

GAHC010199102003



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

Case No. : MFA/153/2003

NATIONAL INSURANCE CO LTD

VERSUS

DURGESWAR NEOG

Advocate for the Petitioner : MR.P MAHANTA,

Advocate for the Respondent : MR. P P BORTHAKUR, MS IVY HUSSAIN,MS A
HUSSAIN,MAYUR DAS

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 03-10-2024

Heard Mr. P. Mahanta, learned counsel for the appellant and Mr. P.P. Borthakur, learned counsel for the respondents.

2. In this petition, under Section 30 of the Workmen's Compensation Act, 1923 as amended by Act 2000, read with Article 227 of the Constitution of India, is directed against the Judgment and Award, dated 31.03.2003, passed by the learned Commissioner for Workmen Compensation, Nagaon, in W.C. Case No.

283/2001.

3. It is to be noted here that vide Judgment and Award, dated 31.03.2003, the learned Commissioner for Workmen's Compensation, Nagaon has directed the appellant to pay a sum of Rs. 1,51,142/- with interest @ 12% per annum, w.e.f. 03.06.2001, till payment.

4. The background facts leading to filing of the present appeal is adumbrated herein below:-

“The claimant, Shri Durgeswar Neog, respondent No. 1, herein was a driver by profession and he used to drive Mini Bus No. AS-02-7771 (407), belonging to the respondent No. 2, Shri Divya Jyoti Bora, from Dabaka to Nagaon town.

On 03.06.2001, he was driving the said bus from Dabaka to Nagaon. But, while he reached Sutar Gaon, on N.H.36, the vehicle met with an accident and it had gone out of his control and rolled on its back, on account of failure of the brake. In the said accident, the respondent No.1 had sustained multiple injuries on his person and thereafter, he took medical treatment at B.P. Civil Hospital, Nagaon and subsequently, from private practitioner.

Thereafter, he had filed a claim petition before the learned Commissioner for Workmen's Compensation, Nagaon, seeking compensation for the loss of his income due to the injuries sustained by him in the said accident.

Upon the said claim petition, the learned Commissioner for Workmen's Compensation, Nagaon has registered a case, being W.C. Case No. 283/2001, against the owner of the vehicle and the present appellant. Then on receipt of the notice from the learned

Commissioner, the appellant herein entered appearance as respondent in the said case and contested the case by filing written statement.

Thereafter, hearing learned counsel for both the parties, the learned Commissioner for Workmen's Compensation, Nagaon had allowed the claim petition and directed the appellant herein to pay a sum of Rs. 1,51,142/- with interest @ 12% per annum, w.e.f. 03.06.2001, till payment."

5. Being highly aggrieved, the appellant has approached this court by filing the present appeal, on the following grounds:-

- (i) That, the learned Commissioner for Workmen's Compensation acted illegally while deciding the issue No. 3, in holding the percentage of loss of earning capacity of the claimant as 40%, on the basis of the loss of 30% disablement as adduced and certified (Annexure – 5) by the P.W.2, the Doctor who examined the claimant on 28.11.2001, without any basis and finding of specific injury on the date of issuing certificate and as such, the physical disability of the claimant, on account of which the Judgment and Award dated 31.03.2003, was passed is without any basis and therefore, the same liable to set aside;
- (ii) That, the learned Commissioner for Workmen's Compensation has committed illegality in deciding the percentage of earning capacity on the basis of the certificate issued by P.W.2, the Doctor on the basis of some old clinical report, without mentioning the injury in permanent, total and partial in nature, while issuing certificate;

