(1997) 03 KL CK 0040

High Court Of Kerala

Case No: M.F.A. No''s. 60 and 122 of 1989

New India Assurance Co. Ltd.	APPELLANT
Vs	
M.N. Sheeja and Others	RESPONDENT

Date of Decision: March 6, 1997

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 33

Citation: (1997) ACJ 1072

Hon'ble Judges: V.V. Kamat, J; K.A. Mohamed Shafi, J

Bench: Division Bench

Advocate: S. Parameswaran, for the Appellant; V.V. Surendran and P.M. Padmanabhan, for the Respondent

Judgement

V.V. Kamat, J.
These are appeals by the insurance company and the claimant respectively.

2. The proceedings of the award dated 30.11.1988 in O.P. (MV) No. 11 of 1987 of the Motor Accidents Claims Tribunal, Wayanad-Kalpetta was brought before us.

3. The insurance company relying on the statutory provisions of Section 95(2)(b)(i) of the Motor Vehicles Act, 1939 governing compensation as on 30.11.1986 when the accident took place, urged that the upper limit is Rs. 1,50,000/- and consequential grievance against the award for the total sum of Rs. 2,62,000/- as liability of the appellant insurance company in the first instance.

4. The incident is of 30.11.1986, occurred at 3.30 p.m., when the injured M.N. Sheeja, walking on the eastern side of Kalpetta-Battery Road at Kainatty side was knocked down by a lorry KLC 5633, driven by Aboobacker, original respondent No. 1, owned by K. Vijayan, original respondent No. 2 and insured with the appellant, original respondent No. 3. The result of the accident was that Sheeja''s left leg was crushed and ultimately had to be amputated at the Medical College Hospital, Calicut. The

incident led to the presentation of claim petition on 29.1.1987 before the Tribunal claiming a total compensation of Rs. 3,00,000/-.

5. The Tribunal by the impugned award granted compensation of Rs. 2,62,000/- with interest at 12 per cent per annum from 29.1.1987 till the date of payment with proportionate cost.

6. With regard to the contention of the appellant insurance company, the Tribunal had dealt with it in para 9 of the award. What is observed by the Tribunal in the context is more than curious and it is as follows:

In this case, i.e., in Exh. R1 the said column is kept blank. Moreover, nowhere it is recorded in Exh. R1 that the limit is Rs. 1,50,000/-. Exh. R1 only shows that the insurance premium is Rs. 200/-. None has come to the box to prove Exh. R1 and to say that as per this the limit is Rs. 1,50,000/-. Therefore, 1 find that the Exh. R1 is not properly proved. Therefore no reliance can be made on Exh. R1. Therefore, I find that the respondent No. 3, insurance company, failed to prove that its limit is Rs. 1,50,000/-.

It is basing that the limit of the liability is set down by Section 95(2)(b)(i) of Motor Vehicles Act, 1939, governing the day on which the accident took place and there is no difficulty that this limit is Rs. 1,50,000. The reasoning of the Tribunal, therefore, is only needed to be stated for setting it aside which we hereby do. The appeal of the insurance company is confined to this submission only and rightly so and it is therefore hereby allowed.

7. While going through the impugned award and that too for the purpose of considering the merits of M.F.A. No. 122 of 1989, preferred by the claimant M.N. Sheeja contending for enhancement over and above the amount of Rs. 2,62,000/- granted, urging in support thereof that the requirement for artificial limb and for the amounts to be spent in future are some of the factors needed to consider enhancement, we went through the records of the proceedings.

8. We have seen that the negligence attributable to respondents flows from the facts which speak for themselves and the Tribunal in the context has emphasised that the claimant Sheeja was not at all cross-examined by the respondents. The Tribunal also emphasised that the fact that the lorry went off from the road and fell into a channel on the roadside is also a speaking situation as seen from Exh. A9 series of photographs. No wonder then that the Tribunal had no difficulty in recording the finding of rashness and negligence at the first instance. We do not find any defect in regard thereto.

9. The petitioner-claimant, at the time of the incident, was a girl of 9 years and a student. The incident resulted in crush injury on the left leg and fracture of shaft of left femur, with the result that her leg was amputated. Her evidence is supported by that of her father as PW 2. The Tribunal had also considered the case sheet, Exh. XI

and had observed, as a consequence the accident gave her great pain and suffering which continued also during the period of treatment. The Tribunal has recorded that petitioner-claimant is otherwise found to be smart, a good looking girl, would have to suffer throughout her life because of the amputation of her leg. The Tribunal seeks to support the above proposal by reference of certificate of merit in pencil drawing, group song and light music. This is sought to be re-inforced by reference to the certificates, Exh. A7, issued by Head Master certifying that she was very active in curricular and extracurricular activities. The Tribunal referring to the mark list of the Terminal Examination of the academic year 1986-87 thought that she secured very high marks, performance is securing 304 out of 400 marks (above 70 per cent) and in the annual examination 292 out of 500 marks (little over 50 per cent); she had also appealed for lower secondary scholarship examination.

