(2015) 05 KL CK 0066

In the High Court Of Kerala

Case No : M.A.C.A. No. 2340 of 2010

Reji P. Alex — APPELLANT

Vs

S. Jalajamani and Others — RESPONDENT

Date of Decision : 28-05-2015

Acts Referred:

Citation : (2015) 05 KL CK 0066

Hon'ble Judges : T.R. Ramachandran Nair, J;K.P. Jyothindranath, J

Bench : Division Bench

Advocate : S. Rajeev and K.K. Dheerendrakrishnan, for the Appellant; C.B. Sreekumar, Advocates for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J.

1. In this appeal filed by the claimants the main grievance is regarding the non-consideration of his employment as a driver in gulf countries. The Tribunal even though considered the evidence produced by the appellant did not award compensation by treating him as a driver working in Dubai but applied the Indian conditions and then fixed monthly salary at Rs. 6,000/-.

2. For having a complete picture of the accident and injuries we will refer to the following details: The accident occurred on 18.1.2003 at about 9 p.m. while he was riding a motorcycle bearing registration No. KEE/4152 through Kottamukal - Vadakkedathukavu public road. It was hit by an ambassador car bearing registration No. KL-05/D 8868 and as a result of which he sustained very serious injuries including compound fracture on his right leg. He was immediately taken to the Maria Hospital, Adoor and after giving first aid he was referred to Century Hospital Mulakuzha. He was treated there as an inpatient till 4.2.2003. Again he was treated there from 20.2.2003 and discharged on 1.3.2003. Subsequently also he had underwent inpatient treatment in different hospitals.

3. It was claimed that his monthly salary was 3,600 Dirhams equivalent to Rs.

43,200/- and under various heads the petitioner calculated damages at Rs. 16,61,000/- and the claim is limited to Rs. 15,00,000/-. The Tribunal awarded an amount of Rs. 8,65,875/-.

4. Heard both sides. Exts. A1 to A24 series have been produced before the Tribunal and he was examined as P.W. 1. The Tribunal found that the driver of the offending vehicle was negligent. We are not called upon to decide anything about the legality of the said finding. Therefore we concur with the same.

5. As far as the procedures of treatment are concerned, it may require a detailed evaluation in view of the argument raised by the learned counsel that he has not fully recovered from the effects of the injury even now. Exts. A9, A22 and A23 are treatment records of the appellant. It is submitted by the learned counsel for the appellant that he had undergone four surgeries namely on 26.10.2005, 22.10.2006, 7.11.2007 and 7.11.2009. Ext. A9 (1) is the medical certificate issued from Century Hospital. It will show that he was admitted on 18.1.2003 immediately after the accident. He had compound comminuted fracture both bones right leg lower thirds -with crushed soft tissue injury and bone loss. Debridement with open reduction and external fixation with AK POP slab right has been done. Ext. A9 (2) is the next discharge summary which will show that he was treated as an inpatient in the hospital from 18.1.2003 till 4.2.2003 (16 days). The next treatment certificate is Ext. A9 (3) issued from the Mary Queen Mission Hospital, Kanjirappilly. It will show that he was treated as inpatient from 10.9.2003 to 19.9.2003 (9 days). The next treatment certificate is Ext. A9 (5) issued form Holly Cross Hospital, Adoor dated 27.12.2003. He was treated in that hospital from 1.7.2003. Ext. A9 (6) is the discharge summary issued from Thiruvalla Medical Mission Hospital, where he was treated as an inpatient from 1.1.2004 to 12.1.2004. Later he was treated in Pushpagiri Medical College Hospital, Thiruvalla which is supported by Ext. A9 (7) discharge summary and the period of treatment is from 18.4.2005 to 28.5.2005 as an inpatient. As on that day the diagnosis was "non union right tibia M/3, L/3 junction with united fracture fibula". Again he was admitted in the same hospital on 24.10.2005 and discharged on 1.11.2005 and later from 20.11.2006 to 2.12.2006. These details are supported by Exts. A9 (8) and A9 (9). Still later he was treated as an inpatient in the same hospital from 5.11.2007 to 15.11.2007. Thus the total inpatient treatment is for a period of 107 days and he had undergone major operations during the course of treatment.

6. We will now come to Exts. A22 and A23. Ext. A22 is the medical certificate issued from Thiruvalla Medical Mission Hospital dated 6.11.2009. It will show that the fracture had united and he is able to walk and it is further stated that he had discharge of sinuses on his leg which needs continuous treatment.

7. Ext. A23 dated 12.11.2009 is another discharge summary issued from Pushpagiri Medical College Hospital, Thiruvalla. The said certificate will show that as on that day he was walking with full weight bearing. A mild anterior bowing of Tibia present at middle and lower 1/3rd junction. There was discharge of sinus at

middle and lower 1/3rd junction. It is also stated as follows: "ROM - full at ankle and knee joint. No DNVD. Other joints normal." He was advised to have a further review also.

8. The Tribunal, in the light of Exts. A22 and A23 medical certificates was of the view that since there is discharge of sinuses, further treatment is necessary.

9. Ext. A8 is the disability certificate issued by the Medical Board of the General Hospital, Pathanamthitta. There they have noted shortening of 2 c.m. of right leg. Partial ankylosis of right ankle and stiffness of all toes of right foot present. It is also recorded that he can walk only with support and is unable to squat and as per Mcbrides index the permanent disability is noted as 35%.

10. In paragraph 13, the Tribunal has recorded the observations on time when he was present in that court. It is noted therein that even now the wounds are not healed and he is walking with the help of stick and he has sustained serious disability on his right leg.

