(2014) 09 DEL CK 0433

In the Delhi High Court

Case No : Mac. App. 903/2011 and 454/2012

New India Assurance Co. Ltd. and Others APPELLANT

Vs

Madan Mohan and Others RESPONDENT

Date of Decision : 25-09-2014

Acts Referred:

Citation : (2014) 09 DEL CK 0433

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : K.L. Nandwani, Advocates for the Appellant; O.P. Mannie, Advocates for the Respondent

Judgement

Jayant Nath, J.—The brief facts giving rise to the above two appeals are that the claimant Shri Madan Mohan on 15.12.2007 was standing at the bus stand of Raj Ghat, Delhi when a bus stated to be driven in a very high speed in a rash and negligent manner hit the claimant as a result of which the claimant fell down and sustained grievous injuries.

2. Based on the evidence on record the Tribunal awarded the following compensation:-

MAC.APP. 903/2011

3. I will first deal with the appeal No. 903/2011 filed by the appellant/insurance company which was the insurer of the offending vehicle and as per the Award of the Tribunal is liable to deposit the amount.

4. Learned counsel appearing for the appellant has made two submissions to impugn the Award stating that the compensation awarded is on the higher side. He firstly submits that the claimant has 72% permanent disability in the right upper and right lower limb. The Tribunal has thereafter for the purpose of calculating loss of earning capacity taken the disability suffered by the claimant as 70% of the entire body which he submits is entirely erroneous. There were no

grounds to take the loss of functional disability at 70%. He submits that this should have been at best 50%. He also submits that as per judgment of the Supreme Court in the case of Raj Kumar Vs. Ajay Kumar and Another, the treating doctor should also have been summoned by the claimant before assessment of functional disability. He secondly submits that the Tribunal has erroneously granted compensation for loss of wages of Rs.63,288/- and loss of earning capacity due to his disability at Rs. 3,24,900/-. He submits that these are for the same purpose and are a duplication. He relies upon the judgment of the Supreme Court in the case of Kumari Kiran Vs. Sajjan Singh, .

5. As far as the first submission of learned counsel for the appellant is concerned the Tribunal noted that the claimant had 26% disability in relation to his right upper limb and 65% disability with respect to his right lower limb. The total disability in respect of right upper and lower limb comes to 72%. Hence, for the purpose of effecting his earning capacity loss was taken as 70% qua the entire body. A perusal of the affidavit by way of evidence of PW-3 Shri Madan Mohan shows that all that he has said about his loss of earning capacity is that he was doing service as Field Supervisor with M/s.M.K. Petro Products India Pvt. Limited at Jeevan Nagar, New Delhi. He further states that due to serious injuries received he could not work from the date of the accident till today as he is now unable to walk, run and perform field duty properly. It was stated that he cannot move without help of a stick. There is no cross-examination of PW-3 on this aspect.

6. As far as the contention of the learned counsel for the insurance company is concerned about the evidence of the doctor for assessment of functional disability, the contention is without merits. PW-4 Dr.Puneet Mishra, Associate Professor, Guru Teg Bahadur Hospital, Delhi has proved the disability certificate ExPW4/A. As per judgment of the Supreme Court in the case of Raj Kumar vs.Ajay Kumar, (supra) the doctor who treated the injured or claimant or who may have specifically assessed the extent of permanent disability cannot give evidence with regard to loss of earning capacity as the same has to be assessed by the Tribunal with reference to evidence in entirety.

7. On the issue of assessment of functional disability the Supreme Court in the case of Raj Kumar vs. Ajay Kumar,(supra) in paragraph 13 held as under:-

13. 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 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."

8. As per the evidence placed on record by the claimant, he was doing a supervisory job. No details whatsoever are given of what all his work entailed. No doubt given the nature of disability suffered by him he is likely to have suffered difficulty in completing his work and consequent loss of earning is bound to occur. I would, however, agree with the learned counsel for the appellant that the disability as fixed by the Tribunal of 70% qua the entire body is on the higher side. The is no evidence on record to support this assessment. Given the limited nature of evidence placed on record, in my opinion in the facts and circumstances of this case functional disability should be fixed at 50%. I accordingly modify the award. Loss of earning capacity would be computed accordingly.

