(2018) 05 GAU CK 0112

In the Gauhati High Court

Case No : MACApp. 19 of 2012

Sanjoy Kumar Mahato APPELLANT

Vs

Raju Banik And Anr RESPONDENT

Date of Decision : 18-05-2018

Acts Referred:

Citation : (2018) 05 GAU CK 0112

Hon'ble Judges : MIR ALFAZ ALI, J

Bench : Single Bench

Advocate : S K Medhi, R. Goswami, S. Rasul, M H Rajbarbhuiyan

Final Decision : Allowed

Judgement

1. Heard Mr. J. Das, learned counsel for the appellant and Mr.R.Goswami, learned counsel for the respondent No. 2 and Ms.S. Rasul, learned

counsel for the respondent No. 1/owner of the vehicle.

2. This appeal is filed by the claimant against the judgment and award dated 23/08/2010 passed by learned Addl. District Judge-cum-MACT,

Karimganj in MAC Case No. 57/09, whereby learned tribunal granted a compensation of Rs. 5,38,000/- with interest @ 7% per annum in favour of

the claimant, who sustained injury in a motor vehicle accident.

3. Unsatisfied with the above compensation, the claimant urged for enhancement of compensation on the following components of the award :-

(i) loss of earning.

(ii) Pain and suffering

(iii) other non-conventional heads.

4. Undisputed facts in this appeal are that the claimant sustained injury as a

result of the accident involving the vehicle bearing registration No. AS-

01/5162. The accident occurred due to fault of the driver of the said vehicle. The respondent No. 2 Reliance General Insurance Co. Ltd was the

insurer of the vehicle at the relevant time. Age of the deceased was 30 years.

5. Contention of the learned counsel for the appellant is that the claimant sustained 60% permanent disablement. However, learned tribunal while

assessing the loss of earning, assumed the functional disability as 50%. Further contention of the learned counsel is that the learned tribunal ought not

to have reduced the extent of functional disability to 50%, when the doctor assessed the permanent physical disability as 60%. It is the settled position

of law that in case of permanent disablement due to vehicular accident, the extent of permanent disablement and the resultant loss of earning or

functional disability may not be the same. The Apex Court in Raj Kumar â?"VS- Ajay Kumar and Ors. reported in (2011) 1 SCC 343 dealing with the

correlation between the physical disability and loss of earning capacity or functional disability as a result of physical disability observed in paragraph

10, 11 & 13 as under : -

â??10. Where the claimant suffers a permanent disability as a result of injuries, the assessment of compensation under the head of loss of future

earnings, would depend upon the effect and impact of such permanent disability on his earning capacity. The Tribunal should not mechanically apply

the percentage of permanent disability as the percentage of economic loss or loss of earning capacity. In most of the cases, the percentage of

economic loss, that is, percentage of loss of earning capacity, arising from a permanent disability will be different from the percentage of permanent

8disability. Some Tribunals wrongly assume that in all cases, a particular extent (percentage) of permanent disability would result in a corresponding

loss of earning capacity, and consequently, if the evidence produced show 45% as the permanent disability, will hold that there is 45% loss of future

earning capacity. In most of the cases, equating the extent (percentage) of loss of earning capacity to the extent (percentage) of permanent disability

will result in award of either too low or too high a compensation.

11. What requires to be assessed by the Tribunal is the effect of the permanently disability on the earning capacity of the injured; and after assessing

the loss of earning capacity in terms of a percentage of the income, it has to be quantified in terns of money, to arrive at the future loss of earnings (by

applying the standard multiplier method used to determine loss of dependency). We may however note that in some cases, on appreciation of evidence

and assessment, the Tribunal may find that percentage of loss of earning capacity as a result of the permanent disability, is approximately the same as

the percentage of permanent disability in which case, of course, the Tribunal will adopt the said percentage for determination of compensation (see for

example, the decisions of this court in Arvind Kumar Mishra v. New India Assurance Co.Ltd. - 2010(10) SCALE 298 and Yadava Kumar v. D.M.,

National Insurance Co. Ltd. - 2010 (8) SCALE 567).

13. Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what

activities the claimant could carry on in spite of the permanent 10disability and what he could not do as a result of the permanent ability (this is also

relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of

work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or

(ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying

on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale

of activities and functions so that he continues to earn or can continue to earn his livelihood.â??

6. The Apex Court, in G. Dhanashekar- VS- Managing Director, Metropolitan Transport Corporation, also dealing with the correlation between the

permanent physical disability and resultant functional disability held as under :-

â??As far as compensation for functional disability is concerned, it has to be borne in mind that the principle cannot be uniformly applied. It would

depend on the impact caused by the injury on the victimâ??s profession/career. To what extent the career of the victim has been affected, thereby

his regular income is reduced or dried up will depend on the facts and circumstances of each case. There may be even situations where the physical

disability does not involve any functional disability at all.â??

