
(2013) 02 P&H CK 0064
In the Punjab And Haryana At Chandigarh
Case No : FAO No. 4566 of 2011 (O and M)

Mobin Khan

APPELLANT

Vs

Neeraj Kumar and Others

RESPONDENT

Date of Decision : 08-02-2013

Acts Referred:

Employees State Insurance Act, 1948 — Section 2(8), 53, 61
Motor Vehicles Act, 1988 — Section 167

Citation : (2013) 139 FLR 911 : (2013) 3 LLJ 163 : (2013) 170 PLR 56

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Advocate : Ashwani Arora, for the Appellant; R.M. Suri for the Insurance Company - Respondent No. 3, for the Respondent

Final Decision : Allowed

Judgement

K. Kannan, J.—The appeal is for enhancement of claim for compensation for injuries suffered in a motor accident. The accident was said to have taken place at the time when the claimant was proceeding from his residence to a religious place on a motorcycle alongwith the pillion rider. The injury was on account of a collision with a truck with the claimant's motorcycle that required hospitalisation and surgical interventions thrice. The doctor who had examined, gave evidence to the effect that the claimant was operated on four occasions, namely, on 7.7.2008, 11.7.2008, 29.7.2008 and again on 29.8.2007. The first two operations were for reducing the fractured shaft of femur and for fracture of D12 with paraplegia. The third operation was for the infected wound and the fourth operation was for the infected bed sore. It appears that for implants which had been made for correction of fracture was removed on 14.11.2009 after subsequent admission and discharge. The doctor also gave evidence that the patient was under a follow up treatment till late in the year 2010 and the bed-sores were healing. The medical evidence brought through PW 4 also was a pointer to the effect that he had been rendered immobile and that he could walk on his own. He was certified to be a paraplegic with 100% disability. PW 3 was

an Account Executive of the company in which the claimant was working as a driver on a salary of Rs. 4500/-. He gave evidence to the effect that his services were being kept on compassionate basis and could be terminated at any time. He was to retire after completing 58 years of age. The Tribunal while awarding compensation assessed the income at Rs. 4500/- and considering the fact that he was aged 28 years, applied a multiplier of 16 and assessed the loss of earning capacity at Rs. 8,64,000/-. It added provision for medicines, attendant charges and transportation and provided total compensation of Rs. 10,95,407/-.

2. In a claim for enhancement, the principal contest taken by the Insurance Company is that the claimant had availed of the benefit under the ESI Scheme and had claimed medical reimbursement of the amount that he had incurred. The counsel argued that the present petition is not maintainable and barred u/s 53 of the ESI Act. This question has been the subject matter of adjudication through several decisions of the High Court elsewhere and both the counsel relied on decisions, which pertained to situation when the Motor Vehicles Act would be barred and circumstances when Section 53 of the ESI Act would be attracted.

3. Learned counsel for the appellant would submit that Section 53 in its language would bar an action only if the claim under the Act is for employment injury. Section 53 is reproduced as under:-

Bar against receiving or recovery of compensation or damages under any other law.-An insured person or his dependents shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 (8 of 1923), or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act.

The employment injury is defined u/s 2(8) of the ESI Act. "Employment injury" means a personal injury to an employee caused by accident or an occupational disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India;"

4. By conjoint reading, it would be evident that the claim under the ESI Act under an insurance scheme would be admissible only in respect of the injuries sustained out of or in the course of employment. I have already extracted the portion of the petition that sets out the circumstances and the time when the accident had taken place. It was neither in the place of employment nor when the petitioner was going towards the place of employment or was coming back home. On the other hand, the accident had taken place during a private visit to a religious place. The counsel for the respondent would counter this argument not by reference to the provisions contained in the section itself but would make a submission that whenever an option is exercised by an employee for recovery of some benefits under the ESI Act, the benefit under the Motor Vehicles Act would

be barred.

5. I am afraid that this sets out a proposition, which is out of sync with the express provision. The statute of Motor Vehicles Act contains but one provision u/s 167, which allows for alternative remedies to be availed of in case of employment injury, namely, the claim under the Workmen's Compensation Act or under the Motor Vehicles Act. The Motor Vehicles Act does not make any reference to any claim under the ESI Act. Therefore, there shall be a bar against making a claim under the Motor Vehicles Act only if there must be a bar under the provisions of ESI Act itself. Section 53 stipulates such a bar to an employee only in case of employment injury. It is, therefore, not possible to enlarge the operation of bar. The plea in defence, therefore, that the claimant is barred from prosecuting the petition under the Motor Vehicles Act is rejected.

6. The only contention that could still be urged is that the claimant cannot have the benefit of duplicating his claim for availing refunds under the ESI Act and also claiming the benefit under the Motor Vehicles Act. To that extent, any reimbursement that he had obtained for medical bills that was elicited in evidence, cannot be a matter of a claim under the Motor Vehicles Act. The tribunal could not have, therefore, included the provision of medical expenses in the claim.

7. The counsel also wants to place reliance on Section 61 of the ESI Act, which is as follows:-

Bar of benefits under other enactments.-When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other enactment.

8. This Section bars a benefit which a person obtains under the provisions of an Act cannot again be replicated to claim a similar benefit under any other Act. The benefit which the Act allows for is the benefit of medical reimbursement or treatment expenses for employment injury. If the employee allows for himself for the benefit of medical expenses even though he may not come strictly within his entitlement, on the ground that the claim for compensation was only for employment injury, then all that could be excluded under the provisions of Motor Vehicles Act is the benefit of medical expenses, Section 61 of the ESI Act cannot also, therefore, exclude the claim under several heads, which are allowable under the Motor Vehicles Act. In my assessment, the Tribunal has not properly provided for compensation for pain and suffering, the loss of amenities for life for a person who has been confined to wheelchair and the loss of earning capacity. The disability which takes place during the course of employment after coming into force of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 may allow a person to continue employment but the entire benefit of such continuous employment cannot be a deduction. For the same reason, even the continuation of employment of some terms cannot result in all the monetary benefits that he obtains in such continued employment. I will

not take the entire 100% of disability as loss of earning capacity as well. I would find that a person that has been confined to wheelchair for the rest of his life but who is allowed the benefit of employment on compassionate grounds must be taken as having suffered loss of earning capacity to the tune of 60%. Further, for reckoning the increase of salary, he would have got I take the average income after providing for increase of 50% and take the amount to be Rs. 6750/-. I will adopt 60% to determine the extent of loss of earning capacity and take monthly loss of Rs. 4050/-. I will adopt multiplier of 17 as against 16 taken by the Tribunal and find the loss of earning capacity at Rs. 8,26,200/-. For loss of amenities of life for a person who is confined to wheelchair, I will provide for Rs. 2,00,000/- and also provide for the claim of Rs. 1,00,000/- towards pain and suffering. I will make no provision for medicines but I find that he would require an attendant throughout life and, therefore, provide Rs. 1,500/- and adopt a multiplier of 17 that would give a corpus which in turn will return a monthly payment of the attendant, at Rs. 3,06,000/- towards attendant charges. The Tribunal has already provided Rs. 60,000/- (1500 x 12 x 17) which I will retain.

9. The total compensation is tabulated as under:-

The amount in excess of what has been determined by the Tribunal will attract interest at the rate of 7.5% from the date of petition till the payment. The liability shall be in the same manner as determined by the Tribunal.

The award stands modified and the appeal stands allowed to the above extent.