
(2010) 09 P&H CK 0459
In the Punjab And Haryana At Chandigarh
Case No : F.A.O. No's. 759 and 1001 of 1989

New India Assurance Company Ltd.

APPELLANT

Vs

Jagdish and Others

RESPONDENT

Date of Decision : 07-09-2010

Acts Referred:

Motor Vehicles Act, 1988 — Section 163A, 167, 173
Workmens Compensation Act, 1923 — Section 147, 167, 173, 30, 4

Citation : (2010) 09 P&H CK 0459

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

K. Kannan, J.—The two appeals.

The two appeals in F.A.O. No. 759 of 1989 and F.A.O. No. 1001/1989 arise out of the same award, the former at the instance of the insurer and the latter at the instance of the claimant for enhancement.

II. Entitlement of a workman/driver responsible for accident.

2. The petition for compensation for injuries had been filed before the Motor Accident Claims Tribunal by a driver of a truck, who had been injured in a collision with another truck, whose driver was responsible for causing the accident. The claimant had not merely made the owner of the other truck and the insurer as party but had also made his own employer/owner and the insurer as parties to the claim petition. The insurer of the vehicle, which the claimant was driving is the Appellant before this Court. Although the claimant had contended that the driver of the other truck namely Raghbir Singh was responsible for the accident, the Tribunal found that the claimant himself was responsible. The insurance company pleaded that if the claimant had been the tortfeasor himself, the liability, if at all against the employer-owner, could be only in claim before the Workmen's Compensation Commissioner under the

Workmen's Compensation Act and the petition could not have been successfully prosecuted against the insurer. The Tribunal found that in view of Section 167 of the Motor Vehicles Act enabling a person to file a case either under the Motor Vehicles Act or under the Workmen's Compensation Act, the petition filed before the Tribunal was justified and decided to assess to compensation on the basis of evidence a (sic) awarded a compensation of Rs. 25,000/- against the insurer of the vehicle, which he was himself driving.

III. Choice of forum u/s 167 arises only if claims are possible in a given situated under both MV and WC Acts.

3. The issue of jurisdiction in (sic) collision between vehicles at the instant workmen or the representatives have (sic) themselves source of several litigations an (sic) necessary to stave clear of the cobweb (sic) claptrap and obtain a proper legal perceptional the respective spheres of jurisdiction under the Workmen's Compensation Act and under the Motor Vehicles Act. There could be no doubt that if a claim is possible both under the Motor Vehicles Act and under the Workmen's Compensation Act, Section 167 will certainly be attracted and it will enable the workman to prosecute in either of the Forums. However, the respective enactments have their own limitations of applicability and it may not always be that a workman will not be able to claim compensation under the Motor Vehicles Act only because the accident resulted out of the use of motor vehicle. Under the Workmen's Compensation Act, all that could be necessary, would be to show that the accident arose out of and in the course of employment. The issue of negligence of the workman itself may not always be relevant, except in cases of injuries where the employment injury had been the result of doing an act which is expressly against the instructions given by the employer. The mere act of negligence may not exclude liability for the employer. Therefore, in motor accident situation if the workman had been guilty of causing an accident by his negligent driving, if the accident arose out of or in the course of employment, a petition under Workmen's Compensation Act would be perfectly maintainable and in such an event, the insurer's liability will also be attracted.

4. On the other hand, the same accident that resulted by his negligent act may not give rise to a claim for compensation under the Motor Vehicles Act. A claimant, who is a workman cannot successfully prosecute a claim for his own tortuous act before the MACT under the "Motor Vehicles Act. The principle of providing compensation under the Act is still on the basis of fault which provides the philosophical foundation of a tort law liability, but secured through statutory prescription under MV Act. A workman, who is a driver, will fail in an action under the Motor Vehicles Act if he were to make the allegation that the accident took place by his own fault. Here Section 167 cannot come into play, for the Workman's remedy was only under the Workmen's Compensation Act and not under the Motor Vehicles Act. The exercise of option also, therefore, does not arise.

