IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

THURSDAY, THE 30TH DAY OF JULY 2015/8TH SRAVANA, 1937

Ins.APP.No. 73 of 2011 ( )

(E.I.C.NO. 2/2007 OF EMPLOYEES' INSURANCE COURT, KOZHIKODE DATED 27-08-2009)

APPELLANT/RESPONDENT:

THE REGIONAL DIRECTOR,
E.S.I. CORPORATION, THRISSUR-20.

BY ADV. SRI.P.SANKARANKUTTY NAIR

RESPONDENT/APPELLANT:

K.SADANANDAN, S/O.CHOYI,
KUMAYAKKAL HOUSE, THAMPI ROAD,
POST BEYPORE, CALICUT-673 015.

BY ADVS. SRI.A.RANJITH NARAYANAN
SRI.S.K.SAJU

THIS INSURANCE APPEAL HAVING BEEN FINALLY HEARD ON 30-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.B.SURESH KUMAR, J.

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Ins.Appeal.No.73 of 2011

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Dated this the 30th day of July, 2015.

J U D G M E N T

The decision of the Employees' Insurance Court, Kozhikode in E.I.C.(Appeal).No.2 of 2007 is under challenge in this appeal. The Regional Director of the Employees State Insurance Corporation ('the Corporation' for short) is the appellant.

2. The respondent was an insured employee under M/s.Kerala Transport Company, an establishment covered under the provisions of the Employees' State Insurance Act ('the Act' for short). He met with an accident on 4.6.2000. In the accident, he sustained various injuries including a comminuted fracture of the neck of his right femur. As the respondent was unable to pursue his avocation as a driver thereafter, he applied to the Corporation for permanent disablement benefits. The

Corporation referred the respondent to a duly constituted Medical Board to assess the loss of earning capacity. The Medical Board assessed the loss of earning capacity of the respondent at 40%. Being aggrieved by the assessment of the loss of earning capacity made by the Medical Board, the respondent preferred an appeal before the Medical Appellate Tribunal, Kozhikode. The Medical Appellate Tribunal, on appraisal of the materials produced before it, re-assessed the loss of earning capacity of the respondent at 60%. Dissatisfied with the said re-assessment of the loss of earning capacity, the respondent filed the Insurance Case referred to above. The prayer in the application before the Insurance Court was to declare that the respondent is eligible to get disablement benefit reckoning his percentage of loss of earning capacity at 100%.

3. The evidence in the case consists of the oral evidence tendered by PW1 and Exts.P1 to P4 on the side of the respondent and Exts.D1 to D5 on the side of the Corporation.

4. The Insurance Court, on appraisal of the materials on record, found that the loss of earning capacity of the respondent was 100% and consequently directed the Corporation to disburse permanent total disablement benefit to him on that basis. The Corporation is aggrieved by the said decision of the Insurance Court.

5. Heard the learned counsel for the appellant and also the learned counsel for the respondent.

6. Section 2(15)(B) of the Act which defines 'permanent total disablement' reads thus:

> “Permanent total disablement” means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident in such disablement:
>
> Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent, or more.”

It is beyond dispute that permanent disablement benefits can be claimed only based on an employment injury caused by an accident. It is clear from the aforesaid definition that the permanent total disablement is such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident. The question, therefore, is whether the respondent is incapacitated from performing all works which he was capable of performing at the time of the accident on 4.6.2000. The fact that the respondent sustained comminuted fracture of the neck of his right femur is not disputed by the Corporation. Likewise, the fact that the respondent was working as a driver in the covered establishment is also not in dispute. In the evidence tendered by the respondent before the Insurance Court as PW1, he categorically stated that on account of the injuries, he is unable to walk even after several years of the accident without crutches. He also deposed that the length of his right leg was shortened on account of the injuries sustained by him. He further deposed that he is unable to do any work. His evidence indicates that the respondent had to resign from the job at the age of 50 on account of the injuries sustained by him in the accident. In cross examination, in answer to a question put by the learned counsel for the Corporation, the respondent reiterated that he is unable to do any job. There is no suggestion from the counsel for the Corporation as to any job which the respondent is capable of performing now. The Insurance Court found that the respondent had appeared before the court with the help of another person and a walking stick. The matter was taken up before the Insurance Court after the lapse of almost eight years from the date of accident. The Insurance Court also recorded in the judgment that it is manifest that the respondent is incapacitated from doing any work either by standing or sitting to earn his livelihood. It is in the said circumstances, the Insurance Court assessed the percentage of loss of earning capacity of the respondent at 100%. I do not find any illegality in the aforesaid finding rendered by the Insurance Court.

7. The learned counsel for the Corporation contended that since it was found by the Insurance Court

that the decision of the Medical Appellate Tribunal is incorrect, the matter should have been remitted to the Medical Appellate Tribunal, for, the Medical Appellate Tribunal being an expert body, will be entitled to assess the loss of earning capacity of the respondent correctly. I do not find any substance in this contention. In **E.S.I Corporation vs. Pushpa** [2009 (3) KLT 562], this Court held that in an appeal preferred under Section 54A of the Act challenging the decision of the Medical Board, the Employees' Insurance Court has the power to decide the matter finally on the basis of the evidence adduced before it. The relevant portion of the judgment reads as follows :-

> "5. The powers of the E.I Courts are as mentioned in S.78 of the Act. The order of the E.I Court is to be treated as a decree of a civil court. The E.I Courts have been given certain powers which are available to a civil court. For all practical purposes, issues which are germane are to be dealt with by the E.I Court as is clear from sub -s (3) of S.75. <u>Therefore, when the matter came up before the E.I Court in an Appeal under S.54A, certainly the E.I Court has the power to decide the matter on the basis of the evidence adduced before it. The evidence may include the evidence of Experts adduced before it in such a manner so as to establish before it that the relief which is sought may be granted. In an appeal from the decision of the Medical Board, the E.I Court would certainly have</u>

the power to call for re-appraisal or re-assessment or consider such evidence which would show that a re-assessment is warranted. It may also have the incidental power to remit the matter back to the very same Medical Board for a review. This is a power which flows from S.54A as when the Court refers it back to the Medical Board, it is doing it in the course of the exercise of the appellate powers with which it is vested. It may be that circumstances co-exists as are to be found either in sub-s (1) or sub-s(2) of S.55. We notice also that in an Appeal to the Medical Appeal Tribunal, the Medical Appeal Tribunal has the power to get expert evidence. No doubt, such power is not specifically mentioned in respect of E.I court, but that does not mean that the Court would have the power which is given to the Tribunal. The reason being that the said power must be incidental to the main power for deciding the correctness of the assessment made by the Medical Board, the decision being challenged in an appeal. But, in this case, we notice that without assigning any reason and after finding that the matter has to go for review by the Medical Board, the E.I Court has directed a review by a Medical Board constituted with medical experts preferably from Medical College Hospital or from the State Health Service. No doubt, the word used 'preferably' may not enjoin any peremptoriness on the same direction. But, when it decides the matter to be sent for review, it may not be open to the E.I Court to further direct "preferably by Experts" mentioned already. We cannot say that there is no question of law as such, as the question of law relates to the power of the E.I Court. In the light of this discussion, we allow the Appeal to the extent of deleting the direction that the appellant may constitute a Medical Board with medical experts preferably from Medical College Hospital or from the State Health Service. The Medical Board shall be constituted as per the direction of the Court at the earliest and the assessment done as aforesaid." (underline supplied)

In the result, the appeal is devoid of merit and the same is, accordingly, dismissed.

Sd/-
P.B.SURESH KUMAR, JUDGE.

Kvs/-

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PA TO JUDGE.