

HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.549 OF 2005

JUDGMENT:

This civil miscellaneous appeal is filed under Section 30 of the Workmen's Compensation Act, challenging the order dated 24.2.2005 in W.C. Case No.61 of 2004 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-I, Hyderabad (for short, the Commissioner), wherein and whereby an amount of Rs.4,85,003/- was awarded as against the claim of Rs.3,50,000/-.

2. The parties to this appeal will hereinafter be referred to as they are arrayed before the Commissioner in W.C. Case, for the sake of convenience.

3. The facts leading to filing of the present appeal are briefly as follows: On 22.2.2004, the applicant while driving Eicher Van bearing No.AP 1T 3383 was proceeding from Jagtial, Karimnagar District to Kurnool. When he reached near Macharam in Mahabubnagar District, the driver of the bus, who was proceeding in front of the applicant's Van, had applied sudden breaks without giving any signal. In that process, the Van dashed against the bus. The Station House Officer, Jadcherla Police Station registered a case in Crime No.35 of 2004 under Section 337 IPC against the applicant. The applicant sustained fractures on various parts of the body and took treatment as inpatient in Osmania General Hospital, Hyderabad, for a long time. Due to the fractures, the applicant sustained disability and thereby lost his income. By the time of the accident, the applicant was earning Rs.3,000/- per month as driver of the Van bearing No.AP 1T 3383. The Van belongs to the opposite party No.1 was insured with opposite party No.2 vide Policy Cover Note No.501603/31/03/6300891/31/03/6300891, with effect from 28.1.2004 to 27.1.2005. Therefore, opposite

party Nos.1 and 2 are jointly and severally liable to pay compensation of Rs.3,50,000/- to the applicant.

4. The opposite party No.1 filed counter admitting the averments made in the application including employer-employee relation between him and the applicant. It is further stated that by the time of the accident, opposite party No.1 is paying the applicant an amount of Rs.3,000/- per month towards salary and an amount of Rs.50/- per day towards batta. The compensation claimed by the applicant is on higher side. Hence, the application may be dismissed against opposite party No.1.

5. The opposite party No.2 filed counter denying all the averments made in the application including the nature of the fractures sustained by the applicant. The amount of compensation claimed by the applicant is highly excessive and exorbitant. There is no employer-employee relation between opposite party No.1 and the applicant. The Van bearing No.AP 1T 3383 was not insured with opposite party No.2. Hence, the application may be dismissed.

6. Basing on the above pleadings, the learned Commissioner framed the following points:

1. Whether the applicant Sri Md.Minhaz met with an accident on 22.2.2004, which arose out of and in the course of his employment as a driver on Eicher Van bearing No.AP 1T 3383 in the employment of the 1st opp. Party and sustained injuries?
2. If yes, what is the percentage of physical disability and the consequent loss of earning capacity suffered by the applicant?
3. Who are liable to pay compensation to the applicant? And;
4. What is the amount of compensation entitled by the applicant?

7. During the course of enquiry, on behalf of the applicant, A.Ws.1 and 2 were examined and Exs.A1 to A10 were marked. On behalf of the opposite party Nos.1 and 2, no oral evidence was let in but Ex.D1

was marked.

8. On appraising the oral, documentary evidence and other material available on record, the learned Commissioner allowed the application by awarding an amount of Rs.4,85,003/- towards compensation. Feeling aggrieved by the order of the learned Commissioner, opposite party No.2 preferred the present appeal.

9. The contention of learned counsel for the appellant-opposite party No.2 is three fold:

(1) The material available on record falls short to establish employer-employee relation between opposite party No.1 and the applicant; therefore, the application filed under Section 22 of the Workmen's Compensation Act is not maintainable;

(2) The finding of the learned Commissioner that the applicant is not fit to drive the Van; therefore, the loss of earnings can be taken as 100% is not supported by any evidence much less legally admissible evidence; and

(3) the learned Commissioner committed error while awarding more compensation than claimed by the applicant.

Per contra, learned counsel for the respondent No.1–applicant submitted that the learned Commissioner rightly considered the oral and documentary evidence in right perspective and allowed the petition.

10. Basing on the rival contentions, the point that arises for consideration in this appeal is:

(1) Whether the jural relationship of employer and employee is existing between the opposite party No.1 and the applicant at the relevant point of time?

