

(2011) 01 P&H CK 0420

In the Punjab And Haryana At Chandigarh

Case No : F.A.O. No's. 2988 to 2989, 3087 of 1996 and 445 of 1997 (O and M)

National Insurance Company Limited

APPELLANT

Vs

Rajbir Singh and Others

RESPONDENT

Date of Decision : 18-01-2011

Acts Referred:

Workmens Compensation Act, 1923 — Section 149

Citation : (2011) 162 PLR 98

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

K. Kannan, J.—All the four appeals are connected as they arise out of the same accident. FAO Nos. 2888 and 2889 of 1996 are at the instance of the Insurance Company denying liability and FAO Nos. 3087 of 1996 and 445 of 1997 are at the instance of the claimants seeking for enhancement of compensation for the injuries sustained in the accident.

2. As regards the contention of the Insurance Company that there had been no sufficient opportunity granted to the insurer to establish his defence that the driver did not have a valid driving licence, the contention is without merit for the Insurance Company did no more than produce a copy of a communication from the licensing authority that the licence was not genuine. If the insurer had not taken steps to produce the relevant records and failed to examine the official connected with the same, the Insurance Company will have to blame itself. In any event it is not even relevant for the issue of the genuineness or otherwise is invariably tested on the bona fides of the owner of the vehicle, for, Section 149 contemplates a situation of a violation of terms of policy by the owner/insured. The bona fides will again depend on what the owner believes to be true. There was evidence to the effect that he had verified the driving licence at the time when he employed the driver and he said that he believed the same to be true. The Tribunal has adverted to this aspect as well in its judgment. The insured

cannot be, therefore, said to have committed any violation of terms of policy by engaging a person, who did not have a valid driving licence. The liability cast by the Tribunal shall, therefore, be maintained and the appeals by the Insurance Company in FAO Nos. 2888 and 2889 of 1996 on the issue of liability shall stand dismissed.

3. As regards the claim for compensation for injuries in FAO No. 3087 of 1996, the claimant namely Rajbir Singh had crush injuries on his foot and it was on record that he was hospitalized and remained under treatment for over 3 months. The doctor, who conducted a surgery on his crushed foot for reconstruction, have given evidence to the effect that he will have limping in his leg and that it would continue throughout his life. He had assessed his disability at 8%. While determining the compensation, the Tribunal took the evidence given by the claimant that he had incurred medical expenses, transport and other charges to the tune of Rs. 45,000/- and awarded the entire amount as claimed. As regards the pain and suffering and loss of earning capacity which the claimant was said to have incurred, the Tribunal awarded Rs. 1,60,000/- under the head "special damage". The overall sum determined was Rs. 2,05,000/-. The assessment of compensation for the nature of disability at Rs. 1,60,000/- towards special damage itself is more than what can normally be expected to be given and I would, therefore, not make any intervention for enhancement. The award passed already by the Tribunal is sustained and the appeal is dismissed.

4. As regards the claim for enhancement at the instance of a Constable in FAO No. 445 of 1997, who was 26 years of age and had been trained as a Commando and had received appreciation certificates from his superiors. On account of injuries, his leg was amputated and the doctor had assessed the disability arising from the same at 70%. He gave evidence to the effect that his prolonged hospitalization and treatment, the Tribunal had awarded Rs. 32,000/- for the pecuniary heads of claim for medical charges, attendant charges, and special diet etc. and had awarded Rs. 2,75,000/- towards special damage which I believe is an assessment for non-pecuniary damages like, pain and suffering, loss of amenities and loss of earning capacity. Overall, the compensation was awarded as Rs. 3,07,000/-.

