(2015) 07 KL CK 0178

In the High Court Of Kerala

Case No : M.A.C.A. Nos. 578 and 1769 of 2009

United India Insurance Company Ltd. APPELLANT

Vs

Anju Antony RESPONDENT

Date of Decision : 14-07-2015

Acts Referred:

Citation : (2015) 07 KL CK 0178

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

Bench : Division Bench

Advocate : Mathews Jacob, Senior Advocate and P. Jacob Mathew, for the Appellant; R.S. Kalkura, Advocates for the Respondent

Final Decision : Allowed

Judgement

T.R. Ramachandran Nair, J—Both these appeals are filed by the respective appellants aggrieved by the award in O.P.(MV) No. 401/2003 of the Motor Accidents Claims Tribunal, Ernakulam. The Insurance Company who was the third respondent is the appellant in M.A.C.A. No. 578/2009 and the claimant is the appellant in M.A.C.A. No. 1769/2009. The claimant in this case, an Engineering graduate at the time of the accident, but later got employment as Software Engineer in INFOSYS, suffered serious injuries on 17.10.2002 in an accident which occurred at Sahodaran Ayyappan road, Ernakulam at 9.15 a.m. The Tribunal has assessed a total compensation of Rs. 12,22,145/-. Out of the said amount, Rs. 7 lakhs has been granted towards future treatment and in the appeal filed by the Insurance Company, it is contended that the same is an exorbitant amount. As far as the claimant is concerned, enhancement is sought on various heads including medical expenses, for permanent disability, for bystander''s expenses, for extra nourishment, for pain and suffering, for loss of amenities and disfigurement.

2. We heard the learned Senior Counsel for the Insurance Company Sri. Mathews Jacob for the appellant in M.A.C.A. No. 578/2009 and Sri. R.S. Kalkura, Sri. M.S. Kalesh and Sri. Harish Gopinath for the appellant in M.A.C.A. No. 1769/2009.

3. A description of the accident shows that the claimant on the date of accident had boarded the bus bearing Reg. No. KL-01-D-8487 at Vyttila-Janatha stop. She had climbed only to the first step of the foot board and then the driver took forward the bus which caused her to fall down from the bus. Along with her, another lady Smt. Savithamma who was climbing ahead of her also lost balance and both of them were thrown out of the bus. The left back wheel of the bus ran over the left thigh of the claimant causing crush injuries to left thigh from top to knee and beyond. She was immediately admitted in the Medical Trust Hospital, Ernakulam and was treated as inpatient from 17.10.2002 to 7.12.2002.

4. We will be referring to the details of the treatment for assessing claims under various heads. According to her, she was aged 22 at the time of the accident and had obtained Engineering degree in the discipline of Computer Science in June 2002. At the time of the accident she was self employed and it was also contended that she was undertaking work of software development for clients and contractors and was earning Rs. 20,000/- to Rs. 25,000/- a month. She belongs to an upper middle class family. Her father is a qualified mechanical engineer, her mother is a Senior Officer in the Kerala State Electricity Board and her sisters are also doctors and they are married to a Senior College Lecturer and a Marine Engineer.

5. The claimant also alleged that she does not have both thighs and whatever is there are disfigured. The entire cells and flesh of the left leg from hip to knee and beyond were dead and doctors had to remove the entire flesh from left hip to knee and groin, leaving bone fully exposed. It was also stated that several plastic surgeries were conducted for grafting flesh from other parts of the body. This was a continuing procedure and surgeries had to be conducted 13 to 15 times. She had to undertake treatment in St. John''s Medical College Hospital, Bangalore under Dr. Vijay Joseph, Prof. & Head of the Department of Plastic and Reconstructive Surgery, who was examined in this case as P.W. 1.

