
(2010) 11 KAR CK 0005

In the Karnataka High Court

Case No : MFA No. 929 of 2008 (MV) C/W MFA Crob No. 238 of 2008 (MV)

New India Assurance Co. Ltd.

APPELLANT

Vs

Venkateshappa and T. Ravichandran
 Sri.
Venkateshappa Vs Sri. T. Ravichandran and The Branch
Manager, M/s. New India Assurance Co. Ltd.

RESPONDENT

Date of Decision : 03-11-2010

Acts Referred:

Citation : (2010) 11 KAR CK 0005

Hon'ble Judges : Arali Nagaraj, J

Bench : Single Bench

Advocate : O. Mahesh, in MFA No. 929/2008MV and Sri Raghavendra, for Smt. Suguna R. Reddy, in MFA Crob No. 238/2008MV, for the Appellant; C.N. Raghavendra, for Smt. Suguna R. Reddy, for Respondent 1) (Respondent 2 notice dispensed with) in MFA No. 929/2008(MV) and Sri. O. Mahesh, for Respondent 2 in in MFA Crob No. 238/2008(MV), for the Respondent

Judgement

1. The present appeal is filed by the Insurance Company with which the Bajaj Chetak Scooter bearing Registration No. KA-03/K-3965 which was involved in the accident that occurred on 23.04.2003 at about 6.30p.m in front of RTO Office at Kolar within the limits of Kolar Town was insured. The Appellant - insurer has challenged in this appeal the correctness of the impugned judgment and Award dated 27.10.2007 passed in MVC No. 207/2003 by the learned II Additional Civil Judge (Sr. Dn.) and Member, Additional MACT, Kolar (hereinafter referred to as "Claims Tribunal" for short) insofar as it relates to the quantum of compensation of 1, 42,000/- awarded in favour of the claimant in the said case who is Respondent No. 1 herein.

2. The first Respondent - claimant has filed his Cross Objection No. 238/2008 in this appeal seeking enhancement of the compensation awarded in his favour by the Claims Tribunal under the impugned judgement and Award.

3. The facts that there occurred motor vehicle accident on the said date, time

and place and the said scooter insured with the present Appellant was involved in the said accident and also that the said accident occurred due to the rash and negligent driving of the said scooter are all not in dispute. It is also not in dispute that as a result of the said accident, the claimant, who was a pedestrian at the place of accident, was dashed against by the scooterist and consequently he sustained severe bodily injuries resulting in his permanent disability.

4. The Appellant - insurer has seriously challenged the quantum of compensation awarded by the Claims Tribunal in favour of the injured claimant on the ground that it is on higher scale. The Cross Objector claimant has sought for enhancement of the same. Sri. O. Mahesh, learned Counsel for the Appellant - insurer strongly contends as under:

(i) The Claims Tribunal awarded 10,750/- under the head "medical expenses" without noticing that Ex. P14 series, the medical bills totally amounting to Rs. 10,750/- are dated 16th, 17th, 18th and 20th of March 2003 i.e., a few days prior to the date of accident and therefore the said amount of compensation deserves to be deleted.

(ii) The Claims Tribunal committed further error in taking physical disability of the claimant at 25% despite there being the evidence of P.W. 2, the doctor who examined the claimant for assessment of the disability, that as a result of fracture of mid-shaft of left femur, the claimant sustained 50% of physical disability in respect of the said limb. The Claims Tribunal ought to have taken the physical disability of the claimant at 16% or 17% being 1/3rd of 50% while determining the compensation under the head "loss of future income".

(iii) The amounts of 25,000/- and 15,000/- awarded by the Claims Tribunal respectively under the heads "pain and sufferings" and "loss of amenities" are also on higher scales and therefore the same deserve to be reduced.

(iv) When once compensation is awarded under the head "loss of future income" by taking the age of the injured as on the date of the accident and by adopting the appropriate multiplier, compensation under the head "loss of earnings during the period of treatment and rest" cannot be granted in as much as it amounts to duplication of the award.

