(2013) 11 MAD CK 0124

In the Madras High Court

Case No : C.M.A. No. 695 of 2009

R. Venkatesan — APPELLANT

Vs

V. Jaganathan, The New India Assurance Co. Ltd., P.S. Krishnan and The United India Insurance Co. Ltd. — RESPONDENT

Date of Decision : 27-11-2013

Acts Referred:

Citation : (2013) 11 MAD CK 0124

Hon'ble Judges : S. Vimala, J

Bench : Single Bench

Advocate : A.N. Viswanatha Rao, for the Appellant; V. Kabirdoss, for the Respondent

Final Decision : Partly Allowed

Judgement

S. Vimala, J.—A person injured in an accident leaves his family in greater distress, vis-?-vis a family in a case of death. In the latter case, the initial shock gives way to a feeling of resignation and acceptance, and in time, compels the family to move on. The case of an injured and disabled person is, however, more pitiable and the feeling of hurt, helplessness, despair and often destitution enures every day. The support that is needed by a severely handicapped person comes at an enormous price, physical, financial and emotional, not only on the victim but even more so on his family and attendants and the stress saps their energy and destroys their equanimity". Thus the poignant position of the claimant was expressed the Hon''ble Supreme Court, in the decision reported in the case of Nizam Institute of Medical Sciences Vs. Prasanth S. Dhananka and Others, . But still the Tribunal did not understand and appreciate the duty to award ''just compensation'' and exhibited the mechanical approach towards calculation of loss. As against the claim made for a sum of Rs. 15,00,000/-, the Tribunal granted a sum of Rs. 2,85,670/-, when the claim was made by the claimant, R. Venkatesh, aged 16, studying 10th standard at Ebenezer Matriculation School, who suffered amputation of leg above knee. This is under challenge in this Appeal.

2. Explaining the need for awarding full and fair compensation, the Hon''ble Supreme Court observed in the case of Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and Another, , thus:--

7. ...The whole idea is to put the claimant in the same position as he was in so far as money can. Perfect compensation is hardly possible but one has to keep in mind that the victim has done no wrong; he has suffered at the hands of the wrongdoer and the court must take care to give him full and fair compensation for that he had suffered....

2.1. The heads under which compensation should be awarded in the case of personal injury and the principles involved in assessing the compensation have been explained in the case of Raj Kumar Vs. Ajay Kumar and Another, :-

A person is not to be compensated for the physical injury, but also for the loss which he suffered as a result of such injury. This means that he is to be compensated for his inability to lead a full life, his inability to enjoy those normal amenities which he would have enjoyed but for the injuries, and his inability to earn as much as he used to earn or could have earned.

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

Pecuniary damages (special damages)

(i) Expenses relating to treatment, hospitalisation, 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 injuries.

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

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

2.2. Govind Yadav Vs. The New India Insurance Company Limited, . While pointing out that the principle laid down in the case of Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and Another, and Raj Kumar Vs. Ajay Kumar and Another, should be followed by all the Tribunals and the High Courts in determining the quantum of compensation payable to the disabled victims. The

Hon''ble Supreme Court observed further, with regard to award of future medical expenses, covering compensation for artificial leg.

The award made by the Tribunal for future medical expenses was wholly inadequate. In Nagappa Vs. Gurudayal Singh and Others, , this Court considered whether it was permissible to award compensation in installments or recurring compensation to meet the future medical expenses of the victim. After noticing the judgment of M. Jagannadha Rao, J. (as he then was) in P. Satyanarayana through his wife P. Mahalakshmi Vs. I. Babu Rajendra Prasad and Another, , the judgment of the Division Bench of the Kerala High Court in Valiyakathodi Mohammed Koya Vs. Ayyappankadu Ramamoorthi Mohan and Others, , this Court observed:

In this view of the matter, in our view, it would be difficult to hold that for future medical expenses which are required to be incurred by a victim, fresh award could be passed. However, for such medical treatment, the court has to arrive at a reasonable estimate on the basis of the evidence brought on record. In the present case, it has been pointed out that for replacing the artificial leg every two to three years, the appellant would be required to have some sort of operation and also change the artificial leg. At that time, the estimated expenses for this were Rs. 18,000 and the High Court has awarded the said amount. For change of the artificial leg every two or three years no compensation is awarded. Considering this aspect, if Rs. one lakh is awarded as an additional compensation, the appellant would be in a position to meet the said expenses from the interest of the said amount.

2.3. Explaining the necessity of revisiting judgments relating to compensation, keeping in view the fast changing societal values, the impact of globalisation on the economy of the Nation and their impact on the life of the people, the Hon''ble Supreme Court in the case of Santosh Devi Vs. National Insurance Company Ltd. and Others, pointed out thus:--

11. ...Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people.