6. As far as the appeal filed by the Insurance Company is concerned, the learned Senior Counsel for the Insurance Company contended that the Tribunal relied upon Ext. A15, a letter sent to loss assessor (surveyor) by Dr. Vijay Joseph, wherein the expenses for future treatment has been estimated as Rs. 7 lakhs to Rs. 9 lakhs. It is submitted that such an assessment made by the Tribunal is without any support from concrete material as to the treatment to be undertaken and other factors.

7. In this context, the learned Senior Counsel further submitted that the various aspects pointed out by the Doctor would also show that there can be variation in the expenses even for the treatments he has mentioned in Ext. A15. Therefore, it is submitted that the assessment becomes speculative which cannot be justified. It is also submitted that the amount covered by future treatment, the Tribunal has granted interest from the date of petition which also is not a correct method.

8. Apart from replying to the said argument and seeking additional amounts

towards various counts, the learned counsel for the claimant narrated her troubles and sufferings which she had to adjust at the young age of 22. It is submitted that the accident resulted in serious injuries to her and she had to be under bed rest for a continuous period of six months. It is submitted that even at the time when she was employed she was getting very good amount while undertaking work with the contractors and other clients. It is also submitted that the Tribunal ought to have granted the entire amount for which medical bills have been produced viz. for more than Rs. 4 lakhs. Even if consolidated bills might have contained some duplication those alone should have been excluded. The learned counsel further submitted that Serial No. 154 among the medical bills shows an amount of Rs. 29,200/- towards Ayurvedic treatment which she had undergone after her discharge from Medical Trust Hospital. It is submitted that exclusion of the said bill from reckoning cannot be justified. At any rate, the learned counsel submits that a reasonable amount ought to have been granted for Ayurvedic treatment.

9. Great stress was laid by the learned counsel for the claimant on the requirement to have future treatment and the learned counsel also submits that Exts. A10 and A27 really spells out the disabilities she has suffered due to the accident. The learned counsel by referring to the dates on which Exts. A10 and A27 have been issued submits that while the Doctor, P.W. 1 assessed the disability at 12.5%, the Medical Board which issued the latter certificate has assessed it at 16% which shows that there is a constant increase of percentage of disability. It is submitted that she had to undergo treatment in St. John''s Hospital, Bangalore, the details of which have been spoken to by the Doctor, P.W. 1. There cannot be any doubt regarding the requirement to have future treatment as the scars and other difficulties she has sustained had to be corrected and properly cured. Therefore, the learned counsel submitted that the assessment is only reasonable.

10. It is also submitted that there is evidence to show that she had consultation and treatment in U.S., but the Tribunal discarded the same without any justification. It is submitted by the learned counsel that the Tribunal has committed grave error in not reckoning the permanent disability for proper quantification. The learned counsel points out that the Tribunal was guided by the factor that she had obtained a job later. But according to the learned counsel when permanent disability is there as far as the claimant is concerned, irrespective of the functional disability or occupational disability, the injured is liable to be compensated for the physical injury and the consequences thereof. If that be so, the learned counsel submits that 16% disability which has been assessed by the Medical Board should get appropriate reckoning for the assessment of due compensation. The learned counsel in that context submitted that her salary income which is discernible from Ext. A26 could be made use of by this Court for fixing the multiplicand, where the fixed salary is shown as Rs. 31,365/-. She joined the said organization on 19.5.2003. The learned counsel submits that the Tribunal adopted a method by which the disability is calculated

and the compensation is arrived at by reckoning her age of retirement as 60 and the multiplier adopted is 8.

11. The next aspect pointed out is the requirement to award more amounts towards loss of amenities and disfigurement. It is submitted that at the young age, she had to suffer the disability and lot of inconveniences have been caused to her because of the disability sustained, including the one to the knee. Thus the learned counsel submitted that the award will have to be upheld and more amounts will have to be granted.

12. The claimant was examined as P.W. 3 and the Doctor Vijay Joseph was examined as P.W. 1. In her evidence as P.W. 3, she has given certain details with regard to her potential as a Software Engineer and her present job etc. The claimant also supported the medical bills towards Ayurvedic treatment in her evidence. She has narrated the details of other treatments also.

