(2023) 08 DEL CK 0040

In the Delhi High Court

Case No : MAC.APP. No. 780 Of 2016

Chitrasen — APPELLANT

Vs

Mohd Hrun & Ors (Universal Sompo General Insurance Co Ltd) — RESPONDENT

Date of Decision : 01-08-2023

Acts Referred:

Citation : (2023) 08 DEL CK 0040

Hon'ble Judges : Navin Chawla, J

Bench : Single Bench

Advocate : Manish Maini, Vibhor Jain, Yashika Miglani, Mohd. Mustafi

Final Decision : Allowed

Judgement

Navin Chawla, J

CM APPL. 12684/2023

1. This application has been filed seeking early hearing of the appeal, which has been pending adjudication since 2016.

2. With the consent of the learned counsel for the appellant and the respondent no.3, who is the only contesting party, the hearing of the appeal is expedited and is taken up for hearing today itself.

MAC.APP.-780/2016

3. This appeal has been filed by the appellant challenging the Award dated 23.05.2016 passed by the learned Motor Accidents Claims Tribunal (North), Rohini (hereinafter referred to as the 'Tribunal') in Suit no.116/2013 seeking enhancement of the compensation awarded by the Impugned Award.

4. The Impugned Award discusses the injuries and the record of the hospitalization of the appellant as under:

“8. It is sworn on oath by the petitioner in his affidavit that after accident he was taken to Sushrut Trauma Centre for treatment and found sustaining following injuries:-

- AS PER DISCH. SLIP 7 MLC-GRIEVOUS

-TRANS TIBIAL AMPUTATION OF RIGHT LOWER LIMB DONE

-CRUSH INJURIES OVER RIGHT FOOT AND ANKLE

-SSG (SPLIT SKIN GRAFTING) WAS APPLIED ON RAW AREA OVER AMPUTATED STUMP

-ABRASIONS ON RIGHT ELBOW AND RIGHT KNEE

-PROFUSELY BLEEDING

-MULTIPLE ABRASIONS AND BLUNT INJURY ALL OVER BODY.

9. From Sushruta Trauma Centre, he was shifted to Sant Parmanand Hospital. His right leg was amputated after a surgery. He was discharged on 13.11.12 and again admitted on 17.11.12 in same hospital and was discharged on 02.12.2012, after repeated debridement and dressing. He was admitted again in same hospital on 26.12.12 and was discharged on same day, after application of Split Skin Grafting (SSG) on amputated stump. He visited said hospital 5-6 times in OPD for regular check up. Apart from said hospitals i.e. Sushruta Trauma Centre and Sant Parmanand Hospital, he was treated by Dr. Shekhar Srivastava. He spent more than Rs. 2 lacs on his treatment, Rs. 20,000/- on conveyance , Rs. 30,000/- on special diets and Rs. 36,000/- on payment of attendant.”

5. The first challenge of the appellant is on the assessment of his functional disability by the learned Tribunal, which has been taken at only 50%. The learned counsel for the appellant submits that Dr. Jitender Singh (in short PW-5) had deposed that the appellant had suffered 60% permanent disability in relation to his right lower limb, with his right leg being amputated below the knee. Mr. Pushkar Pandey (in short PW-3), Senior Executive with Kadence International, Times of India Building, 23A Shivaji Marg, New Delhi-110015 (hereinafter referred to as the ‘Company’) had stated that the appellant was working as a Field Executive with the Company, which deals in market research. The appellant’s job included visiting sites of work of the Company; providing equipments to the labour force; and to make arrangements for the Company’s clients. The learned counsel for the appellant further places reliance on the cross-examination of the appellant, that has been recorded by the learned Tribunal on 14.08.2015, wherein he had stated that he was no longer working with the Company. He had further stated that he was, in fact, not doing any job. The appellant in his affidavit of evidence had further stated that due to the injury suffered, he could not walk and run properly; could not lift weights; and could not do any field job. The learned counsel for the appellant submits that therefore, the assessment of the functional disability held at only 50% by the

learned Tribunal is incorrect and is liable to be enhanced.

6. On the other hand, the learned counsel for the respondent no.3 submits that the functional disability has been determined by the learned Tribunal at a higher side. He submits that from the statement of PW-5, it had come on record that the petitioner had suffered 60% permanent disability only in relation to his right lower limb. The functional disability for the whole body, therefore, has to be far less.

7. I have considered the submissions made by the learned counsels for the parties on the above issue.

8. In Raj Kumar v. Ajay Kumar & Anr., (2011) 1 SCC 343, the Supreme Court has laid down the principles with respect to the assessment of the functional disability of a person suffering permanent disability as a consequence of an motor accident, as under:

"12. Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence:

(i) whether the disablement is permanent or temporary;

(ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement;

(iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person.

