IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

F.M.A. 185 of 2006

The New India Assurance Co. Ltd.
–Vs.—
Sri Sankar Biswas Barman & Ors.

Coram	:	The Hon'ble Justice Rajiv Sharma The Hon'ble Justice Shivakant Prasad
For the Appellant		:Mr. Kamal Krishna Das
For the Respondent		: Mr. Amat Ranjan Roy
Heard On		:17.7.2015
Judgment On		: **05.8.2015**

SHIVAKANT PRASAD, J.

The New India Assurance Co. Ltd. preferred this appeal under Section 173 M.V. Act, 1988 challenging the Order dated 17th March, 2005 passed by the Additional District Judge, 14th Court, Alipore and Motor Accident Claims Tribunal Judge, Alipore in M.A.C. Case No. 283 of 2000 on the grounds inter-alia, that the award assessed by the learned Tribunal for a sum of Rs. 4,02,259/- less already paid a sum of Rs. 25,000/- in the case under no fault liability is illegal and bad in law inasmuch as the learned Tribunal while assessing the amount of compensation failed to consider the fact that the claimant/ respondent was more than 59 years old on the date of accident and that he was due to retire from his service only after 6/7 months from

the date of accident and as such, multiplier of it should not have been applied in the instant case in view of a decision of the Hon'ble Supreme Court in the case of *Maala Prakasha Rao Vs. Maala Janhabi and others reported in (2004) 3 SCC 343.*

It is submitted on behalf of the appellant that the injured claimant did not suffer any loss of income for the injury he sustained since as P.W.-1 in the cross-examination he stated in clear crystal term that his income has been increased after the accident and that he did not suffer any loss of income. Therefore, the claimant/ respondent did not suffer any pecuniary loss as admitted by himself. To support his argument, the learned Counsel for the appellant has invited our attention to a case of *Divisional Controller K S R T C Vs. Mahadeva Shetty and Another reported in 2003 (3) TAC 284 (SC) = (2003) 7 SCC 197* wherein the Hon'ble Apex Court held that,—

> ***"The damages for vehicular accidents are in the nature of compensation in money for loss of any kind caused to any person. The main principles of law on compensation for injuries were worked out in the 19th century, where railway accidents were becoming common and all actions were tried by the jury. It has to be borne in mind that compensation for loss of limbs or life can hardly be weighed in golden scales. Bodily injury is nothing but a deprivation which entitles the claimant to damages. The quantum of damages fixed should be in accordance with***

the injury. An injury may bring about many consequences like loss of earning capacity, loss of mental pleasure and many such consequential losses. A person becomes entitled to damages for mental and physical loss, his or her life may have been shortened or that he or she cannot enjoy life, which has been curtailed because of physical handicap. The normal expectation of life is impaired. But at the same time it has to be borne in mind that the compensation is not expected to be a windfall for the victim. Statutory provisions clearly indicate that the compensation must be "just" and it cannot be a bonanza; not a source of profit but the same should not be a pittance. The courts and tribunals have a duty to weigh the various factors and quantify the amount of compensation, which should be just. What would be "just" compensation is a vexed question. There can be no golden rule applicable to all cases for measuring the value of human life or a limb. Measure of damages cannot be arrived at by precise mathematical calculations. It would depend upon the particular facts and circumstances, and attending peculiar or special features, if any. Every method or mode adopted for assessing compensation has to be considered in the background of "just" compensation which is the pivotal consideration. Though by use of the expression "which appears to it to be just", a wide discretion is vested in the Tribunal, the determination has to be rational, to be done by a judicious approach and not the outcome of whims, wild guesses and arbitrariness. "

Further it is contended on behalf of the appellant that Dr. P. K. Mondal who assessed the permanent partial disablement to the extent of 28% did not treat the injured claimant/respondent for the injury he sustained. He only issued the certificate. He used to issue certificate and adduce evidence on behalf of the injured claimants in different claim cases before the Tribunal. Therefore, his certificate as regards the percentage of permanent partial disablement should not have been accepted by the learned Tribunal.

Thirdly, the learned Counsel for the appellant submits that the award of compensation on account of future loss of earnings ought not have been given as there is no evidence that as a result of injury, income of the injured was reduced rather his salary has increased. This is not a case where there has been loss of earnings for the reason of removal from service on account of disablement incapable of doing any work as he used to do in his job before the accident.

