

(2013) 07 DEL CK 0208
In the Delhi High Court
Case No : MAC. A. 965 of 2011

National Insurance Co. Ltd.	Vs	APPELLANT
Hari Om Mittal and Others		RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 9

Citation : (2013) 3 ACC 496

Hon'ble Judges : Suresh Kait, J

Bench : Single Bench

Advocate : Pradeep Gaur, for the Appellant; D.K. Ahuja, for R1 and Mr. H.S. Bhullar, for R3, for the Respondent

Final Decision : Dismissed

Judgement

Suresh Kait, J.—Instant appeal has been preferred against the impugned award dated 26.08.2011 whereby, Ld. Tribunal has granted compensation for a sum of Rs. 21,28,413/- with interest @ 7.5% per annum from the date of filing of the petition till its realization. Counsel for the appellant has argued that respondent no. 1/claimant was not in any employment as a driver, however, the Ld. Tribunal has considered his income at Rs. 3,590/- as per minimum wages for a skilled person.

2. Ld. Counsel submitted that PW 7, brother of the respondent no. 1, has stated before the Ld. Trial Court that he used to engage respondent no. 1 as a driver whenever there was shortage of drivers or in case of emergency. Therefore, he was not in regular service. The minimum wages can be considered only in case the person is in employment on regular basis.

3. It is argued that as per the disability certificate, the Medical Board assessed 70% disability on the basis of grievous injuries received by respondent No. 1 and due to which his right leg has been amputated. Ld. Tribunal has considered the functional disability as 100% instead of 70% as assessed by the Medical Board.

4. Ld. Counsel has further argued that Ld. Tribunal has wrongly granted 50% towards future prospects whereas the injured was 29 years of age at the time of accident.

5. Ld. Counsel has mainly argued that as per FIR, two trucks were involved in the accident in question, i.e., Truck No. HR-38E-2191, the offending vehicle as per the charge sheet filed by the police and another Truck vide registration No. HR-38E-996. Respondent no. 1 has filed the claim petition only against the offending vehicle i.e. HR-38E-2191 whereas, owner and driver of the other vehicle mentioned above have not been impleaded as a party. He submitted, Ld. Tribunal should have dismissed the claim petition for non-joinder of necessary parties.

6. In view of above, Ld. Counsel for the appellant has prayed before this court that in view of the fact as stated in the FIR, which was lodged by the injured himself, matter may be remanded back for fresh enquiry.

7. On the other hand, Ld. Counsel for claimant argued that Ld. Tribunal has recorded in the impugned judgment that PW 7 deposed that his brother / claimant used to drive the tanker in the case of an emergency or in the absence of other drivers. In the absence of any proof regarding the educational qualification, and salary certificate, Ld. Tribunal has assessed the minimum wages for skilled labour for the reasons he placed on record the driving licence Ex. PW1/R1 for Light Motor Vehicle / Transport Vehicle.

8. He further submitted, that while considering the nature of injuries sustained by him, which resulted in the permanent disability of 70% due to amputation of right leg, the Ld. Tribunal has considered 100% functional disability for the reason that he would not be able to perform his job as driver with one leg.

9. On the issue of the employment as driver, Ld. Counsel appearing on behalf of the claimants submitted that he was in the pool of drivers and that whenever there was a shortage of drivers or in case of an emergency, he used to drive the tanker of his brother, PW 7. Thus, he was in a regular service and Ld. Tribunal in the absence of the salary certificate has rightly considered the minimum wages for skilled person.

10. On the issue of negligence, it is recorded in the FIR, respondent no. 1 was first hit by vehicle no. HR-38E-996 and thereafter by Truck No. HR-38E-2191.

11. In a written statement, he has stated that the offending vehicle was HR-38E-2191. Though the question regarding the other vehicle as mentioned in the FIR has been put in the cross-examination, however, he stated that offending vehicle was HR-38E-2191, and that, he did not know the number of the other vehicle for the reason that after the accident he became unconscious and the FIR was also not recorded on his statement.

12. Ld. Tribunal has considered this issue at length and has come to the conclusion that appellant / insurance company has neither taken the ground

regarding other offending vehicle in the written statement nor put in any efforts to implead the said vehicle and also did not lead any evidence in this regard. Therefore, as per the testimony of PW 1 R1 who has clearly deposed that the offending vehicle was HR-38E-2191, the Ld. Tribunal has rightly assessed that the offending vehicle was the above noted vehicle.

