

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

FIRST APPEAL NO. 3612 OF 2011

Nagnath @ Nagesh Chanbas Swami
(Mathapati) .. Appellant

Versus

Shantivir Shivacharya Hiremath
and another .. Respondents

Shri Girish Rane, Advocate for the Appellant.
Shri M. M. Ambhore, Advocate for the Respondent No. 2.

**CORAM : S. V. GANGAPURWALA, J.
DATE : 30TH SEPTEMBER, 2015.**

PER COURT :

. The present appellant had filed an application for compensation under the provisions of the Employees Compensation Act. The said application is partly allowed. The present appeal is filed for enhancement.

2. Mr. Rane, the learned counsel submits that, the present appeal is filed on following substantial questions of law :

(i) Though the disability certificate shows the disability of 29%, the functional disability is 100% as the appellant is not in a position to drive the vehicle and perform his avocation as a driver?

(ii) Though the salary is Rs. 5,000/- per month and even the employer had admitted in the written statement that, there is no contra evidence, still the Commissioner has considered the salary as Rs. 4,000/-.

3. The learned counsel for the appellant submits that, only because employer has not stepped into witness box adverse inference is drawn against the appellant. The appellant has specifically deposed that, the appellant was getting salary of Rs. 5,000/- per month and that appellant is a driver. According to the learned counsel Court is required to consider functional disability if the person is not in a position to perform the avocation, which he was performing at the time of accident. In such a case functional disability of 100% is required to be considered. The learned counsel further submits that, there was no impediment to consider the income as Rs. 5,000/- per month in view of specific proof that is deposition on oath by the present appellant, so also the admission of the employer in the written statement and more particularly when no contra evidence is on record. Even the Apex Court in the case of **Minu Rout and another Vs. Satya Pradyumna Mohapatra and others** reported in ***AIR 2013 SC (Supp) 62*** had held that the job of driver is skilled job and Rs. 6,000/- per month notional income was considered.

4. Mr. Ambhore, the learned counsel submits that the date of the accident is 29.01.2010. At that time the ceiling of Rs. 8,000/- per month was not introduced, as such ceiling of Rs. 4,000/- per month is required to be considered. As such notional income of Rs. 4,000/- per month is rightly considered. The disability of 29% is rightly considered in view of the medical certificate. There is no question of functional disability of 100%. No evidence to that effect is led.

5. With the assistance of learned counsel I have considered the judgment, so also the record and proceedings. The functional disability of 100% can only be considered, if the person is not in a position to do the job which he was doing at the time of accident. No such evidence is on record. There is no iota of evidence to conclude that the appellant would not be in a position to do his avocation and perform his work. There is no proof that the appellant was required to surrender his license of driving vehicle. In the light of that, 100% disability could not have been considered.

6. As far as the proof of income is concerned on 29.01.2010 the upper ceiling of Rs. 4,000/- could not have been applied as the said provision was already deleted. During the said period i. e. at the time of accident there was no upper ceiling laid down under the Employees Compensation Act. The evidence on record

substantiates the claim of appellant that he was earning Rs. 5,000/- per month. There is no contra evidence on record. Even employer has admitted in his written statement. The Apex Court in the case of Minu Rout and another Vs. Satya Pradyumna Mohapatra and others referred to supra has also observed that, the job of a driver is skilled job and had considered income of Rs. 6,000/- per month. In the present case, the claimant has deposed that, he was earning salary of Rs. 5,000/- per month. Considering the above circumstances the salary of Rs. 5,000/- per month ought to have been considered by the Commissioner.

7. In the light of the above, appeal needs to be partly allowed. The income is required to be considered as Rs. 5,000/- per month. The multiplier of 192.14 would be applicable considering the age of the claimant as 37 years and considering the disability, it would be to the extent of 60%, if the income of Rs. 5,000/- per month is considered, then the claimant would be entitled for Rs. 3,45,852/- for compensation and the medical expenses of Rs. 1,38,776/-. As such, the appellant is entitled for total amount of Rs. 4,84,628/-.

8. In the result I pass following order.

9. The original opponent Nos. 1 and 2 are jointly and

severally liable to pay the appellant/claimant compensation of Rs. 4,84,628/- with interest at the rate of Rs. 12% per annum on the amount of compensation after expiry of one month from the date of accident till its realization. No costs.

[S. V. GANGAPURWALA, J.]

bsb/Sept. 15