

(2024) 02 CAL CK 0036

Calcutta High Court (Appellete Side)

Case No: F.M.A No. 1508 Of 2008

New India Assurance Company
Ltd.

APPELLANT

Vs

Jadav Das & Anr.

RESPONDENT

Date of Decision: Feb. 8, 2024

Acts Referred:

- Code Of Civil Procedure, 1908 - Order 41 Rule 33
- Motor Vehicles Act, 1988 - Section 166

Hon'ble Judges: Subhendu Samanta, J

Bench: Single Bench

Advocate: Saibalendu Bhowmik, Srilekha Chattopadhyay, Amit Ranjan Roy

Final Decision: Disposed Of

Judgement

Subhendu Samanta, J

1. Instant appeal has been preferred against the judgment and award dated 7th January, 2008 passed by the learned Judge Motor Accident Claims Tribunal, fourth court appear one in MSC case No. 146 / 241 up to 2005.

2. The brief of fact of the case is that the present respondent No. 1 being the claimant had preferred an application under section 166 of MV Act before the learned tribunal for getting compensation on the ground that he suffer bodily injury due to rash and negligent driving of the driver of the offending vehicle insured under the policy of the Insurance Company. By such accidents he became permanently disabled, thus he prayed for just and proper compensation. The Insurance Company has contested the matter before the learned tribunal by filing written statement.

3. After hearing the parties and after receiving the evidences the learned Tribunal has awarded a sum of Rs. 4 lakh in favour of the claimants together with 8% interest

per annum from the date of application and directed the present appellant to pay the compensation.

4. Being aggrieved by and dissatisfied with the said award the present appeal has been preferred.

5. Mr. Saibalendu Bhowmik, learned Advocate appearing on behalf of the Insurance Company submits that the impugned award passed by the tribunal suffers illegality. The learned Tribunal has failed to appreciate the facts and circumstance of this case and came to erroneous findings. He argued that the Learned Tribunal without observing the materials on record has considered the physical disability of the claimants to be 80 percent. The disability certificate issued by the Government Hospital was at all proved by the author of the certificate, thus the learned tribunal should not have acted upon such certificate. He further argued that one doctor who deposes before the learned Tribunal namely Dr. Chinmoy Dey (PW-4) only treated the claimant at hospital, but he had no sign the disability certificate. Thus his evidence cannot be considered for assessing the disability of the claimant.

6. He further argued that learned tribunal has unreasonably assessed the income of the claimants without any specific or cogent evidence. He further argued the award passed by the learned Tribunal is arbitrary and exorbitant; the same is required to be set aside.

7. Learned Advocate appearing on behalf of the respondent claimants submits that the learned tribunal has committed no error. More over the learned Tribunal has award only 4 lakh towards the compensation while the claim was 6 lakh. The tribunal has passed the award in the year 2005 and now the law of the land has been drastically changed. The application for compensation as well as in the pending appeal, the Principle of law lay down by the Hon'ble Supreme Court in Nationals Insurance Company Ltd vs. Pronoy Sethi must have to be followed. He further argued that it is the direction of Hon'ble Supreme Court in several decisions that the claim of compensation has to be awarded according to the structure formula laid down by the Apex Court in Sarala Varma vs. Delhi Transport Corporations & Anr. He further argued in this case if the structure formula is adopted, then the claimants is entitled to get more compensation.

8. Learned Advocate for the Insurance Company submitted that the argument advance by the learned advocate for the claimants cannot be entertained, the pleading are at variance with proof. Initially, the claimant application was filed claiming the compensation amounting to Rs. 1 lakh. Thereafter the same was enhanced by way of amendment application to the tune of Rs. 6,20,000. During the evidence the claimant has claimed the compensation amounting to Rs. 6 lakh. Consequently, the prayer of the claimant cannot be considered. He further argued that by virtue of the decision of Hon'ble Supreme Court in Ranjana Prakash Ors. vs. the Divisional Manager and Others, the claimants is not entitled to enhanced

compensation as he has lost his right of appeal or, waived right appeal by not filings any appeal or cross appeal against the impugned award. He further argued that the observation of Hon'ble Supreme Court in *Ranjana Prakash (supra)* has been specifically and literally followed by the Division Bench of this court in *National Insurance Company limited vs. Smt. Sulekha Das and Ors.* It is the view of the Hon'ble Division Bench of this that:

"We, however, part with the observation that unless the Supreme Court revisits the issue and reserves the ratio of the decisions in *R. Swaminathan (supra)* and *Ranjana Prakash (supra)* and lays down the law authoritatively for guidance of the High Court's thereby paving the way for award of enhanced compensation in course of appeal proceedings without there being any cross-objection, in exceptional cases warranting such approach, Order XLI Rule 33 cannot come to the rescue of the respondents/claimants for enhanced compensation in an appeal by the owner or the insurer for reducing the compensation awarded."

