Neutral Citation No. - 2024:AHC:163155

A.F.R.

Reserved

Court No. - 35

Case :- FIRST APPEAL FROM ORDER No. - 3075 of 2007

Appellant :- Km. Cheenu

Respondent :- Bishambhar Singh And Another

Counsel for Appellant :- S.D. Ojha

Counsel for Respondent :- Pankaj Rai

Hon'ble Vipin Chandra Dixit,J.

1. This first appeal from order has been filed on behalf of claimant-appellant for enhancement of compensation against the judgment and award dated 8.8.2007 passed by Motor Accident Claims Tribunal/Additional District Judge, Court No.8, Bulandshahar in M.A.C.P. No.61 of 2006 (Km. Cheenu minor through her mother Smt. Rubi Vs. Bishambhar Singh and another) by which compensation of Rs.1,08,875/- along with 6% interest has been awarded in favour of claimant-appellant on account of injuries received by her.

2. The brief facts of the case are that on fateful day 22.8.2005 the claimant-appellant was returning from Agra to Bulandshahar by Maruti Van bearing no.RJ-01-C-8496 along with her other family members and at about 12 noon when they reached near Village Gijrauli, District Hathras, the offending truck bearing no.MP-6-E-5318 which was coming from opposite direction hit the Maruti Van. The offending truck was being driven by its driver very rashly and negligently. The claimant-appellant had received grievous injuries in the accident and has become permanent disable. The first information report was lodged against truck driver in Police Station Kotwali, Hathras, which was registered as Case Crime No.263 of 2005, under Sections 279, 338, 304A I.P.C.

3. The claim petition was filed on behalf of claimant-appellant (minor) through her mother under Sections 166 and 168 of Motor Vehicles Act claiming compensation of Rs.36,05,000/-. The claim petition

was registered as M.A.C.P. No.61 of 2006. As per claim petition, the claimant had received grievous injuries in the accident and had become permanent disable to the extent of 75%. The age of claimant was only 2 years at the time of accident.

4. The opposite party/respondent no.1, who is owner of truck has appeared before the Claims Tribunal and filed his written statement denying the claim allegation. It was pleaded that the truck in question was insured from 15.10.2004 to 14.10.2005. It was also pleaded that registration certificate, insurance and permit of truck as well as driving licence of truck driver was valid and effective on the date of accident.

5. The opposite party/respondent no.2 the Oriental Insurance Company Limited has also filed its written statement denying the claim allegation but it was admitted that truck was insured for third party for the period 15.10.2004 to 14.10.2005. It was pleaded that the accident was occurred on account of negligence of drivers of both the vehicles. It was also pleaded that the owner, driver and insurer of Maruti Van were necessary parties but were not impleaded in the claim petition and the claim petition is defective for non-joinder of necessary parties.

6. The Claims Tribunal had framed five issues for determination as rash and negligent driving of truck driver, contributory negligence of drivers of truck as well as Maruti Van, validity of driving licence of both the drivers, non-joinder of necessary party and lastly relief as well as liability for payment of compensation.

7. The claimant had produced Rubi Goel, who is mother of claimant as P.W.-1 and had also produced documentary evidence to prove her case. The opposite parties have not adduced any oral evidence and opposite party no.1 had filed documentary evidence in support of his defence.

8. The Claims Tribunal after considering the evidence and materials adduced by the parties, had recorded the finding while deciding issue nos.1, 2, 3 and 4 that drivers of both the vehicles were equally negligent

and responsible for the accident. The Claims Tribunal has recorded the finding that there was contributory negligence on the part of both the drivers to the extent of 50-50%. The Claims Tribunal has further recorded the finding that driver of truck was having valid and effective driving licence to driver the truck, whereas the driver of Maruti Van was not having valid driving licence. The Claims Tribunal has also recorded the finding that there is no evidence to establish that Maruti Van was insured on the date of accident. The owner of Maruti Van was necessary party, but was not impleaded by the claimant and the claim petition is defective for non-joinder of necessary party. The Claims Tribunal has decided issue no.1 in favour of claimant, whereas issue nos.2, 3 and 4 were decided in favour of opposite parties.