If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent disability (this is also relevant for awarding compensation under the head of loss of amenities of life). 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 (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) 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 continues to earn or can continue to earn his livelihood.

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 per cent, 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 be 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.

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19. We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that the percentage of loss of earning capacity is the same as the percentage of permanent disability).

(iii) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

9. Applying the above principles to the facts of the present case, it was relevant for the learned Tribunal to note that the appellant was working in the field job for the employer. It has also come on record that he had to leave the said job and

was unemployed as on the date of his examination before the learned Tribunal. His job profile as described by PW-3, showed that with the amputation of his right leg, the appellant would have found it almost impossible to carry out the job for which he was employed. The assessment of the functional disability by the learned Tribunal is therefore, on a lower side. The same deserves to be enhanced to 60%. The Award is also modified to this extent.

10. The next challenge of the learned counsel for the appellant is to the income taken by the learned Tribunal for assessment of the loss of future earnings. The learned counsel or the appellant submits that based on the salary slips, the learned Tribunal had erred in assessing the gross salary of the appellant at only Rs.10,926/- per month. Placing reliance on the certificate produced by PW-3, he submits that apart from basic salary, HRA and conveyance, the employer was also contributing towards ESI and the Provident Fund, thereby making the cost to the company as Rs.12,186/- per month. He submits that there was no reason for the learned Tribunal to have excluded the said amounts from the gross salary /take home salary of the appellant.

11. On the other hand, the learned counsel for the respondent no.3 submits that the certificate relied upon by the appellant itself stated that the salary of the appellant is Rs.10,925/-(it should in fact be Rs.10,926/-). He submits that therefore, no infirmity can be found in the Award.

12. I have considered the submissions made by the learned counsels for the parties.

13. The certificate (Ex. PW1/71) (colly) relied upon by the learned Tribunal, is reproduced hereinunder:

Designation : Field

executive

Per Month

Per Annum

Basic

5463

65556

HRA

3278

30336

Conveyance

2185

26220

Employer’s ESI

Contribution

519

6228

Employer’s PF

Contribution

743

8916

Cost to Company

12187

146244

14. A reading of the above Certificate would show that apart from the basic salary, the appellant was also drawing house rent allowance and conveyance. The employer was also contributing to the ESI and the Provident Fund. These contributions are to the benefit of the estate of the employee. The learned Tribunal, therefore, has erred in excluding the employer’s contribution to ESI and the Provident Fund for determining the monthly income of the appellant.

15. In Sunil Sharma & Ors. v. Bachitar Singh & Ors., (2011) 11 SCC 425, the Supreme Court placing reliance on its earlier judgment in National Insurance Company Ltd. v. Indira Srivastava & Ors., AIR 2008 SC 845, has held that having regard to the change in societal conditions, the Court must consider the determination of income not only having regard to the pay package the employee carries home at the end of the month, but also to other perks which are beneficial to the members of the entire family.

16. Applying the above principles, it has to be held that the contribution made by the employer to the ESI and the Provident Fund are for the benefit of the employee and add to his income. They should have been therefore, added to the monthly income otherwise drawn by the appellant and taken home from the employer.

17. The monthly income of the appellant is therefore, determined at Rs.12,187/- per month and the impugned Award shall stand modified to that extent.

18. The learned counsel for the appellant further submits that the learned Tribunal has erred in not adding future prospects to the loss of income of the appellant. Placing reliance on the judgment of the Supreme Court in Pappu Deo Yadav v. Naresh Kumar & Ors., 2020 SCC OnLine SC 752 , and in Mohd. Sabeer

@ Shabir Hussain v. Regional Manager, U.P. State Road Transport Corporation, 2022 SCCOnline SC 1701, the learned counsel for the appellant submits that at least 40% should have been added for the future prospects towards the loss of income determined.

19. I am in agreement with the submissions made by the learned counsel for the appellant.

20. In Pappu Deo Yadav (supra), 40% was added towards future prospects for the purpose of calculation of compensation. In Mohd. Sabeer (supra), the Supreme Court reiterated that in case of the claimant suffering a permanent disablement caused by a motor accident, the claimant is entitled to not just future loss of income but also loss of future prospects. The Court placing reliance on its judgment in National Insurance Company Ltd. v. Pranay Sethi & Ors., (2017) 16 SCC 680, applied 40% addition towards future prospects.