13. We have to consider the evidence of the Doctor P.W. 1, a little elaborately since the vehement attack made by the learned Senior Counsel for the Insurance Company is regarding the letter he has given as Ext. A15 and the requirement for such a huge amount towards future treatment. The Doctor in his evidence in the Chief Examination has confirmed that he had extended treatment to the claimant from July 2003. It is also stated by him that she was operated upon for correcting the scars and disfigurement. According to him, she had extensive loss of skin and soft tissue extending from just below the hip to below the knee. These areas have skin grafts and there are multiple areas of hypertrophic scars on the left thigh. She had also repeated infections and ulcers in the grafted skin. She had stiffness and laxity of ligaments of the left knee. He supported the contents of Ext. A11 certificate, where he had assessed the requirement of further treatments. His evidence will show that she had been consulting him from time to time and was continuing treatment for a long time under him. Therefore, the evidence of the Doctor will indicate that skin grafting was done extensively to treat loss of skin. The aspect concerning the disfigurement has also been spoken to by the Doctor. It appears going by the evidence that skin for grafting has been extracted from other parts of the left leg and right lower limb which has also left scars on the remaining part of the right leg. The evidence of the Doctor will show that to reduce the hypertrophy of the scars she has been using compression garments and the Doctor was asked specifically as how long she has to continue with the said garments and the answer is that she has to use it as long as hypertrophy scar exists and the scar is there. The evidence of the Doctor also indicate that she is having difficulty in standing as it is causing discomfort to her knees also. The Doctor has owned Ext. A15 which has been issued to Surveyor Sri. C.S. Padmanabhan.

14. The certificate issued from the Medical Trust Hospital has been marked as Ext. A3. Under the heading physical findings, the injury is described as degloving injury of left lower limb from groin to middle of leg, with nonviable skin flap and open knee joint with lacerated lateral retinaculum and vastus lateralis tendon.

The treatments undertaken by her include wound debridement and harvesting of skin graft from the degloved skin. Open knee joint debridement and closure done by Orthopaedic Surgeon. This was done was 17.10.2002 and on 19.10.2002 redebridement and coverage of raw area left knee with free microvascular lattissimus dorsi muscle flap from right side was performed. Previously harvested skin graft applied over raw area thigh. Various other treatments done have also been mentioned in the said certificate and the condition on discharge is described as small raw areas over posterior aspect of thigh likely to heal by conservative management and was advised knee mobilisation and walking exercise.

15. It is evident from the evidence of P.W. 1 that she had undertaken consultation after her discharge from the Medical Trust Hospital and especially the Doctor P.W. 1 was specific that skin grafting was done and several surgeries were done. Therefore, we have to take the evidence of the Doctor as convincing regarding those aspects.

16. The assessment by the Doctor as regards the expenses of future treatment is contained in Ext. A15. It will show that for painful scars, she will need steroid injections into them. The Doctor has opined that treatment will depend on whether these scars are painful or whether she wants some of the scarring removed. The expense for each injunction has been assessed as Rs. 3,000/-. As far as the reduction of scars, what is advised is that there should be use of tissue expanders and she will need three expanders for each session which costs Rs. 20,000/- each. It is also explained by the Doctor that each session of expansion involves a surgical procedure to place the expanders, 2 months of expansion, another surgical procedure to remove the expanders, advance the expanded skin and remove part of the scar. According to the Doctor, the two surgical procedures will cost approximately Rs. 1,00,000/- and thus it is assessed that each session of tissue expansion will cost about Rs. 2,00,000/- and this may have to be repeated 3 to 4 times. The intervals between surgeries should be atleast 6 months to 1 year. Thus the cost is assessed as Rs. 7,00,000/- to Rs. 9,00,000/-.