5. per contra Sri. C.N. Raghavendra, learned Counsel for the cross objector - claimant strongly contends as under:

(i) Though the physical disability of the claimant in respect of his left lower limb is 50%, the Claims Tribunal, having regard to the fact that the claimant was doing grazing of ducks and sales in ducks ought to have taken functional / economic disability of the claimant at the minimum of 80% because, as a result of the said disability, earning capacity of the claimant has been reduced to that extent.

(ii) Despite there being evidence of the injured claimant that he was earning an income of Rs. 5,000/- to 6,000/- per month by grazing and selling of ducks, the

Claims Tribunal committed serious error in taking said income at 2,100/-per month 70/- per day) and therefore while contending so he further submits that Claims Tribunal ought to have taken the income of the claimant atleast at 100/- to 150/-per day or 3,000/- to 4,500/- per month while determining the "loss of income during the period of treatment and rest" and also "loss of future income" or "reduction in earning capacity of the claimant".

(iii) In view of the established fact that the claimant was treated as inpatient for 88 days and underwent two operations, the amounts awarded by the Claims Tribunal under the head "pain and sufferings", "attendant charges", food and nutrition" are all not adequate and therefore, the said amounts deserves to be enhanced.

(iv) In view of the fact that the injured claimant was aged about 45 years as on the date of accident, Claims Tribunal was not justified in awarding only a sum of 15,000/- towards "loss of amenities and enjoyment in the future life" of the claimant which may not be less than about 20 years and therefore the said amount also requires to be enhanced.

6. The injured claimant -has got himself examined as P.W. 1 and he has got marked the documents at Exs. P1 to P21. His oral evidence, Ex.P6, the copy of wound certificate; Exs.PI0 and P11 OPD slips and Exs.P16 and P17 the original case sheets pertaining to the treatment of claimant in District Hospital, Kolar clearly establish that as a result of the said accident, he sustained fracture of mid shaft of left femur and three other simple injuries resulting in shortening of his left leg by 6 cms and wasting of thigh muscle by 11/2 cms. He was treated as inpatient at District Hospital, Kolar for the periods from 23.04.2003 to 02.06.2003 and from 17.03.2005 to 05.05.2005 i.e., for about 88 days.

7. Further, P.W. 2 Dr. Halesh, the Orthopedic Surgeon working in SNR Hospital, Kolar has stated in his evidence that, on 23.04.2003 the injured claimant was admitted in District Hospital, Kolar; as a result of accident he had sustained the fracture of shaft of left femur and also other minor injuries to his head and other parts of the body; he underwent the surgery for the said fracture on 06.05.2003 and he was discharged on 02.06.2003. He has further deposed in his evidence that on 17.03.2005 he was admitted to the hospital again and second surgery was performed on him and broken implant was removed from the fractured site and new plate and screws came to be fixed and bone grafting was also done and the patient was discharged on 05.05.2005.

8. P.W. 2, the Orthopedic Surgeon, has also stated in his evidence that he examined the injured claimant on 12.03.2007 for assessing his physical disability and, on his examination on that date, he found that he was walking with cane support, there was wasting of thigh muscles by 11/2 cms and wasting of leg muscles by 1 cm and shortening of left leg by 6 cms, flexion of left knee was limited by 40 degrees, power in the left lower limb was 4/5. He has further stated in his evidence that, in his opinion, the claimant has sustained permanent

disability to the extent of 50% in respect of his left limb and 25% in respect of his whole body and this disability comes in the way of his avocation.

9. Having regard to the above nature and extent of permanent disability, the period of treatment undergone by the claimant as inpatient and also in view of the fact that he underwent two surgeries for the said injuries, I am of the considered opinion that the Claims Tribunal was not justified in awarding Rs. 25,000/- and Rs. 15,000/- respectively under the heads "pain and sufferings" and "loss of amenities". Since the claimant was aged about 45 years as on the date of accident, he has suffered all the pain, inconvenience, frustration, discomfort, etc., throughout his life which may not be less than 15 to 20 years. Therefore, I hereby enhance the compensation under the head "pain and sufferings" from Rs. 25,000/- to Rs. 50,000/- and compensation under the head "loss of amenities" from Rs. 15,000/- to Rs. 75,000/-.

