

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 1909 OF 2009

Mujaji s/o Ramrao Sawale,
Age: 25 years, Occ: Cleaner,
R/o. Nishana, Tq. Kalamnuri,
Dist. Hingoli.

...Appellant

versus

1. Anil s/o Gangaram Shinde,
Age: 40 years, Occ: Business,
(Owner of Truck bearing
No.MH 22/1296)
R/o. C/o. Deogaonkar, Shakuntala,
Sharda Nagar, Nanded, Dist.Nanded.

2. National Insurance Company Ltd.
Through its Divisional Manager,
Guru Govind Singh Market,
Nanded, Tq. & Dist. Nanded.

...Respondents

.....
Mr. P.S. Agrawal, Advocate for appellant
Mr. V.N. Upadhye, Advocate for respondent No.2
Respondent No. 1 : Served
.....

CORAM : N.W. SAMBRE, J.

**RESERVED ON : 10/08/2015
PRONOUNCED ON: 14/08/2015**

JUDGMENT :

This appeal is by the claimant against the award delivered by the Commissioner under Workmen's Compensation Act on 05/05/2009 whereby the Commissioner has allowed the award in part and rejected the balance claim.

2. The appellant-claimant urged that he has preferred claim petition against the present respondent Nos. 1 and 2 hereto, non applicants to the Claim Petition No. 24 of 2007 under Section 4 of the Workmen's Compensation Act, 1923 claiming compensation of Rs.2,92,828/- alongwith 50% penalty and interest @ 12% p.a. According to him, he was employee as cleaner on the truck bearing Registration No. MH-22/1296 owned by respondent No. 1 insured with respondent No. 2, met with an accident while carrying cotton on 20/01/2007 resulting into registration of Crime No. 10/2007 for an offence punishable under Sections 279, 337 and 338 of the Indian Penal Code with Asalli police station (Gujrat). The appellant claimed that in the said accident, he suffered injury to his forehead and fracture on left tibia fibula and as such, there is permanent disability to the extent of 24% and claimed loss of 100% earning capacity.

3. The claim was resisted by respondents by filing written statement.

4. The claimant examined himself at Exhibit-32 and deposed in support of the claim petition and claimed that he is entitled for compensation of 2,92,828/- with 50% penalty. In his deposition, he deposed in support of the claim and has produced on record discharge card at Exhibit-34, bills issued by Dr. Jaydeep at

Exhibit-36 and his salary certificate at Exhibit-37. In his cross examination by insurance company, he denied that he was travelling as gratuitous passenger. He has also produced medical evidence. In support of his claim, examined Dr. Manish Bagadiya, M.S.(Ortho.), who deposed in support of disability to the extent of 24%.

5. The Insurance Company, so also vehicle owner have not examined any witness.

6. The Commissioner, considering the disability certificate at Exhibit-42 which speaks of fracture to tibia fibula and other injuries which are not covered under Schedule-I of the Act declared that the petitioner is entitled for the compensation under the Act. The Commissioner then having regard to the undisputed age of the petitioner, has considered 60% of his salary for considering award of claim as compensation after considering 24% disability and as such ordered 24% i.e. Rs. 70,279/-. The claim of insurance company that the risk covered under the policy is only Rs.10,000/- was accepted by learned Commissioner and has proceeded to pass award awarding compensation of Rs.10,000/- to be paid by the insurance company and Rs.60,279/- by the employer. The Commissioner has also ordered penalty of Rs.35,140/-.

7. In view of above referred back ground, Mr. Agrawal, learned Counsel for the appellant has raised following question of law;

Whether the Commissioner has recorded perverse finding as regards entitlement of Rs.70,279/- only?