17. At the outset we will have to agree with the learned Senior Counsel for the Insurance Company that the acceptance of Ext. A15 by the Tribunal to grant Rs. 7 lakhs is slightly excessive. Of course, she requires future treatment, which is the valuable opinion given by the Doctor which we have to reckon also. But as far as the expenses are concerned, while granting compensation, the Court will have to assess various factors and to see that amount granted is not exorbitant for any extent. Therefore even though the learned counsel for the claimant submitted that this Court should accept Ext. A15, which is the assessment by the Doctor of the amount required, unless there are further materials to support the expenses, we will not be justified in granting the entire amount indicated in Ext. P15. But at the same time, a reasonable amount will have to be granted for future medical expenses. After considering the arguments of the learned counsel on both sides and the materials in this case, we are also of the opinion that the removal of scars and other ill effects on her body will definitely require future

treatment and we fix an amount of Rs. 4,00,000/- as expenses for future treatment.

18. Now we come to the claim for enhancement by the claimant. The medical expenses have been granted by the Tribunal after verifying each of the bills. The consolidated bills issued from Medical Trust Hospital were verified by the Tribunal, which is clear from paragraph 17 of the award. The findings recorded therein will show that the Tribunal has scrupulously verified the bills and found out that there is duplication in respect of various bills and it has been found that the claimant will be entitled for Rs. 2,39,345/-.

19. Even though the learned counsel for the claimant submitted that the entire amount of Rs. 4,90,053/- will have to be granted, when there is a definite finding that there is duplication and in the absence of any evidence to show that the said finding is wrong, we will not be justified in granting the entire claim towards medical expenses. But one of the aspects pointed out by the learned counsel is the denial of the amount towards Ayurvedic treatment. The learned Senior Counsel for the Insurance Company submits that item No. 154 will show that expense has been incurred upto 30.5.2003, whereas she obtained a job on 19.5.2003 and points out that, that was the reason for rejection of the entire bill by the Tribunal. But on a verification of the said item, we find that the period of treatment commenced from 28.12.2002. It is seen that final date is noted as 30.05.2003. Of course there is no explanation from the part of the claimant regarding the said final date. But she has stated that she has undergone Ayurvedic treatment before she joined duty. Therefore, out of the total amount of Rs. 29,200/-, we will be justified in granting a reasonable amount of Rs. 20,000/- for Ayurvedic treatment.

20. As far as bystander''s expenses are concerned, she was bed ridden for a period of six months. Therefore, we grant amount @ Rs. 200/- per day for the said period. One of the items pointed out by the learned counsel is that her mother had been working on loss of salary and the said claim should have been granted. We cannot agree. The compensation that can be granted are only amounts which are the direct result of the personal injury sustained by the party and the loss of salary of the mother cannot be an amount which can be granted. But at the same time, she will be entitled for more amounts towards pain and suffering and loss of amenities. She had to suffer serious injuries at the young age of 22 and the entire left leg has been affected by the injury as well as the treatment. She had to undergo several surgeries including skin grafting and plastic surgery. Therefore, we award an amount of Rs. 1,00,000/- towards pain and suffering, which continued for a long period.

21. The next aspect is loss of amenities and loss of pleasures of life. The disability certificate will show that the disability has been assessed under four different grounds by the Medical Board. This includes flexion of knees and other factors. We extract below the details given in Ext. A27 disability certificate:

"Skin & soft tissue loss (L) thigh & (L) knee posteoriorly 40 cms. Long area. Circumferential, healed swelling due to lymphatic obstruction (5%)

(L) hip movements - from 180 degree to 90 degree flexion (3%)

ER-20, IR - 30 (1%) Abduction - 10 degree, abduction - 30 degree (2%).