10. The Claims Tribunal has taken income of the injured claimant at Rs. 70/- per day (Rs. 2,100/- per month). The claimant has stated in his evidence that earlier to the accident he was grazing and selling the ducks and was earning Rs. 5,000/- to Rs. 6,000/- every month.

11. Learned Counsel for the insurer strongly contends that the claimant has not produced any documents to substantiate his evidence. Admittedly, the accident took place in the year 2003. Placing strong reliance on the Division Bench Decision of this Court in the case of *The New India Assurance Company Limited v. Smt. Channamma and Ors.* Reported in ILR 2007 KAR 1289, the learned Counsel for the claimant contends that the Claims Tribunal ought to have taken the income of the claimant at the minimum of 100/- to 150/- per day / 3,000/- to 4,500/- per month. It is observed by the Division Bench at Para 10 of the judgment as under:

It is to be noted that the accident has taken place in the year 2004. This Court in number of cases has held that in the absence of any documentary evidence, if the deceased or injured is working as unskilled labor, minimum wages payable during this period has to be taken into consideration. The Court has taken judicial notice that between 2000 and 2005, the minimum wages for an unskilled laborer was around Rs. 100/- to Rs. 150/-. The Commissioner has taken the wages slightly less than Rs. 120/-. Hence on this ground also, we do not see any merits. There is no dispute as to the age as well as relevant factor is concerned. As such, we see no merits in the appeal and it is accordingly rejected.

[Emphasis supplied]

12. Respectfully following the above observations I am of the considered opinion that admittedly the injured claimant has been an unskilled person doing manual labor work viz: grazing and selling of ducks.

Therefore, the Claims Tribunal ought to have taken the income of the injured claimant at Rs. 100/- per day or Rs. 3,000/- per month while determining "loss

of income of the claimant during the period of treatment and rest" and also "loss of future income" / "reduction in his earning capacity"

13. As to the percentage of disability suffered by the claimant resulting in his earning capacity, it is the contention of the learned Counsel for the insurer that when the disability in respect of left limb, as stated by the doctor, is 50% the Claims Tribunal ought to have taken 1/3rd of it i.e., 16% or 17% as the functional disability while determining the "loss of future income". In this regard, the contention of the learned Counsel for the cross objector - claimant is that though the physical disability is stated to be at 50%, the earning capacity of the claimant has been reduced to almost 100% in as much as with such disability he cannot do any manual work including the grazing and selling of ducks and therefore, the claims Tribunal ought to have taken functional/economic disability at least at 80% in determining "loss of future income" or "reduction in the earning capacity" of the claimant.

14. As to awarding of compensation towards loss of income during the period of treatment and rest, Sri. O. Mahesh, learned Counsel for the Appellant strongly contends that when once future loss of income is determined and the compensation awarded under the said head by taking the age of the injured as on the date of accident and applying the multiplier there cannot be any compensation under the head "loss of income during the period of treatment". On the other hand, placing his reliance on the decision of Hon'ble Supreme Court in the case of R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, and also the decision of the Division Bench of this Court in the case of Narasimha Murthy v. The Manager, M/s. Oriental Insurance Co.Ltd" Bangalore and Anr. reported in ILR 2004 EAR 2471, learned Counsel for the claimant strongly contends that in the case of personal injuries the injured claimant has to be compensated under both the said heads.

15. In the case of R.D. Hattangadi Vs. M/s. Pest Control (India) Pvt. Ltd. and Others, Hon'ble Supreme Court has observed at Para 9 of its judgment is as under:

Para 9: "Broadly speaking, while fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money; whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. In order to appreciate two concepts pecuniary damages may include expenses incurred by the claimant: (i) medical attendance; (ii) loss of earning of profit up to the date of trial; (iii) other material loss. So far as non-pecuniary damages are concerned, they may include (i) damages for mental and physical shock, pain and suffering already suffered or likely to be suffered in future; (ii) damages to compensate for the loss of amenities of life which may include a variety of matters, i.e., on account of injury the claimant may not be able to walk, run or sit; (iii) damages for the loss of

expectation of life, i.e., on account of injury the normal longevity of the person concerned is shortened; (iv) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life.

