

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO 187/2005

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Judgment delivered on: 28.05.2012

AVTAR SINGH

..... Appellant

Through : Mr. Alok Kumar along with
Mr. Neeraj Gupta, Advs.

versus

BIJENDER SINGH & ANR.

..... Respondents

Through : Mr. Pradeep Gaur along with
Mr. Amit Gaur & Mr. Shashank
Sharma, Advs. for R-2.

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. This is an appeal under Section 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as 'the Act') against impugned order dated 19.04.2005 passed by the Commissioner Workmen Compensation, Ashok Vihar, Delhi for enhancement of compensation awarded to the appellant. There is also a prayer for directions to the respondents to pay the penalty and interest amount on the compensation amount.

2. The case of the appellant is that appellant was employed as a 'driver' with respondent no. 1 and was getting Rs. 4,500/- per month. On 04.06.2003, during the course of his duties the appellant was proceeding from Muradabad to Delhi on a truck bearing no. DL-1L-E-2731. The said

truck was owned by respondent no. 1 and it was insured with respondent no. 2 vide policy No. 360400/31/02/6312926 valid from 27.03.2003 to 26.03.2004. At about 4.00 a.m. when the truck driven by him had reached near village Chhijarsi in the area of P.S. Pilakhua, District Ghaziabad (U.P.) a broken down accident tractor bearing No. PJS 6668 and a truck bearing No. UP 15B 0241 respectively were parked on the main road. Those vehicles came in front of the truck being driven by the appellant as a result of which appellant had lost control of his vehicle and the same had struck against that truck which was parked on the road. As a result of the forceful impact, appellant sustained multiple grievous injuries which resulted in amputation of his right leg below knee and fracture of shaft of femur. The appellant was operated on 06.06.2003 and interlocking nail was inserted in his right hip in Yashoda Hospital, Ghaziabad, U.P. The appellant had produced a disability certificate issued by office of Medical Superintendent, Babu Jagjeevan Ram Memorial Hospital assessing disability as 70%. The appellant remained in hospital from 04.06.2003 to 13.06.2003 and incurred more than Rs. 1 lakh on his treatment. The matter was also reported to the Police. The appellant suffered serious injuries resulting in permanent 100% loss of earning capacity. He had sent a demand notice and thereafter filed a claim before the Commissioner appointed under the Act. By way of claim petition, appellant had claimed compensation of Rs. 7 lakhs along with 18% interest from the date of accident till the realization of the award amount and also 50% penalty.

3. The respondent no. 1 i.e. the employer had filed the written statement wherein he admitted that the appellant was his employee at the relevant time. He also admitted the factum of accident and also admitted appellant having

sustained multiple grievous injuries in the said accident which resulted in amputation of his right leg. However, it was stated in the written statement that vehicle in question was insured with respondent no.2, as such respondent no. 1 was not liable to indemnify the loss. If the appellant was entitled to any compensation, the same was the liability of respondent no. 2.

4. The written statement was also filed by respondent no. 2 i.e. the Insurance Company denying the averments made in the petition. However, the respondent no. 2 admitted the factum of insurance of vehicle in question by respondent no. 1 vide the policy number stated above on the date of accident. Insurance Company further took the stand that the appellant was not employed with the respondent no. 1 and there was no relationship of employee and employer. The respondent had also disability certificate of appellant showing the disability about 40%.

5. On the basis of pleadings of the parties, issues were framed. The appellant as well as respondent no. 2 led evidence whereas no evidence was led by respondent no. 1. After some arguments, the learned Commissioner had held that it was a case of 50% disability and taking into account his age, wages and percentage of disability granted compensation of Rs. 1,87,764/-. As regards penalty and interest is concerned, a separate show cause notice was issued to the respondents and as the vehicle at the relevant time was insured, the respondent no. 2 was directed to deposit the compensation amount within 30 days from the date of the order.

6. Aggrieved with the said order, the present appeal is filed by the appellant.

7. Learned counsel for appellant has contended that the leg of appellant has been amputated. Appellant is unable to do the work of driver. It is contended that it is a case of total disablement and learned counsel has referred to the definition of 'total disablement' given under Section 2 (I) of the Act. Learned counsel has referred to judgment of **Pratap Narain Singh Deo v. Shri Nivas Sabata and Anr.; 1976 ACJ 141** in support of his contention, wherein a carpenter during the course of his employment had lost his left arm above elbow and the Apex Court held that the disablement was total and not partial and compensation was given on the basis of 100% earning capacity.

8. On the other hand, learned counsel for respondent no. 2-Insurance Company has contended that the impugned order is legal and valid in all respects. It is contended that the leg of appellant was amputated and the said injury comes under the Schedule I Part II of the Act under the heading "List of Injuries" deemed to result in permanent-partial disablement and the percentage of loss of earning capacity stated therein for the said injury is 50% and the Commissioner has rightly taken the said percentage in awarding the compensation. It is further contended that there is no opinion of the doctor that there was 100% loss of earning capacity as such no interference is required in the impugned order.

9. I have heard counsel for the parties and perused the material on record.

10. In order to appreciate the controversy, the relevant provisions under the Act are reproduced as under:-

“a. Section 2 (1) (g) of the Act defines ‘**Partial disablement**’ which means that where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: provided that every injury specified [in Part II of Schedule I] shall be deemed to result in permanent partial disablement.

b. Whereas ‘**Total disablement**’ is defined under Section 2 (1) (l) of the Act, which means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement:

[provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in part II thereof where the aggregate percentage of loss of earning capacity, as specified in the said part II against those injuries, amounts to one hundred percent or more.]”