9. The Claims Tribunal while deciding the issue no.5 has recorded the finding that the claimant had received grievous injuries in the accident and has become permanent disable on account of injuries received by her. The Claims Tribunal has further recorded that as per disability certificate which is Paper No.18C-2 issued by office of Chief Medical Officer, the disability of claimant was 75%. The opposite parties had not disputed the genuineness of disability certificate and it has been held that the claimant has become permanent disable to the extent of 75%. The Claims Tribunal has further recorded that since the claimant is aged about 2 years having no income, the income is accepted as Rs.15,000/- per annum as provided in 2nd Schedule of Motor Vehicles Act, 1988. The Claims Tribunal while calculating the compensation has applied the multiplier of 15. The Claims Tribunal while considering the medical expenses has recorded the finding that as per list of document Paper No.53C1 the claimant has filed bills/vouchers of Rs.47,628/- and through list of documents Paper No.33C-1 bills/vouchers of Rs.94,343/-, but had awarded only Rs.15,000/- for medical expenses as provided in Second Schedule of Section 163A of Motor Vehicles Act, 1988. The Claims Tribunal has further awarded Rs.5,000/- for mental and physical pain, Rs.20,000/- for

helping hand, Rs.5,000/- for special diet and Rs.4,000/- for transportation and total compensation was assessed as Rs.2,17,715/-. The Claims Tribunal after deducting 50% compensation on account of contributory negligence of driver of Maruti Van has awarded Rs.1,08,875/- against the insurer of truck. The Claims Tribunal has recorded the finding that the claimant is entitle to receive remaining 50% from owner and insurer of Maruti Van but since they were not impleaded as party in the claim petition, no direction can be issued for payment against them. The total compensation of Rs.1,08,875/- along with 6% interest has been awarded in favour of claimant-appellant.

10. Heard Sri S.D. Ojha, learned counsel for claimant-appellant, Sri Pankaj Rai, learned counsel appearing on behalf of respondent no.2 Insurance Company and perused the record. No one is present on behalf of respondent no.1, who is owner of truck.

11. It is submitted by learned counsel for claimant-appellant that a very meagre amount of compensation has been awarded by the Claims Tribunal in favour of claimant-appellant. The accident was occurred on account of sole negligence of driver of truck and there was no negligence on the part of driver of Maruti Van and the Claims Tribunal has erred in holding negligence of both the drivers. The F.I.R. was lodged by one Ghanshyam, who was travelling in Maruti Van and was an eye witness of the accident against the driver of truck. The Investigating Officer after due investigation has also submitted charge-sheet against truck driver which proves the rash and negligent driving of truck driver. The claimant has produced Smt. Rubi as P.W.-1, who was also travelling in Maruti Van and was an eye witness of the accident. She has stated on oath before the Claims Tribunal that accident was occurred on account of sole negligence of truck driver and this witness was not cross examined by the opposite parties on the issue of negligence and as such the statement of P.W.-1 was uncontroverted. The Claims Tribunal has recorded perverse finding of fact

regarding negligence of driver of both the vehicles, in absence of any evidence of contributory negligence.

12. It is further submitted that even otherwise the claimant was travelling in Maruti Van and there was no contribution of claimant towards accident and in any case it was a case of composite negligence and it is open to the claimant to claim compensation either from one vehicle or from both the vehicles. He placed reliance on the judgment of Hon'ble the Apex Court in the case ***Khenyei vs. New India Assurance Company Limited and others*** reported in ***2015(2) T.A.C. 677(S.C.)*** that in case of composite negligence, it is open for the claimant to claim compensation either from the owner/driver and insurer of both the vehicles or from any one of them. Relevant paragraph 12 is quoted herein below:-