Explaining the necessity of putting the victim to pre-accidental position and what is to be done to put the victim to pre-accidental position, the Hon''ble Supreme Court has pointed out that apart from pecuniary losses, non-pecuniary loss also has to be taken into account, while awarding compensation. The relevant observation reads thus:-

In cases of motor accidents the endeavour is to put the dependants/claimants in the pre-accidental position. Compensation in cases of motor accidents, as in other matters, is paid for reparation of damages. The damages so awarded should be adequate sum of money that would put the party, who has suffered, in the same position if he had not suffered on account of the wrong. Compensation is therefore required to be paid for prospective pecuniary loss i.e. future loss of income/dependency suffered on account of the wrongful act. However, no amount of compensation can restore the lost limb or the experience of pain and suffering due to loss of life. Loss of a child, life or a limb can never be eliminated or ameliorated completely.

To put it simply--pecuniary damages cannot replace a human life or limb lost. Therefore, in addition to the pecuniary losses, the law recognises that payment should also be made for non-pecuniary losses on account of, loss of happiness, pain, suffering and expectancy of life, etc. The Act provides for payment of "just compensation" vide Sections 166 and 168. It is left to the courts to decide what would be "just compensation" in the facts of a case.

3. New India Assurance Co. Ltd. Vs. K. Kartheeswaran and Another, . In a case of 17 years old school student, who suffered amputation of left leg above knee, compensation of Rs. 13,90,000/- was awarded.

4. Sri Kumaresh Vs. The Divl. Manager National Insurance Company Ltd. and Another, . It is a case of amputation of right leg, below knee. The injured was aged 20 working as a Building Centering Worker, drawing Rs. 6,000/- per month. Compensation awarded by the Tribunal was Rs. 5,48,000/-, which was enhanced to Rs. 9,97,000/- by the Supreme Court.

5. As against the claim made for a sum of Rs. 15,00,000/-, the Tribunal granted a sum of Rs. 2,85,670/-. The claimant, R. Venkatesh, aged 16, studying 10th standard at Ebenezer Matriculation School, who was also a kabadi player, met with an accident on 02.11.2004 and suffered amputation of traumatic. The Tribunal has awarded a sum of Rs. 2,86,670/- and the break up details are as furnished hereunder:--

Compensation for permanent disability - Rs. 1,60,000/-

Partial and permanent disability - Rs. 10,000/-

Pain and sufferings ? Rs. 20,000/-

Transport to hospital -Rs. 4,000/-

Future transport to hospital - Rs. 4,000/-

Extra nourishment -Rs. 7,000/-

Damages to clothing -Rs. 1,000/-

Attender charges -Rs. 7,500/-

Medical expenses -Rs. 2,170/-

Mental shock and agony - Rs. 20,000/-

Loss of future marriage prospects - Rs. 50,000/-

Total - Rs. 2,85,670/-

5.1. The Tribunal, while quantifying the compensation has taken the formula of awarding Rs. 2,000/-, per percentage and has awarded a sum of Rs. 1,60,000/- in respect of 80% of disability.

5.2. The formula to be adopted is applicable only in case of injuries which did not result in total loss of earning capacity. In a case, where the injury results in total and permanent loss of earning capacity, the Tribunal ought to have adopted the multiplier method of quantification, by adopting suitable multiplier in respect of age of ''16'' year old student and also by taking into account, the future prospective earning of injured. But that has not been done. The mathematical formula has been mechanically applied by the Claims Tribunal, adopting artificial standards, without looking into the consequences of injury and the impact of the injury upon the mind of the young boy. Therefore, it is a case where this Court has to interfere with the award passed by the Claims Tribunal.

5.3. Admittedly, the injured was a student, aged 16, standing by the side of centre-median and he was hit unaware by a lorry, which was driving rashly and negligently. This is a case where the principle of rep ipsa loquitur also applies.

5.4. The Doctor has given evidence stating that it is not possible to fix an artificial limb for the injured because of the peculiar way in which amputation has occurred. Therefore, it is clearly a pathetic case where the artificial leg also will not come to the aid of the claimant. Therefore, throughout the life, he has to depend upon the family members or relatives for his assistance.

5.5. As rightly pointed out by the learned counsel for the appellant, the son, who has to be a support for his parents, is now under the mercy of the parents and they have to be the supporters throughout his life. In such circumstances, even though money is not an equivalent for leg, the equivalent in money, which would provide a helping hand to the claimant should be provided. Only with the assistance of money, he would be able to get the assistance of somebody else throughout the life.

5.6. All the aforestated factors have to be taken into account while assessing the quantum of compensation. Being a student of 10th standard, he would have completed his school education and he would have been placed fairly in good employment. However, even considering the modest estimate of the income at Rs. 4,000/- per month and the annual income, being Rs. 48,000/-, adopting the multiplier of ''18'', the loss of income would be Rs. 8,64,000/- (Rs. 48,000/- x 18).