16. Further, in the case of K. Narasimha Murthy Vs. The Manager, Oriental Insurance Company Limited and Another, Division Bench of this Court has observed at Para 16 of its judgment as under:

Para 16: "The Courts and Tribunals, in bodily injury cases, while assessing compensation, should take into account all relevant circumstances, evidence, legal principles governing quantification of compensation. Further, they have to approach the issue of awarding compensation on the larger perspectives of justices, equity and good conscience and eschew technicalities in the decision making. There should be realization on the part of the Tribunals and Courts that the possession of one's own body is the first and most valuable of all human rights, and that all possession and ownership are extensions of this primary right, while awarding compensation for bodily injuries. Bodily injury is to be treated as a deprivation which entitles a claimant to damages. The amount of damages varies according to gravity of injuries. Deprivation sustained as a consequence of bodily injuries may bring with it three consequences, namely, (i) loss of earning and earning capacity, (ii) expenses to pay others for what otherwise he would do for himself and (iii) loss or diminution in full pleasures and joys of living. Though it is impossible to equate money with human suffering, agony and personal deprivation, the Tribunals and Courts should make an honest and serious attempt to award damages so far as money can compensate the loss, loss of curing and earning should adequately be compensated. Therefore, while considering deprivation, the Tribunals and Courts should have due regard to the gravity and degree of deprivation as well as the degree of awareness of deprivation. It is trite, in awarding damages in personal injury cases, the compensation awarded by the Court should be substantial, it should not be merely token damages."

[Emphasis supplied]

17. The Division Bench has further observed at Para Nos. 41 and 43 of its Judgment in the case of K. Narasimha Murthy Vs. The Manager, Oriental Insurance Company Limited and Another, as under:

Para 41: It is said that the Appellant is only SSLC and he does not possess any skill or experience or training to undertake any other work, manual or otherwise. After SSLC, the Appellant joined CRPF as a Police Constable and he was trained in combating and to perform other duties and functions attached to the post of Police Constable. Since the Appellant lacks skill or training or experience to undertake any other work, it is highly improbable and unlikely that the Appellant will be able to secure any job even assuming that despite the injuries sustained by him, he is able to perform some light manual work or ordinary clerical work by squatting on the floor with pain and discomfort. Further, it needs to be

emphasized that it is not the right of the tortfeasor or a person who has taken over the liability of the tortfeasor in terms of and under the Act to dictate that the injured person should do some other work, manual or otherwise, it does not matter, may be with pain and discomfort, in order to minimize his or its liability. Such insistence is untenable in law and if such is the case, it would violate basic human rights of the injured person. In this case, the Appellant is reduced to such a state that he is unable to do any work, manual or otherwise, without subjecting himself to pain and suffering, agony and discomfort. In an accident, if a man is disabled for a work which he was doing before the accident, that he has no talents, skill, experience or training for anything else and he is unable to find any work, manual or clerical, such a man for all practical purposes has lost all earning capacity he possessed before and he is required to be compensated on the basis of total loss. In reaching this conclusion we may derive support from the judgments in *Daniels v Sir Robert Mc Alpine and Sons Limited* and *Blair v FJC Lilley (Marine) Limited*. Secondly, the physical incapacity to earn income sustained by the Appellant is not temporary but permanent and complete as per Exhibit P.43. Thirdly, it cannot be said that since the Appellant has sustained only 54% permanent physical disability in respect of the whole body as per P.W. 3, the Court should take into account functional disability also at 54% only while assessing the loss of earning capacity. Such hypothesis does not stand to reason nor can it be accepted as valid in terms of law. An injured person is compensated for the loss which he incurs as a result of physical injury and not for physical injury itself. In other words, compensation is given only for what is lost due to accident in terms of an equivalent in money insofar as the nature of money admits for the loss sustained. In an accident, if a person loses a limb or eye or sustained an injury, the Court while computing damages for the loss of organs or physical injury, does not value a limb or eye in isolation, but only values totality of the harm which the loss has entailed the loss of amenities of life and infliction of pain and suffering: the loss of the good things of life, joys of life and the positive infliction of pain the distress.