- (iii) That, the mode of assessment of loss of earning capacity and the person competent to assess it have been provided in Section 4 of the Act and while judging the loss of earning capacity, the basis of sound principle of medical science and assessment done by a qualified medical practitioner plays a vital role and there must be a basis for it and while assessing the loss of earning capacity the qualified medical practitioner will have due regard to different injury specified in Schedule – 1 and in the case in hand, the Doctor while issuing disable certificate placed reliance on old X-ray report, tenderness on the right shoulder and the same is nothing but a guess work and without mentioning whether the injury sustained is permanent or partial injury and came to the opinion of 40% loss of earning capacity is not acceptable in the eye of law;
- (iv) That, though P.W.2, the Doctor has issued the certificate on the basis of report submitted by Dr. G. Das, Orthopedic Surgeon and he was the best person to issue certificate relating to permanent disable certificate under the Act. But, said Doctor has not issued any certificate to show the permanent partial injury of the claimant;
- (v) That, the learned Commissioner committed illegality by holding that the income of the claimant was Rs. 3,000/- per month, on the basis of the written statement filed by the owner and since the owner of the vehicle did not enter into witness box to prove the facts stated cannot be relied upon; and
- (vi) That, the learned Commissioner has committed illegality by awarding 12% interest per-annum.

6. It is to be noted here that though the original record of W.C. Case No. 283/2001, was called for from the Office of learned Commissioner for Workmen Compensation, Nagaon, yet the same could not be traced out. Thereafter on the basis of admitted documents, available with the learned counsel for both the parties, and on furnishing the same to this court, and as agreed upon by learned Advocates of both sides, it decided to hear and dispose of this appeal.

7. Mr. Mahanta, learned counsel for the appellant submits that nature of injuries sustained by the claimant – respondent No. 1 is not of permanent in nature and there is no medical certificate to that effect. Mr. Mahanta further submits that the P.W.2, who had given the certificate, is not an Orthopedic Surgeon and as such, assessing disability at 30% and also assessing loss of earning at 40%, are not in accordance with law. Mr. Mahanta referring to Exhibit – 4, the certificate of Doctor, submits that nowhere in the certificate it is stated that the injury got by the claimant is permanent in nature. Mr. Mahanta also submits that there was no servant and employer relationship between the respondent No.1 and 2, and though the respondent No. 2, the owner of the vehicle filed the written statement stating that the claimant – respondent No. 1 was his servant and he used to pay a sum of Rs. 3,000/- per month to him, is not established as he did not enter into the witness box. Mr. Mahanta also submits that awarding interest @ 12% is illegal at the relevant point of time the rate of interest was below than the same and the factor, which is required to be taken into account in assessing the compensation was not correct and as such, the impugned judgment and order is illegal and therefore, it is contended to set it aside.

7.1. Mr. Mahanta has referred a case law of Hon'ble Supreme Court, in the case of **New India Assurance Company Limited vs. Sanjeeb Kumar and Another**, reported in **2000(2) GLT 567**, in support of his submission.

8. Per-contra, Mr. Borthakur, learned counsel for the respondents submits that as per provision of the Workmen's Compensation Act, the Doctor who has to examine the injured person, is to be a qualified medical practitioner and not necessarily he ought to have been an Orthopedic Surgeon or specialist. Mr. Borthakur further submits that the appellant had not effectively cross-examined the P.W.2, who had categorically stated on the basis of one report received from the Orthopedic Surgeon that he had ascertained the percentage of disable of the claimant and as such, no fault could be found with the evidence of the Doctor. Mr. Borthakur also submits that the claimant received a sum of Rs. 1,500/- as salary and he categorically stated that owner of the vehicle also used to give him a sum of Rs. 50/- per day and as such, the learned Commissioner has rightly determined the monthly income of the deceased at Rs. 3,000/- per month. Mr. Borthakur lastly submits that at the relevant point of time, i.e. in the year 2001, the rate of interest was 12% and as such, the Commissioner has rightly granted the rate of interest @ 12% per-annum. Under such circumstances, Mr. Borthakur has contended to dismiss the appeal.

9. Having heard the submissions of learned counsel for both the parties, I have carefully gone through the petition as well as the documents placed on record and also perused the impugned Judgment and Award dated 31.03.2003, passed by Commissioner for Workmen's Compensation, Nagaon, in W.C. Case No. 283/2001.

10. In view of the rival submission of learned Advocates of both sides, the issue, to be decided by this court is:-

(i) Whether the learned Commissioner had correctly decided issue of entitlement of compensation by the respondent No.1.

11. It appears from the impugned judgment and award that while deciding the claim petition, the learned Commissioner had framed following three issues:-

- (i) whether there is any cause of action for the claimant;
- (ii) whether the claim petition is maintainable in its present form; and
- (iii) whether the opposite parties are liable to pay compensation, if so, to what relief the claimant is entitled to.