(2) Whether the learned Commissioner is not entitled to grant more compensation than claimed by the applicant?

(3) Whether there is any illegality or irregularity in the order passed by the learned Commissioner, warranting interference of this Court?

Point No.1:

11. Establishment of employer-employee relation is *sine qua non* to claim compensation under the Workmen's Compensation Act. In the

application, the applicant clearly stated that by the time of accident, he was working as a driver on Eicher Van bearing No.AP 1T 3383, which belongs to opposite party No.1. The opposite party No.1 is competent person to say whether the applicant was working as driver under his control by the time of the accident or not. In the counter filed by the opposite party No.1, it is categorically admitted that by the time of the accident, the applicant was working as driver on Eicher Van bearing No.AP 1T 3383 belongs to him. A perusal of Ex.A1 F.I.R., reveals that by the time of the accident, the applicant was driving Van bearing No.AP 1T 3383 belongs to opposite party No.1. In the cross-examination of A.W.1, nothing was elicited to shake his testimony so far as employee-employer relationship between him and opposite party No.1 is concerned. The material available on record clinchingly establishes that by the time of the accident, the applicant was working as driver under the control of opposite party No.1. Thus, the employer-employee relation between opposite No.1 and the applicant is established. The learned Commissioner has assigned cogent and valid reasons to his finding that there is employer-employer relation between opposite party No.1 and the applicant by the time of the accident. I am fully agreeing with the said finding recorded by the learned Commissioner. Further, as per the principle enunciated in **United India Insurance Company Limited v Obili Venkata Dasu**^[1] and **P.Narasimha Reddy v K.Ramchander**^[2], once the employer admits the factum of employment, it is not at all open to the insurer to doubt those facts.

12. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, the contention of the learned counsel for the opposite party No.2 that there is no jural relationship of employer-employee between opposite party No.1 and the applicant cannot be accepted. Accordingly, point No.1 is answered.

Point Nos.2 and 3:

13. The oral testimony of A.W.1 coupled with Exs.A1 and A10 clearly reveals that the applicant sustained injuries on 22.2.2004 while driving Van bearing No.AP 1T 3383. A perusal of Exs.A2, A4, A6 and A9 clearly reveals that the applicant sustained fractures to both legs. The oral testimony of A.W.2 (Doctor) coupled with documentary evidence clearly reveals that the left leg of the applicant was shortened by one inch. He further stated that due to the fractures, the applicant sustained limping. The oral testimony of A.W.2 coupled with Exs.A2, A3 and A4 clearly reveals that the applicant sustained 55% functional disability.

14. The crucial question that falls for consideration is whether sustaining of 55% functional disability incapacitated the applicant to drive the motor vehicles or not. The contention of the learned counsel for the opposite party No.2 is that the learned Commissioner has committed error while assessing the loss of earning capacity of the applicant as 100%. The contention of the learned counsel for the applicant is that the applicant is incapacitated to earn anything due to the shortening of his left leg coupled with limping. Therefore, the learned Commissioner has rightly assessed loss of earning capacity of the applicant as 100%.

15. The loss of earning capacity of a workman in respect of scheduled injuries is covered by Part I and Part II of Schedule I of the Act. If the permanent or partial disability sustained by the workman falls within the ambit of Part I and/or Part II of Schedule I of the Act, there is no difficulty in fixing the loss of earning capacity. If the permanent or partial disability sustained by the workman falls outside the purview of Schedule I of the Act, the Court has to take meticulous care while assessing the loss of earning capacity of the workman in order to strike the balance between the employer and the employee. If

the Court has not meticulously scrutinized the medical evidence available on record while assessing the loss of earning capacity, there is likelihood of financial loss either to the employer or to the insurer. If the approach of the Court is pedantic, certainly, the same would deprive the workman his legitimate share of compensation. The compensation awarded by the Commissioner shall not be either a bonanza or too low. The Court has to keep in mind the object with which the Workmen's Compensation Act was enacted. The approach of the Court shall be to achieve the object with which the Act was enacted. It is needless to say that the Workmen's Compensation Act is a piece of social beneficial legislation to safeguard the interest of the workman who sustained injuries in an accident arising out of and in the course of his employment. Suffice it to say that a functional disability sustained by the workman cannot be equated with the loss of earning capacity in each and every case. While assessing the loss of earning capacity of a workman basing on the functional disability sustained by him, the Court has to take into consideration the age, avocation and dependency of the applicant apart from chance of getting of similar type of employment in future with same wages.