11. Whereas Section 4 of the Act deals with the amount of compensation, relevant for the case in hand is Clause (c) which is extracted as under:

“4. AMOUNT OF COMPENSATION. –

(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a) xxxxxxx xxxxxx xxxxxxx

(b) xxxxxxx xxxxxx xxxxxxx

(c) Where permanent partial disablement results from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury;

xxxxx xxxxxx xxxxxx xxxxxx”

12. Part I of the Schedule I enumerates the list of injuries deemed to result in “permanent total disablement” and the percentage of loss of earning capacity with respect to the injury described in the list. Part II of the Schedule I of the Act enumerates the list of injuries deemed to result in “permanent partial disablement”. Serial 20 of part II describes the injury of

amputation below knee with stump exceeding 8.89 cms but not exceeding 12.70 cms serial and Serial 21 of the same part describes the amputation below knee with stump exceeding 12.70 cms. In both the cases the percentage of loss of earning capacity is specified as 50 percent.

13. The Supreme Court, in the case of **Pratap Narain Singh Deo v. Shri Nivas Sabata and Anr.**, (*supra*), while construing the expression “total disablement” as defined in section 2 (1) (l) of the Act, has held that if injury makes the workman unfit for the work which he was discharging prior to the accident, the disablement is total and not partial. In that case a carpenter while doing work in course of employment fell down and sustained injuries as a result of which his left arm above elbow was amputated and he became unfit for the work of carpenter and as per Schedule I of the Act, it was a case of “Permanent Partial Disablement”. The Supreme Court held that the disablement incapacitated the respondent for all work which he was capable of performing at the time of accident, as such disablement was total and not partial as the work of carpentry cannot be done by one hand only.

14. In **K. Janardhan vs. United India Insurance Co. Ltd.**, AIR 2008 SC 2384, where appellant was a tanker driver, while driving vehicle he met with an accident as a result of which he sustained injuries and also amputation of right leg upto the knee joint. The Commissioner found that as the claimant had suffered amputation of his right leg upto knee, he was said to have suffered a loss of 100% of his earning capacity as a driver and on that basis awarded compensation to him. An appeal was filed before the

High Court of Karnataka by the Insurance Company. The High Court accepted the plea raised in the appeal that as per Schedule to the Workmen's Compensation Act, the loss of a leg on amputation amounted to 60% reduction in the earning capacity and as the doctor had opined to a 65% disability, and as such above figure was to be accepted and accordingly reduced the compensation. In these circumstances, the claimant moved to the Supreme Court. The Supreme Court relying on its decision in **Pratap Narain Singh Deo v. Shri Nivas Sabata and Anr** (*supra*) held that appellant had suffered 100% disability and incapacity, in earning as a driver as his right leg had been amputated from the knee and set aside the judgment of High Court and restored the order of the Commissioner.

15. A Division Bench of Karnataka High Court in **Siddappa v. The General Manager, K.S.R.T.C. and Anr**, (1988) I ACC 539, has also explained the scope of extent of percentage of loss of earning capacities specified in part II of the Schedule and has pointed out that the extent of permanent disablement specified therein should be deemed to have been taken place in the instances specified in column 2 of the schedule. But there is no bar upon the claimant from proving his case that he had suffered higher percentage of loss of earning capacity.

16. The ratio of the aforesaid judgments was applied in **National Insurance Company Ltd. V. R. Vishnu and Anr**, 1992 ACJ 590, wherein injured workman was employed as a driver of a tourist bus which met with an accident and his both legs were injured and finally his left leg was

amputated below knee. The Commissioner concluded that the claimant had suffered total permanent disablement. In appeal, the Division Bench of Karnataka High Court observed that the extent of permanent disability suffered as specified in the schedule to the Act is no bar for pleading and proving that actually the concerned workman has suffered higher percentage of or total, disability.

17. A learned Judge of Orissa High Court in case of **National Insurance Company v. Narendra Samal and Anr**, 1993 ACJ 1095, wherein the injured workman was a helper and was going in the truck from Ramgarh to Baripada, the truck dashed against a tree at road-side and over turned whereby left leg of the workman was crushed resulting in compound fracture, which was amputated, observed that it was a case of total disablement and not partial as the injured workman was not able to perform his duties as a helper in the truck.

18. In the present case, it is not disputed that because of amputation of right leg appellant has been incapacitated to drive the vehicle. The appellant is not able to walk without support. There is an evidence of appellant/claimant in the form of an affidavit in the trial court record wherein he has stated that he cannot be the driver of vehicle for whole of his life and has become 100% disabled for the purpose of driving. He has stated in the cross-examination that due to amputation he is also not in a position to walk. In the amputated leg rod has been inserted and there is no sensation in that leg. He has stated that he has lost his job and has become 100% disabled

due to accident. Nothing contrary is placed on record by the respondent to rebut the same. It is a clear case of “permanent disablement”. On the basis of evidence on record, the present is a case of total disablement as such he is not debarred from claiming compensation more than what is specified in the Schedule for the loss of earning capacity as has been held by the Supreme Court in **Pratap Narain Singh Deo v. Shri Nivas Sabata and Anr.** (supra), **K. Janardhan vs. United India Insurance Co. Ltd.** (supra) and other cases referred to above. Accordingly, the impugned order is set aside and compensation of the appellant is enhanced to Rs. 3,75,528/-. Accordingly, appellant is entitled to Rs. 3,75,528/- as amount of compensation. Respondent no. 2 is directed to pay the same within 30 days from the date of this order. Respondent no. 2 shall also be entitled to deduct the amount of compensation which it has already paid. As regards issue of interest and penalty is concerned, it has been noted in the impugned order that a separate show cause notice has already been issued to the respondent and the same is pending disposal before the Commissioner. Since the same is pending consideration, no order on the same can be passed at this stage.

The appeal stands partly allowed.

VEENA BIRBAL, J

MAY 28, 2012

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