11.1 Thereafter, considering the evidence adduced by the respondent No.1 and also considering the submissions of learned counsel for both the parties, the learned Commissioner has decided all the issues in favour of the respondent No.1.

11.2. That in respect of issue No. 1, the learned Commissioner has held that there is cause of action for the respondent No.1 to file the case under Workmen's Compensation Act. The learned Commissioner had found that there is evidence of the respondent No.1 in that regard and the medical documents and police reports, Exhibit 1 – 6, are corroborative with each other. The learned Commissioner had also found that the claim is maintainable in the present form as in the written statement, the owner of the vehicle, i.e. the respondent No. 2 has admitted the fact of accident, salary of the claimant, day, time and place of accident along with the injury sustained by the claimant and in no uncertain terms he stated that the respondent No.1 was his driver and he received injuries during the course of his employment, while discharging his duties. Therefore, the Commissioner had decided the Issue Nos. 1 & 2 in favour of the respondent No.1.

12. Though, Mr. Mahanta, learned counsel for the appellant has disputed the

claim made by the respondent No.1, on the ground that the respondent No. 2, though had filed written statement supporting the claim of the respondent No.1, yet he had never contested the claim and entered into witness box for which no value could be attributed upon the said written statement, yet, in the cross-examination, the appellant could not rebut the categorical evidence adduced by the respondent No.1 in that regard. And as such the evidence of the respondent No.1 that he was an employee of the respondent No. 2 and he that received salary of Rs. 3,000/- per month, and that in the said accident he sustained injuries has to be accepted. The medical documents also lend support to his evidence and as such, no fault could be found with the finding the learned Commissioner in deciding the issue Nos. 1 & 2 in favour of the claimant.

13. It also appears that while deciding the issue No. 3, the learned Commissioner had found that the respondent No.1 had sustained the injuries while he was on his duty and working as driver of the respondent No.2 and the learned Commissioner had also found the documents exhibited by respondent No.1 supported his evidence. The learned Commissioner had also found that the evidence of the Doctor/P.W.2 also shows that he had examined the respondent No.1, on different occasions, and finally he had assessed the percentage of physical disablement at 30% and consequent loss of earning of the respondent No.1 at 40%.

14. Thereafter, the learned Commissioner had assessed the compensation as under:-

- “1. Loss of earning capacity as determined by a qualified medical practitioner is 40%.**
- 2. Salary of the workman inclusive of allowances is Rs. 3,000/- P.M. as admitted by his employer in his written statement and**

3. Age of the workman at the relevant time was 29 years as per medico legal documents adduced in the proceeding.

Therefore the entitlement of compensation of the claimant is calculated as follows:

$$40\% \text{ of Rs. } 1800 \times 209.92 = \text{Rs. } 1,51,142.40/-$$

The amount is rounded off Rs. 1,51,142/- only. (Rupees one lac fifty one thousand one hundred forty two only).

In addition to this, the claimant is also entitled to simple interest on the amount of compensation as determined above @ 12% P.A. as per provision laid down under Section 4A of the Act calculated w.e.f. 3.6.01 to the date of deposit by the O.P.”

15. Further, it also appears that the learned Commissioner had examined the Doctor, who had examined the respondent No.1, as P.W.2, who was working as Medical Inspector of Tea Gardens of Nagaon District. His evidence reveals that had examined the respondent No.1, who had shown him the medical documents of his previous treatment, Exhibit 1 & 2 and thereafter he had issued the prescription, Exhibit 3, and he had mentioned there the injuries sustained by the respondent No.1 and also he had referred respondent No.1 to consult the Orthopedic Surgeon. And after examining him, the Orthopedic Surgeon had issued Exhibit - 4. Thereafter, the claimant had shown the same to him and accordingly, he issued Exhibit - 5, mentioning the percentage of disability as 30% and consequent loss of earning at 40%. His evidence also reveals that the 30% disability is permanent in nature for which respondent No.1 would not be able drive any vehicle.

