

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

**FIRST APPEAL NO. 1912 OF 2014
WITH
CIVIL APPLICATION NO. 11038 OF 2014**

Vyankatesh s/o Chandramohan Nadar,
Age: 39 years, Occ: Business,
R/o. Dal-Mill, Near Police Quarter,
Babhalgaon, Tq. & Dist. Latur. ...Appellant

versus

Mr. Ram s/o Shivaji Gangane,
Age: Adult, Occ: Employed,
R/o. Babhalgaon, Tq. & Dist. Latur. ...Respondent

.....
Mr. T.K. Prabahakaran, Advocate for appellant
Mr. R.P. Adgaonkar, Advocate for respondent
.....

CORAM : N.W. SAMBRE, J.

DATE : 28th JULY, 2015

ORAL ORDER :

Present appeal is under Section 30 of the Workmen's Compensation Act, 1923 by the employer questioning the legality and validity of the award dated 18/08/2014 passed by the Commissioner for Workmen's Compensation Act bearing W.C.A. No. 56 of 2010.

2. The respondent-claimant being engaged by the appellant herein as labour and was paid daily wages of Rs. 125/- per day, met with an accident on 29/10/2009 at about 4-30 a.m during the course of employment resulting into fracture to three fingers. It is

claimed that immediately after the accident, he was shifted to Dr. Poddar's hospital, who was examined at Exhibit C-22.

3. Dr. Poddar then operated him and the matter was reported to the police resulting into registration of the complaint. Pursuant to the accident, the claim petition was lodged claiming compensation of Rs.5,04,000/- alongwith 50% penalty.

4. The claim petition was resisted by present appellant by filing his written statement at Exhibit C-6. The appellant denied the very existence of the industry, so also the employer and employee relationship.

5. Based on the pleadings of the parties, the Commissioner framed the issues at Exhibit O-3 and permitted the parties to lead evidence. The respondent-claimant adduced his evidence at Exhibit U-6 and examined Dr. Rameshwar Kande at Exhibit U-20. In addition to above oral evidence, he has placed on record the documentary evidence i.e. spot panchnama at Exhibit U-11, medical certificate from Shree hospital at Exhibit U-26, discharge card at Exhibit U-12, copy of notice at Exhibit U-13, acknowledgment at Exhibit U-14, 15 and 16. He has also placed on record the statement given by the present appellant Vyankatesh Nadar at Exhibit U-17, statement of

Balaji Nadar at Exhibit U-18, disability certificate at Exhibit U-21, loss of earning capacity certificate at Exhibit U-22, injury certificate at Exhibit U-24 and other evidence.

6. The appellant herein examined himself at Exhibit U-14 and also examined another witness Dr. Sureshchandran Amramels at Exhibit C-16. Apart from above, he has examined Dr. Poddar at Exhibit C-22.

7. Considering the oral and documentary evidence, the Commissioner has awarded compensation as claimed of Rs.5,04,000/- with interest @12% p.a. from the date of accident till realization.

6. Feeling aggrieved thereby, present appeal by the appellant employer.

7. Mr. Prabhakaran, learned Counsel for the appellant has sought to canvass following question of law;

“Whether in the light of nature of injuries suffered by the claimant-respondent, the Commissioner was right in awarding compensation considering 100% loss of earning capacity.?”

8. So as to substantiate his contentions, he has invited my attention to the nature of injuries suffered by the claimant-respondent. According to him, the nature of injury was fracture to second, third and fourth metacarpal of right hand, for which the claimant was operated on 30/10/2009. It is further required to be noted that the injury certificate as is placed on record vide Exhibit U-24 also justifies the nature of injuries suffered by the claimant. The injury in question was caused because of fall of heavy object on right hand. The injury certificate further speaks of weakness in right hand and inability of claimant to do same work. According to learned Counsel for the appellant, if the nature of injuries suffered is compared with that of descriptions of injuries and percentage of loss of earning capacity as are mentioned in part-I and II of Schedule I prescribed under Section 2(1) and 4 of the Employee's Compensation Act, 1923 (hereinafter shall be referred to as 'the Act' for the sake of brevity). He submits the hand of the claimant was not amputated. Apart from above, according to him, loss of earning capacity could be calculated only to the extent of 33%, even if loss to the whole index finger, middle finger, right or little finger is considered. He would further urge that loss of earning capacity based on the same ought to have been analyzed by the Commissioner and according to him, award in question, as such, is liable to be set aside or modified to the extent of awarding

compensation only to the extent of loss of 33% of earning capacity.

9. He would further urge that the evidence of Dr. Poddar, witness who was examined at Exhibit C-22 in support of defence by the present appellant was not at all considered.

10. While opposing the above referred submissions, learned Counsel for the respondent-claimant would urge that the injury suffered is admittedly not covered in any of the Schedule under the Act. According to him, in such eventuality, provisions of clause-(ii) of sub section (c) of Section 4(1) of the Act is required to be adhered to. He would urge that once expert's evidence is brought on record, who has deposed at Exhibit U-20, which certifies the loss of earning capacity to the extent of 100%. He would urge that the said aspect was rightly considered by the Commissioner and according to him, the award delivered by the Commissioner is just and proper and does not call for any interference and prayed for dismissal of the appeal.