5. In my view, the compensation made by the Tribunal was not appropriate. The loss of a leg for sprightly policeman, who was trained to be a Commando, was literally a serious blow to his career and the loss of earning capacity must have been determined with reference to what an amputation would result. The defence was that he was earning Rs. 2,700/- at the time of accident and subsequent to the accident and after amputation, he was being retained in light duties and at that time, he was being paid Rs. 3,200/-. The learned Counsel for the insurer would contend that continuance in job and suffering no loss of pay immediately must be duly factored and he need not be compensated and in any event, the fact of his retention in service must be taken note of. In my view, the argument has to be only stated to be rejected for retention in service by an

employer cannot deny to a claimant a right to seek for loss of earning capacity. The best method of arriving at the loss of earning capacity in a case of amputation is what the Workmen's Compensation Act itself provides and this principle has been recognized under Schedule-II as well for awarding claim for damages for injuries. An amputation of foot below knee which has been assessed at 70% disability must be taken as resulting in 70% loss of earning capacity as well. The effect of retention in service by an employer in relation to loss of earning capacity has been a subject of consideration in several decisions of various High Courts and also by the House of Lords in UK. This Court has an occasion to deal with the same in FAO No. 3432 of 2009, decided on 29.09.2010 titled "New India Assurance Company Limited v. Smt. Santosh and Ors. (2010) 160 P.L.R. 780 as under:

In cases of injury, it is not merely the financial issues that the Courts look at but it also factors the loss of amenities to life, pain and suffering and several non-pecuniary damages. There is definitely a resultant loss of prospects of promotion and loss that is occasioned by the physical disability that a person carries. In a slightly different situation in *The Management of Sree Lalithambika Enterprises, Salem Vs. S. Kailasam*, , coming under the Workmen's Compensation Act, the contention was that for a person, who continues in service and has not suffered any financial loss, there shall be no compensation since no loss of earning is sustained by such a workman. This case and several other cases have examined this situation through several judgments. We are not dealing in cases of workmen against the Workmen's Compensation Act but I would still apply the same principle as applicable. In *V. Jayaraj Vs. Thanthai Periyar Transport Corporation Ltd.*, , *Mgt. of Tamilnadu Cement Corporation Ltd. Vs. N. Jayapalan*, , *Kerala Minerals and Metals Limited v. Raman Nair* 1998 (I) L.L.J. 993 (Ker.), the Courts have dealt with the situation of continuance of employment of a workman despite the injury and awarded compensation including projected loss of earning capacity, (para 19)

20. The Madras High Court posed the question in *Lalithambika's* case (supra) whether an employer could be relieved of his liability to pay compensation by retaining a person in employment and providing for the same wages. It answered that the mere continuance of work does not disentitle a person from claiming compensation. There is also an opinion of the House of Lords that may be relevant to understand this concept. *Bale v. William Hunts and Sons Limited* 1912 A.C. 496 was 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 had come to such a disability status when he had sustained an employment injury in which the defective eye had to be removed with the consequences that he could not get employment though physically he was as well as before. The House of Lords held that the incapacity of work included inability to work or in other words, there is incapacity for work when a man has a physical defect which makes his working un-saleable in any market reasonably accessible to him. Applying the same logic, a person who has suffered an injury may not come by

immediate loss if he is retained in the same employment and does not lose his job, but in his own saleability elsewhere as a fresh recruit to a new employer, he may come by a serious handicap. That shall be a justification enough to provide for compensation in such types of cases.

I cannot, therefore, accept a plea that a retention in government service, despite the injury would have any bearing for denying to the claimant the compensation worked out on the basis of loss of earning capacity as 70%. I will not even take it to be mitigating circumstances in the manner urged by the learned Counsel for the claimant. He was a police constable and trained to be a Commando and the evidence was that after his injury, he has been put on light duty. There was a sure prospect of increase in salary for him which I would take as being the resultant loss on account of his serious injury and it requires no evidence to even make an appropriate inference that his career as a Commando could have been completely shattered. I would provide for therefore a 50% increase of his salary and apply 70% of the same as the resultant loss of earning capacity and apply a multiplier of 17 to take the loss of earning capacity at Rs. 5,99,760/-. I will also add Rs. 75,000/- towards loss of amenities, for inconvenience and for hardship suffered and provided for another Rs. 25,000/- towards pain and suffering. In all, the total of compensation would come to Rs. 7,31,760/-. The Tribunal has already awarded Rs. 3,07,000/- and the amount in excess of what has been awarded by the Tribunal, will attract interest at 6% from the date of petition till date of payment. The liability shall be in the same manner as determined by the Tribunal. The appeal in FAO No. 445 of 1997 for enhancement is allowed to the above extent.