(L) knee - from 180 degree to 90 degree flexion (5%)"

22. She will be entitled for a reasonable amount towards loss of amenities which we fix it at Rs. 1,00,000/-.

23. The next aspect is the amount towards disfiguration and the same is also confirmed by the medical evidence and we grant a reasonable amount of Rs. 35,000/- towards disfiguration. As far as the amount towards permanent disability is concerned, there is serious dispute between the learned counsel on both sides as to the manner in which it can be assessed. According to the learned Senior Counsel for the Insurance Company, since there is no functional disability, the basis on which it should be granted should be properly gone into by this Court. Of course, it is a case where she is working and her employment potential has not been affected by the injuries. But as far as the permanent disability, namely the physical disability is concerned, it is a factor which has to be compensated by the tort feasor. Even though there may not be functional disability, due compensation will be granted towards permanent disability suffered by her. This is the principle that is accepted by the Honourable Supreme Court in various decisions viz. Kavita Vs. Deepak and Others, (2012) ACJ 2161 : AIR 2012 SC 2893 : (2012) 7 JT 595 : (2013) 169 PLR 140 : (2012) 4 RCR(Civil) 273 : (2012) 7 SCALE 500 : (2012) 8 SCC 604 : (2012) AIRSCW 4771 : (2012) 6 Supreme 261 , K. Suresh Vs. New India Assurance Company Ltd. and Another, (2012) ACJ 2694 : (2012) 10 JT 484 : (2013) 169 PLR 337 : (2013) 1 RCR(Civil) 312 : (2012) 10 SCALE 516 : (2012) 12 SCC 274 , S. Manickam Vs. Metropolitan Transport Corporation Ltd., (2013) 4 ACC 264 : (2013) ACJ 1935 : (2013) 7 AD 567 : AIR 2013 SC 2629 : (2014) 117 CLT 88 : (2013) 172 PLR 84 : (2013) 3 RCR(Civil) 696 : (2013) 8 SCALE 179 : (2013) 12 SCC 603 , Sanjay Verma Vs. Haryana Roadways, (2014) 1 ACC 473 : (2014) ACJ 692 : AIR 2014 SC 995 : (2014) AIRSCW 856 : (2014) 2 JT 384 : (2014) 1 RCR(Civil) 914 : (2014) 1 SCALE 682 : (2014) 3 SCC 210 and in Smt. Sarla Verma and Others Vs. Delhi Transport Corporation and Another, (2009) ACJ 1298 : AIR 2009 SC 3104 : (2009) CLT 1055 : (2009) 6 JT 495 : (2009) 6 SCALE 129 : (2009) 6 SCC 121 : (2009) 5 SCR 1098 : (2009) 5 UJ 2280 : (2009) AIRSCW 4992 : (2009) 3 Supreme 487 and multiplier method has to be adopted also. But as far as fixation of multiplicand is concerned, herein she has claimed that she was getting Rs. 20,000/- to Rs. 25,000/- during her self employment period. The fact that she had very good potential as a qualified engineer is beyond dispute and she is getting Rs. 31,000/- and above after she joined INFOSYS. As regards the evidence regarding her income during the period of employment, there are no documents. But being a qualified engineer, we will have to assess the

employment potential. According to us, a reasonable amount of Rs. 10,000/- per month can be fixed as the income during the said period for assessment of compensation. Therefore, the compensation towards permanent disability will be Rs. 3,45,600/-, by taking the multiplier as 18 and the percentage of disability as 16%.

24. Accordingly, we refix the compensation in the following manner :

25. The amount of compensation will carry interest @ 9% per annum from the date of petition except for Rs. 4 lakhs awarded for future treatment. As far as the expenses of Rs. 4 lakhs for future treatment are concerned, we fix the interest at 9% per annum from the date of award of the Tribunal. The Insurance Company is found liable by the Tribunal and there will be a direction to the Insurance Company to deposit the amount less the amount already deposited before the Tribunal within three months and we permit the appellant/claimant to withdraw the amount also.

The appeals are accordingly allowed. The parties will suffer their costs in the appeals.

