim is 80%. The reason to acceptance of such disability certificate has been well canvassed by the learned tribunal. Let me consider what are the view of the Hon'ble Apex Court regarding acceptance of disability certificate issued by Private Doctor who treated the victim.

In ***D. Sampath (supra)*** the Hon'ble Supreme Court has held that:

“7. We hastened to add that we are not saying that under all circumstances, the Court has to blindly accept the disability certificate produced by the claimant. The Court has the discretion to accept either totally or partially or reject the certificate so produced and marked in the trial but, that, can be done only by assigning cogent and acceptable reasons. In this view of the matter, we take the disability suffered by the claimant at 75% and calculate the loss of income of the claimant keeping in view the loss of earning capacity of the claimant assessed by the High Court. Accordingly, we arrive at the loss of

earning capacity of the claimant at Rs.6,12,000/-”.

The Division Bench of this Court in ***Dodul Paul (supra)*** has also placed their reliance upon the observation of Hon’ble Supreme Court in ***Raj Kumar (supra)***.

In Raj Kumar (supra) the Hon’ble Supreme Court has fixed the principle regarding acceptance of disability certificate of the victim as follows:

“19. We may now summarise 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 the percentage of loss of earning capacity is the same as the 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 to 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”.

So, after considering the ratio of the Hon’ble Apex Court, it appears to me that the disability certificate issued by a Private Doctor cannot be always disregarded when it is otherwise reliable and cogent. Let me consider the principle of Hon’ble Supreme Court in ***Raj Kumar Vs. Ajay Kumar*** and how far it is applicable in the present case. It is true that the condition of the present victim was precarious. During the treatment in the different Hospitals she was treated in all four Hospitals and she had to admit there time and again as her condition became deteriorated. She undergone the treatment of the Hospitals in total 264 days. The PW-5 has considerably discussed about the discharge certificates issued by the different Hospitals and has opined in the disability certificate as follows:

“The striking features of the Residual Damage after prolonged treatment for almost 2 yrs are mainly the massive damage &

disfigurement to her skin & soft tissue from below the naval to Mon's Pubis and both lower limbs. Then comes the structural damage to her Pelvis (Basin) on which rests her body and all the abdominal internal organs. Even if in the future her offspring, there is no movement in the Pelvic Joints. As a result, she is unable to sit or sleep or walk properly. As there is shortening of the fixed hip Joints there is also shortening of lower limbs with limping. She has to perform her call to the nature with great difficulty. Moreover, the prospect of her marriage at this tender age and chances of bearing child doubtful in the future. This is the biggest damage above all that she has lost her very womanhood due to the R.T.A. caused on her body. The recent X-rays taken shows fixed Hip Joint & destruction of the Pelvic bones on 03.05.2013.

In my opinion, this case of massive & wide injury involving wide facets of problem of life has caused a residual damage beyond further rectification resulting in PARTIAL PERMANENT DISABILITY to an extent of 80%. She needs Lakhs of Rupees for continuation of further treatment as she is still not fully cured”.

So, after considering the entire aspects and also considering the fact that the victim appeared before the learned tribunal personally at the time of

the deposition and after the learned tribunal has seen the victim has come to an opinion that the permanent disability of the victim is 80%. I find no justification to interfere with the said finding of the learned tribunal. In my view, in this case the disability of the victim should be assessed as 80%.

In considering the monthly income of the victim it appears that the victim has pleaded that she used to earn Rs. 4,000/- per month; during her cross-examination she also stated that she used to earn Rs. 4,000/- per month as a Private Tutor. It is true that no document of income in the said occupation is not possible to produce in case of Private Tutor, but at the same time, the notional income adopted by the learned tribunal fixation the monthly income of the claimant to be Rs.3,000/- be appeared to be justified as the accident happened in the year 2009.

However, in this case the assessment of multiplier by the learned tribunal is incorrect. The correct multiplier would be 18 by virtue of the decision of Hon'ble Apex Court in **Sarla Verma** followed by **Pranay Sethi (supra)**. The claimant is also entitled to get the future prospects of 40% to her establish income.

In considering the entire circumstances it appears to me that the exhibit-24 i.e. the disability certificate as well as the discharge certificate issued

by different Hospitals suggests the reconstruction of hip joint of the claimant/victim. The learned tribunal has not considered the same though he is accepted the disability certificate issued by the Doctor (PW-5). So, in this case, the victim is entitled to get additional award of Rs. 1,50,000/- towards the future medical treatment of the reconstruction of Hip joint

In considering the entire circumstances and under the above observation the award passed by the learned tribunal needs modification.

Accordingly, the just and proper compensation of this case assessed as hereunder:-

Calculation of compensation

1. Monthly Income	:Rs. 3,000/-
2. Annual Income (Rs.3,000/- X 12)	:Rs.36,000/-
3. Add: Future Prospects @ 40%	<u>:Rs.14,400/-</u> :Rs.50,400/-
4. Multiplier 18 (Rs.50,400/- X 18)	:Rs.9,07,200/-
5. Disability (80%)	:Rs.7,25,760/-
6. Add: Non-Pecuniary	:Rs. 3,50,000/-
7. Add: Medical Expenses	<u>:Rs.2,14,766/-</u> :Rs.12,90,526/-
8. Less: Received	<u>:Rs.4,37,783/-</u> :Rs.8,52,743/-

After calculation the award comes to Rs. 12,90,526/-. The victim has already received Rs.4,37,783/-. After deduction the balance award comes to Rs.8,52,743/-. The balance award shall

carry interest @ 6% per annum from the date of filing of the claim application i.e. from 06.01.2010. The Insurance Company has deposited the amount of Rs. 4,37,783/- with the office of the learned Registrar General, High Court Calcutta along with interest. The office of the learned Registrar General, High Court Calcutta is directed to return the same along with accrued interest to the Insurance Company.

The Insurance Company is directed to deposit the balance award amounting to Rs.8,52,753/-together with interest @ 6% per annum from the date of filing of the claim application i.e. from 06.01.2010 within six weeks to the office of the he learned Registrar General, High Court Calcutta. On such deposit the victim is entitled to get the same from the office of the learned Registrar General, High Court Calcutta.

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 instant **FMA 2032 of 2018** alongwith **COT 108 of 2018** are 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.)