16. In the case on hand, the possibility of the applicant getting the job of a driver of a motor vehicle is completely ruled out because of shortening of his left leg as well as limping. It is a known fact that a person, who is capable of climbing the vehicles, will only be engaged as a driver. By any stretch of imagination, it cannot be presumed that the applicant can discharge duties of driver on any type of motor vehicles. For better appreciation of the rival contentions, it is apposite to extract hereunder Section 2(l) of the Act.

2(1)(l). “total disablement” means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement:

Provided that permanent total disablement shall be deemed

to result from every injury specified in Part I of Schedule I 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.

17. A perusal of the above section, at a glance, clearly demonstrates that while assessing the total disablement of the workman, the Court has to taken into consideration the description of injury as specified in Part I and Part II of Schedule I of the Act. Section 3 of the Act deals with the liability of the employer to pay compensation. Section 4 of the Act contemplates quantification of compensation. The Parliament in its wisdom incorporated Section 2(1)(l) of the Act with a laudable object to protect the interest of workman who sustained disability of such nature which falls outside the purview of Part I and Part II of Schedule I of the Act. Undoubtedly, the applicant was incapacitated for performing the duties of driver, which he used to discharge prior to the accident. In such circumstances, whether the court has to assess the loss of earning capacity of the applicant as 100% or 55%. In order to resolve the issue, this court is placing reliance on the decisions of this court in

N.Sree Ramulu v B.Lakshmi Narayana (died) and others ^[3].

33. CMA No.335 of 2002:

The claimant/appellant was working as a lorry cleaner on the lorry of the 1st respondent and he received injuries on 11.06.2000 when he was covering the load on the lorry with a tarpaulin and fell down from the lorry on account of rain and sustained injuries to his right leg, left shoulder and multiple injuries all over his body. AW.2, the medical practitioner who treated him stated that the claimant suffered injuries of dislocation of left shoulder and left body of his scapula, 1, 2, 3 metatarsals of right foot and fracture of ulna styloid right side of wrist apart from facial nerve palsy. He assessed the disability of the claimant at 45% and stated that he cannot work as lorry cleaner; he cannot walk properly as there is malunion in the foot on account of metatarsal fracture; he cannot hold objects with right hand because of stiffness of wrist; and cannot chew properly because of facial nerve palsy. The Commissioner assessed the loss of earning capacity at 45% and awarded compensation on the said basis.

As the injuries suffered by the claimant in the accident are

such that he can no longer work as a lorry cleaner, walk properly or walk long distances, cannot hold objects with right hand because of stiffness of wrist and also cannot chew properly because of facial nerve palsy, it would be difficult for him to secure any employment. Therefore, the loss of earning capacity ought to have been taken as 100% by the Commissioner. Therefore, the order dt.15.12.2001 in W.C. No.22 of 2000 of the Commissioner for Workmen's Compensation and Asst. Commissioner for Labour-I, Guntur, is set aside. Compensation shall be assessed and paid to the appellant on the basis that his loss of earning capacity is 100%. The appeal is accordingly allowed. No costs.

In **New India Assurance Compaly Ltd., v A.Narsimhulu**^[4], it was held as under:

Section 2(1)(l) of the Act defines 'total disablement' - means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement. Therefore even if a workman suffers physical disablement to a lesser extent, say 25%, 40%, 50% etc., if such physical disablement itself totally incapacitates the workman from doing any work which he was capable of performing before accident, it can be treated total disablement. In this case Ex.A-4 - disability certificate shows that physical disability suffered by workman is 45% but Doctor -A.W.2 stated that right leg of the workman was shortened which means that workman can never be driver and therefore, he suffered total disablement. In such situation amount assessed by Commissioner remained unassailable.

The facts of the case on hand are almost identical to the facts of the cases cited supra.