13. At this stage, Id. Counsel for the appellant has clarified that they moved an application to implead another vehicle, i.e., HR-38E-996. Same was dismissed vide order dated 22.05.2008 by the trial court stating that the petition has been filed by the respondent no. 1/claimant, therefore, this issue could be raised at the time of evidence only.

14. Counsel for the respondents/claimants submitted that neither the order dated 22.05.2008 has been challenged nor the appellant led any evidence to prove another vehicle, HR-38E-996 as the offending vehicle.

15. In the instant case, PW 7 brother of deceased, deposed in evidence by way of affidavit, Ex. P1 that he was running the business of water supply under the name of Mittal Water Suppliers of which he was the proprietor. Injured was employed by him in the said business. In his cross-examination, he disclosed that he had ten tankers and that his brother Hari Om Mittal used to drive the tanker in case of Emergency or in absence of any driver employed by him for these tankers.

16. Injured has placed on record his driving licence Ex. PW1/R1 which is for light motor vehicle / transport vehicle.

17. On the issue of income, I hold that while calculating the loss of income on account of injuries sustained by the claimant, Ld. Tribunal has rightly taken minimum wages for skilled persons, prevalent at the time of accident.

18. On the second issue of disability as per the disability certificate Ex. PW1/42 issued by Dr. RML Hospital dated 31.03.2006, the leg above knee was amputated with stump above middle one-third of thigh (right) as a result of which the injured suffered 70% physical permanent disability in relation to whole body.

19. Amputation of right leg above 1/3rd of thigh (right) will adversely affect the earning capacity of a person, specially to a driver, In Raj Kumar Vs. Ajay Kumar and Another, it is held as under:

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 10 disability and what he could not do as a result of the permanent ability (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. 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 percent, 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 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. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may.

20. Ld. Tribunal while calculating the earning capacity rightly considered 100% functional disability qua whole body.

21. Injured in the instant case was 29 years of age at the time of accident and was enjoying good health. The Apex court in its recent judgment in *Rajesh and Others Vs. Rajbir Singh and Others*, has granted 50% future prospects till the age of 40 years & 30% till the age of 50% to the victims. So I hold that the future prospect has rightly been given by the Ld. Tribunal.

22. As per FIR, two trucks were involved in the accident and the respondent no. 1 has filed the claim petition only against the offending vehicle, i.e., truck no. HR-38E-2191, whereas the owner and driver of truck bearing No. HR-38E-996 were not impleaded as party. Thereafter, the appellant moved an application before the Id. Tribunal to implead the said vehicle, i.e., HR-38E-996 as a party. Same was dismissed by the Id. Tribunal vide order dated 22.05.2008. Appellant never challenged the same.

23. In *Savitri Garg v. the Director, National Heart Institute*, in Civil Appeal No.

4024 of 2003 the Apex Court has held as under:

So far as the law with regard to the non-joinder of necessary party under Code of Civil Procedure, Order 1 Rule 9 and Order 1 Rule 10 CPC there also even no suit shall fail because of mis-joinder or non-joinder of parties. It can proceed against the persons who are parties before the court. Even the court has the power under Order 1 Rule 10(4) to give direction to implead a person who is a necessary party. Therefore, even if after the direction given by the Commission the concerned doctor and the nursing staff who were looking after the deceased A.K. Garg have not been impleaded as opposite parties it cannot result in dismissal of the original petition as a whole.

24. Therefore, I find no merit in the instant appeal. Same is accordingly dismissed.

25. Registry is directed to release the statutory amount.

26. Vide order dated 03.11.2011 execution proceedings were stayed by this Court, subject to deposit of the award amount with the State Bank of India, Tis Hazari Courts, Delhi in terms of the order of the Tribunal. Thereafter, vide order dated 01.03.2012, 50% of the amount was directed to be released to the respondent No. 1 in terms of the Tribunal's order. Since the appeal of the Insurance Company has been dismissed, therefore, the Branch Manager, State Bank of India Tis Hazari Courts, Delhi is directed to release the balance amount with interest accrued thereon in favour of the respondents/claimants.

CM. NO. 20027/2011

With the disposal of the petition itself, instant application has become infructuous. The same is disposed of accordingly.