> *"12. A Full Bench of Madhya Pradesh High Court in Smt. Sushila Bhadoriya & Ors. v. M.P. State Road Transport Corpn. & Anr. [2005 (1) MPLJ 372] has also laid down that in case of composite negligence, the liability is joint and several and it is open to implead the driver, owner and the insurer one of the vehicles to recover the whole amount from one of the joint tort feasors. As to apportionment also, it has been observed that both the vehicles will be jointly and severally liable to pay the compensation. Once the negligence and compensation is determined, it is not permissible to apportion the compensation between the two as it is difficult to determine the apportionment in the absence of the drivers of both the vehicles appearing in the witness box. Therefore, there cannot be apportionment of the claim between the joint tort feasors. The relevant portion of decision of Full Bench is extracted hereunder :*
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> > *"When injury is caused as a result of negligence of two joint tort-feasors, claimant is not required to lay his finger on the exact person regarding his proportion of liability. In the absence of any evidence enabling the Court to distinguish the act of each joint tort-feasor, liability can be fastened on both the tort-feasors jointly and in case only one of the joint tort-feasors is impleaded as party, then entire liability can be fastened upon one of the joint tort-feasors. If both the joint tort-feasors are before the Court and there is sufficient evidence regarding the act of each tort-feasors and it is possible for the Court to apportion the claim considering the exact nature of negligence by both the joint tort-feasors, it may apportion the claim. However, it is not necessary to apportion the claim when it is not possible to determine the ratio of negligence of joint tort-feasors. In such cases, joint tort-feasors will be jointly and severally liable to pay the compensation.*
> >
> > *On the same principle, in the case of joint tort- feasors where the liability is joint and several, it is the choice of the claimant to claim*

damages from the owner and driver and insurer of both the vehicles or any one of them. If claim is made against one of them, entire amount of compensation on account of injury or death can be imposed against the owner, driver and insurer of that vehicle as their liability is joint and several and the claimant can recover the amount from any one of them. There can not be apportionment of claim of each tort- feasors in the absence of proper and cogent evidence on record and it is not necessary to apportion the claim.

To sum up, we hold as under:-

(i) Owner, driver and insurer of one of the vehicles can be sued and it is not necessary to sue owner, driver and insurer of both the vehicles.

Claimant may implead the owner, driver and insurer of both the vehicles or anyone of them.

(ii) There can not be apportionment of the liability of joint tort-feasors. In case both the joint tort-feasors are impleaded as party and if there is sufficient material on record, then the question of apportionment can be considered by the Claims Tribunal. However, on general principles of Jaw, there is no necessity to apportion the inter se liability of joint tort- feasors.

Reference is answered accordingly. Appeal be placed before appropriate Bench for hearing."

13. It is further submitted that the accident was occurred in the year 2005 and the Claims Tribunal has erred in accepting notional income of Rs.15,000/- per annum whereas the Hon'ble Apex Court in the case of ***Laxmi Devi & others vs. Mohammad Tabbar & Another*** reported in ***2008 (2) T.A.C. 394 (S.C.)***, has accepted notional income of Rs.3,000/- per month (Rs.36,000/- per annum) for the accident which occurred in the year 2004. It is further submitted that the parents of the claimant had spent more than Rs.3,00,000/- in her medical treatment and bills/vouchers of about Rs.1,50,000/- has already been produced before the Claims Tribunal which were not disputed by the opposite parties and the Claims Tribunal has erred in awarding only Rs.15,000/- towards medical expenses.

14. Lastly, it is submitted that the claimant has become permanent disable to the extent of 75% and she is still under the medical treatment and the parents of claimant-appellant had spent a very huge amount even after the judgment of Claims Tribunal. The claimant-appellant had filed bills/vouchers and other documents related to her treatment before this Court as an additional evidence through application filed under Order 41 Rule 27 C.P.C. This Court vide order dated 6.4.2017 directed the Claims

Tribunal to verify the documents related to medical expenses annexed with application filed under Order 41 Rule 27 C.P.C. dated 9.12.2013 as additional evidence. The Claims Tribunal had verified the medical bills of Rs.4,42,000/- vide its report dated 7.9.2019. The Claims Tribunal has awarded a very less amount of Rs.20,000/- for attendant whereas on account of injuries she could not perform her daily routine works without attendant. One attendant was engaged by parents of claimant on payment of Rs.2,000/- per month. The Claims Tribunal had also erred in awarding only Rs.5,000/- for physical and mental pain, Rs.5,000/- for special died and Rs.4,000/- for transportation. The compensation awarded by the Claims Tribunal is inappropriate looking the age and nature of injuries of claimant-appellant.

