
(2014) 04 AP CK 0098

In the Andhra Pradesh High Court

Case No : M.A.C.M.A. Nos. 3763 of 2009 and 54 of 2010

N. Surendra Babu

APPELLANT

Vs

Narasimha Reddy and Another
 The New India
Assurance Co. Ltd. Vs N. Surendra Babu and Another

RESPONDENT

Date of Decision : 07-04-2014

Acts Referred:

Evidence Act, 1872 — Section 45
Motor Vehicles Act, 1988 — Section 140, 166

Citation : (2014) 04 AP CK 0098

Hon'ble Judges : U. Durga Prasad Rao, J

Bench : Single Bench

Advocate : S.V. Muni Reddy in M.A.C.M.A. No. 3763 of 2009 and Sri Sriman in M.A.C.M.A. No. 54 of 2010, Advocate for the Appellant; Sriman for Respondent No. 2 in M.A.C.M.A. No. 3763 of 2009 and Sri S.V. Muni Reddy for Respondent No. 1 in M.A.C.M.A. No. 54 of 2010, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

U. Durga Prasad Rao, J.—Aggrieved by the Award in MVOP No. 305 of 2007 passed by MACT-cum-III Additional District Judge, Tirupathi (for short "the Tribunal") both claimant and 2nd respondent/Insurance Company preferred MACMA Nos. 3763 of 2009 and 54 of 2010 respectively.

2. The factual matrix of the case is thus:

a) On 04-08-2006 at about 5 PM when the claimant was boarding the bus bearing No. AP 03 U 2977 in front of Ladies Club near Collector's Bungalow, Chittoor to go to Estate, the conductor of the bus without observing the claimant, negligently gave signal to the driver and thereby the driver moved the bus in a rash and negligent manner and at high speed and thereby the claimant fell down and the left side rear wheel of the offending bus ran over the claimant and thereby he suffered fracture to both the legs, for which he took treatment in CMC Hospital, Vellore. His further case is that he was working as Supervisor in

Singapore Egg Mart, Chittoor and earning Rs. 6,000/- per month and due to injuries he became permanently disabled and unable to walk and attend his job and hence he suffered loss of earnings. It is further averred that accident was occurred due to the fault of driver of the bus. On these pleas, he filed MVOP No. 305 of 2007 against respondents 1 and 2, who are the owner and insurer of the offending bus and claimed Rs. 3,00,000/- as compensation under different heads.

b) First respondent remained ex-parte.

c) Second respondent/Insurance Company filed counter and opposed the claim denying all the material averments in the petition. R2 denied the method and manner of occurrence of accident and petitioner's plea of fault of driver. R2 contended that accident was occurred due to the fault of claimant himself, as he in order to catch the moving bus ran and fell down and sustained the injuries and there was no fault of the bus driver. Secondly, it denied the age, avocation and income of the petitioner as pleaded in the petition. Thirdly, R2 denied the petitioner's plea of suffering permanent disability. R2 further contended that the first respondent is not the registered owner of the bus and it has no valid permit. It also contended that the driver has no valid driving license. Finally, R2 contended that claim is highly excessive and exorbitant.

d) During trial PWs. 1 to 3 were examined and Exs. A1 to A6 and X1 and X2 were marked on behalf of the claimant. Policy copy filed by R2 was marked as Ex. B1.

e) A perusal of the award would show that issue No. 1 is concerned, the Tribunal relying upon the evidence of PW1--claimant coupled with Ex. A1--FIR and A4--charge sheet, gave a finding that the bus driver was responsible for the accident. Issue No. 2 which relates to quantum of compensation is concerned, the Tribunal having relied upon the evidence of PW3--doctor who issued disability certificate accepted the disability of the claimant as 35% permanent and granted compensation under various heads as follows:

Thus, the Tribunal awarded total compensation of Rs. 2,28,040/- with proportionate costs and simple interest @ 7.5% per annum from the date of OP till the date of realization against the respondents 1 and 2.

Hence, the appeal by the claimant on the ground of inadequacy of compensation and the appeal by 2nd respondent/Insurance Company on the ground of excessiveness of compensation.