8. In my opinion, the above referred issue is answered in the affirmative for the following reasons.

9. In the present case, though the disability certifies to the extent of 24% was duly proved, however it is required to appreciated that Dr. Bagadiya has stated that there is loss of earning capacity of claimant in view of 24% permanent disability. The said Doctor was member of the medical board. Once it is certified that there is 24% permanent disability suffered by the appellant and there will be loss of earning capacity, in view of the fact that the injury suffered is non scheduled, it will be appropriate for this Court to record finding about the degree of loss of earning capacity, particularly in the light of evidence recorded.

10. The appellant in his evidence has deposed that because of the accident in question, he will remain disabled throughout his

life. The fact remains that because of his permanent disability, he is able to perform duty of cleaner as was performed earlier, as such loss of earning has to be calculated at 100%.

11. In view of the evidence of the claimant and that of Doctor who has deposed that the injuries of the claimant are incurable and his inability to make statement as to degree of loss of earning capacity of the claimant, the fact remains that the claimant will not be in a position to perform his duty as cleaner and there will be substantial restrictions on his free movements. In view of above, the loss of earning capacity of the present claimant is calculated at 100%.

12. Once it is noticed that there is 100% loss of earning capacity then this Court is required to analyze as to entitlement of the quantum of compensation. In plaint, the claimant has pleaded that he was working as cleaner on truck and was earning Rs.75/- per day i.e. Rs. 2250/- per month. His age was stated to be 25 years on the date of accident and upon considering 60% of his monthly salary, the claimant could be calculated at Rs.2,92,828/-. The above referred fact is also admitted by his employer i.e. non applicant No.1 in paragraph-5 of the written statement which is at Exhibit-13/1. In his evidence, the claimant has established the said fact by deposing

to that effect and in his cross examination, nothing could be elicited. The appellant herein has not brought on record any evidence apart the case of only simplicitor denial on income. In view of above, this Court is required to accept the contention of the claimant that he was earning Rs.2250/- per month towards salary and 60% of the same can be taken for the purpose of calculating the compensation.

13. The perusal of evidence of witness of the claimant reflects that he has established the fact about accident in question occurred while working as employee with respondent No. 1 on his truck, which was insured with respondent No. 2. In view thereof, the claim of Rs.2,92,828/- as is claimed by the appellant is required to be accepted. The findings recorded by the Commissioner are required to be upset. In my opinion, the insurance company will be liable to pay the entire amount of compensation in view of the admitted fact that the vehicle in question alongwith its employee was insured with the insurance company and appropriate premium was accepted. The claim of insurance company that their liability to indemnify to the extent of Rs.10,000/- only as is raised before the Commissioner is ridiculous and same is liable to rejected.

14. The Commissioner has ordered recovery of penalty from the vehicle owner to the extent of 50% i.e. Rs. 35,140/- along with

interest @ 12%.

15. Respondent No. 1 owner though served, none appears. In view thereof, this Court having noticed that the vehicle owner has not preferred any appeal against the order of awarding penalty, it will be appropriate, in my opinion, to award penalty in favour of the present appellant to be recovered from vehicle owner to the extent of 50% of the claim awarded and shall carry interest @9% p.a.

16. In view of finding, as regards awarding penalty, recorded by the Commissioner, it is worth to add here that since the order is not objected by vehicle owner respondent No.1, the vehicle owner since has not paid compensation, it will be appropriate that respondent No.1 be held responsible for payment of penalty.

17. In view of above, I propose to pass the following order.

18. It is ordered that respondent No. 2 Insurance Company to pay compensation of Rs.2,92,828/- (Rs. Two lac ninty two thousand eight hundred twenty eight only) to the appellant within period of two months from the date of this order and in default, same shall carry interest @9% p.a. till date of its realization.

19. Respondent No. 1 shall pay penalty of Rs.1,46,414/- (Rs. One lac forty six thousand four hundred fourteen only) to the appellant within period of two months from today alongwith interest @9% p.a.

20. The amount deposited before the learned Commissioner under Workmen's Compensation Act is permitted to be withdrawn.

21. The appeal is allowed in above terms. No order as to the costs.

Sd/-
[**N.W. SAMBRE, J.**]

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