15. On the other hand, Sri Pankaj Rai, learned counsel appearing on behalf of respondent no.2 the Oriental Insurance Company Limited has submitted that admittedly it was a case of head on collision in between the insured truck and Maruti Van and the Claims Tribunal after considering the entire evidence and materials which are available on record has rightly recorded the finding that both the drivers were rash and negligent and were responsible for the accident to the extent of 50-50%. It is further submitted that the claimant-appellant was aged about 2 years at the time of accident having no income. The Claims Tribunal has rightly accepted Rs.15,000/- per annum as notional income, provided in IInd Schedule of Motor Vehicles Act, 1988. The medical expenses was also rightly awarded as per provisions of IInd Schedule which was inserted in Motor Vehicles Act, 1988 in the year 1994. Lastly, it is submitted that the compensation awarded by the Claims Tribunal is almost just and proper and there is no illegality in any manner. No ground for enhancement is made out. The appeal filed by claimant-appellant has no force and is liable to be dismissed with costs.

16. Considered the submissions of learned counsel for the parties and perused the record.

17. It is admitted fact that the claimant aged about 2 years along with her family members was travelling in Maruti Van and it was a case of composite negligence. The Claims Tribunal has erred in deciding the issue of contributory negligence ignoring the fact that it was a case of composite negligence and it is open to the claimant to claim compensation either from one vehicle or from both the vehicles in view of law laid down by Hon'ble the Apex Court in the case of ***Khenyei*** (supra). Since the claim petition was filed claiming compensation from the owner and insurer of truck, the Claims Tribunal had erred in deducting 50% compensation on account of contributory negligence of driver of Maruti Van.

18. The Claims Tribunal has also erred in accepting notional income of Rs.15,000/- per annum as provided in IInd Schedule of Motor Vehicles Act, 1988 which was inserted in the year 1994, whereas in the present case the accident occurred on 22.8.2005 and as such the notional income of claimant is accepted as Rs.3,000/- per month as provided by Hon'ble the Apex Court in the case of ***Laxmi Devi*** (supra) for the accident occurred in the year 2004. The Claims Tribunal has not awarded any amount towards future prospects whereas the claimant-appellant is also entitled for 40% future prospects in view of law laid down by the Hon'ble Apex Court in the case of ***Jagdish vs. Mohan*** reported in ***2018(2) TAC 14***.

19. The Claims Tribunal has also erred in accepting 75% loss of earning capacity relying on the disability certificate which discloses 75% disability to the claimant, whereas as per the evidence adduced by claimant before the Claims Tribunal, the claimant-appellant has become permanent disable to the extent of 100%. Loss of income is accepted 100%.

20. So far as medical expenses are concerned, the claimant had fully proved her medical expenses by producing bills/vouchers of Rs.47,628/-

and Rs.94,343/- before the Claims Tribunal and the Claims Tribunal has erred in awarding only Rs.15,000/- for medical expenses. The claimant-appellant is entitled for Rs.1,41,971/- towards medical expenses occurred till the award passed by the Claims Tribunal. The claimant-appellant has also filed several documents related to the treatment and medical expenses of claimant-appellant amounting to Rs.4,42,000/- through application filed under Order 41 Rule 27 C.P.C. dated 9.12.2013. This Court vide order dated 6.4.2017 sent the documents annexed with application under Order 41 Rule 27 C.P.C. to the concerned Claims Tribunal for verification of said documents. The Claims Tribunal has registered miscellaneous case as Misc. Case No.1631 of 2017. The Claims Tribunal after affording opportunity of hearing to the parties had verified the bills and vouchers filed on behalf of claimant-appellant as additional evidence and submitted its report to this Court by letter dated 7.9.2019. The medical expenses occurred after the judgment and award of Claims Tribunal dated 8.8.2007 till 9.12.2013 (filing application under Order 41 Rule 27 C.P.C.) amounting to Rs.4,42,000/- were duly verified by the concerned Claims Tribunal. The respondent Insurance Company has not disputed the fact that aforesaid amount has not been incurred in the medical treatment of claimant-appellant. The claimant-appellant is entitled for medical expenses occurred in her treatment. The medical treatment of the claimant-appellant is still going on as she is disable to the extent of 100%. Nothing has been awarded towards future medical expenses. The claimant-appellant is also entitle for Rs.3,00,000/- towards future medical expenses looking the nature of injuries.