3. Heard Sri S.V. Muni Reddy, learned counsel for appellant-claimant in MACMA No. 3763 of 2009/1st respondent in MACMA No. 54 of 2010 and Sri Sriman, learned counsel for appellant-Insurance Company in MACMA No. 54 of 2010/2nd respondent in MACMA No. 3763 of 2009.

4. a) Learned counsel for appellant in MACMA No. 3763 of 2009 while criticizing the quantum of compensation as too low and inadequate firstly argued that the Tribunal while computing loss of earning power due to disability has taken a very low amount of Rs. 15,000/- p.a. as the income of the claimant, though in fact he

was earning Rs. 6,000/- p.m. by working as Supervisor in Singapore Egg Mart, Chittoor. Learned counsel argued that PWs. 1 and 2 have clearly deposed about the employment and earnings of the claimant and therefore, the Tribunal ought to have accepted the said amount for computation of compensation.

b) Secondly, learned counsel argued that though the physical disability of claimant is only 35% as spoken by PW. 3-Dr. B. Sashidar Reddy, his functional disability is much more because due to the disability he is now unable to attend his supervisor work in the Singapore Egg Mark and therefore, the Tribunal while computing compensation for loss of earning power ought to have taken a higher percentage of disability than 35%.

c) Thirdly, learned counsel argued that the claimant at the time of accident was resident of Chittoor and all the way he went to C.M.C., Vellore and took treatment in two spells for a considerable period by incurring not only huge medical expenditure but also other incidental expenditure like transportation charges, attendant charges and extra nourishment charges. However, the Tribunal did not grant any compensation under those heads. Hence, he deserves compensation under those heads.

Thus he prayed to allow the appeal and enhance the compensation.

5. a) Per contra, learned counsel for appellant in MACMA No. 54 of 2010/2nd respondent-Insurance Company in MACMA No. 3763 of 2009 while criticizing the compensation as excessive and exorbitant firstly argued that the Tribunal erred in accepting the disability of the claimant as 35% basing on the evidence of PW. 3. Expatiating it, he submitted that PW. 3 was not the Doctor who ever treated the claimant or conducted any operation. Admittedly, the claimant took treatment in C.M.C., Vellore but not under PW. 3. Further, PW. 3 is not a member of the Medical Board and Ex. X.2-certificate was not the one issued by the Medical Board. Therefore, the Tribunal ought to have rejected the evidence of PW. 3 and also Ex. X.2 and it ought not to have granted any compensation for the alleged permanent disability. He alternatively argued that even assuming that the claimant suffered 35% of permanent disability as spoken by PW. 3, still the said disability will not result in any corresponding loss of earning capacity in his job as a Supervisor in Singapore Egg Mart. He argued that it is only when the physical disability also resulted in functional disability and adversely effected the income of an injured, then to the extent of that functional disability only the Tribunal may grant compensation. In the instant case, he argued, there is no functional disability since the claimant has not evidently suffered loss of income. Therefore, the Tribunal erred in granting Rs. 94,500/- as compensation. He relied upon the decision of Hon''ble Supreme Court in the case of Raj Kumar Vs. Ajay Kumar and Another, on the aspect of principles governing the assessment of compensation for permanent disability.

b) Secondly, learned counsel argued that while already granting compensation of Rs. 94,500/- for the "loss of earning power due to disability", the Tribunal

committed grave error in granting another sum of Rs. 25,000/- for the "disability" u/s 140 of the M.V. Act. He argued when the claim petition is filed u/s 166 of the M.V. Act, the Tribunal cannot grant compensation u/s 140 of the M.V. Act. Due to this, compensation was unduly escalated.

He thus prayed to allow the appeal and reduce the compensation suitably.

6. In the light of above rival arguments, the point for determination is:

Whether the compensation awarded by the Tribunal is just and reasonable in all respects and needs reassessment?

