(2014) 12 KAR CK 0230

In the Karnataka High Court

Case No : Miscellaneous First Appeal No. 5756/2008 (MV)

National Insurance Company Limited — APPELLANT

Vs

Sayed Allauddin — RESPONDENT

Date of Decision : 03-12-2014

Acts Referred:

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2(i)

Citation : (2014) 12 KAR CK 0230

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : Aruna Deshpande, Advocate for the Appellant; Dinesh M. Kulkarni, Advocate for the Respondent

Judgement

Anand Byrareddy, J.—The appeal is considered for final disposal at this stage.

2. The appellant is the Insurance Company, which had insured a vehicle involved in an accident. The appellant had insured the car, which had dashed against the two wheeler that was being ridden by the claimant-respondent No. 1 herein. It transpires that he was working as a driver of a tanker and earning about Rs. 6,000/- per month. The accident had taken place on 28.01.2004. It is claimed that as a result of the injuries to both his legs, face, eyebrows and left upper arm, he was admitted to hospital and he was an inpatient for more than one month and he was discharged and was still under treatment for a long period and had incurred a medical expenditure of Rs. 50,000/-. That he was no longer capable of working as a driver in view of the disability he had suffered. The Medical Practitioner had assessed the disability at 55% to the whole body and it is on this basis that claim for compensation was laid. The appellant had contested the matter and the Tribunal on considering the rival contentions had opined that there was 100% loss of earning capacity on the footing that though the Medical Practitioner had indicated that there was whole body disability of 55% having regard to the avocation in which the claimant was engaged at the

time of the accident and as a result of the injuries he was no longer capable of carrying on that avocation. There was 100% loss of earning capacity and has accordingly proceeded to award the compensation. It is that which is sought to be challenged in the present appeal.

3. During the pendency of the appeal, the entire amount of compensation having been deposited, the respondent - claimant has withdrawn 50% of the same, without prejudice to this appeal.

4. The short question that arises for consideration is -

"Whether by virtue of the disability having been assessed by the Medical Practitioner at 55% to the whole body, the Tribunal was justified in assessing the loss of earning capacity at 100% only on the footing that the claimant was no longer capable of carrying on the avocation in which he was engaged?"

5. In this regard, a recent judgment of the Supreme Court in the case of Basappa S/o. Sanganabasappa Bahvikatti v. T. Ramesh S/o. Tangavelu and Another, 2014 SAR (Civil) 1145 , has re-visited the case law and has culled out the principles that would have to be applied in the Tribunal deciding as to the loss of earning capacity vis-?-vis the disability as may be assessed by the medical evidence. In a recent judgment the Supreme Court has cited the opinion expressed in an earlier decision in Raj Kumar Vs. Ajay Kumar and Another, , to the following effect-

"8. Disability refers to any restriction or lack of ability to perform an activity in the manner considered normal for a human being. Permanent disability refers to the residuary incapacity or loss of use of some part of the body, found existing at the end of the period of treatment and recuperation, after achieving the maximum bodily improvement or recovery which is likely to remain for the remainder life of the injured. Temporary disability refers to the incapacity or loss of use of some part of the body on account of the injury, which will cease to exist at the end of the period of treatment and recuperation. Permanent disability can be either partial or total. Partial permanent disability refers to a person''s inability to perform all the duties and bodily functions that he could perform before the accident, though he is able to perform some of them and is still able to engage in some gainful activity. Total permanent disability refers to a person''s inability to perform any avocation or employment related activities as a result of the accident. The permanent disabilities that may arise from motor accident injuries, are of a much wider range when compared to the physical disabilities which are enumerated in the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 ("the Disabilities Act", for short). But if any of the disabilities enumerated in Section 2(i) of the Disabilities Act are the result of injuries sustained in a motor accident, they can be permanent disabilities for the purpose of claiming compensation.

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10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future earnings would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of economic loss, that is, the percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanent disability on the earning capacity of the injured; and after assessing the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terms of money, to arrive at the future loss of earnings (by applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence and assessment, the Tribunal may find that the percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation. (See for example, the decisions of this Court in Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and Another, and Yadava Kumar Vs. The Divisional Manager, National Insurance Co. Ltd. and Another,

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.

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."

6. The Apex Court has then referred to a decision in Syed Sadiq etc. Vs. Divisional Manager, United India Ins. Company, , wherein the principles laid down in Rajkumar had been applied, namely, though the disability determined by the High Court in that case was 65%, the Supreme Court has worked out the compensation treating the disability at 85% in the following manner -

"7. Further, the appellant claims that he was working as a vegetable vendor. It is true that a vegetable vendor might not require mobility to the extent that he sells vegetables at one place. However, the occupation of vegetable vending is not confined to selling vegetables from a particular location. It rather involves procuring vegetables from the wholesale market or the farmers and then selling it off in the retail market. This often involves selling vegetables in the cart which requires 100% mobility. But even by conservative approach, if we presume that the vegetable vending by the appellant claimant involved selling vegetables from one place, the claimant would require assistance with his mobility in bringing vegetables to the marketplace which otherwise would be extremely difficult for him with an amputated leg. We are required to be sensitive while dealing with manual labour cases where loss of limb is often equivalent to loss of livelihood. Yet, considering that the appellant claimant is still capable to fend for his livelihood once he is brought in the marketplace, we determine the disability at 85% to determine the loss of income."

7. Therefore, if the above principles are to be applied, it would be necessary for the claimant-respondent to have adduced independent evidence as regards the loss of earning capacity. The mere determination of the percentage of disability would only enable the Tribunal to proceed on that basis unless there was independent evidence by the claimant to demonstrate that even though he was not capable of doing any other avocation that he could undertake, would result in providing him an earning of a certain amount of money, which, when compared to the income that he was already earning as a driver, the difference would be the loss of earning capacity. This exercise cannot be on the basis of surmises, but on the basis of the circumstances pertaining to the claimant, namely, it would depend on his level of education, his background, his age and his capability of undertaking such other employment and this can only be on the basis of the further evidence independently tendered by the claimant. Since that is not forthcoming, it would be necessary to provide yet another opportunity to the claimant to demonstrate that his loss of earning capacity would far exceed the percentage of bodily disability, which are two independent components in arriving

at the loss of earning capacity. Since the claimant has already withdrawn 50% of the compensation that is awarded and since the physical disability has been assessed at 55%, there may not be any prejudice caused to the appellant in that amount remaining with the claimant, subject to further determination of any additional compensation that he may be entitled to by way of loss of earning capacity, which is now to be determined by the Tribunal, keeping in view the settled principles of law as expounded by the Supreme Court herein above. With that observation, the appeal is allowed in part. The matter is remanded to the Tribunal with liberty to the claimant-respondent to tender additional evidence to establish his case for higher quantum of loss of earning capacity. The appeal stands disposed of accordingly.

The amount in deposit be remitted to the Tribunal to be invested in a Fixed Deposit, pending further adjudication, as stated above.