

GAHC010002922011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : MFA/1/2011

NEW INDIA ASSURANCE CO. LTD.
HAVING ITS REGISTERED AND HEAD OFFICE AT NEW INDIA ASSURANCE
BUILDING, 87, MAHATMA GANDHI ROAD, FORT, MUMBAI-400001

VERSUS

MD. RITUL ALI
S/O MD. ABDUL KHALEK, VILL. HEDAYATNAGAR, P.O. NAGAON,P.S.
SADAR, DIST. NAGAON, ASSAM.

2:KRISHNA KAMAL BORA
S/O SURENDRA NATH BORA
VILL. PANIGAON
P.O. PANIGAON
P.S. SADAR
DIST. NAGAON
ASSAM

B E F O R E

Hon'ble MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the Appellant : Ms. M. Choudhury,
Advocate.

Advocate for the respondents : xxxxxx.

Date of hearing : 20.09.2023

Date of judgment : 20.09.2023

JUDGMENT & ORDER

The instant appeal has been preferred under section 30 of the Workmen's Compensation Act, 1923 (presently Employees Compensation Act, 1923) against a judgement dated 17.09.2007 passed by the learned Commissioner, Workmen's Compensation, Nagaon in NWC Case No. 115 of 2004. By the aforesaid judgement, the learned Commissioner has awarded a compensation of Rs.1,58,364/- (Rupees One Lakh Fifty Eight Thousand Three Hundred Sixty Four) with 12% interest.

2. This Court while admitting the appeal vide order dated 07.01.2011 had framed the following substantial questions of law:-

“1. Whether a sum of amount paid to workman to cover any special expenses entailed on him by the nature of his employment includes in his wages?

2. Whether learned Commissioner had erred in law and facts in accepting the disablement as well as the loss of earning capacity of the injured at 30% and 40% respectively on the basis of the mere assumption made by the Doctor ?”

3. I have heard Ms. M. Choudhury, learned counsel for the appellant. None has appeared for the opposite parties in spite of service. This Court had also passed an order dated 19.02.2020 regarding completion of service.

4. Ms. M. Choudhury, the learned counsel for the applicant has submitted that with regard to the first substantial questions of law, there are certain relevant case laws. Reliance has been placed upon the case of ***Oriental Insurance Co. Ltd. vs Lakhimai Das & Anr.*** reported in ***2006 (3) GLT 870*** in which the Hon'ble Division Bench of this Court had held that wages would not include the daily allowance. The learned counsel has however also placed on record the decision of the Hon'ble Supreme Court in the case of ***Mohd. Ameeruddin & Anr. Vs United India Insurance Company*** reported in ***(2011) 1 SCC 304*** in which such daily allowance

has been held to be part of the wages. The learned counsel however also places reliance upon a subsequent decision of the Hon'ble Supreme Court in the case of ***Surekha and Ors. Vs Branch Manager, National Insurance Company Limited and Anr.*** reported in ***(2017) 15 SCC 579*** wherein it has been again laid down that wages will not include the daily allowance. Following the said decision, this High Court has also passed an order dated 03.09.2019 in MFA No. 19/2010.

5. The learned counsel has however fairly pointed out that both the aforesaid judgements of the Hon'ble Supreme Court are passed by Benches of equal strength and it also appears that in the subsequent judgement of 2017, the earlier judgement was not brought to notice.

6. Be that as it may, the learned counsel submits that the computation of the compensation by including the daily allowance as a part of the wages is not permissible under the law and requires interference.

7. As regards the second substantial question of law regarding disablement, wherein the loss of earning capacity has been held to be 40%, the learned counsel has submitted that such assessment has been done on the basis of a certificate issued by a doctor in his personal capacity. It is submitted that there is a procedure prescribed for ascertaining disablement and the same cannot be proceeded on the basis of any presumption. The learned counsel has further pointed out that the doctor who was examined as PW2 in his cross-examination has admitted that the assessment of the factor of disability has been done on the basis of presumption.

8. The learned counsel accordingly submits that the second substantial question of law is also liable to be answered in favour of the appellant.

9. In the instant case, the claimant had made a claim on the basis of sustaining injuries in an accident occurring on 09.07.2004 concerning a vehicle (Mini Bus) bearing

registration No. AS-02/9686 in which the claimant had claimed to be working as a cleaner/Handyman. The records also revealed that till 13.07.2004, the claimant was an indoor patient in the BP Civil Hospital, Nagaon and in that period, there was no assessment made with regard to any disablement suffered by the claimant.

10. As indicated above, none of the opposite parties have come forward to contest the present appeal.

11. The contentions advanced by Ms. Choudhury, the learned counsel for the appellants have been duly considered and the materials placed before this Court including the LCRs have been carefully perused.

12. As indicated above, as per requirement of Section 30 of the Act in question, the appeal was admitted on two substantial questions of law which have been indicated above.

13. With regard to the first substantial question of law, the case laws placed before this Court would reveal that there is no consistency in the issue. He further reveals that the earlier decision of the Hon'ble Supreme Court in the case of **Mohd. Ameeruddin** (supra) was not even brought to the notice when the case of **Surekha** (supra) was being considered at a subsequent stage. Being confronted with such a situation, this Court had taken the recourse of having the objective of the statute in mind which is a beneficial piece of legislation meant to protect a workmen at the time of suffering any injuries or his family in the event of death during the course of his employment. Therefore, this court is of the opinion that the interpretation which is in favour of the workmen would be preferable, meaning thereby that the wages should be held to be inclusive of the daily allowance. Accordingly, the first question of law formulated by this Court stands answered in favour of the claimant.

14. With regard to the second substantial question of law, this Court finds force in the argument of the learned counsel for the Insurance Company-appellant that there is no materials prescribed by law to justify the assessment of 40% disablement including such disablement with regard to loss of earning capacity. Therefore, the approach of the learned Commissioner in accepting the aforesaid contention with regard to 40% disability regarding loss of earning capacity does not appear to be based on relevant materials on record. Therefore, this Court is of the opinion that the second substantial question of law is to be answered in favour of the appellant. This Court is accordingly left to decide on the amount of compensation granted by the impugned judgment and award dated 17.09.2007. The award is of an amount of Rs.1,58,364 (Rupees One Lakh Fifty Eight Thousand Three Hundred Sixty Four) as indicated above. The accident was of the year 2004 and the judgment is of the year 2007.

15. Under those aforesaid facts and circumstances, while answering the substantial questions of law, this Court is of the opinion that taking into account the aforesaid factors, the amount in question may not be interfered with and accordingly the same is sustained. At this stage, the learned counsel for the appellant has submitted that 50% of the Award was deposited at the time of admission of the appeal before the Workmen Compensation Commissioner, Nagaon. Therefore, the Insurance Company is directed to deposit the remaining 50%. It is further clarified that the interest granted would accrue only upon the balance 50% which is left to be deposited. The balance amount as directed above is to be deposited alongwith the interest before the Workmen Compensation Commissioner, Nagaon within a period of 60 (sixty) days. The claimant would be entitled for release of the amount from the learned Workmen Compensation Commissioner (Presently Employees' Compensation Commissioner, Nagaon) in accordance with law and on being properly identified by his counsel.

16. Appeal accordingly stands disposed of.

17. The LCRs may be sent back forthwith.

JUDGE

Comparing Assistant