

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

MA No. 157/2018
c/w
MA No. 96/2017
IA No. 1/2017
IA No. 1/2018

Pronounced on : 19th 05.2020

Amit Choudhary

.... Appellant(s)

Through:- Mr. Satinder Gupta, Advocate in
MA No. 157/2018
Mr. Jugal Kishore Gupta,
Advocate in MA No. 96/2017

V/s

Oriental Insurance Co. Ltd.
and others

.....Respondent(s)

Through:- Mr. Jugal Kishore Gupta,
Advocate in MA No. 157/2018
for R-1
Ms. Pallavi Sharma, Advocate for
respondent No. 3 and vice Mr.
Ravinder Gupta, Advocate for
respondent No. 2

Coram : HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

- 01.** Both the appeals are against the common award dated 25.01.2017 passed by the learned Motor Accident Claims Tribunal, Jammu (hereinafter to be referred to as 'the learned Tribunal') presided over by the learned 1st Additional District Judge, Jammu.
- 02.** The award has been challenged by the Insurance Company *inter alia* on the ground that since application under Section 170 of Motor Accident Claims Tribunal, Jammu was never decided, therefore, the Insurance Company could not defend the claim petition. But it is admitted case of the appellant/Insurance Company that even without allowing the

application, counsel for the appellant was able to cross-examine all the witnesses examined by the claimant. However, all the defence raised by the appellant/Insurance Company have not been reflected and an award of Rs. 9,42,252/- was passed by the learned Tribunal with 10% annual interest.

- 03.** Grievance of the Insurance Company is that amount awarded is excessive and the interest awarded higher than what has been awarded by the Hon'ble Apex Court.
- 04.** Claimant has also filed an appeal seeking enhancement of the amount awarded on the ground that because of the accident, claimant/injured has suffered multiple grievous injuries including the head injury because injuries suffered due to accident, the claimant has lost control over the body and is mentally and physically disabled permanently. He is unable to follow his daily routine and requires attendant and also requires medical treatment throughout life.
- 05.** It is a fact that the claim petition has been filed by the injured through his next friend i.e. his father and an appeal was also filed by next friend through his father, this has not been objected by the appellant/insurance Company or owner of the vehicle. Both, the owner & driver of the vehicle, who are respondent Nos. 2 & 3, appeared and filed their objections denying the accident for want of knowledge but they did not produce any evidence to support the denial. Respondent No. 3/driver of the vehicle involved in the accident also did not appear in the witness box. The learned Tribunal framed the following issues:-

- (1) Whether on 2.1.2011 the petitioner while going on his cycle to home was hit by offending vehicle bearing registration No.PB07W-4430 (Swift VDI) owned by respondent No. 2

and driven very rashly and negligently by respondent No. 3 as a result of which he received multiple grievous and fatal injuries all over his body? OPP

- (2) Whether the offending vehicle was being plied by the driver without a valid and effective driving license and in contravention of terms and conditions of insurance policy and registration certificate at the time of the accident as such respondent No. 1 is not liable to pay compensation ? OPR
- (3) Whether petitioner is entitled to the compensation, if so, to what amount and from whom ? OPP
- (4) Relief ? O. P. Parties.

06. The learned Tribunal decided Issue No. 1 in favour of the claimant after appreciating the evidence of the eye witness. PW-Amar Singh stated that even otherwise, it is a case where a cyclist was hit from behind while going ahead of the Maruti Swift as both the injured and Maruti swift were proceeding towards Samba from Jammu, so the principle of *res-ipsa-loquitor* is attracted and the driver/respondent No. 3 is guilty of negligence.
07. According to PW-Amar Singh, the cyclist-Amit Choudhary was cycling a head of Maruti Swift which came from behind and hit the cycle from behind so the finding of the learned Tribunal on Issue No. 1 is right and the same is affirmed.
08. The onus of Issue No. 2 was on the Insurance Company but no evidence was produced and rightly so because the driver-Manu Sharma was found in possession of the valid driving license, which is valid upto 26.10.2023 and finding on this Issue, has not been challenged by the Insurance Company. This takes me to Issue No. 3 and the learned Tribunal relying upon the judgments and principles laid down by the Hon'ble Supreme in

Raj Kumar Vs. Ajay Kumar & anr., 2011 ACJ 1, considering three steps to appreciate in case of disability to be relied on (2012) 6 SCC 421 and (2013) 3 SCC (Cri.) 817, awarded the amount under the following heads:-

Loss of future income	:	Rs.7,29,000/-
Loss of damages on account of pain and sufferings	:	Rs.1,00,000/-
Loss of amenities	:	Rs.1,00,000/-
Expenses on medicine	:	Rs. 13,252/-
Total	:	Rs.9,42,252/-

09. The learned Tribunal has also awarded 10% interest from *pendent lite* and future interest.
10. The case of the appellant/injured is that he has to lead a vegetable life because according to Dr. Rakesh Sharma, with such type of injury referring to, “that the patient was suffering from right sided hemiparesis due to left fronto parietal SDH with haemorrhage and contusions and his permanent disability amounting to 50%. The injured/appellant’s grievance is that “ascertainment of the effect of the permanent disability on the actual earning of injured to be done with a very practical and pragmatic manner.”
11. It has been argued by Mr. Satinder Gupta, learned counsel for the appellant/claimant, that the learned Tribunal has failed to assess the disability in accordance with law laid down in 2011 (1) SCC 343 which is relevant in view of the unchallenged statement of Dr. Rakesh Sharma. Learned counsel further argued that the learned Tribunal has failed to provide the loss of future income and not in a position to make even a statement.