10. The material on record led the Tribunal to observe that this young bright girl is going to meet her future life very adversely because of the amputation of the leg due to the accident.

11. With an effort to avoid the clouding of our judicial vision, we would like to observe that the performance in the examination as is sought to be inferred on the basis of material on record could not be said to be that of a brilliant girl in these days of photo-finish competition, which starts sometime from about 90 per cent. We have to be conscious that it is the function of the court to determine just compensation.

12. This court becomes conscious especially when the appellant insurance company, in view of provisions of Section 96 of the Act, has a limited scope and thereby prevented from challenging the quantum to consider the situation especially when it finds that the quantum is blown out of all proportion, even by a process of unnecessary duplication in regard thereto by the Tribunal. Therefore, we are reminded of provisions of Order XLI, Rule 33 of Code of Civil Procedure, with reference to our power to pass or make such order as the case may require, notwithstanding the situation that the appeals before us relate to only a part of the aspect of the proceedings and the real parties (owner and driver) have not appealed or even approached by way of any remedy of their own. Giving our anxious thought, we feel that this is the occasion that requires us to consider the question of quantum because it requires to be suitably modified so that the function of this Court to award just and adequate compensation be realised.

13. The aspect is taken up for consideration by the Tribunal at para 11 of the award. In the first instance, the claim of Rs. 50,000/- is taken up with reference to pain and suffering at the time of the accident and during the period of treatment. The Tribunal without any discussion in regard thereto found it reasonable and has allowed it. Even then without realising that the amount is granted on the ground of pain and suffering not only at the time of accident but throughout her life in future monetising it at Rs. 50,000/-, the Tribunal has also thereafter proceeded to consider

the claim with regard to personal disability as well as loss of earning due to personal disability separately, the Tribunal has awarded Rs. 1,00,000/- each on these counts. The process of reasoning would show that brightness in studies and smartness and goodness in looks all fail the claimant throughout as a permanent disability. In the same process of reasoning, the Tribunal has also considered that she will not be able to go for a successful life because of the amputation of her leg which would be an impediment for proper marriage alliance. Thus, it would be found that on these three analogous aspects the Tribunal has awarded Rs. 2,50,000/-. Bare reading of the award would show that Tribunal has not realised the overlapping character of pain and suffering at the time of the accident and thereafter throughout her life, the consequence of permanent disability and loss of earning, all necessarily flowing in an overlapping way. Certainly, the Tribunal is in obvious error of granting Rs. 1,00,000/- more than once almost on the same count. In our judgment, it becomes really necessary to exercise the power of Order XLI, Rule 33 of CPC with regard to this consequence of unnecessary duplication. It would follow that the award would have to be modified by reduction of Rs. 1,00,000/- in the context, for the above reasons.

14. The above discussion would show that the three factors, such as pain and suffering suffered at the time of accident and during the period of treatment resulting in consequential pain and suffering throughout the life of the claimant together with the aspect of permanent disability and loss of earning capacity, the requirement for artificial limb which is required to be changed more often than not once as well as the amounts to be spent in future. In our judgment, it is necessary to bear in mind that what is required to be awarded by the court u/s 110-B of Motor Vehicles Act, is just and adequate compensation. It is not in the nature of a gift and definitely the reasoning of the Tribunal and the approach is more than emotional in the context. In all such cases, it is the misfortune of the situation, perhaps which is to be remembered for the rest of the life with sorrowful tears. In this context, the court in its process of determination of adequate and just compensation has to perform the delicate task of extricating the burst of emotion in the process. It becomes an emotional approach, when it is reasoned out that the girl would be without marriage, that the girl would be without work and that the girl would be without capacity. Every situation of calamity brings along with it necessary courage to meet the situation, and younger the age greater is the need and energy that flows into the situation to make up the victim ready for future eventualities. It is the experience and passage of time that is the healer. In the award of compensation, justness and adequacy are factors which are more prominent. Giving our anxious thought, we find that just and adequate compensation would be Rs. 1,62,000/- with liability of the insurance company, the appellant, up to Rs. 1,50,000/- and the rest would be that of the owner and driver.

15. For the above reasons, the impugned award stands modified and respondent Nos. 1 to 3 are ordered to pay compensation of Rs. 1,62,000/- with interest at 12 per

cent per annum on the said sum of Rs. 1,62,000/- from the date of petition (29.1.1987) till the date of payment with proportionate cost, as ordered by the Tribunal making it clear that the liability of the insurance company, respondent No. 3, would be that of Rs. 1,50,000/- and interest thereon, leaving the rest of the liability as of respondent Nos. 1 and 2 (owner and driver) respectively. It is needless to say that all payments that are made would be adjusted in the process. The proceedings are decided as above.

16. Therefore, M.F.A. No. 60 of 1989 by the insurance company is allowed with regard to the limit of Rs. 1,50,000/-. Similarly M.F.A. No. 122 of 1989 preferred by the claimant for enhancement stands dismissed. The impugned award stands modified in the light of the observations in the judgment to Rs. 1,62,000/- in exercise of the power under Order XLI, Rule 33 of CPC as specified. Ordered accordingly.