Para 43: In conclusion we hold that the Appellant has sustained 100% permanent functional disability in his earning capacity, and, on that basis, we proceed to quantify the financial loss of the appellant. In estimating the financial or pecuniary loss, the Court must first form an opinion, from the evidence and probabilities in the case of the nature and extent of the loss. While estimating the loss of earnings, the Court must first decide what the claimant would have been earned if the accident had not happened, allowing for any future increase or decrease in the rate of earnings. It is also necessary for the Court to decide how long the loss will continue, whether there is incapacity for life or for a shorter period. The Court should also make an estimate of the amount, if any, which the claimant could still earn in future, notwithstanding disabilities sustained by him in the accident. Further, in a case where the claimant claims medical and nursing expenses, the Court must find as a fact what expenses have already been incurred and must estimate from the evidence the expenses which

will be incurred in future.

(Emphasis supplied)

18. Respectfully following the above observations of the Hon^{ble} Supreme Court and this Court in the decisions referred to above, I am of the considered opinion that the contentions of Sri. O. Mahesh, the learned Counsel for the Appellant - Insurer that when once compensation is awarded under the head "loss of future income" no amount of compensation could be awarded under the head "loss of earning during the period of treatment" and rest is wholly untenable and therefore it cannot be accepted.

19. I am of the further opinion that loss of future income or reduction in earning capacity of an injured by reason of the permanent physical disability suffered by him as a result of the injuries sustained in the accident has to be assessed taking into consideration "functional disability" i.e., extent of the effect of his "physical disability" on his earning capacity having regard to his age, avocation etc., also, besides considering the extent of his physical disability. The reason, for this is, the percentage of functional disability" need not always be the same as the percentage of "physical disability" which the injured suffers. In a given case, though physical disability suffered by an injured may be hardly 10% or 20%, the functional disability i.e. the extent of the effect of his physical disability on his earning capacity, having regard to his avocation, may be more than the Physical Disability, it may even be 100%. For instance if an injured person, who is vocalist (Singer) by profession suffers permanent disability in his vocal chord, though his physical disability with respect to his whole body cannot be more than the extent of disability with respect to vocal chord, reduction in his earning capacity may be even to the extent of 100% as he would not be able to sing. On the other hand, if such an injured happens to be an unskilled manual laborer, the extent of reduction in his earning capacity may be even less than his physical disability. Therefore, it is clear that while determining loss of future earnings/reduction in earning capacity of the injured claimant suffering permanent physical disability, the extent of functional disability" having regard to his avocation, has to be considered.

20. Since the injured in the instant case has been an unskilled laborer and as such, he cannot do his work as efficiently as he was doing earlier to the accident. Therefore, though he has suffered 50% physical disability in respect of left limb, the extent of functional disability i.e., the extent of effect of physical disability on his earning capacity, cannot be the same. Therefore, in my considered view, the Claims Tribunal is not justified in taking the functional disability of the claimant at 25% only in determining the loss of his future income / reduction in his earning capacity. It ought to have taken the functional disability of the injured claimant at least at 60%.

21. If the income of the claimant is taken at Rs. 100/- per day or Rs. 3,000/- per month as held by me supra and his functional disability is taken at 60%, the

reduction in his earning capacity in terms of money comes to Rs. 60/- per day or Rs. 1800/- per month. Thus the annual loss of income / reduction in earning capacity of the claimant comes to 21,600/-. There is no dispute as to the multiplier "11" being adopted by the claims Tribunal. Therefore, if this amount of 21,600/- is multiplied by the multiplier "11" the total loss of future earnings/ reduction in earning capacity in terms of money comes to Rs. 2,37,600/- and the same is hereby awarded as against 69,300/- awarded by the claims Tribunal under this head. Thus, the claimant shall be entitled to an additional amount of Rs. 1,68,300/- under this head and the same is rounded off to Rs. 1,68,000/-.