IV. Claims u/s 163-A MV Act for one's own neglect does not normally lie, unless policy conditions make it possible.

5. The experience, however, has been that applications u/s 163-A are filed at the instance of the workmen on an assumption that the issue of negligence is an irrelevant fact for a claim under structured formula and therefore, petitions are filed by a workman or his representatives even in cases where he had involved himself in an accident by driving into ditch or hitting against a tree. It is doubtful whether such claims are possible, for what Section 163-A contemplates is the non-necessity for having to prove negligence in another person, who had caused the accident, it cannot be understood as giving a license for even a tortfeasor to make a claim u/s 163-A of the Motor Vehicles Act. In such situations, the duty of the Tribunal shall only be to refer the claimant or the representative to approach the Workmen's Compensation Commissioner for appropriate remedy, if the claim arises out of an accident injury caused to a workman in the course of or out of employment. I am not addressing a situation, where under the specific policy conditions, the risk to a driver is undertaken for death or injuries in a motor accident, (even apart from the liability under WC Act as in an Act policy u/s 147), where additional premium is paid for a driver who is duly licensed. In all other situations, it will be wrong for the MACT itself to assume the powers of the Workmen's Compensation Commissioner. The modes of appointment and the powers of Workmen's Compensation Commissioner and MACT judge are sourced to distinct notifications under WC Act and MV Act respectively and therefore, it will be wrong for a judge exercising jurisdiction under the Motor Vehicles Act to treat himself as a Workmen's Compensation Commissioner and decide the case. This statement applies only to the Tribunal but may not apply to a High Court exercising jurisdiction in an appeal from a Tribunal because, even if it were to be contended that the Tribunal did not have a power of the Workmen's Compensation Commissioner, High Court is the appellate jurisdiction both under the Motor Vehicles Act u/s 173 and under the Workmen's Compensation Act u/s 30. Inherent powers that may not exist for a Tribunal, however, would exist for a High Court as an authority to decide on the dispute under the particular enactment.

V. In a collision situation where on averments, cause of action under MV Act is made, it would continue to exercise jurisdiction, even for accident resulting out of workman's negligent act.

6. Another situation could arise and that is what has happened in this case. On the averments made in the petition attributing the negligence on the part of the driver of the other vehicle, Reghbir Singh, the petition before the Motor Accident Claims Tribunal was clearly maintainable. He had made the owner as well as the insurer of the other truck also as parties. However, by consideration of the evidence at the trial, the Tribunal came to the conclusion that the accident was a result of his own negligence. In such a case, the question is whether Tribunal loses jurisdiction, making it imperative to refer the matter to the Workmen's

Compensation Commissioner, by the legal reasoning expounded in the earlier paragraph. It is not truly an insurmountable conundrum in the sense that it is not as if it is untraversed judicial territory. A somewhat similar situation, involving the interplay of the provisions of the Motor Vehicles Act and the Railways Act came for consideration before the Hon''ble Supreme Court in Union of India (UOI) Vs. United India Insurance Co. Ltd. and Others, . The two member Bench originally held that in a case where there is a collision between a motor vehicle and a train, if a petition were to be filed by the passengers of a motor vehicle alleging the negligence of the driver of the bus and it turns out at the trial that the bus driver was not negligent, the issue of compensation against the Railway would not be dealt with by the Motor Accident Claims Tribunal itself. The Hon''ble Supreme Court held that the case shall be required to be transferred to the Railway Tribunal. The correctness of this judgment was doubted and in a reference to a larger Bench, this position of law was disapproved in Union of India Vs. Bhagwati Prasad and Others, . The 3 member Bench of the Supreme Court held that Motor Accident Claims Tribunal would have jurisdiction, even if it was found that there was no negligence of the motor vehicle driver, unless, when the case was filed with an express averment that the accident was a result of negligence of the Railways Authorities, in which case the exclusive jurisdiction of the Railway Accident Claims Tribunal would come into effect. The decision of the Hon''ble Supreme Court in Union of India v. Bhagwati Parshad (dead) (supra) case is, therefore, the answer to a contention of the insurer in this case that when the Tribunal found that the claimant was himself responsible for the accident, it would lose the jurisdiction. If a right of compensation for a workman could be available on the basis of averments made either under the Workmen's Compensation Act or under the MV Act by operation of Section 167 MV Act, it shall become possible to continue the proceedings and award compensation even if it finds during the trial by proof of facts that one of the forums would not have jurisdiction.

VI. In the exceptional situation enumerated, scale of compensation shall be as provided under special enactment (WC Act) and not as per MV Act.

7. The only difference in such a situation when the right of action was available only under the WC regime, the compensation will then have to be assessed under the scale of compensation provided under the Workmen's Compensation Act itself. It is more a principle of exigency than what would be otherwise not permissible for a Tribunal to do. It shall be wrong to turn a claimant to another Tribunal at the conclusion of the trial for at its institution in the manner in which the averments are made, the petition would have been perfectly tenable. The judgment of the Hon''ble Supreme Court in Union of India v. Bhagwati Parshad (dead) (supra) did not go as far as to say that when the Tribunal was competent to award compensation against the Railway Administration on the basis of sole negligence on the part of the Railway Administration, it could award compensation without reference to the scale of compensation provided under the Railways Act. It must be remembered that under Railways Accident and

Untoward Incidents Compensation Rules of 1990, there is cap on liability against the Railway Administration to Rs. 4 lacs for death and personal injuries. By exercise of jurisdiction by the Tribunal, it may not be that the Tribunal could award even compensation larger than how the Railway Administration could be made liable. Applying the same logic, it shall not become possible for a Tribunal to award compensation larger than the scale of compensation that the Workmen's Compensation Act itself provides. The Workmen's Compensation Act itself does not provide specifically for medical expenses, pain and suffering etc. but provides for a scale of compensation as laid down u/s 4 in the manner specified in Schedule 1 read with Schedule IV. The injuries mentioned in Schedule I refer privation of limbs and not to percentage of loss of earning capacity for fractures or other disabilities arising out of an accident. The latter types of injuries are called in common parlance as non-schedule injuries. The ascertainment of percentage of loss of earning capacity must be carried out only by translation of the disability into loss of earning capacity, on the basis of what a functional disability of a limb results to the particular type of activity or employment that the injured workman was engaged in. The adjudicating mechanism under the Workmen's Compensation Act would allow for adjudication to a Commissioner to determine the percentage of loss of earning power for non-schedule injuries also.

