

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 24.09.2020

Pronounced on : 29.09.2020

Coram:

THE HONOURABLE DR. JUSTICE G.JAYACHANDRAN

C.M.A.No.2472 of 2016

and

C.M.P.No.17521 of 2016

Reliance General Insurance Co.Ltd.,
Rais Towers, 2nd Floor, 2nd Avenue,
Anna Nagar, Chennai 600 040. .. Appellant/2nd Respondent

/versus/

1.M.Senthilkumar ..1st Respondent/Petitioner
2.S.Lalitha ..2nd Respondents/1st Respondent

Prayer: Civil Miscellaneous Appeal has been filed under Section 173 of the Motor Vehicles Act, 1988, against the award and decree dated 16.02.2016 made in M.C.O.P.No.2183 of 2013 on the file of the Motor Accident Claims Tribunal, II Court of Small Causes, Chennai.

For Appellant : Mr.S.Arunkumar

For Respondents: Mr.R.Kalaiarasan for R1
No appearance for R2

JUDGMENT

(The case has been heard through Video conference)

This appeal is by the Insurer, aggrieved by the award passed by the Motor Accident Claims Tribunal, II Court of Small Causes, Chennai. It is alleged that that award is based on unreasonable and unscientific assessment of loss and disability.

2.The claim petition reads as follow:-

On 02/12/2012 at about 13.00 hours, while the claimant was proceeding from East Tambaram to Irumbuliyur along Sudhanandha Bharathi Street, North to South direction in his motorcycle bearing registration No. TN-22-BS-2661, a car bearing registration No. TN-21-AW- 9371 from the opposite direction dashed the motorcycle in which the claimant has suffered comminute fracture of left leg bones, severe avulsion injury in left leg below knee and injury over both shoulder. The injured was admitted at Chrompet Government Hospital and later at Puttur. He incurred medical expenses about Rs.20,000/-. Due to the injuries, he is unable to attend any work. Before accident, he was working as a Driver earning Rs.4,500/- per month with Rs.250/- batta per day. Rs.12,00,000/- was sought as compensation for the loss of earning, disability and other conventional and non-conventional loss. Relief sought against the owner of the car and its insurer.

3.Counter of the insurer reads as follow:-

The insurance policy issued to the car subject to terms and conditions. The car is a tourist cab. To drive that car, the driver must possess LMV license with batch. In the instant case, the tourist cab driver had no valid driving license. The insurer cannot be held liable in case of violation of policy condition. Further, the accident being head on collision between the car and the two wheeler, the claimant is also guilty of contributory negligence. The claim of income, loss of earning, disability and pain and suffering are all exaggerated to get higher claim.

4.Before the Tribunal, 2 witnesses for the claimant and one witness for the respondent were examined. 6 exhibits were marked on the side of the claimant and 4 exhibits were marked on the side of the respondent.

5.The Tribunal based on the certificate Ex.P-5 issued by PW-2 has fixed the disability as 40% and also taking note of the fact that the claimant is a heavy transport vehicle driver as per Ex.P-4, applied multiplier for loss of earning power. The Tribunal for computation of loss of income has fixed Rs.9000/- per month as notional income and awarded a total compensation of Rs.9,56,200/-.

6.The learned counsel for the appellant submit that, the Tribunal erred in applying multiplier for loss of earning power. Further, after applying the multiplier for the non-schedule injury, the Tribunal has also awarded a consolidated compensation for the disability for the same injury. This double payment is contrary to law. The Tribunal award is in violation of the principle laid down by the Hon'ble Supreme Court in Raj Kumar vs Ajay Kumar & Anr reported in [2011 (1) SCC 343].

7. Referring to the evidence of the claimant that he is still working as acting driver, the learned counsel for the insurer submit that the admission of the claimant proves that the accident injuries have no bearing on the earning power of the claimant. For the temporary loss of income and disability, the tribunal has awarded Rs.36,000 and Rs.1,20,000/- respectively. Also an additional sum of Rs.24,000/- was awarded for loss of amenities. While so, the compensation of Rs.6,91,200/- under the head loss of earning capacity is excessive, unreasonable and unscientific.

8. Heard the learned counsels and records carefully considered.

9. Before the Tribunal, the claimant has placed 6 exhibits to substantiate his claim. Beside the doctor, who gave the disability certificate Ex.P-5 and the X ray, there is no other document to prove disability or loss of earning power. The Tribunal has assessed the compensation mainly on the disability certificate and oral evidence of PW-2. The injuries sustained by the claimant is not a scheduled injury. In such cases, application of multiplier is not permissible, unless the Court is convinced that the injuries have a direct bearing in the functional capacity of the claimant to earn. In such circumstances the Tribunal should have sought for proper medical records to ascertain the percentage of functional disability.

10. In Raj Kumar vs Ajay Kumar & Anr reported in [2011 (1) SCC 343], the Supreme court has laid down guidelines for the Courts below when to apply multiplier for injury and how the percentage of functional disability should be computed.

"7. The percentage of permanent disability is expressed by the Doctors with reference to the whole body, or more often than not, with reference to a particular limb. When a disability certificate states that the injured has suffered permanent disability to an extent of 45% of the left lower limb, it is not the same as 45% permanent disability with reference to the whole body. The extent of disability of a limb (or part of the body) expressed in terms of a percentage of the total functions of that limb, obviously cannot be assumed to be the extent of disability of the whole body. If there is 60% permanent disability of the

right hand and 80% permanent disability of left leg, it does not mean that the extent of permanent disability with reference to the whole body is 140% (that is 80% plus 60%). If different parts of the body have suffered different percentages of disabilities, the sum total thereof expressed in terms of the permanent disability with reference to the whole body, cannot obviously exceed 100%.

