

Ashok Kumar Vs. Sheel Kumar and ors

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Court : Delhi

Decided On : Feb-26-2013

Judge : G.P. Mittal

Appellant : Ashok Kumar

Respondent : Sheel Kumar and ors

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on:

6. h December, 2012 Pronounced on:

26. h February, 2013 + MAC.APP. 314/2006 ASHOK KUMAR Through: Appellant Mr.Peeush Sharma, Advocate versus SHEEL KUMAR & ORS Through: Respondents Mr.Rohit Gandhi, Advocate for the Respondents No.1,2 & 4. CORAM: HON'BLE MR. JUSTICE G.P.MITTAL JUDGMENT G. P. MITTAL, J.

1. The Appellant Ashok Kumar impugns a judgment dated 18.01.2006 passed by the Motor Accident Claims Tribunal(the Claims Tribunal) whereby while awarding a compensation of `1,22,400/- along with interest @ 6% per annum, the Claims Tribunal exonerated the United India Insurance Co. Ltd., the insurer of the vehicle, on the ground that the policy commenced on 03.10.1997 at 8:30 pm whereas the accident occurred on 03.10.1997 at 5.30 pm.

2. There is twin challenge to the award. First, on the quantum of compensation and, second on the liability.

3. The finding on negligence reached by the Claims Tribunal is not challenged by any of the four Respondents by preferring any Appeal against the order dated 18.01.2006. Thus, the same has attained finality.

4. It is urged by the learned counsel for the Appellant that he suffered permanent disability to the extent of 7.5% in his right knee on account of moderate restriction in movement. He was, however, not awarded any compensation on account of loss of earning capacity due to permanent disability. It is the Appellants case that Dr. M.L. Sharma, Plastic Surgeon from the Holy Family Hospital was examined by him as PW7, who had estimated the cost of the second surgery to be `2,00,000/-, yet no compensation was awarded under this head by the Claims Tribunal on the premise that the second surgery was not performed despite a lapse of a period of nine years since the time of the accident.

5. On the other hand, the learned counsel for the Respondents urged that the compensation awarded is just and reasonable.

6. While dealing with the injuries suffered by the Appellant, the treatment received by him and the award of compensation, the Claims Tribunal held as under:

5. Petitioner received crushed injuries in respect of knee of both the legs. The Patella of right leg was fractured. He was admitted in RML Hospital from 3.10.97 to 9.10.97. He was not cured there. He was sent to Safdurjung hospital for skin grafting but he was not admitted there. On the same day he was admitted in Holy Family Hospital and he remained there till 4.11.97. In all he was hospitalised for more than a month. At Holy Family Hospital it was found that he had a large degloving (Dead Skin) on the right knee and loss of skin about 10 cm X 6 cm. On the left leg there was a loss of skin 18 cm X 1.cm lot of dead skin from upper thigh to mid leg. He had undisplaced fracture of right Patella. He was operated there where all the dead tissues were removed. The skin graft was taken from left thigh and leg and it was applied to all the raw areas on both lower limbs. Dr M.L. Sharma, (PW-7) Plastic Surgeon, who treated him was examined and he stated that he requires another surgery and in case he undertakes another surgery that will cost hi approximately Rs two lacs now. The certificate was given by him in August 1999. But it is a fact that the petitioner has not under gone any surgery

after 1999 and it is almost nine years. Petitioner admitted that he is employed with previous employee Smt Leelawati and now is getting a salary of Rs.2400/- per month. The disability certificate shows that he has suffered disability to the extent of 7.5 per cent due to the stiffness of right knee with moderate restrictions. He proved on record that he had spent a sum of Rs 70000/- on his treatment. I award him a sum of Rs70000/- towards medicine/treatment. I also award him a sum of Rs.5000/- for special diet Rs 2000/- for conveyance. A sum of Rs.20000/- for disability. Smt Leelawati with whom the petitioner was employed testified that he remained on leave without pay from 4.10.97 to 31.3.99 on account of the accident. Taking into consideration the nature of injuries it must have kept him out of work for at least one year as knee of both his legs were crushed and there was fracture in the right knee. The skin grafting was done. In 1997 the minimum wages in respect of an unskilled worker were Rs 1784/- It is rounded off to Rs 1700/-. I award him a sum of Rs 1700 X 1.= 20400/- for loss of income.

6. I also award him a sum of Rs 5000/- for pain sufferings.

7. I have before me the Trial Court record. First of all, I shall deal with the question whether the Appellant was entitled to any compensation on account of loss of earning capacity. The Appellant was employed in Leelawati Flour Mill. He stated that he joined the Mill in the year 1992 on a salary of `2,000/- per month. On the date of the accident, he was earning a salary of `4,000/- per month. Leelawati, the owner of the Flour Mill also filed her affidavit stating about the Appellants income. In cross-examination, she deposed that she herself was earning an income of `2,000/- per month after paying the salary of the staff. No documentary evidence was produced with regard to running of Leelawati Floor Mill or the Appellants salary, except the certificate Ex.P-36. In the circumstances, it would be difficult to believe that the Appellant as a manual labour at Leelawati Flour Mill would be earning much more than the owner of the Flour Mill. Salary of `48,000/- in the year 1997-98 was subject to Income Tax. Admittedly, no tax was being deducted or paid by the Appellant. There was no record with regard to his salary, no register was produced regarding the employment or payment of salary for more than five years. In the circumstances, it would be difficult to believe the Appellants income at the time of the accident to be `4,000/- per month.