9. Coming to the second submission of learned counsel for the appellant the Tribunal has awarded Rs.66,288/- for loss of wages and Rs.3,24,900/- for loss of earning capacity due to disability. The Supreme Court in the case of Raj Kumar vs. Ajay Kumar (supra|) in paragraph 5 had culled out the heads under which compensation is to be awarded based on the facts of the case as follows:-

"5. The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special Damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii) Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses. Non-pecuniary damages (General Damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v) Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity) "

10. In the present case the Tribunal has awarded Rs.63,300/- on account of the long period of treatment that has been undergone by the claimant. The Tribunal noted that the claimant remained under active medical treatment from the date of the accident 15.12.2007 to 25.07.2009 i.e., 1 1/2 years. Based on this, the Tribunal granted loss of wages to the claimant for 1 1/2 years of Rs.63,300/- i.e., the wages assessed namely Rs.3516x18 = Rs.63,300/-.

11. If we see the compensation given for loss of earning capacity for disability, the Tribunal has granted keeping into account the functional disability of the claimant was 70% (this court has now held that it should be 50%). Hence the loss of earning capacity is calculated as Rs.3,24,878/- (Rs.3516x12x11x70/100).

12. The difference between the two heads of compensation is obvious. In the period when the claimant was undergoing medical treatment, he was not able to undertake his professional work and hence he has been awarded full wages of Rs.3516 for the period of 18 months. In contrast while awarding loss of earning capacity due to disability, the same has been calculated @70% of the assessed income of Rs.3516. There is obviously no duplication.

13. That apart the compensation as awarded under different heads for the pecuniary damages is as per judgment of the Supreme Court in the case of Raj Kumar vs. Ajay Kumar. There is accordingly no merit in the said contention of the learned counsel for the insurance company.

14. Accordingly the appeal of the appellant is partially allowed as above.

15. The statutory amount if deposited be refunded to the Insurance Company.

MAC.APP,No.454/2012

16. This appeal is filed by the appellant/claimant for enhancement of the compensation. Learned counsel appearing for the appellant submits that the claimant was earning Rs.5,400/- per month as field Supervisor in M/s. M.K. Petro Products India (P) Ltd. Despite this position he submits that the Tribunal has awarded minimum wages for an unskilled worker of Rs.3,516/- per month. He submits that there was no reason to discard the averments made by the claimant as a witness about his salary being Rs.5,400/- per month. He relies upon the judgment of a Division Bench of the Allahabad High Court in the case of National Insurance Company Ltd. Vs. Smt. Anisa Begum, Rais Ahmad and S.K. Chaddha . In any case he submits that without prejudice even if there was an issue about the evidence on record, at best the minimum wages of a skilled worker ought to have been used which were Rs.3,940/- per month. He further submits that the compensation under non- pecuniary heads, namely, pain and suffering is on the lower side as only Rs.40,000/- has been awarded. He further submits that no compensation for loss of amenities and loss of expectation, disfigurement and disability has been given. He also seeks payment of attendant charges.

17. The learned counsel appearing for the insurance company has opposed the present appeal stating that there are no grounds for enhancement of the

compensation awarded. He further submits that on some of the compensation that is being claimed, the same is not pleaded in the grounds of appeal and hence cannot be urged.

18. Coming to the first contention of learned counsel for the appellant. The Tribunal noted the evidence on record of PW-3, namely, the claimant and also noted that the claimant gives no details of his nature of employment, his qualifications etc. In view of these facts the Tribunal took the income of the claimant based on the minimum wages for an unskilled worker.

19. In my opinion, there are no reasons to differ with the views of the Tribunal. There is no attempt whatsoever to explain the nature of job done by the claimant. Merely stating that he is working as a supervisor in a company is a bald statement and does not give any indication of the trade in which the employee is working, his own skills, qualifications etc. The claimant cannot on the evidence on record be assessed as a skilled worker.

20. Coming to the non-pecuniary loss, the Tribunal awarded Rs.40,000/- towards pain and suffering to the claimant/appellant. Learned counsel appearing for the appellant relies upon V. Mekala Vs. M. Malathi and Another, ; Rekha Jain vs. National Insurance Company Limited in Civil Appeal Nos. 5370-5372 of 2013 dated August 01, 2013 and Kavita Vs. Deepak and Others, to contend that compensation awarded on account of earning and suffering is on the lower side.

