(2012) 12 P&H CK 0035

In the Punjab And Haryana At Chandigarh

Case No : FAO No. 2179 of 1997

Balwinder Pal Singh	APPELLANT
Vs	
Harjinder Singh Alias Jinda and Others	RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:
Evidence Act, 1872 — Section 165

Citation : (2013) 169 PLR 568

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : G.S. Bhatia, for the Appellant; V. Chaudhary, for the Respondent

Final Decision : Allowed

Judgement

K. Kannan, J.—The appeal is by the claimant seeking for enhancement of compensation for injury suffered by the claimant that resulted in amputation of leg above knee. The assessment of disability had been made at 80% and the Tribunal awarded a compensation of Rs. 2 lacs, The Tribunal assessed Rs. 1,40,000/- as non-pecuniary loss and Rs. 60,000/- as pecuniary loss. The pecuniary component was for medical expenses incurred and Rs. 1,40,000/- must be taken as going towards pain and suffering, loss of amenities and loss of earning capacity. In this case the claimant was a Wireless Operator in the Police Department with the State of Punjab. His rank was equivalent to a Constable and at the time when the evidence was given, he continued in service. The Tribunal found that he had not come by actual loss of his earning since he was being continued in service and therefore, did not make any separate provision for loss of earning capacity. The compensation was only seen as necessary for the inconvenience that he had suffered with amputation of leg and therefore, an amount of Rs. 1,40,000/- was determined as payable for non-pecuniary loss.

2. The manner of assessment of compensation by the Tribunal is grossly inadequate and improper. Since the petitioner was present in Court, I was of the view that his own evidence on his present status could also be obtained to do

complete justice. I, therefore, invoked the power u/s 165 of the Indian Evidence Act and examined him. Learned counsel for the insurance company availed himself of the right of cross-examination. The evidence given by the witness has brought out the following facts. That the accident had taken place on 17.01.1993 and he continued in service in the same post as a Constable upto 31.12.2004. He had applied for voluntary retirement after completing 15 years of service and secured to himself the benefits attendant on such premature retirement. It was elicited in the cross examination by the counsel appearing on behalf of the insurance company that he was receiving a pension of Rs. 6,000/- per month. It was also brought out in evidence that even during the time when he continued in service subsequent to the impairment, he could not effectively discharge his duties since his work involved mobility within office to carry the message received in the Wireless Service Department to higher officials. During the said period, the Signal Officer had objected to his inability to move from one room to another and subsequently was also served with the order of transfer but on his own request expressing difficulty, the order of transfer was cancelled and he continued in the same post as Constable without securing any promotion. He explained that he decided to seek for voluntary retirement only on account of difficulties, which he was encountering in carrying out his official duties.

3. The evidence makes it clear that although he continued in service and was drawing his salary, he encountered handicaps that definitely disabled him from working efficiently to earn promotion. A constable in service to be forced to opt for voluntary retirement itself is a signal as to how the injury had impacted his earning skills. It was not merely a physical disability but also a mental trauma for a person, who is hampered in his free mobility even within his own office. It is in this context that House of Lords considered the issue of how compensation would have to be assessed if a person is retained in service after a person is disabled on account of accident. The House of Lords in Bale v. William Hunts and sons Limited 1912 AC 496 was considering the case of a workman, who was blinded in one eye. The defect was not visible and he was to have appearance as two eyed man. He was retained in service but the House of Lords said that incapacity to work included inability to work. In other words, there is incapacity for work when a man has physical defect, which makes his earning skills unsaleable in any market reasonably accessible to him. This judgment was considered by a Division Bench of the Madras High Court in The The Management of Sree Lalithambika Enterprises, Salem Vs. S. Kailasam, where a claim for compensation under the Workmen''s Compensation Act by a workman was resisted by the management stating that he was being retained in service at the same salary and therefore, there had been no loss of earning capacity. The Division Bench cited the House of Lords and held that a person, who may have suffered an injury may not come by an immediate loss if he is retained in the same employment and does not lose his job but his own saleability elsewhere as a fresh recruit to a new employer shall be surely a factor that had to be taken note of and that shall be a justification enough to provide compensation in such type of cases. The Court

also ruled as a matter of policy that an interpretation cannot be made as regards loss of earning capacity that can completely nullify the effect of a welfare legislation such as the Workmen''s Compensation Act. A workman, who comes by any injury specified in Schedule I could be defeated from claiming the benefit of assessment of loss of earning capacity if the employer were to come around to say that he was being retained in the same employment and therefore, no loss of earning capacity had ensued, Such an interpretation would be wholly wrong. This Court had an occasion to consider the same issue where the above two decisions were referred to in Jai Ram v. State of Haryana and others in FAO No. 2618 of 1998 dated 11.02.2011.