To fortify his argument reference has also been made to a decision of *United India Insurance Co. Ltd. Vs. D.C. Rajanna And Anr. reported in 2001 ACJ 425* in Paragraph 6 wherein it has been held thus—

> ***"It has to be borne in mind, while awarding compensation for future loss of earnings, there must be evidence to show that as a result of injury, the income was reduced or there was loss of earnings or***

he was removed from service on account of disability

or he is incapable of doing any work."

In the case in hand admittedly there has been increase in the income of the injured claimant/respondent. So the question of considering the compensation on account of future loss of earning does not arise.

The learned Counsel for the respondent on the other hand submitted that the multiplier 8 (eight) has been correctly applied by the learned Tribunal considering the age of the claimant 59 years old and the income of the claimant at the time of accident as provided in second schedule of Section 163A of M.V. Act. and relied upon the Hon'ble Apex Court decision of *APSRTC Vs. M. Pentaiah Chary reported in 2007 SAR (Civil) 778,* wherein it has been observed at Paragraph 5 that application of multiplier in a structural form was provided in the second Schedule appended to the Motor Vehicles Act benefit of applying such a structural formula was considered by the Hon'ble Court in *General Manager, Kerala State Road Transport Corporation, Trivandrum Vs. Susama Thomas (Mrs.) and Others [(1994) 2 SCC 176].*

In respectful consideration of the cited decision we are of the opinion that facts and circumstances of the case is distinguishable

from the instant case inasmuch as claimant while riding two wheelers met with the accident having been hit by bus belonging to appellant and he became permanently disabled and lost his earning capacity. The cited decision, therefore, is not apposite to the facts and circumstances of the instant case because in this case the respondent/claimant has not suffered permanent disablement rather he suffered fracture injury. He has also not lost his earning capacity rather his salary was increased by virtue of his service as Deputy Manager of BSNL.

Learned counsel for the respondent further submitted that such ground of compensation should be considered as non-pecuniary loss of the claimant whereby the learned Tribunal did not award any compensation under the heading of non-pecuniary loss as per the guidelines of the Apex Court in decision of *R. D. Hattangadi Vs. Pest Control (India Pvt. Ltd.) reported in AIR 1995 SC 755* for assessment of It would be profitable to bear in mind the guidelines given in the cited decision as under—

> ***"While fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages and special damages are those which the victim has actually incurred and which is capable of being calculated in terms of money; whereas non-pecuniary damages***

are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant : (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far non-pecuniary damages are concerned; they may include: (i) damages for mental and physical shock, pain suffering, already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of expectation of life, i.e. on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life."

It is submitted that due to the said accident, the claimant/ respondent received severe injuries on his person which he received at an old age so considering the future treatment, pain and suffering, mental agony, the claimant sufferance throughout the future life, and that the learned Tribunal has rightly awarded the compensation by application of the multiplier 8 (eight) considering the disablement certificate issued by Dr. P. K. Mondal, P.W.-3 to which the appellant did not raise any objection. P.W.-3 is a retired professor who was

Head of the Department of Orthopaedics at Calcutta National Medical College and Hospital and his authority for issuing the disablement certificate cannot be challenged at this stage. In support of disablement the respondent relied upon the judgement of Honb'le Apex court in case of *S. Perumal versus K. Ambika & Anr. reported in (2015)2 WBLR (SC)773*. We have respectfully gone through the decision and we are of the considered view that the facts and circumstances of the cited decision is distinguishable from the instant case as the claimant in this case has not suffered multiple injury to the extent that he became disbodied to undertake his work rather his income increased as he was posted as DGM legal cell in BSNL. Whereas in the cited case the claimant was a poultry labourer and considering the nature of occupation of the claimant and disability, loss of future earning was taken into account.

Therefore, we are unable to agree with this contention of the learned counsel for the respondent for the sole reason that the claimant/ respondent was never under the treatment of Dr. P.K. Mondal. Simply by examination of X-ray, Dr. Mondal had no authority to issue disablement certificate. Such a certificate showing partial permanent disablement can only be issued by a duly constituted Medical Board**.**

The learned Counsel for the appellant has referred to a decision of the Hon'ble Supreme Court in case of *Raj Kumar Vs. Ajay Kumar and Anr. reported in (2011) 1 Supreme Court Cases 343* wherein the principles have been laid down in Paragraph 19 in regard to assessment of compensation in respect of injury claim cases and the Hon'ble Apex Court has enshrined the following principle :

> ***"(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 in 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.)***
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> ***(iii) The doctor who treated an injured claimant or who examined him subsequently to access 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.***
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> - ***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.