8. 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 disability. 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. What requires to be assessed by the Tribunal is the effect of the permanent 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 terms 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.

11. After discussing the law and probabilities, the Court has summarized the principles as below:-

(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.

On coming to the facts of the case, the Hon'ble Supreme Court has observed that,

"18. The Tribunal has proceeded on the basis that the permanent disability of the injured-claimant was 45% and the loss of his future earning capacity was also 45%. The Tribunal overlooked the fact that the disability certificate referred to 45% disability with reference to left lower limb and not in regard to the entire body. The said extent of permanent disability of the limb could not be considered to be the functional disability of the body nor could it be assumed to result in a corresponding extent of loss of earning capacity, as the disability would not have prevented him from carrying on his avocation as a cheese vendor, though it might impede in his smooth functioning. Normally, the absence of clear and sufficient evidence would have necessitated remand of the case for further evidence on this aspect. However,

instead of remanding the matter for a finding on this issue, at this distance of time after nearly two decades, on the facts and circumstances, to do complete justice, we propose to assess the permanent functional disability of the body as 25% and the loss of future earning capacity as 20%."

12.This Court is of the view that the above observation of the Supreme Court made in Rajkumar-vs- AjayKumar case squarely applies to the facts of this case. The look at the disability certificate, this Court finds that the accident injuries had caused 40% of partial permanent disability of the left limb and not the whole body. It is not a total permanent disability to apply multiplier. The disability certificate Ex.P5 relied by the Tribunal is not given by the Board of Doctors. It is given by a private Doctor who has not treated the claimant. The disability certificate is not annexed with the working sheet and guidelines. When the claimant himself admits that he is presently earning his livelihood as acting driver for few days in a month, the Tribunal ought not to have resorted to multiplier. More so, when Rs.1,20,000/- awarded for 40% partial permanent disability. In alternate, if the Tribunal had thought fit that multiplier should be applied, for the injuries found in the disability certificate, the percentage of functional disability ought not to have fixed converting the 40% disability for one limb into whole body. As per the doctor's evident, the injury has restricted movement of the knee upto 90° and the claimant suffers difficulty in walking/climbing steps/crossing legs/squatting. For the loss of these amenities , the Tribunal has awarded Rs.24,000/-. Therefore, for the comminuted fracture of left leg bones, the restriction in functioning could be at the most only 25%. When compensation for disability is awarded applying multiplier, for the same disability further consolidated compensation of Rs.1,20,000/- is not warranted.

13.This Court also noticed that the tribunal has awarded compensation under different name for the same loss. The Tribunal has cited judgments of the High Court and Hon'ble Supreme Court to justify the award, but without any relevance to the facts of the case under consideration and also without proof or evidence. This also requires modification or deletion as the case may be.

14.Therefore this Court finds that the excessive award should be pruned to just and reasonable compensation. Accordingly the award is modified as below:-

Head of compensation	As per tribunal award in MCOP No.2183/2013 Rs.	As per the judgement of the High court in CMA No.2472/2016 Rs.
Transportation, nourishing and miscellaneous expenditure. (no proof)	Rs 25,000/-	Rs 15,000
Medical expenditure	Rs 5,000/-	Rs 5,000/-
Attender charges	Rs 5,000/-	Rs 5,000/-
Damages for pain and suffering and trauma	Rs 50,000/-	Rs 15,000/-
For 40% P.P.Disability	Rs 1,20,000/-	---
Loss of earning during the period of treatment (9000 x 4 months)	Rs 36,000/-	Rs 36,000/-
Loss of earning capacity	Rs 6,91,200/- (9000 x 12 x 16 x 40 %)	Rs 4,32,000/- (9000 x 12 x 16 x 25%)
Loss of Amenities	Rs.24,00-00	-----
Total		5,08,000-00

15.For the reasons stated, the award passed by the tribunal is modified accordingly. The claimant is entitled for a compensation of Rs.5,08,000/- with interest at the rate of 7.5% p.a from the date of numbering the claim petition till the date of deposit.

16.The Tribunal considering the fact that the driver of the offending vehicle had no valid driving license, had ordered the insurance company to pay and recover it from the owner of the car, who is the first respondent in the claim petition. The said order is confirmed.

17.The learned counsel appearing for the appellant/insurance company would submit that the entire award amount of the Tribunal has already been deposited by the appellant/insurance company before in the MCOP account as per order of this Court dated 09.11.2016. If it is so, the appellant/Insurance Company is permitted to withdraw the excess amount lying in the deposit of the MCOP account on filing proper application. The claimant is permitted to withdraw the modified award passed by this

Court, less the amount already withdrawn if any by him as per order of this Court dated 09.11.2016 if any.

18.In the result, the Civil Miscellaneous Appeal is partly allowed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

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To
The Motor Accident Claims Tribunal,
II Court of Small Causes, Chennai.

+1 cc to M/s.S.Arunkumar, Advocate Sr.No. 32372
+2cc to M/s. N.M.Muthurajan, Advocate, Sr.no.32229

C.M.A.No.2472 of 2016
and
C.M.P.No.17521 of 2016

KJ(CO)
RMP(29/04/2021)