7. POINT: The accident, involvement of private bus bearing No. AP 03 U 2977 and claimant suffering injuries are all admitted facts. The Tribunal basing on the evidence on record held that the bus driver was responsible for the accident and since the said finding is not challenged in the appeal filed by the Insurance Company (MACMA No. 54/2010), it attained finality. Hence now the prime point for consideration in these two appeals is whether compensation awarded by the Tribunal is just and reasonable or not.

8. So far as the nature of injuries and consequent disability are concerned, we have the oral evidence of PWs. 1 and 3 coupled with Ex. A.2, A.5, X.1 and X.2. The evidence of PW. 1 is that when he fell down from the bus, the left rear wheel of the bus ran over on his right leg and thereby his right leg below knee was fractured and further his left leg thigh was also fractured. Then Ex. A.2-wound certificate issued by the Government Headquarters Hospital, Chittoor would show that the claimant suffered:

- 1) Lacerated wound on right leg lower 1/3rd anterior aspect 8 x 4 cm.
- 2) Lacerated wound on lateral aspect of right leg 6 x 2 cm.
- 3) Lacerated wound middle 1/3rd of right leg.

Since X-ray report was pending, the casualty Medical Officer has not given any opinion. Subsequently the claimant, it appears has taken treatment in C.M.C., Vellore in two spells. Ex. A.5-discharge summary issued by the said hospital would show that the claimant suffered following injuries:

- 1) Left Superior and Inferior Rami fracture.
- 2) Type III B open right tibia fracture.
- 3) Closed proximal comminuted right fibula fracture.
- 4) Right closed lateral malleolus fracture.

For these injuries, the claimant underwent treatment in C.M.C., Vellore in two spells i.e., from 05.08.2006 to 07.08.2006 and again from 31.08.2006 to 06.09.2006. Be that it may, PW. 3-Dr. B. Sashidhar Reddy, an orthopedic surgeon at Tirupathi deposed that he treated the claimant as outpatient and after taking

X-ray, he noticed, petitioner having painful walking and due to malunion of right fibula, he suffered 35% permanent disability. Accordingly, he issued Ex. X.2-disability certificate. The Tribunal placed reliance on his evidence. The above oral and documentary evidence no doubt would show that the claimant suffered four fractures in his both legs. However the core point is whether he suffered any permanent disability as deposed by PW. 3 and whether it resulted in functional disability.

9. In this context, in Raj Kumar's case (Supra), Hon''ble Apex Court while drawing a distinction between physical disability and functional disability, has given certain principles as to the method of assessment of compensation in disability cases. The Supreme Court summarized its principles as below:

(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 percentage of loss of earning capacity is the same as 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 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.

Now in the light of above principles, the present case has to be determined.

10. So far as disability is concerned, the contention of Insurance Company is that PW. 3 never treated the claimant and he only obliged him and issued Ex. X.2 and therefore, the disability as deposed by him shall not be accepted at all. I am unable to accept the above contention. If a Doctor is a qualified doctor to speak about the disability and if he on thorough clinical examination of the patient and on obtaining X-ray reports, speaks about the disability, the same can be admissible in evidence. His evidence stands in the position of an expert's evidence with reference to section 45 of Indian Evidence Act. Therefore, his evidence will be admissible. The opposite party during the cross-examination can question him with regard to his qualification, competency etc.,. The Court may believe his evidence if it is trustworthy or otherwise it may reject his evidence. However the Court cannot reject the evidence of a Doctor out-rightly on the sole ground that he has not treated the patient. The third principle laid down by the