12. Learned counsel for the appellant/claimant has relied upon the judgment rendered in *Raj Kumar Vs. Ajay Kumar & anr.*, 2011 (1) SCC 343, wherein the Hon'ble Apex Court in Para No. 8 has held as under:-

8. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation.

13. After the above statement, the Hon'ble Apex Court has held in Paragraph Nos. 9 & 10 as under:-

‘9. 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.

10. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government

service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.'

14. In *Arvind Kumar Mishra vs New India Assurance Company Ltd.*, (2010) 10 SCC 254, the Hon'ble Apex Court was pleased to held in paragraph No. 13 as under:-

'13. The appellant at the time of accident was a final year engineering (Mechanical) student in a reputed college. He was a remarkably brilliant student having passed all his semester examinations in distinction. Due to the said accident he suffered grievous injuries and remained in coma for about two months. His studies got interrupted as he was moved to different hospitals for surgeries and other treatments. For many months his condition remained serious; his right hand was amputated and vision seriously affected. These multiple injuries ultimately led to 70% permanent disablement. He has been rendered incapacitated and a career ahead of him in his chosen line of mechanical engineering got dashed for ever. He is now in a physical condition that he requires domestic help throughout his life. He has been deprived of pecuniary benefits which he could have reasonably acquired had he not suffered permanent disablement to the extent of 70% in the accident.'

15. In some cases, for personal injury, the claim could be in respect of the life time earnings lost because though he will live, he could not earn his living. In others, the claim may be made for partial loss of earnings.

Each case has to be considered in light of its own facts and at the end, one must ask whether the sum awarded is fair and reasonable. The conventional basis of assessing the compensation in personal injury cases i.e., now recognized mode as to the proper measure of compensation is taken appropriate multiplier of an appropriate multiplication.

- 16.** In this case, according to Dr. Rakesh Sharma, even the medical board has found that the patient has right sided hemiparesis due to left fronto parietal SDH with haemorrhage and contusions. According to PW-Rakesh Sharma, with such type of disability, the injured cannot lead normal life. The injured can manage to walk but for out door activities, or strenuous activities, he may require an attendant. The injured cannot perform his job which using his upper limb and lower limb. This statement of the doctor has not been challenged as a witness was not confronted with any contrary view but in cross examination, he replied to question by the counsel for the Insurance Company, as under :-

“Due to the brain injury on the left half of the brain, right half of the body is affected physically i.e., right upper limb and right lower limb are affected.”

- 17.** There is no challenge to the findings of the Medical Board that the patient was suffering from right sided hemiparesis. Hemiparesis is a weakness of one entire side of the body and medical definition of hemiparesis is muscular or weakness of partial paralysis restricted to one side of the body. Similarly, the term “left fronto parietal SDH in medical terms means sub dural hematoma which is collection of blood below the inner layer of the dura. It is most common type of chromatic enter carnial mass lesion.

18. Sub-dural hemotoma is collection of blood outside the brain. The bleedings and increased pressure on the brain from sub-dural hemotoma can be life threatening. The question, therefore, arises whether the appellant/claimant can lead a normal life. This question was opposed to Dr. Rakesh Sharma, whose reply is empathetic. He stated that the injured cannot lead a normal life and he cannot do the job of labourer which he was doing so it is long to assess the loss of income by applying the principles of 50% disability. His disability is 100% as he cannot do any job.

19. Following the principles laid down in case of *Arvind Kumar Mishra vs New India Assurance Company Ltd., (2010) 10 SCC 254*, his monthly income is stepped by 100% which comes to Rs.9,000/- and which is to be multiplied by 18 as he was just 21 years old, so Rs.9,000/- X 18 X 12 comes to Rs.19,44,000/-, therefore, the loss of future income is held to be Rs.19,44,000/-. The only other item, on which increase is justified, is medical expenses. Even by guess work, the medical expenses and special diet, beside transport expenses during the months, stay is required, needs to be enhanced by Rs.50,000/-, therefore, the appellant/claimant is also entitled to Rs.01 Lac on account of pain and suffering and Rs. 01 lac on account of loss of amenities as awarded by the Tribunal and thus, the appellant is entitled to compensation as under:-

Loss of future income	:	Rs.19,44,000/-
Loss of damages on account of pain and sufferings	:	Rs.1,00,000/-
Loss of amenities	:	Rs.1,00,000/-
Expenses on medicine	:	Rs. 50,000/-
Total	:	Rs.21,94,000/-

20. The interest awarded is justified and needs no interference.

21. Accordingly, appeal filed by the Insurance Company is **dismissed** alongwith connected IA whereas appeal filed by the claimant is **allowed** alongwith connected IA by modifying the award in the above terms.

(Sindhu Sharma)
Judge

JAMMU
19TH.05.2020
Ram Murti

Whether the order is reportable : Yes
Whether the order is speaking : Yes/No