22. The Claims Tribunal has awarded a sum of Rs. 6,370/- under the head "loss of income during the period of treatment and rest" for three months by taking the income at Rs. 70/- per day or Rs. 2,100/- per month. If the income of the claimant is taken at Rs. 3,000/- per month as against Rs. 2,100/- per month as held supra, there would be difference of Rs. 900/- per month. Therefore, the claimant shall be entitled to an additional amount of Rs. 2,700/- (Rs. 900x3) under this head.

23. The claims Tribunal has awarded Rs. 10,750/- towards "medical expenses". It has relied upon the documents at Ex. P14 series, the bills and cash memos. As could be noticed from the dates on these bills, they pertain to the dates prior to the occurrence of the accident. Therefore, the claims Tribunal is not justified in relying upon the said documents. These bills disclose that the medicines there under were purchased about a month prior to the occurrence of the accident in question. Referring to these documents (Ex.P14 bills and cash memos), learned Counsel for the Appellant - insurer strongly contends that the claimant was already ailing earlier to the occurrence of this accident and therefore the disability which he has suffered should not have been taken as a result of the injuries sustained by him in the accident. This submission is contrary to material on record inasmuch as Exs. P16 and P17, the two original case sheets, clearly disclose that the claimant was admitted in the District Hospital, Kolar on the very date of accident and the doctor found fracture of mid shaft of left femur which was fresh and therefore the injured - claimant came to be admitted as inpatient in the said hospital and he was operated for the said fracture. Even if it were be a fact that the claimant had some ailment about a month prior to the accident there could be no nexus between the said ailment and the fracture sustained by the claimant as a result of the said accident consequent to which he suffered that much of physical disability.

24. Though the Claims Tribunal is not justified in awarding Rs. 10,750/- towards "medical expenses" placing reliance on the said bills, for the reason that the medicines there under were purchased prior to the date of accident, in view of the established fact that the claimant was treated as inpatient for a period of 88 days and he underwent two surgeries, even in the absence of any medical bills, he deserves to the grant of compensation of Rs. 10,000/- towards "medical expenses". Therefore, the said amount of compensation awarded by the Claims

Tribunal under the head "medical expenses" need to be reduced from Rs. 10,750/-to Rs. 10,000/- resulting in reduction by Rs. 700/-

25. In view of my foregoing discussion the present appeal of the insurer deserves to be dismissed and the cross objection of the first Respondent - claimant deserves to be allowed in part. Accordingly the appeal is dismissed as Cross objection is allowed in part.

26. In the result, the claimant shall be entitled to receive from the Appellant - insurance company additional compensation as particularised below, over and above what has been awarded by the Claims Tribunal;

Towards pain and sufferings

Rs. 25,000/-

Towards loss of amenities and enjoyment

Rs. 60,000/-

Towards loss of income during the period of treatment and rest

Rs. 2,700/-

Towards loss of future Income / reduction in earning Capacity of the claimant

Rs. 1,168.00/-

Total

Rs. 2,55,700/-

Less the excess amount awarded towards "Medical Expenses"

Rs. 700/-

Rs. 2,55,000/-

(i) Thus the claimant shall be entitled to a total enhanced compensation of Rs. 2,55,000/- with interest thereon at the rate of 6% p.a from the date of petition till the date of actual payment.

(ii) The enhanced amount of compensation with interest thereon shall be deposited by the Appellant - insurance company, along with the balance, if any, as per Award of the Claims Tribunal within eight weeks from the date of modified award.

(iii) From out of this enhanced compensation a sum of Rs. 2,00,000/- shall be deposited into Fixed Deposit in the name of the claimant with any Nationalised Bank of his choice initially for a period of 5 years which shall be renewed for further period of 5 years during his lifetime with a direction to the banker that interest accrued thereon shall be paid to the claimant regularly once in every month or every quarter, as he opts. The banker shall be further directed that the

said amount of Deposit or any part thereof shall not be permitted to be withdrawn nor any loan shall be permitted to be raised thereon by him without the prior permission of the Claims Tribunal. Balance of Rs. 55,000/- shall be paid to the claimant.

Award shall be modified in the above terms. No order as to costs in the appeal and also in the cross objection.

Whatever amount is deposited with this Court shall be transmitted to the Claims Tribunal so as to enable the claimant to withdraw the same.