Supreme Court in the above decision gives an understanding that the Doctor who treated the injured-claimant or the Doctor who examined him subsequently to assess the extent of his permanent disability can give evidence with regard to the extent of his permanent disability (emphasis supplied). Thus, it can be said that the Doctor who has not treated the claimant is not debarred from deposing about the disability. However, believing his evidence or not depends on various other factors like his qualification, competency etc. PW. 3 is concerned, he deposed that he is an Orthopedic Surgeon and he treated the claimant as outpatient and on obtaining Ex. X.1--X-ray, he found malunion of right fibula fracture and thereby he is having painful walking and suffered 35% permanent disability. In the cross-examination, it is only extracted that he has not issued wound certificate and not maintained case-sheet. Except that the qualification and competency of PW. 3 were not challenged. Therefore, in my view, the Tribunal was right in accepting the evidence of PW. 3. The disability deposed by PW. 3 is physical disability. In the light of above principles enshrined by the Supreme Court it has to be seen what is the extent of functional disability with reference to the employment of the claimant. Though claimant and PW. 2 deposed that claimant was working as Supervisor in Singapore Egg Mart of PW. 2 and earning Rs. 6,000/- p.m., the Tribunal rightly did not accept the same for want of proper documentary evidence. On the other hand, the Tribunal fixed the annual income of the claimant at Rs. 15,000/-. Then it appears, the Tribunal has opined that the permanent disability has resulted in equal functional disability and computed compensation accordingly. Since the notional income of the claimant is taken basing on his physical activities, 35% of physical disability can be equated with same percentage of functional disability. Hence the compensation of Rs. 94,500/- granted by the Tribunal for the loss of earning capacity cannot be found fault.

11. The next argument of the Insurance Company is that when the Tribunal granted compensation for loss of earning capacity, it cannot again grant compensation for physical disability u/s 140 of M.V. Act. This argument is advanced in view of Tribunal granting additional amount of Rs. 25,000/- for permanent disability u/s 140 of the M.V. Act. I am unable to accept this argument. Physical disability and functional disability are two different concepts. Physical disability is the restriction or lack of ability in a particular organ of the body to perform an activity resulting in the loss of certain basic amenities in life. For example, a physical disability in the hand of a person may restrict its movements and thereby depending on its gravity, he may not be able to carry weights or hold objects with that hand. As such he loses certain basic amenities in the life. Whereas functional disability means the physical disability intruding into the domain of his occupation or employment and restricting those activities totally or partially resulting in loss of his earning capacity. Therefore, when an injured in a motor vehicle accident is able to establish that he suffered not only physical disability but also functional disability and consequent loss of earning capacity, he has to be suitably compensated on both the counts. My view is

fortified by the decision of Hon''ble Supreme Court reported in S. Manickam Vs. Metropolitan Transport Corporation Ltd., . The point for determination in that case was thus:

The important question which arise for consideration in these appeals is whether compensation in a motor vehicle accident case is payable to a claimant for both heads, viz., loss of earning/earning capacity as well as permanent disability.

On the above point, Hon''ble Apex Court while referring the previous decisions of Apex Court and other High Courts held that compensation can be granted for permanent disability apart from functional disability i.e., loss of earning capacity. Hence the contention of Insurance Company cannot be upheld in this regard. So at the outset, there are no merits in the MACMA No. 54 of 2010 filed by Insurance Company and the same is liable to be dismissed.

12. So far as MACMA No. 3763 of 2009 filed by claimant is concerned, his only argument which is worth consideration is that the Tribunal did not grant compensation for the incidental expenditure like transportation, attendant expenditure and extra nourishment charges. Ex. A.5 would show that the claimant who was resident of Chittoor took treatment in C.M.C., Vellore. Though he did not produce transportation bills, still by virtue of his taking treatment in a different city away from his native place, his incurring transportation charges can be understood. Similarly, his requirement of an attendant during his stay in the hospital is also well found. Accordingly, the claimant is awarded a sum of Rs. 10,000/- towards transportation, attendant expenditure and extra nourishment charges.

13. In view of the above discussion, the two appeals are disposed of as follows:

- i) MACMA No. 54 of 2010 filed by Insurance Company/2nd respondent in the O.P. is dismissed and
- ii) MACMA No. 3763 of 2009 filed by claimant in the O.P. is partly allowed and the compensation is enhanced by Rs. 10,000/- with proportionate costs and simple interest at 7.5% p.a. from the date of O.P. till the date of realization.
- iii) Respondents 1 and 2 in the O.P. are directed to deposit the compensation amount within one month from the date of this judgment, failing which execution can be taken out against it.
- iv) No order as to costs in the appeals.

As a sequel, miscellaneous applications if any pending in these appeals shall stand closed.