11. Since the main argument is with regard to the employment and the salary which should have been reckoned by the Tribunal, we will have to refer to the documents in support of the same. Exts. A10, A18 and A19 are the crucial documents relied on by the appellant. Ext. A10 is the driving license obtained from United Arab Emirates, Ministry of Interior, Sharjah Police, which is valid from 7.3.1992 to 6.3.2012. In Ext. A18 which is the certificate issued by the Head of Driver''s Affairs, Roads and Transport Authority, Government of Dubai it is stated as follows:

"This is to certify that Mr. Rangi Panackachirayil Alex (Indian) nationality was working with Dubai Transport as a (Driver) from 29.7.1997 to 3.2.2003."

12. In Ext. A19 the details of salary have been recorded, going by which it will be 5028 Dirhams and after conversion it will be Rs. 50,000/-, according to the learned counsel for the appellant.

13. The Tribunal has not fully accepted the case of the appellant that he had a permanent employment in gulf countries. It is seen from Ext. A11 that he had valid visa from to 22.10.1996 to 21.10.2006. In the evidence his case is that he was expected to go back for continuing his job (actually he went back on 20.5.2003 according to P.W. 1 but because of the disabilities he returned to India on 9.6.2003 and in view of the disability he was not re-employed.)

14. The learned counsel for the Insurance Company relied upon the judgment of this court in Sherfuddin v. Saveesh K. [2014 (1) KHC 242 (DB)] wherein the view taken is that employment in gulf countries is on contract and not on permanent in nature and therefore in such cases, compensation can be calculated based on Indian conditions by fixing a reasonable amount for a similar post in India.

15. In this case the Tribunal was of the view that the monthly income can be fixed as Rs. 6,000/- and Ext. A19 cannot be taken into account. This amount was

fixed after finding that he was working in Dubai for a considerable period. It was also observed that in gulf countries the appointments are made on contract and there is no security for employment. Even though the learned counsel for the appellant argued vehemently that Exts. A18 and A19 could have been accepted and compensation ought have been fixed accordingly, we cannot agree. In Ext. A18 certificate which we have extracted, his employment period was ending on 4.2.2003. As far as the possibility for renewal and any like offer, what we are having is the oral evidence of the appellant alone which is not supported by any offer in writing by any employer. In that view of the matter, we will not be justified in taking the monthly income he was getting in Dubai for fixing the compensation.

16. But at the same time we will have to consider the fact that he was having a driving licence for driving vehicles in Dubai. The said driving licence was valid and continue to be so for a number of years. Therefore, the potential as a driver for getting employment in Dubai was there, but for the accident. In that view of the matter after considering the employment potential also, we fix the monthly income at Rs. 7,000/- instead of Rs. 6,000/- fixed by the Tribunal for assessing the compensation.

17. Next aspect is the disability factor. As far as the disability for the limb concerned the assessment is 35%. In a case like this where he was having a driving licence for getting employment as a driver the question will be whether the injuries and the disabilities will result in functional disability, which going by the various decisions of the Apex Court we will have to assess. Even though the learned counsel for the appellant submitted that he will not be able to work as a driver and therefore the functional disability should be taken as 100%, we cannot agree. The learned counsel relied upon the judgment of a Division Bench of this Court in United India Insurance Co. Ltd, Palakkad v. Jayaprakash and Ors. [2014 (4) KHC 905], by one of us (T.R. Ramachandran Nair J.) where the injured was a cleaner whose left leg was amputated to above knee and this court adopted 100% functional disability for assessing the compensation. Unlike a case of amputation, herein the major factor is partial ankylosis of right ankle and stiffness of the leg. Of course, he may not be able to work as a driver but it is possible to have other avocations but subject to the disabilities. Therefore, it will be proper to fix the functional disability at 50% for the purpose of assessing the compensation.

18. We are also of the view that the compensation awarded towards pain and sufferings i.e. Rs. 35,000/-, for loss of amenities of life, inconvenience and discomforts caused Rs. 25,000/- and for bystander''s expenses Rs. 10,000/- etc require proper enhancement.

19. One of the aspects to be considered is the necessity to provide proper amount for future treatment also. Since going by Exts. A22 and A23 medical certificates sinus discharge is often there and he will have to continue the treatment.

20. As far as bystander''s expenses are concerned, he was treated as inpatient for a period of 107 days and the Tribunal has granted Rs. 100/- per day, which we enhance to Rs. 200/- per day and the amount will be Rs. 21,400/-. As far as partial loss of earnings are concerned Rs. 7,000/- for a period of 5 months makes the amount to Rs. 35,000/-. For pain and sufferings we fix an amount of Rs. 60,000/- since he had undergone four surgeries and the treatment was continuing for a number of years. Similarly, for loss of amenities and discomforts also, we fix the amount at Rs. 60,000/- since the disability he is now suffering will deny normal pleasures of life and will result in much inconveniences. The compensation towards permanent disability will be Rs. 6,30,000/- and for future treatment we provide Rs. 75,000/-. Accordingly, we re-fix the compensation as follows:

Accordingly, total compensation will be Rs. 12,71,275/- (Rupees twelve lakhs seventy one thousand two hundred and seventy five only). The enhanced compensation will carry interest at the rate of 9% per annum from the date of petition till realisation. There will be a direction to the Insurance Company to deposit the amount of compensation, less the amount already deposited, before the Tribunal within a period of three months and we permit the claimant to withdraw the amount when the amount is deposited by the Insurance Company.

The appeal is accordingly allowed. There will be no order as to costs in the appeal.