8. The Appellant has suffered disability to the extent of 7.5% in respect of his right lower limb on account of suffering due to moderate restriction in movement. The Appellant examined Dr. M.L. Sharma, Plastic Surgeon as PW7. Nothing could be elicited from the testimony of PW7 as to how the Appellants disability would impact his earning capacity.

9. In *Raj Kumar v. Ajay Kumar & Anr.*, 2011 (1) SCC 343.the Supreme Court brought out the difference between permanent disability and functional disability resulting in the loss of earning capacity. It was laid down that the compensation on account of loss of earning capacity has to be granted in accordance to the nature of job undertaken by the victim of motor accident. Paras 11 and 14 of the report are extracted hereunder:

11. 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 (see for example, the decisions of this Court in *Arvind Kumar Mishra v. New India Assurance Co. Ltd.* 2010 (10) SCC 25.and *Yadava Kumar v. D.M., National Insurance Co. Ltd.* 2010 (10) SCC 341.x x x x x x x 14.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.

10. Keeping in view that the Appellant was a menial worker, I would try to make a guess work and consider the moderate stiffness in both his knees to impact his (Appellants) earning capacity to the extent of 10%. The Appellant was aged about 21 years at the time of the accident. I would award him a compensation of `50,094/- on account of loss of earning capacity including augmentation of 30% in view of the judgment of the Supreme Court in Santosh Devi v. National Insurance Company Ltd. & Ors., 2012 (4) SCALE 55 ($1784 + 30\% \times 12 \times 18 \times 10\%$).

11. The Appellant proved the assessment with regard to the expenditure on his treatment as Ex.P-1. Ex.P-1 gives the details of the expenditure to be incurred by the Appellant including 30% extra money for unforeseen complications. PW7 Dr. M.L. Sharma stated that the surgeries require to be undertaken by the Appellant would entail an expenditure of `2,00,000/- in the year 2005, at the time of his examination in 2005. PW7s testimony was not challenged in cross-examination and, therefore, the fact that the Appellant did not undergo the surgeries as advised by the Doctor for want of money could not have disentitled the Appellant to seek the compensation first and then to undergo the surgeries. Relying on the certificate Ex.P-1 coupled with the testimony of PW7, I award him a sum of `2,00,000/- towards surgeries as on 20.05.2005.

12. Considering the nature of injuries suffered, the period of hospitalization and outdoor treatment as has been stated by the Appellant and corroborated by Dr. M.L. Sharma (PW7), the award of compensation of `5,000/- towards special diet and `2,000/- towards conveyance was on the lower side. The Appellant was not

granted any compensation towards loss of amenities. Since the accident took place in the year 1997, the compensation of `5,000/- towards special diet and `2,000/- towards conveyance is enhanced to `10,000/- and `5,000/- respectively. Since I have separately awarded a compensation of `50,094/- towards loss of earning capacity, the sum of `20,000/- awarded towards disability shall be duplication of the award.

13. It is difficult to measure the pain and suffering in terms of money which has been suffered by the claimant on account of serious injuries caused to him in a motor accident. Since the compensation is required to be paid for pain and suffering an attempt must be made to award compensation which may have some objective relation with the pain and suffering underwent by the victim of a motor accident. For this purpose, the Claims Tribunal and the Courts normally consider the nature of injury; the parts of the body where the injuries were sustained; surgeries (if any) underwent by the victim; confinement in the hospital and the duration of the treatment. The Claims Tribunal awarded a compensation of `5,000/towards pain and suffering which is very meagre in view of the fact that the Appellant remained admitted in RML Hospital, Safdarjung Hospital and Holy Family Hospital. He underwent successive surgeries. Thus, the compensation towards pain and suffering is enhanced from `5,000/- to `20,000/-.

14. The compensation awarded is recomputed as under: Sl.No. Compensation under various heads Amount Awarded 1. Medicine/Treatment (awarded by the Claims Tribunal) ` 70,000/- 2. Loss of Earning Capacity `50,094/- 3. Special Diet ` 10,000/- 4. Conveyance ` 5,000/- 5. Pain and Suffering ` 20,000/- 6. Loss of Amenities/Disability ` 20,000/- 7. Future Treatment/Surgeries ` 2,00,000/- Total 15. ` 3,75,094/- A fervent appeal was made by the learned counsel for the Appellant that the Respondent United India Insurance Company Ltd. should be asked to pay the compensation in the first instance and to recover the same from the insured later on. The Claims Tribunal reached a finding that the accident took place on 03.10.1997 at 5:30 pm, whereas the vehicle was insured only at 8:30 pm. The case is covered under Clause 149(2)(b) of the Motor Vehicles Act, 1988. Had the Insurance Company been informed of the accident three hours before obtaining the coverage, the Insurance Company would not have entered into a contract of

insurance. Otherwise also, in view of the judgment in New India Assurance Co. Ltd. v. Sita Bai, 2000 ACJ 4.(SC), the Insurance Company cannot be fastened with the liability. The finding on liability reached by the Claims Tribunal cannot be faulted.

16. The compensation stands enhanced by `2,52,694/- out of which ` 52,694/- shall carry interest @ 7.5% per annum from the date of filing of the Petition till its payment and the compensation of `2,00,000/(awarded for future treatment) shall carry interest @ 7.5% per annum w.e.f. 01.06.2005 upto the date of payment.

17. The Respondent No.4 being the owner and Respondent No.1 being the driver are held jointly and severally liable to pay the compensation. The Respondent No.4 is directed to deposit the enhanced compensation within six weeks with the Claims Tribunal.

18. The Appeal is allowed in above terms.

19. Pending Applications stand disposed of. (G.P. MITTAL) JUDGE FEBRUARY 26 2013 pst

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