IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.08.2015

CORAM:

THE HON'BLE Ms.JUSTICE K.B.K.VASUKI

C.M.A.No.1814 of 2010
And
M.P.No.1 of 2010

National Insurance Co. Ltd.,
Pondicherry Road,
Manjakuppam,
Cuddalore - 1. ... Appellant/2nd Respondent

Vs.

1.Lakshmikanthan
2.V.T.Selvam

(2nd Respondent exparte in Lower Court
and hence Notice may be dispensed with) ... Respondents/Petitioner and 1st Respondent.

Prayer :
Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree in M.C.O.P.No.100 of 2006 dated 23.04.2007, on the file of the Motor Accidents Claims Tribunal (II Additional Sub Court), Cuddalore Incharge.

For Appellant : Mr.Srinivasan Ramalingam
For Respondents : Mr.N.Damodaran for R1
R2- Exparte

JUDGMENT

The second respondent Insurance Company before the Tribunal is the appellant herein. The present appeal is filed against the award of compensation of Rs.3,47,550/- payable with interest at the rate of 7.5% to the injured in the accident.

2.The challenge before this Court is only with regard to the quantum of compensation awarded, particularly the award of Rs.3,12,000/- towards loss of earning. It is not in dispute that the injured/ claimant sustained two fractures one in left ulna bone and another on the frontal bone. The claimant was, as evident from exhibits Ex.P3 to Ex.P5, given treatment for the injuries sustained by him in the Government Hospital, Cuddalore and Chennai. As seen from Ex.P4 and Ex.P5, the injured was hospitalized at Government Hospital, Cuddalore for one day on 17.04.2005 and he was under treatment in Government Hospital, Chennai between 18.04.2005 and 28.04.2005. At the time of discharge from the hospital, the ulna bone was as per Ex.P5 certificate, mal-united and the same was also to some extent confirmed by Ex.P13 X-Ray.

3.P.W.2 Doctor who examined the claimant assessed the disability in his exhibit Ex.P12 Disability certificate at 50% as follows:

a) functional loss brain - 30%

b) functional loss left forearm - 20%

and the same is also explained by P.W.2 and is accepted by the Tribunal.

4.The learned counsel for the appellant would strenuously argue before this Court that the Tribunal has erred in simply accepting the disability at 50% as assessed by P.W.2 Doctor without reference to the impact of the same on the functional disability of the entire body which coupled with the nature of avocation of the injured is material factor to assess the degree of disability or loss of earning capacity.

5.The learned counsel for the appellant would cite the following authorities in support of his contention that disability is assessed by the Tribunal in an erratic manner, (i)2010 (2) TN MAC 581 (SC) (Raj Kumar Versus Ajay Kumar and another) and (ii)2009 (2) TN MAC 188 (DB) (National Insurance Company Limited versus R.Sivakumar and another).

6.In both the cases, the Hon'ble Supreme Court and Division Bench of our High Court have come down heavily on the Courts below for assessing the total disability as equivalent with percentage of disability caused to particular organ.

7.The Division Bench of our High Court expressed serious concern and anxiety in different modes adopted by the Tribunals in assessing the disability and the need for consistency and uniformity to be adopted in fixing the degree of disability for fractures and other injuries which are not as grievous as loss of limbs or amputation. It is in the observation of the Division Bench of our High Court that claim petition is not an occasion for bonanza for persons who sustained fractures and injury sustained must always be correlated to avocation of injured to assess degree of disability or loss of earning capacity.

8.The Hon'ble Supreme Court in the judgment above cited has elaborately dealt with permanent disability and partial disability and what is permanent disability with reference to whole body and the assessment of compensation and the mode of assessment of compensation under the head of loss of future earnings depending upon the effect and impact of such permanent disability on his earning capacity and what are the aspects to be considered while assessing the permanent disability and the manner of evaluating the medical evidence and the three steps to be taken for ascertaining the defect of the permanent disability on the actual earning capacity.

9.The observation of the Hon'ble Supreme Court in paragraph 10 of the above cited judgment is as follows:

> "10.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 Disability 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. For example, if the left hand of a Claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the Claimant was a driver or a carpenter, the actual Loss of Earning Capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the Claimant was a clerk in Government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the Loss of Earning Capacity will not be 100% as in the case of a driver or carpenter nor 60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'Loss of Future Earnings', if the Claimant continues in Government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured Claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post of job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of Future Earning

Capacity, taking note of the reduced earning capacity. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may."

10.In paragraph 13 of the above cited judgment, the Hon'ble Supreme Court has summarized the discussion as follows:

"13.We may now summarise the principles discussed above:

(i) All injuries (or permanent disabilities arising from injuries), do not result in Loss of Earning Capacity.

(ii) The percentage of Permanent Disability with reference to the whole body of a person, cannot be assumed to be the percentage of Loss of Earning Capacity. To put it differently, the percentage of Loss of Earning Capacity is not the same as the percentage of Permanent Disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of Loss of Earning Capacity is the same as percentage of Permanent Disability).

(iii) The Doctor who treated an injured-Claimant or who examined him subsequently to assess the extent of his Permanent Disability can give evidence only in regard the extent of Permanent Disability. The Loss of Earning Capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

(iv) The same Permanent Disability may result in different percentages of Loss of Earning Capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors."

11.By applying the principles laid down by the Hon'ble Supreme Court and Division Bench of our High Court, this Court is of the view that considering the nature of the fracture sustained by the claimant, the percentage of disability of a particular organ cannot be having regard to the nature of the avocation of the injured herein considered as the functional disability of the whole body and the percentage of 50% cannot be taken as the percentage of functional disability of the whole body for assessing loss of earning capacity.

In that event, the determination of the loss of earning capacity at 50% which is only the percentage of disability of the forearm and brain is totally erroneous and it is factually and legally unsustainable.

12.In this case, considering the percentage of disability of the fore arm, the disability is fixed at 20% for fixing loss of earning capacity. As the total monthly income of the injured is Rs.4,000/-, the loss of earning capacity is to be taken as only Rs.800/- per month which works out to Rs.9,600/- per year and the total loss of income is by applying '13' multiplier assessed at Rs.1,24,800/-.

13.As there is no grievance with regard to the compensation awarded under other heads, the total compensation to be awarded to the claimant is restricted as follows:

For loss of income	- Rs.1,24,800/-
For pain and suffering	- Rs. 20,000/-
For extra nutrition	- Rs. 10,000/-
For transport charges	- Rs. 3,850/-
For medical expenses	- Rs. 1,300/-
Total	- Rs.1,59,950/-

and the same is payable at the rate of 7.5% per annum.

14.In the result, the amount of compensation is reduced to Rs.1,59,950/- payable with interest at the rate of 7.5% interest per annum. The award is confirmed in other respects. The appellant/ Insurance company is directed to deposit the compensation amount as awarded by this Court before the Tribunal within a period of six weeks from the date of receipt of a copy of this order, if not already deposited. On such deposit being made, the first respondent/ claimant is permitted to withdraw the entire compensation amount with accrued interest and costs. If the appellant/ Insurance Company has already deposited the amount, the appellant/ Insurance Company is permitted to withdraw the balance amount, if any.

The Civil Miscellaneous Appeal is accordingly allowed. No costs. Consequently, the connected miscellaneous petition is also closed.

Sd/-
Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

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To
1. Motor Accidents Claims Tribunal (II Additional Sub Court), Cuddalore incharge
2. The Section Officer, VR Section, High Court, Madras.
+1 cc to M/s.Srinivasan, Advocate, sr.40511

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rj co, kra 06/10 And M.P.No.1 of 2010