21. In view of the above judgments, I find merit in the submissions made by the learned counsel for the appellant. The appellant shall be entitled to future prospects for determination of the loss of income @ 40%. The impugned Award shall stand modified to this extent.

22. The next challenge of the appellant to the Impugned Award is on the failure of the learned Tribunal to grant compensation towards attendant charges to the claimant. The learned counsel for the appellant submits that looking into the injury suffered and the period of hospitalization of the appellant, attendant charges at least for the period of hospitalization should have been awarded.

23. I am in agreement with the submissions made by the learned counsel for the appellant.

24. Looking into the nature of the injury suffered by the appellant, the appellant would certainly have needed an attendant at least during the period he recoups, at least partially, from his injuries. Taking into account the minimum wages as notified and other attendant circumstances, an amount of Rs.36,000/-, as claimed by the claimant in its Claim Petition, was reasonable and should have been awarded by the learned Tribunal. The Award shall stand modified to this extent as well.

25. The next challenge of the appellant to the Impugned Award is on the non-grant of any compensation on the head of disfigurement. The learned counsel for the appellant, placing reliance on the judgment of the Supreme Court in Mohd. Sabeer (supra), submits that at least a sum of Rs.2,00,000/- should have been granted towards disfigurement. He, however, fairly submits that in the appeal, a sum of Rs.1,25,000/- has been claimed on this head.

26. Taking into account the judgment of the Supreme Court in Mohd. Sabeer (supra), in my opinion, the learned Tribunal has erred in not awarding any compensation to the appellant on the head of disfigurement. As the appellant has confined his claim to Rs.1,25,000/-, the said amount being found reasonable, is

awarded to the claimant. The Award shall stand modified to this extent.

27. The last challenge of the appellant to the Impugned Award is on the award of only Rs.5,00,000/- for the purchase and maintenance of the artificial limb. The learned counsel for the appellant submits that the appellant, through Sh. Ajay Kumar (PW4), a technician from Otto Bock Healthcare Private Limited, had proved on record that the cost of the below knee prosthetics with accessories was Rs.2,07,780/-; and that the life of such artificial limb was only about 5 years. In addition, the annual maintenance charge of Rs.15,000/- to Rs.20,000/- would also have to be incurred. In spite of this evidence, the learned Tribunal has granted only Rs.5,00,000/- towards the artificial limb, including for its repair and its parts. He submits that as found by the learned Tribunal itself, the appellant at the time of the accident was aged around 28 years. Placing reliance on the judgment of the Supreme Court in Mohd Sabeer (supra), he submits that the said amount is highly inadequate and deserves to be enhanced.

28. On the other hand, the learned counsel for the respondent no.3 submits that the amount as awarded by the learned Tribunal is reasonable. He submits that the learned Tribunal has rightly stated that there is a possibility that some cheaper artificial limb from other companies could be available to the appellant, however, this option was not explored by the appellant.

29. I have considered the submissions made by the learned counsels for the parties.

30. As far as the compensation on account for artificial limb is concerned, the learned Tribunal has observed as under:

"11. Sh. Ajay Kumar (PW4) is a technician from Otto Bock Healthcare Private Limited. This witness identified signatures of Ms. Nupur Bhardwaj, Clinical Rehabilitation Specialist, on a document stated to be an estimate (Ex. PWl/169.) According to this document, annual maintenance of prosthesis like change of foot/ socket of artificial limb is between Rs. 15,000-20,000/- p.a. Similarly, costs of Ottobock Modular Below Knee Prosthesis with accessories is stated to be Rs. 2,07,780/-. As per PW4, life of artificial lower limb is about 5 years. According to Id. Counsel for petitioner, latter is aged about 30 years and hence he will require replacement of artificial limb at least 6-7 times.

12. If, deposition of PW4 is taken as true, petitioner has to spend Rs. 2,07,780/-, apart from costs of maintenance, if he wants to purchase artificial limb from Ottobock. Possibility is not denied about some cheaper artificial limbs of other companies, in market. Considering same, petitioner is granted a lumpsum of Rs. 5 lacs for artificial limb including repairs of its parts."

31. It is evident from the above, the only evidence on record before the learned Tribunal was the statement of PW4, who clearly stated that the cost of the artificial limb along with its accessories is Rs.2,07,780/-; the life of such artificial limb is about 5 years; and the annual maintenance charge of the same is

Rs.15,000/- to Rs.20,000/- per annum. It may be true that the petitioner had produced evidence from only one company before the learned Tribunal, however, the petitioner is not supposed to get multiple opinions on the same. In case the respondent no.3 was to challenge the assessment of the company from which the appellant was seeking to obtain the artificial limb, it was for the respondent no.3 to suggest a better alternative. In absence thereof, the learned Tribunal has erred in ignoring this evidence and arbitrarily awarding a sum of Rs.5,00,000/- to the appellant, which would not even cover 10 years. The appellant was aged 28 years at the time of the accident. At least a period of 30 years should have been covered by the learned Tribunal.