7. What therefore follows from the above decisions is, that it is not necessary

that the extent of functional disability or the loss of earning capacity

should always be equal to the extent of physical disability. It will all depend upon the facts and circumstances of each case, more particularly, the

nature of injury, nature of occupation undertaken by the injured and other similar attending circumstances, and as such, it may so happen that in a

particular case, the extent of loss of earning may be higher than the extent of physical disability. Similarly in another case, it may also be lower than

the extent of physical disability. There may also be an extreme case, where there may not be functional disability or loss of earning at all, due to

physical disability. Therefore, it is the duty of the tribunal to assess the functional disability or loss of earning as a result of physical disability, keeping

in view the necessary facts and circumstances. In the present case, the physical disability of the claimant was assessed as 60% because of

amputation of the left leg below knee. Evidently the claimant was working as a sardar of labourer, and as such, the occupation of the claimant

invariably involved physical movement.

8. In Sayed Sadiq and Ors. â?"VS- Divisional Manager, United India Insurance Co. Ltd. reported in (2014) 2 SCC 735 where, because of 22%

disability of upper limb and 29% disability of lower limb of a cleaner of truck, the Apex Court assumed the functional disability as 85%. Following the

above principle, and having regard to the nature of injury of the claimant being amputation of leg and the nature of occupation, in my considered view,

the extent of functional disability of the claimant in the instant case could not be less than the extent of physical disability. The learned tribunal, while

reducing the functional disability failed to appreciate properly the impact of the physical disability on the occupation of the claimant. Therefore, this

Court is inclined to accept and assess the functional disability or loss of earning as 60%, i.e., equivalent to the physical disability sustained by the

claimant.

9. Learned counsel for the appellant contended that the claimant was working as a head labourer and he was earning Rs. 10,500/- per month.

However, learned tribunal assumed the income of the deceased as Rs. 4,000/-. The record shows that the claimant adduced some oral evidence

showing that he was earning Rs. 10,500/-. In absence of documentary evidence, with regard to income of the claimant, learned tribunal declined to accept the income as deposed by the claimant. A person engaged in an unorganised sector cannot be expected to produce any documentary evidence

of income (See Sayed Sadiq and Ors. â?"VS- Divisional Manager, United India Insurance Co. Ltd., (2014) 2 SCC 735. In case of a person engaged

in unorganized sector, tribunal should taken a pragmatic view, keeping in mind the beneficial object of the legislation and the ground realities. Be that

as it may, even in absence of documentary evidence, tribunal can assume a reasonable income having regard to the occupation of the claimant and the

ground realities. The accident in the instant case occurred in the year 2009 and apparently the claimant was an unskilled labourer. Having considered

the point of time when the accident took place and that the claimant is an unskilled labourer, the income assumed by the learned tribunal as Rs. 4,000/-

, in my considered view, cannot be held to be unreasonable in absence of any reliable contrary evidence. It is pertinent to mention, that while

determining the loss of earning of the claimant, learned tribunal did not take into account the future prospects of income of the victim and as such,

having regard to the age of the claimant, the claimant shall be entitled to addition of an amount equal to 40% to his actual income. Evidently no amount

was awarded by the tribunal for pain and suffering. Following the principles laid down by the Apex Court in Raj Kumar -VS- Ajay Kumar (supra) and

age of the claimant, the tribunal ought to have granted some amount on account of non-pecuniary damage towards pain and suffering. Having regard

to the nature of the injury and suffering of the claimant, this Court is of the view that an amount equal to 50,000/- should be awarded to the claimant

for pain and suffering. In respect of the quantum of Rs. 50,000/- awarded by the learned tribunal on account of loss of expectation of life, no

modification or enhancement is required. Rs. 20,000/- awarded by the tribunal towards future medical expenses is also not required to be modified as

no evidence was brought on record to substantiate any claim for enhancement in this regard. An amount equal to Rs. 40,000/- for loss of amenities of

life is also granted, as the tribunal did not award any amount on that count.

10. With the above enhancement and modification as indicated above, the enhanced and modified compensation, to which the claimant shall be entitled

is assessed as under :-

Loss of income = Rs. 4,000/- = 1600/- = Rs. 5,600/-X60%X 12X17

= Rs. 6,85,440/- Pain and suffering Loss of Expectation of Life Loss of Amenities of life Future medical expenses

= Rs. 50,000/-

= Rs. 50,000/-

= Rs. 40,000/-

= Rs. 20,000/-

Rs. 8,45,440/-

11. The respondent No. 2 Insurance Co. shall satisfy the above award by depositing the same along with interest, as fixed by the tribunal within 6 (six)

weeks. It is made clear that the quantum of future prospects shall not carry any interest. Payment if any, made in the meantime, shall stand adjusted.

Tribunal shall ensure that 40% of the award is fixed deposited in the name of the claimant in a nationalised bank for a period of two years and 25% is

fixed deposited in the name of the claimant in a nationalised bank for a period of six months.

12. The appeal stands allowed accordingly.

13. Send back the LCR.