11. In view of submissions of rival parties, this Court is required to decide question of law in the background of evidence brought on record. It is required to be noted that the claimant has examined himself and Dr. Rameshwar Kande. Though happening of the accident in question cannot be disputed, however the degree of

disability and loss of earning capacity is required to be evaluated in view of the submissions of the learned Counsel for the appellant, particularly in the back ground of provisions of Section 4. This Court has analyzed the evidence of expert. Dr. Rameshwar Kande, who claims to be M.B.B.S. D. Artho, has categorically stated that there was fracture to 2nd, 3rd and 4th metacarpal of right hand. He has advised physiotherapy and soft ball exercises to the claimant. According to him, he has evaluated permanent physical disability to the extent of 27.78% for right upper extremity and proved the certificate of disability at Exhibit U-21. He has also deposed that the claimant will be unable to work as before and as such, assessed 100% loss in his earning capacity. According to him, the contents of the loss of earning capacity at Exhibit U-22 were correct to his knowledge.

12. In his cross examination, he has stated that the claimant can do all the work where the use of right hand is not required. The above referred evidence is taken into account by the Commissioner while reaching to the conclusion as regards the loss of earning capacity to the extent of 100%.

13. The explanation II to clause (c) of sub section (1) of Section 4 reads thus :

“ In assessing the loss of earning capacity for the purposes of sub-clause (ii), the qualified medical practitioner shall have due regard to the percentages of loss of earning capacity in relation to different injuries specified in Schedule I”

14. From perusal of award, it reflects that while considering, analyzing and relying upon the expert's evidence i.e. Doctor, the Commissioner has lost sight of the said explanation-II and has proceeded to award compensation purely on the basis of permanent physical disablement to the extent of 27.78% and certification of 100% loss of earning capacity.

15. It is required to be noted that perusal of Schedule I reflects that particularly part II deals with the description of the injuries. The injury, which is suffered by the claimant has resulted into unable to use his right hand. The description of injuries as mentioned at Serial No. 4 in the said Schedule is required to be considered which reads thus :

“Sr. No. 4. Loss of a hand or of the thumb and four fingers of one hand or amputation from (11.43 cms.) below tip of olecranon, percentage of loss of earning capacity - 60.

16. Once governing Section 4 contemplates adherence to the description of injury and loss of earning capacity to be

considered. The Commissioner has considered expert's evidence (Doctor) for assessing 100% loss of earning capacity and has proceeded to deliver award in question.

17. The reliance placed by learned Counsel for the respondent upon the judgment of this Court in the matter of ***National Insurance Co. Ltd. vs. Rama Dnyanoba Shinde and others*** reported in ***2007(3) Bom. C.R. 379*** so as to canvass that expert's evidence has to be accepted as final word in view of the scheme of clause (c) of sub section (1) of Section 4 of the Act. Para-19 of the said judgment reads thus :

“19. On the facts of the case it is seen that cross examination of Dr. Jadhav does not reveal that his being a qualified medical practitioner or an expert is challenged.

All that was challenged is authority to issue a certificate in the back ground of existence of a medical board. Moreover a certificate to be issued by a medical board in a Civil Hospital is not within the contemplation of the Workmens Compensation Act, while it may be a matter vis-a-vis a Government servant or parties who are claiming certain benefits under the scheme of the Government,”

18. From the above referred observations, it is clear that the Commissioner in the said matter was not dealing with explanation II of the said Section, which is reproduced herein above. What is required to look in the present case, is to consider and analyze the evidence of expert i.e. Doctor, who has certified disability to the extent of 27.78%, 100% loss of earning capacity. Once statute contemplates that while assessing loss of earning capacity for the purpose of said clause (ii) qualified medical practitioner will have due regard to the percentage of loss of earning capacity in relation to different injuries specified in Schedule I. It is required to be noted that the medical evidence that is brought on record so as to establish the loss of earning capacity has taken into account all provisions of said Schedule.

19. Though the Doctor was examined so as to establish 100% loss of earning capacity, it was expected of the present appellant to put him in cross examination as regards the loss of earning capacity as provided in Part I or Part II of Schedule I of the Act. Admittedly, in the present case, said expert was not confronted with the said issue.

20. In the above back ground, since the appellant herein has not confronted expert i.e. Doctor on the aspect of percentage of loss

of earning capacity keeping in mind the loss of earning capacity mentioned in Schedule I, present case is squarely governed by the law laid down in the matter of National Insurance Co. Ltd., vs Ram Dnyanoba Shinde cited supra by learned Counsel for respondent.

21. As such, the present appeal fails, same stands dismissed. Consequently, civil application stands disposed of.

[N.W. SAMBRE, J.]