32. In Mohd. Sabeer (supra), almost in identical facts where the age of the injured was 37 years, the Supreme Court held as under:

"COMPENSATION FOR THE PURCHASE AND MAINTENANCE OF THE PROSTHETIC LEG

22. The High Court has awarded a compensation of Rs.5,20,000/- for the prosthetic limb and Rs.50,000/- towards repair and maintenance of the same. The Appellant submits that the cost of the prosthetic limb itself is Rs.2,60,000/- and the life of the prosthetic limb is only 5-6 years. The prosthetic limb also requires repair and maintenance after every 6 months to 1 year, and each repair costs between Rs.15,000/- to Rs.20,000/-. This would mean that the prosthetic limb would last the Appellant for only 15 years under the current compensation. The Appellant at the time of the accident was aged 37 years and has a full life ahead. It has been clearly stated by this Court in the case of Anant Son of Sidheshwar Dukre (supra) that the purpose of fair compensation is to restore the injured to the position he was in prior to the accident as best as possible. The relevant paragraph of the judgment is being extracted herein:

"In cases of motor accidents leading to injuries and disablements, it is a well settled principle that a person must not only be compensated for his physical injury, but also for the non-pecuniary losses which he has suffered due to the injury. The Claimant is entitled to be compensated for his inability to lead a full life and enjoy those things and amenities which he would have enjoyed, but for the injuries."

The purpose of compensation under the Motor Vehicles Act is to fully and adequately restore the aggrieved to the position prior to the accident.

As per the current compensation given for the prosthetic limb and its maintenance, it would last the Appellant for only 15 years, even if we were to assume that the limb would not need to be replaced after a few years. The Appellant was only 37 years at the time of the accident, and it would be reasonable to assume that he would live till he is 70 years old if not more. We are of the opinion that the Appellant must be compensated so that he is able to purchase three prosthetic limbs in his lifetime and is able to maintain the same at least till he has reached 70 years of age. For the Prosthetic limbs alone, the

Appellant is to be awarded compensation of Rs. 7,80,000 and for maintenance of the same he is to be awarded an additional Rs. 5,00,000/-."

33. Keeping in view the above, I find that at least a sum of Rs.10,38,900/- should have been awarded towards cost of the prosthetic limb alone, and an additional amount of Rs.6,00,000/- should have been awarded towards the cost of its maintenance. The Impugned Award shall stand modified to this extent.

34. In view of the above, the following amounts are awarded in favour of the appellant:

Enhanced Calculation

Sl.

No.

Heads

Amount awarded By Tribunal (in Rs.)

Modified by this Court (in Rs.)

1.

Medical

1,89,410

1,89,410.00

2.

Cost of Artificial limb and maintenance

5,00,000.00

(lumpsum)

2,07,780 x 5 =10,38,900+6,00,000/- (maintenance) Total 16,38,900.00

3.

Loss of future earning

11,14,452.00

(12,187+40% increase) x 12 x 12 x 60% functional) = 20,88,364.00

4.

Conveyance

20,000.00

20,000.00

5.

Spl diet

30,000.00

30,000.00

6.

Pain & suffering

1,00,000.00

1,00,000.00

7.

Enjoyment of

life

1,50,000.00

1,50,000.00

8.

Attendant

charges

Nil

36,000.00

9.

Disfigurement

Nil

1,25,000.00

Total

21,03,862.00

43,77,674.00

Total Awarded amount

22,73,812.00

35. The awarded amount shall carry an interest @ 9% per annum, as awarded by the learned Tribunal, from the date of the filing of the Claim Petition before the learned Tribunal till the same is or was deposited by the respondent no.3. As the amount of compensation has been enhanced by the present order, the

respondent no.3 shall deposit the enhanced amount along with the interest with the learned Tribunal within a period of six weeks from today.

36. The learned counsel for the appellant submits that the accident in question had taken place on 20.10.2012. The appellant from his own sources has purchased the artificial limb. He was unemployed for a long period of duration and now wishes to construct a house for his family consisting of his wife, children and parents. He is, therefore, in urgent need of funds.

37. Keeping in view the above circumstances, especially, the fact that almost 11 years have passed since the date of the accident, the learned Tribunal is directed to release the entire amount of compensation (including the enhanced compensation) to the appellant.

38. The appeal is allowed in the above terms.