4. The Court could not have in the light of the above statement of law failed to assess loss of earning capacity if the amputation suffered by person had resulted in blunting his competitiveness to stay in the job market or to vie for any post independently after resigning from his job or to continue in the same job and working with the efficiency that the job may demand. It is a matter of evidence, which was elicited at the Appellate Court that he chose to voluntarily retire from service when he found that his disability hampered his career progression and he was stagnating as a Constable even after putting in 15 years of service. The Supreme Court has in two cases set out elaborately the manner of assessment of compensation relating to injuries arising on account of a motor accident. In Raj Kumar Vs. Ajay Kumar and Another, , the Supreme Court had set out the imperatives of assessing the compensation under distinct heads as the Act itself provides for. The loss of earning capacity is an important head of claim for a person, who has suffered a privation of organ. The Court has held that a disability, which is assessed normally by the doctor will have to be examined in the context of particular employment, which a person has and how the disability makes for loss of his earning capacity. If a disability is assessed by the doctor; it shall be the endeavour of a Presiding Officer to assess the loss of earning skills by applying the functional disability that a person suffers in relation to the particular activity which he was required to perform in his place of work. The Supreme Court referred its earlier ruling in Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and Another, for holding that if the Court assesses loss of earning capacity, it shall also provide for the loss of amenities and the other disabilities arising on account of accident but the same could be minimal. These decisions came to be again recently considered by the Supreme Court in Mohan Soni Vs. Ram Avtar Tomar and Others, The Supreme Court brought in an additional facet in this case of the continuance in employment or an ability to continue notwithstanding a disability arising on account of the empowering provisions under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. The Court extracted the law laid down in Raj Kumar''s case (supra) that ascertainment of the effect of permanent disability on the actual earning capacity involved three steps. The first steps is to ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of such disability. 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 the claimant was totally disabled from earning any kind of livelihood or whether in spite of permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on or 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 continued to earn or could continue to earn his livelihood. There have been occasions where amputation of a leg upto knee joint has been considered, by the Court as resulting in 100% loss as was done by the Supreme Court in K. Janardhan Vs. United India Insurance Co. Ltd. and Another, . In Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, a Carpenter, who lost his hand was assessed as having suffered 100% loss of earning capacity. These two cases in Janardhan and Partap Narain were instances where the Courts were awarding a higher percentage of loss of earning capacity than what was statutorily provided under the Workmen''s Compensation Act.

5. If there was a method of assessing a loss of earning capacity higher than what is statutorily provided by the fact that in actuality the loss could have been more than what the statute posited, by the same token of logic, it shall also be possible to reduce the percentage of loss of earning capacity than what is statutorily, provided there was evidence that particular disability did not completely deprive him of his livelihood or did not cast a loss of earning capacity to the extent provided under the Act.

6. In this case the evidence has allowed for two inferences. One, he continued in service but not for the entire length of his normal span of age of work, which for a person in Police service must have been upto the age of 58 years. Two, his own prospects of promotion were lost and he was not able to compete effectively for obtaining appropriate career grading to move up. I would assess the loss of earning capacity at 50% and proceed to determine compensation for the income, which he was earning. T will also provide for loss of amenities of his life and pain and suffering. There was no particular evidence with reference to cost of prosthesis or the recurring expenses for his replacement. I will still make a due provision for the same taking judicial note of the fact that over a period of time the prosthesis would require to be changed and it is likely to be a recurring expense during his entire life time. While determining compensation, I will discard the portion of evidence that was elicited in the cross-examination that he has received the benefit at the time of securing a voluntarily retirement and he was also claiming pension as irrelevant. A benefit that a person obtains under voluntarily resignation is the benefit for his past service from his employer and the pension is also a deferred wage, which is a recompense to the work which he has rendered. No part of these benefits could result in abatement of the claim or would require any deductions to be made in the light of several decisions that have dealt with this issue.

7. I will tabulate the several heads of claim as follows:-

8. The total compensation payable would be Rs. 6,70,000/-. The additional amount in excess of what has already been provided by the Tribunal shall attract interest @9% from the date of petition till the date of payment. The liability shall be in the same manner as determined by the Tribunal. The award of the Tribunal would stand modified and the appeal is allowed to the above extent.

