



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on
03.09.2018

Delivered on
26.09.2018

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CORAM:

THE HONOURABLE MR.JUSTICE K.K.SASIDHARAN
AND
THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

CMA.No.1893 of 2017

N.Balaganesan

... Appellant/Claimant

-vs-

1.E.S.Balakrishna

2.The Divisional Manager,

The Oriental Insurance Co. Ltd.,

Divisional Office, Chamrajpet,

Bangalore - 18.

... Respondents/Respondents

Civil Miscellaneous Appeal filed under Section 173 of Motor Vehicles Act, 1988 against the judgment and decree dated 15.11.2010 and made in MCOP No.1098 of 2003 on the file of Motor Accident Claims Tribunal, Principal Subordinate Judge at Krishnagiri.

For Appellant : Mr.P.Jagadeesan

For Respondents: Mr.S.Manohar for R2

J U D G M E N T

R.SUBRAMANIAN, J.

1. The injured claimant who was awarded a compensation of Rs.3,19,457/- for the injuries sustained by him in a motor accident that occurred on 18.11.2001 has come forward with this appeal seeking enhancement.

2. According to the appellant/ claimant when he was riding his bicycle at Salem - Dharmapuri Road towards Dharmapuri on the extreme left side of the road a Tempo bearing registration No.KA-05-B-1059, belonging to the 1st respondent Insured with the 2nd respondent, driven by its driver in a rash and negligent manner dashed against the petitioner. Due to the impact the petitioner sustained various injuries which had resulted in a permanent disability as well as loss of earning power. The



3. The 1st respondent owner of the offending van remained ex parte before the Tribunal. The 2nd respondent Insurance Company resisted the claim petition contending that the accident occurred because the petitioner abruptly crossed the road without looking for any on coming vehicle. Due to such sudden action on the part of the injured, the driver of the van could not stop the vehicle despite his best efforts. Therefore, according to the Insurance Company, the accident took place because of the negligence of the claimant himself and hence, they are not liable to pay any compensation.

5. On the quantum, the Tribunal concluded that the disability suffered by the claimant for both the injuries would be about 42.2% and the same was rounded off to 45%. The Tribunal found that because of the injuries caused, the petitioner has lost sense of smell in both his nostrils and he has also got double vision since his right side 6th and 3rd nerves were affected. He has also lost sensation over the face and also has deterioration due to muscle wastage. The Tribunal also took note of the evidence of the Doctor viz., PW2 who was the Neuro Surgeon, which disclosed that, as a result of the injury, the claimant would suffer frequent head aches, sleeplessness, memory loss and he would not be able to walk in a straight line. The Neuro Surgeon has assessed the neurological disability at 90%. PW3 who is an Orthopedic Surgeon had assessed the disability due to the fracture in the right leg at 45%. The Tribunal arrived at the combined effect of the injuries and concluded that the permanent disability caused would be about 45%.

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7. We have heard Mr.P.Jagadeesan, learned counsel appearing for the appellant and Mr.S.Manohar, learned counsel appearing for the respondent, Insurance Company.

8. We must at the outset point out that the award of the Tribunal is very low, inasmuch as the Tribunal has not taken into account the loss of earning capacity as well as the seriousness of the injuries suffered by the claimant and the Tribunal has mechanically awarded a paltry sum of Rs.20,000/- towards pain and suffering and Rs.15,000/- towards partial loss of earning. A reading of the award shows that the tribunal had not even adverted to the occupation of the injured claimant and the effect of the injuries on his occupation which would have bearing on the determination of loss of earning power.

9. It is the settled law that if the injury results in a disability which causes a loss of earning power, the Tribunal will have to award compensation adopting the multiplier method. The Tribunal has not even considered whether the permanent disability caused would have any effect on the earning power of the injured claimant viz-a-viz his occupation. We have already adverted to the fact that the claimant was a photographer and videographer. From the evidence of PW2, Neuro Surgeon, it is seen that the injured claimant has got double vision as a result of the accident, which in our considered opinion would definitely have an effect on the earning capacity of the claimant.