VII. Duty to translate % of disability to % of earning power.

8. In this case, the evidence that has been brought before the Court is that by the injury sustained in the accident, the claimant had suffered 25% disability. At the Tribunal, evidence was led to the effect that the claimant was removed to the Civil Hospital at Karnal after the accident and from there, he had been referred to Medical College and Hospital at Rohtak where he remained admitted for a period of one month and 10 days and later he continued his treatment for 5 - 6 months. He had been operated upon and skin grafting had been done. Traction had also been applied to the right tibia. It appears that there was also yet another fracture of right femur and it was reduced by operation and application of plaster of paris. Skin grafting has also been done. After the period of treatment, it was found at the time of trial that there was a mal-union of fracture of the right side and also on the left side of the knee. Fracture of the right tibia was united with deformity and there was a shortening of limb by 1 cm. The disability regarding the ankle had been fixed at 20% and regarding the knee, it had been fixed at 25%. The disability that had been elicited for the ankle and the knee must be understood as functional disability. For knee or an ankle, which constitute the lower limbs of the body, the following facts are held to be relevant in the guidelines issued by the Ministry of Welfare, Government of India for obtaining Uniform Disability Assessment Standards. A full functional ability of a lower limb would be assessed from the point of view of mobility and stability. Mobility would be assessed with reference to range of movement and muscles strength. The value of maximum range of movement in the mobility component is 90%. Each of the three joints namely hip, knee and (foot) ankle is weighed

equally 30% or 30. The principle of evaluation of muscles strength comprises of value of muscular strength taken at 90% and the strength of muscles is normally graded between grade to grade 5. This minor technical details as provided are brought out only to show that the method of assessment of disability is scientific and addresses a situation which is different from assessing loss of earning capacity. They are not synonymous, as they are normally mistaken. The mode of arriving at loss of earning capacity for non-schedule injuries is not as scientific. There is a degree of subjectivity to apply to find out as to what extent of disability could result in what percentage of loss of earning capacity. For a driver, who lost his range of movement for his knee or ankle, he would cease to be a driver. The capacity to work as a driver may completely be lost. If we are looking at the overall impairment to be merely of one knee and one (ankle) foot, the loss of earning capacity may not be 100%. He may be fit for doing several other activities, which should normally depend upon only the work, which he would otherwise be capable of doing. The attempt of the Court shall, therefore, under such circumstances, be to find, if, by Use existence of the particular disability, he could continue to do the same work and whether it would impair his promotional prospects; if not, what other work he could do and then factor the loss of earning capacity depending on the lower scale of operation that he would be capable of doing. For all these assessments, there has to be proper evidence. The Tribunal has awarded compensation in the manner provided under the Motor Vehicles Act providing for pain and suffering, medical expenses, loss of earning capacity and personal disability. These heads of compensation are irrelevant under the scheme of compensation provided under the Workmen's Compensation Act where percentage of loss of earning capacity has to be found. I shall deem it necessary to remit the matter before the Tribunal itself to give liberty to the parties to adduce evidence on how the existing disability has impacted on his driving abilities as a driver and if he cannot drive vehicles any more, to what other activity that he is capable of doing and the likely result of loss of earning power assessed on such a basis. If that exercise is completed, then the Tribunal shall proceed to determine compensation by applying the relevant factor under Schedule IV and finalize the compensation in the manner set forth u/s 4 of the Workmen's Compensation Act.

VIII. Present disposition.

9. The amount awarded by the Tribunal was a measly Rs. 25,000/- and the same is directed to be deposited, if it has not already been done and the claimant shall also be entitled to withdraw the same without any security. Since there is a claim for enhancement in F.A.O. No. 1001/1989, the matter shall secure a fresh adjudication in the Eight of the above directions. If the amount determined by the Tribunal, under such an exercise, is in excess of what was already awarded, the same shall be duly assessed and award passed thereon. But, in the event of the amount being found to be less than Rs. 25,000/-, there shall be no requirement of having to refund the same to the insurance company. Having regard to the finding that the Tribunal had the jurisdiction to entertain the case

on the basis of averments made in the petition, the challenge to the award taken by the insurance company in its appeal and the liability for compensation arising under such an award are both rejected and the appeal filed in by the insurer stands dismissed with costs assessed at Rs. 5,000/-. F.A.O. No. 1001/1989 is allowed, setting aside the award only in so far as it delimits the compensation at Rs. 25,000/- and remitted to the MACT at Kurukshetra for adjudication in the light of the directions given above.

10. For appearance of the parties before the Tribunal on October 5, 2010.