21. The Claims Tribunal had also failed to consider that on account of 100% disability the marriage prospects of claimant-appellant was substantially damaged and the claimant-appellant is subjected to frustration, disappointment, discomfort and inconvenience but nothing has been awarded in the aforesaid account to the claimant-appellant. The Hon'ble Apex Court in the case of ***Master Ayush Vs. The Branch***

Manager, Reliance General Insurance Company Limited and another passed in Civil Appeal Nos. 2205-2206 of 2022 (arising out of SLP (Civil) Nos. 7238-39 of 2021), has awarded Rs.3,00,000/- for loss of marriage prospects. The claimant-appellant is also entitled for Rs.3,00,000/- for loss of marriage prospects. The Claims Tribunal has awarded only Rs.20,000/- towards helping hand ignoring the fact that at the time of accident she was only 2 years old and was 100% disabled. The attendant charges payable to the appellant is assessed as Rs.2,000/- X 12 X 15 = Rs.3,60,000/-.

22. The Claims Tribunal has also erred in awarding only Rs.5,000/- for pain and suffering. The claimant-appellant is entitled for Rs.30,000/- for pain and suffering. The Claims Tribunal has also erred in awarding only Rs.4,000/- for transportation and Rs.5,000/- for special diet which is also unreasonable and is without any basis looking the nature of injuries as well as disability of the claimant-appellant. The claimant-appellant is entitled for Rs.20,000/- for transportation and Rs.20,000/- for special diet.

23. In view of aforesaid discussion, the quantum of compensation is reassessed as under:-

1) Monthly income	= Rs.3,000/-
2) Annual income	= Rs.3,000/- X 12 = Rs.36,000/-
3) Future prospects (40%)	= Rs.14,400/-
4) Total annual income	= Rs.36,000/- + Rs.14,400/- =Rs.50,400/-
5) Multiplier applicable (15)	= Rs.50,400/- x 15 = Rs.7,56,000/-
6) Medical expenses	
(i) Till award of Claims Tribunal dated 8.8.2007	= Rs.1,41,971/-
(ii) From 8.8.2007 till 9.12.2013 (additional evidence filed before this Court)	= Rs.4,42,000/-
7) Future medical expenses	= Rs.3,00,000/-
8) Attendant charges	= Rs.3,60,000/-
9) Loss of marriage prospects	= Rs.3,00,000/-
10) Pain and suffering	= Rs.30,000/-

11) Transportation = Rs.20,000/-

12) Special diet = Rs.20,000/-

Total = Rs.7,56,000/- + Rs.1,41,971/- + Rs.4,42,000/- + Rs.3,00,000/- + Rs.3,60,000/- + Rs.3,00,000/- + Rs.30,000/- + Rs.20,000/- + Rs.20,000/-

= **Rs. 23,69,971/-**

24. In view of above, the appeal filed by appellant is hereby partly allowed and award of the Claims Tribunal is modified and compensation awarded by the Claims Tribunal is enhanced from Rs.1,08,875/- to Rs.23,69,971/-. The claimant is also entitled for 6% interest on enhanced amount from the date of award of Claims Tribunal dated 8.8.2007.

25. The respondent no.2 Oriental Insurance Company Limited is directed to pay enhanced amount along with interest within two months from today to the claimant-appellant, failing which respondent Insurance Company is liable to pay interest at the rate of 10% on enhanced amount.

26. No order as to costs.

Order Date :- 04.10.2024
Kpy