5.7. In respect of artificial limb, there cannot be an award, as the Doctor has certified that it is not a fit case where artificial limb can be fixed. However, the assistance to be rendered with the assistance of artificial limb has to be alternatively provided by substituting/engaging the services of paid servants/ relatives as the case may be. Therefore, atleast a sum of Rs. 2,00,000/- has to be awarded towards cost of attendant. Hence, a sum of Rs. 2,00,000/- is awarded towards cost of attendant.

5.8. Considering the fact that he has been continuously in treatment, as inpatient, pain and sufferings is awarded at Rs. 1,00,000/-. As pointed out already, he is a Kabadi player and throughout his life, he will not be in a position to enjoy the life like the persons similarly placed like him. The sufferings on account of amputation has to be taken into account to consider the quantum of compensation for loss of enjoyment of amenities. The question is whether at any point of time, the injured will be in a position to enjoy his life or he would be suffering from mental health problems on account of pains specific to amputation.

5.9. A cross-sectional study of post-amputation pain in upper and lower limb amputees, done by Davidson JH, Khor KE, Jones LE. revealed that Upper limb amputees experienced significantly greater proportion, frequency and severity of post-amputation pain than lower limb amputees. The presence of significant pre-operative pain did not correlate with the development of persistent post-amputation pain. In quality of life measures, the amputees experienced a better physical function, role physical and confidence in performance of activities than chronic pain patients attending the pain clinic. Lower limb amputees fared better than upper limb amputees in terms of bodily pain, social function and mental health. However, the amputee groups have a reduced health status in almost all domains compared to the aged matched Australian population norm. The study suggests that upper limb amputees are significantly more likely to suffer post-amputation pain which is more frequent, longer lasting and more severe in intensity when compared to lower limb amputees. Therefore, the loss of enjoyment of amenities is quantified at Rs. 2,00,000/-.

5.10. Medical expenses, would have been much more considering the nature and period of treatment at various hospitals. However, as the medical bills have been produced only to the extent of Rs. 2,170/-, and as per the bills produced, it is awarded at Rs. 2,170/-, which obviously is very less.

5.11. Transport expenses is awarded at Rs. 20,000/-. Having regard to the amputation suffered, extra nourishment is awarded at Rs. 8,000/-. Definitely, from the photograph, it is evident that nobody would be willing to marry him and he would be facing loss of marital pleasures and support of companion through the life. Therefore, loss of marital prospects is estimated at Rs. 1,00,000/-. Thus, the total amount of compensation payable would be Rs. 14,94,170/-.

6. Learned counsel for the respondents/Insurance Company relies upon a decision of the Hon''ble Supreme Court, reported in the case of Master

Mallikarjun v. Divisional Manager, National Insurance Co. Ltd., and another, (Civil Appeal No. 7139 of 2013) where-under it has been pointed out that in the case of children, it would be difficult to have an accurate assessment of compensation and therefore, if the disability is above 10% and up to 30% of the whole body, it is Rs. 3,00,000/-; up to 60%, it is Rs. 4,00,000/- and up to 90%, it is Rs. 5,00,000/- and above 90%, it will be Rs. 6,00,000/-. Relying upon this judgment, the learned counsel for the Insurance Company submitted that the compensation in any event can only be at Rs. 5,00,000/- as the percentage of disability is certified at 85%.

6.1. This contention cannot be accepted, as the physical disability is totally different from functional disability. Physical disability need not always be the same as the functional disability. The functional disability would depend upon the nature of the job vis-?-vis the part of the body affected. In cases of loss of limb which would be sine qua non for any kind of job and which would be essential to lead even a normal life, the loss of earning capacity would be 100%. Having regard to the fact that he is a student, expecting future and he has been immobilized throughout his life, his functional disability should be 100%. Even in the case, cited supra, it has been pointed that, when there are exceptional circumstances to take a different yardstick, it should be adopted by the Tribunal.

6.2. This is a case, where there are exceptional circumstances, which would go to show that the life of a claimant is vegetative living. He has to remain as a liability to the entire family throughout his life.

7. In the result, this Civil Miscellaneous Appeal is partly allowed, enhancing the quantum of compensation from Rs. 2,85,670/- to Rs. 14,94,170/-.

It is represented that already the Insurance Company has deposited the amount, as awarded by the Claims Tribunal. Therefore, the enhanced amount of compensation is payable by the Insurance Company with interest at 7.5% per annum, from the date of petition to till the date of deposit, within a period of six weeks from the date of receipt of a copy of this judgment. Out of the compensation awarded, 50% of the amount shall remain in any of the Nationalised Banks, in a fixed deposit re-investment scheme, for a period of five years and to be renewed, subject to the will of the claimant. The rest of the amount shall be withdrawn by the claimant.