9. Refuting the submission of the learned Advocate for the appellant, the learned Advocate for the respondent submits that the power of appellate court under order 41 Rule 33 cannot be restricted on the ground that the cross appeal has not been preferred by the respondent. In support of his contention he cited his decision in Hon'ble Supreme Court in *State of Andhra Pradesh & Ors. vs. B. Ranga Reddy*:

"The Court did not find any merit in the argument that the Appellate Court was not powerless to grant decree as such decree has been granted in terms of Order 41, Rule 33 of the Code. The Court held as under :"

"15. While allowing the appeal or otherwise interfering with the decree or order appealed against, the appellate court may pass or make such further or other, decree or order, as the case would require being done, consistently with the findings arrived at by the appellate court. The object sought to be achieved by conferment of such power on the appellate court is to avoid inconsistency, inequity, inequality in reliefs granted to similarly placed parties and unworkable decree or order coming into existence. The overriding consideration is achieving the ends of justice. Wider the power, higher the need for caution and care while exercising the power. Usually the power under Rule 33 is exercised when the portion of the decree appealed against or the portion of the decree held liable to be set aside or interfered by the appellate court is so inseparably connected with the portion not appealed against or left untouched that for the reason of the latter portion being left untouched either injustice would result or inconsistent decrees would follow. The power is subject to at least three limitations: firstly, the power cannot be exercised to the prejudice or disadvantage of a person not a party before the court; secondly, a claim given up or lost cannot be revived; and thirdly, such part of the decree which essentially ought to have been appealed against or objected

to by a party and which that party has permitted to achieve a finality cannot be reversed to the advantage of such party. A case where there are two reliefs prayed for and one is refused while the other one is granted and the former is not inseparably connected with or necessarily depending on the other, in an appeal against the latter, the former relief cannot be granted in favour of the respondent by the appellate court exercising power under Rule 33 Order 41."

10. Heard the learned Advocates, perused the material on record; also, perused the award passed by the Learned Tribunal. It appears to me that after taking the evidences and on the basis of the pleadings the learned tribunal has framed as many as 7 issues to determine the case in hand. Learned Tribunal has discussed all the issues one after another. In discussion the learned tribunal is a view that the rush and negligence driving on the part of the petitioner offending vehicle had been well proved by charge-sheet of the police case initiated on the basis of the said accident.

11. The learned tribunal in considering the physical disability of the claimants is of view that though the disability certificate disclosed the disability of 80% but the claimants did not produce any Doctor who signed the disability certificate. So, the disability cannot be believed. However the learned tribunal also placed his reliance upon the evidence of another doctor who treated the claimants at hospital and deposed before the tribunal that the disability of the claimants may be 80%.

12. Learned tribunal has also considered the monthly income of the deceased in a business of lottery ticket on the basis of evidence of PW-2. Considering all materials, learned tribunal is of a view that the claimants is entitled to get the compensation on the ground of medical cost expended by him and also for lose of income of the claimants. Finally the learned tribunal is of opinion that the just and proper compensation in favour of the claimant would be 4 lakh.

13. It appears to me that claimant was engaged in a business of lottery tickets selling. The income of the claimants was stated to be Rs.3000 per month as per version of PW-2. It is also the observation of the learned tribunal that his disability is 80%. It further appears that Insurance Company has not produced any evidence, either oral or documentary, to disprove the pleadings and proof of the claimants.

14. Though the learned tribunal has not adopted the structure formula in this case but it appears to me that there is no justification to enter into the finding of the learned tribunal in awarding the compensation. The accident happened in the year 2005. The just and proper compensation of this case, as allowed by the learned tribunal appeared to me justified.

15. By virtue of the decision of Hon'ble Division Bench of the court passed in National Insurance Company Limited vs. Sulekha Das. I am of the view that the claimant respondents are not entitle to get enhance amount of compensation in an appeal filed by the insurance company.

16. I find no justification to enter into the merit of the award passed by the learned tribunal as the appeal appears to me devoid a merit.

17. Award passed by the tribunal hereby affirmed.

18. It appears that the Insurance Company has deposit the entire award amounts of Rs. 4 lakhs through the office of the learned Registrar General, High Court, Calcutta. Claimant has withdrawn Rs. 1,00,000. Rest amount was invested. The same must have carried interest. The office of the learned Registrar General, High Court, Calcutta to disburse to same along with the accrued interest in favour of the claimant/respondent No. 1 within 4 weeks.

19. Further it appears that the Insurance Company has not deposit the interest portion on and upon the award as directed by the Learned Tribunal. Thus the Insurance Company is further directed to deposit the interest portion on and upon the award of the learned tribunal from the date of filing the claim application, that is, from 16.05.2005 till today, within six weeks from the date of passing of this order through the office of the Registrar General, High Court at Calcutta. On such deposits the claimant at liberty to receive the same according to the prevalent rules.

20. The payment of compensation is subject to the ascertainment of payment of deficit court's fee if any.

21. FMA 1508 of 2008 disposed of; connected applications if pending, and also disposed of.

22. Parties to act upon the server copy and urgent certified copy of the judgment be received from the concerned Dept. on usual terms and conditions.