15.1. The evidence of P.W.2 remained un-impeached in cross-examination. It is however, elicited that he has experience in medicine, dermatology and STD, and that though he had not mentioned the injury sustained as fracture in his report, Exhibit – 1, yet, he had mentioned as P.O.P., which means fracture. Further, it is elicited that he had mentioned in Exhibit – 3, the age of the claimant as 29 years. He denied that he is not competent to issue a disability certificate and that respondent No.2 was not under his treatment from 06.06.2001 to 28.11.2001. It is also elicited that grievous nature means dislocation and fracture and when he examined the claimant clinically he found restricted movement of his hand and he does not know if the condition of the claimant has improved.

16. Thus, it appears that the respondent No.1 had sustained fracture injury over his hand. P.W.2 had found restricted movement of the said hand and he referred the claimant to the Orthopedic Surgeon and accordingly, Orthopedic Surgeon had examined him and given a report, Exhibit - 4 and thereafter, he had assessed that disability of the claimant at 30% and consequently loss of income at 40% and the said disability, according to P.W.2, is permanent in nature for which he could not be able to drive a vehicle.

17. This being the position, it cannot be said that the P.W.2 had committed any illegality in issuing Exhibit - 5 on the basis of Exhibit - 4, issued by Orthopedic Doctor. Though Mr. Mahanta, learned counsel for the appellant, submits that the P.W.2 is not the qualified person to determine the percentage of disability and consequently to assess the loss of income, yet, the said submission left this court unimpressed, in view of express provision made in the act, where it is provided that the injured must be examined by a qualified medical practitioner. There is no indication about the examination of the injured by a Orthopedic Specialist. Mr. Borthakur, learned counsel for the respondent, has rightly pointed this out during hearing and I find sufficient force in the same.

18. It also appears that the claimant has categorically stated his age at the relevant time was 29 years. P.W.2, the Doctor also deposed and reflected in his report the age of the respondent No.1 as 29 years, for which the learned Commissioner has adopted the factor 209.92 while assessing the quantum of compensation. That being the position, the Commissioner has not committed any illegality in assessing the quantum of compensation, which the respondent No.1 is entitled to, at Rs. 1,51,142/-.

19. I have carefully gone through the decision referred by Mr. Mahanta, learned counsel for the appellant in **Sanjeeb Kumar and Another** (supra) and I find that this case would not come into his aid, as in the said case the Commissioner has adopted some mode which is not provided in the Act, while determining the percentage of loss of earning capacity at 50%, without any specific evidence of the Doctor. On such count, the court held that the power is not available with the Commissioner to grant award and thereafter, remanded the matter back to the Commissioner to assess the compensation afresh and in order to do so, he may also ask the Doctor to appear before him and give his opinion with regard to percentage of loss of earning capacity.

20. This is not the fact situation here in this case. Here in this case the Doctor was examined and he is a qualified medical practitioner in terms of the provision of the Act. Besides being a qualified medical practitioner, he had relied upon a Certificate of Orthopedic Doctor in ascertaining the percentage of disability of the respondent No.1. His evidence remained un-impeached in cross-examination.

21. Indisputably, in the present case, the Doctor was examined and he had given his opinion with regard to the percentage of loss of earning capacity at 40%. As such, the learned Commissioner has assessed the compensation and also awarded interest @ 12% per annum on the awarded amount as per

provision of Section 4A of the Act w.e.f. 03.06.2001, till the date of deposit by the appellant – opposite party.

22. Though, Mr. Borthakur, learned counsel for the respondents submits that at the relevant point of time the awarded rate of interest was 12%, yet, he had fails to show any supporting document before this court. That being so, in view of the decision of Hon'ble Supreme Court, in the case of **Municipal Council of Delhi vs. Association of Victims of Uphaar Tragedy**, reported in **(2011) 14 SCC 481**, this court of the view that awarding interest @ 9% per annum will sub-serve the cause of justice.

23. In the result, I find no merit in this appeal. Accordingly, the appeal stands **dismissed**. However, the rate of interest is modified to the extent @ 9% per annum.

24. In terms of above, this appeal stands disposed of. The parties have to bear their own costs.

JUDGE

Comparing Assistant