It appears that the respondent /claimant suffered pecuniary damages to the tune of Rs Rs. 35,616/- which the victim has actually incurred is capable of being calculated in terms of money as per the vouchers and bills submitted by the claimant before the Claim Tribunal. Accordingly, it is submitted on behalf of the appellant that the injured claimant/respondent is entitled to a sum of Rs. 35,616/- on account of his medical treatment which was supported by cash memos, bills, vouchers and a sum of Rs. 5,000/- on account of pain and suffering as has been awarded by the learned Tribunal. The total amount therefore comes to Rs. 40,616/- out of which the injured claimant/respondent has received Rs. 25,000/- in the case of under Section 140 of the M. V. Act. Therefore, the balance amount of Rs. 15,616/- plus interest from the date of filing the claim case till the date of payment is payable by the appellant/Insurance Company.

It is submitted that amount of award being Rs. 4,02,259/- less Rs. 25,000/- already paid in the case under Section 140 =Rs. 3,77,259/- has been deposited by the appellant/Insurance Company in the Hon'ble Court and after payment of the aforesaid amount of Rs. 15,616/- plus interest thereon from the date of filing till the date of

payment may be ordered to the refunded along with the accrued interest thereon to the appellant/Insurance Company.

Learned Counsel for the appellant has referred to a decision in the case in *United India Insurance Co. Ltd. Vs. D. C. Rajanna and another reported in 2001 ACJ 425*. It has been held with this observation that injured was a Deputy Manager in H.M.T and he continued in the same post after the accident and there was no evidence that wages have been reduced or any increments having been stopped. This case is apposite to the facts and circumstances of the instant case because admittedly there has been no loss of earnings as a result of injury. Therefore, we are of the view that as there was no loss of earning on account of disability or he was incapable of doing any work, compensation for loss of future earnings is not admissible to injured claimant. Resultantly, the learned claim tribunal has erred in law and in fact by awarding the compensation on application of structured formula.

With regard to ground no. VII the appellant has taken the ground that the learned Tribunal ought to have apportioned the liabilities among both drivers of the offending vehicles in the instant case. In this context we do agree with contention of Learned counsel for the respondent that the learned Tribunal rightly awarded the compensation against one of the tort feasors in view of the Apex Court

decision in *Khenyi Vs. New India Assurance Company Limited reported in 2015 (2) T.A.C. 677 (SC) (Full Bench).* It has been held that the apportionment of compensation between two tort feasors vis-à-vis the plaintiff/claimant is not permissible. He can recover at his option whole damages from any of them with the observation that in case of accident caused by negligence of joint tort feasors, all the persons who aid or counsel or direct or join in committal of a wrongful act, are liable. In such case, the liability is always joint and several. The extent of negligence of joint tort feasors in such a case is immaterial for satisfaction of the claim.

With regard to the interest awarded @ 9% per annum in default of payment of compensation awarded, the learned Counsel for the claimant/respondent submits that the learned Tribunal ought to have passed interest @ 9% per annum from the date of filing of the claim application till the date of realization in view of the settled principle of the law of the Hon'ble Apex Court.

In consideration of the totality of the evidence on record and the guidelines given by the Hon'ble Apex Court for assessment of compensation in case of injury, we of the opinion and according hold that compensation ought not have been given on account of loss of earning by application of structured formula provided in Schedule II of Section 163A of M.V. Act 1988.

The respondent/claimant may be entitled to non-pecuniary damage i.e. (i) damages for mental and physical shock, pain and suffering, already suffered or likely to be suffered in future; (ii) damages for the loss amenities of life which may include a variety of matters i.e. on account of injury the claimant may not be able to walk, run or sit; (iii) damages for loss of expectation of life i.e. on account of injury the normal longevity of the person concerned is shortened; vi) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

We accordingly determine the compensation of Rs. 1,00,000/- on account of mental and physical shock, pain and suffering; Rs. 50,000/- for inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life under the heading non-pecuniary damage, and further sum of Rs. 35,616/- under the heading pecuniary damages. Thus, the respondent shall be entitled to a sum of Rs.1,85,616/- as a compensation award minus the sum of Rs. 25,000/- already received by the claimant on no fault liability being a total amount of Rs. 1,60,616/-together with interest @ 9% thereon from the date of filing of the claim petition till payment which shall be disbursed to the respondent/claimant from the amount in deposit and the

balance amount shall be refunded to the appellant/Insurance company within a period of four weeks from the date hereof.

Appeal is thus, partly allowed.

Urgent certified photocopy of this Judgment and order, if applied for, he supplied to the parties upon compliance with all requisite formalities.

RAJIV SHARMA, J.

I agree.

RAJIV SHARMA, J.

SHIVAKANT PRASAD, J.