21. Perusal of the evidence of PW-3 shows that he had a long spell in hospital. He was admitted in hospital on 15.12.2007 and discharged on 24.12.2007. Thereafter he states that he had visited the OPD of LNJP hospital 25 to 30 times for regular check up. On 15.11.2008 he was again admitted in the said hospital and discharged on 30.11.2008. During the first admission he had his right thigh/ femur bone and right wrist operated upon by fixing I/M Nail, plate and K-wire respectively. On the second time he was again operated upon as the fracture of right femur was not united, the nail fixed earlier was removed and another nail with bone grafting was fixed in his right thigh. He has thereafter again visited LNJPN hospital for about 10 to 15 times. He has thereafter undergone physiotherapy. He has further averred that in the accident he has suffered the following injuries:-

"? Fracture of Right side Volar Barton (right wrist),

? Fracture of Right thigh (S/C Femur)

? Fracture of Right pubic rami,

? PSVT with loose teeth

? Fracture femur bone treated with Intra medullary Supra condylar Nailing,

? Fracture Right wrist treated with buttress Plating and K wire fixed in radius fragments,

? profusely bleeding,

? Multiple abrasions and blunt injuries on both lips, nose, forehead and all over body."

22. Given the prolonged treatment undergone by the claimant and the nature of injuries suffered by him it would be just and proper that the compensation on account of pain and suffering be enhanced to Rs.1 lac.

23. Coming to the other heads for non pecuniary damages the Supreme Court had in the case of Raj Kumar vs. Ajay Kumar (supra) stated that the other heads include loss of amenities and loss of expectation of life. There has been no award on account of loss of amenities of life or on account of loss of expectation of life. Assessment of the damages involves determination of lumpsum amount with reference to circumstances such as age, nature of injuries, deprivation, disability suffered by the claimant and the effect thereof on the future life of the claimant. Accordingly, I award a sum of Rs.50,000/- on account of loss of amenities and a sum of Rs.50,000/- on account of loss of expectation of life.

24. Coming to the attendant charges as claimed. Given the nature of the disability suffered by the claimant on account of the injuries suffered, in my opinion, he would need an attendant. The appellant was regularly visiting LNJP hospital. The Tribunal has granted him compensation for loss of wages for a period of one and half year as he remained under active medical treatment from the date of the accident, namely, 15.12.2007 till 25.7.2009 i.e. a period of one and half year. I award the claimant a sum of Rs.50,000/- for attendant charges which the claimant would have utilised in the course of this one and half year when he could not attend to his work.

25. Coming to the contention of the learned counsel for the insurance company, namely that some of the compensation sought/enhancement of compensation sought by the claimant is not pleaded in the grounds of appeal. A question was posed to the learned counsel as to how prejudice is caused to the insurance company in as much as the submissions have been made based only on the evidence on record and nothing more. There was no cogent answer to this query. The contention of the learned counsel for the insurance company has no merit and the same is rejected.

26. The total compensation now payable to the claimant would come to as follows :-

27. As per order dated 12.10.2011 in MAC.APP.903/2011 the insurance company was directed to deposit the entire award amount alongwith upto date interest with the Registrar General of this Court.

28. This Court on 25.2.2013 in the said appeal directed that the entire amount be transferred to the claimant in FD. This court also directed that the monthly/ quarterly interest accrued on the deposited amount besides Rs.1 lac as directed by the tribunal be released.

29. In view of the above, the insurance company may pay the excess amount as per directions in this order alongwith interest on the excess amount @ 7.5% per annum from the date of filing of the claim petition till deposit in Court. The additional amount so received shall be released to the claimant.

30. The balance amount has already been transferred in the name of the claimant which is lying in Fixed Deposit with UCO Bank as per order dated 25.09.2013. The claimant shall be entitled to use the said amount as per directions in the Award.

31. Both the appeals stand disposed of.

32. Statutory amount, if any, deposited by the insurance company at the time of filing of the appeal may be refunded to the insurance company/appellant.