18. Having regard to the facts and circumstances of the case and also the decisions cited supra, I am of the considered view that due to the shortening of the left leg coupled with limping, the applicant is totally incapacitated to attend the duty as a driver of the van, which he was attending by the time of the accident, and thereby he lost the future earning capacity to the extent of 100%. I am fully agreeing with the finding of the learned Commissioner that the applicant sustained 100% loss of earning capacity.

19. As per the averments made in the application, by the time of the accident, the applicant was earning Rs.3,000/- per month towards salary and Rs.50/- per day towards batta. This indicates that by the time of the accident, the applicant was earning Rs.4,500/- per month. The opposite party No.1 also admitted the same by filing counter. In the cross-examination of A.W.1 nothing was elicited to shake his testimony. The oral testimony of A.W.2 is supported by the recitals of Ex.A5. Even as per the G.O.Ms. No.30, LET & F (Lab-II), dated 22.7.2000, the basic wage of a driver is Rs.2,587/- and Variable Dearness Allowance, as on the date of the accident as notified by the Commissioner of Labour, is Rs.1,113/-. The learned Commissioner rightly considered G.O.Ms. No.30, dated 22.7.2000 and taken the salary of the applicant as Rs.3,700/- per month. The learned Commissioner has rightly applied the factor 218.47 taking into consideration the age of the applicant as 24 years. Thus the amount of compensation for which the applicant entitled to is (Rs.3,700 X 60/100 X 218.47) Rs.4,85,003/-.

20. The next question that falls for consideration is whether the learned Commissioner is justified in awarding more compensation than claimed by the applicant. Admittedly, the applicant claimed an amount of Rs.3,50,000/-. To resolve the issue, this court is placing reliance on the following decisions:

(i) **National Insurance Company Ltd., v R.Vishnu**^[5], wherein a Division Bench of Karnataka High Court answering the question whether the Commissioner can award more compensation than claimed by the applicant, it was held as follows:

“The Workmen’s Compensation Commissioner has jurisdiction to award compensation higher than what is asked for in a claim petition presented under Section 10 of the Act, if according to law the claimant is entitled to a higher compensation than asked for in the application.”

(ii) **Oriental Insurance Company Limited v N.Sarojini**^[6], wherein this

Court extracted the principle in the treatise of P.L.Malik on 'Commentaries on Workmen's Compensation Act, 1923', (6th edn.,) which reads as follows:

"9. It is immaterial as to what an employee might claim. The commissioner has to grant compensation at the rate permissible under the law, in spite of a lesser claim. He has a duty to see that the injured get fair play. He has no jurisdiction to give less compensation than that laid down in the Act. The Commissioner is also not in any way fettered by what an ignorant injured workman might enter in his original application to him. An application filed under the Act, which is a social security measure, cannot be equated to a plaint before the Court. If in a given case, even though the claimant had asked for lesser amount, after proper adjudication when the Commissioner finds that higher compensation than what was asked for, has to be awarded, he has not only the power but also the duty to award such higher compensation. The claimant has a right to receive the compensation as per Section 4 notwithstanding that he claimed a lesser amount in the application. Claiming a particular amount by way of a compensation does not disentitle the workman to a higher compensation assessed by the Commissioner or, in appeal, by the High Court. A Commissioner under the Workmen's Compensation Act cannot grant lesser compensation than prescribed under the Act and the Schedule."

As per the principle enunciated in the cases cited supra, the Commissioner can award higher compensation than claimed subject to entitlement of the applicant as per the provisions of the Workmen's Compensation Act.

21. Having regard to the facts and circumstances of the case and also the principles enunciated in the cases cited supra, I am unable to accede to the contention of the learned counsel for opposite party No.2 that the learned Commissioner has committed error while awarding more compensation than claimed by the applicant. There is no illegality or irregularity in the order passed by the learned Commissioner. There are no grounds much less valid grounds to interfere with the well considered order of learned Commissioner. Accordingly, point Nos.2 and 3 are answered.

22. In the result, the appeal is dismissed. There shall be no order as to costs. Miscellaneous applications, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 03rd August, 2015.

YS

[\[1\]](#) 2011 (4) ALD 215

[\[2\]](#) 2004 (4) ALD 15

[\[3\]](#) 2013 (5) ALD 249

[\[4\]](#) 2010 ACJ 1593 : 2009(4) ALT 162

[\[5\]](#) 1992 ACJ 590

[\[6\]](#) 2010 ACJ 2277