10. In Raj Kumar Vs. Ajay Kumar and another reported in 2011 (1) SCC 343, the Hon'ble Supreme Court has considered the grant of compensation on the question of loss of earning capacity. The Hon'ble Supreme Court had observed that the loss of earning capacity would depend on the effect and impact of such permanent disability on his earning capacity. While observing that the Tribunal should not mechanically apply percentage of permanent disability as percentage of economic loss or loss of earning capacity, the Hon'ble Supreme Court has pointed out that the occupation of the injured claimant would definitely have a bearing on the loss of earning capacity, the Hon'ble Supreme Court had observed as follows:-

"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)



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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. "

11. In view of the law laid down by the Hon'ble Supreme Court as above, we are of the considered opinion that the Tribunal ought to have awarded a certain amount of compensation towards loss of earning power. It is not in dispute that the avocation of the injured claimant is that of a videographer, eye sight is the most important requirement for a videographer or a photographer. It is in evidence in the form of the testimony of PW2 who is an expert that, the injured claimant will have double vision because of the injury sustained by him in the facial nerve. We are therefore of the opinion that the disability caused would result in a loss of earning power to an extent of 75%, though, the actual physical disability is only 45%. It should also be noted that, according to the evidence of the Neuro Surgeon, the neurological disability is about 90%, a part of it is attributed to loosing of sensation in the nostrils. The combined effect of all these injuries would result in loss of earning power which we fix at 75%.

12. The claimant has stated that he was earning a monthly income of Rs.7,500/-. The accident had occurred on 18.11.2001. Even at the lowest estimate a videographer or photographer in a town like Dharmapuri would have earned atleast Rs.10,000/- at the time of the accident. The claimant was aged about 28 years at the time of the accident, therefore 40% of his income should be added towards future prospects. Thus added, the income for the purposes of determination of compensation works out to Rs.10,500/-. The multiplier applicable is '18'. we have already fixed the loss of earning power at 75%. Thus, the total loss of earning power would be,

$$10,500 \times \frac{75}{100} \times 12 \times 18 = 17,01,000/-$$

13. The Tribunal has awarded a sum of Rs.20,000/- towards pain and suffering. The nature of the injuries, particularly, the facial injuries would show that the claimant would have undergone immense pain and suffered during hospitalization and thereafter also. We therefore enhance the award on the ground of pain and suffering to Rs.1,50,000/-. The amount awarded towards partial loss of earning, transport to hospital, permanent



disability, medical expenses and attender charges are all confirmed. Thus, the total award will be as follows:-

Award towards		Amount
loss of earning power	:	Rs.17,01,000/-
loss of pain and suffering	:	Rs. 1,50,000/-
partial loss of earing	:	Rs. 15,000/-
transport to hospital and extra nourishment	:	Rs. 10,000/-
permanent disability	:	Rs. 90,000/-
medical expenses	:	Rs. 1,74,457/-
attender charges	:	Rs. 10,000/-
Total	:	Rs.21,50,457/-

14. For the foregoing reasons, the award of the Tribunal is modified, the claimant would be entitled to a sum of Rs.21,50,457/- as compensation. The compensation will carry interest at 7.5% from the date of petition till date of payment. It is seen that the Insurance Company has paid a sum of Rs.6,56,591/- on 22.05.2007, the Insurance Company is directed to deposit the balance award amount with proportionate interest and costs within a period of six (6) weeks from the date of the receipt of a copy of the judgment. On such deposit the claimant/ appellant is permitted to withdraw the amount so deposited. The claimant/ appellant shall pay the balance court fee payable since the claimant has paid a court fee by restricting the value of the appeal to Rs.15,01,000/-, three weeks time is granted to the appellant to pay the deficit court fee. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

dsa



To

1. The Motor Accident Claims Tribunal,
Principal Subordinate Court, Krishnagiri.

2. The Divisional Manager, the Oriental
Insurance Company Ltd., Divisional Office
Chamraipet, Bangalore 18.

+ 1 cc to Mr. P.Jagadeesan, Advocate Sr.66887

+ 1 cc to Mr. S. Manohar, Advocate SR.66582

CMA.No.1893 of 2017

RSV(CO)
EU(29/11/2018)