

HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No.1637 of 2004

JUDGMENT:

This appeal is against order dated 28.02.2004 in W.C.No.27 of 2003 on the file of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour Circle-II, Guntur, whereunder, he granted Rs.71,873/- besides stamp duty of Rs.144/- as against the claim of Rs.2,50,000/- for the injuries sustained by appellant-claimant in an accident during course of employment.

2. Brief facts leading to this appeal are as follows:

Appellant-claimant was working as cleaner on lorry bearing No.AEE 5477 and on 29.12.2002 while he was on duty as cleaner on the said lorry, he sustained injuries in the accident that took place at Kokonikunta of Peddaraveedu Mandal of Prakasham District. He contended that he was drawing a salary on Rs.2,500/- as on the date of accident and that he is entitled for a sum of Rs.2,50,000/- as compensation.

3. Insurance Company opposed the claim and contended that there is no liability for the Insurance Company to pay any compensation due to violation of policy conditions and terms.

4. The Assistant Commissioner of Labour-II Circle, Guntur, during enquiry examined two witnesses and marked eleven documents on behalf of claimant and

examined two witnesses and marked four documents on behalf of Insurance Company and on a overall consideration of oral and documentary evidence, fixed the compensation at Rs.71,873/- by taking the wages of claimant at Rs.2,057/- and percentage of disability at 28%. Aggrieved by the quantum, claimant preferred the present appeal.

5. Heard both sides.

6. Advocate for claimant submitted, AW.2-Medical Officer assessed the disability at 32% as per Medical manual, but the lower authority took only 28% and thereby committed error in calculating the compensation. He further submitted that claimant specifically pleaded that he was drawing Rs.2,500/- per month and when the same is deposed in his evidence, there was no cross-examination on behalf of Insurance Company disputing the said quantum, but the lower Authority ignoring the same observed that there is no proof for the salary of claimant and on that ground he took minimum wages payable to the cleaner and fixed the compensation, which is not correct. He further submitted that on account of these injuries, the claimant became unfit to work as cleaner and thereby he lost the earning capacity by 100%, the lower Authority ought to have taken the loss of earning capacity at 100% and for these reasons, the order of the lower Authority has to be set aside.

7. On the other hand, advocate for Insurance

Company submitted that percentage of disability is different from percentage of loss of earning capacity and as there is no specific evidence for the loss of 100% earning capacity, the lower Authority considering the nature of injuries, fixed the percentage as 28% and the same is on correct lines. He further submitted as per the evidence of Medical Officer, there is possibility of re-union of tibia and fibula and by considering the same, the lower Authority fixed the percentage at 28% and that there are no grounds to interfere with the findings of the lower Authority. He further submitted that when there is no income proof, the lower Authority has taken the minimum wages applicable to the cleaner and the objection of claimant on this count is not tenable.

8. Now the point that would arise for my consideration in this revision is:

Whether the order in W.C.No.27 of 2003, of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-II Circle, Guntur, is legal, proper and correct?

POINT :

9. There is no dispute with regard to the accident that took place on 29.12.2002, in which claimant received injuries while working as a cleaner on lorry bearing No.AEE 5477. There is also no dispute with regard to relationship of employee and employer between appellant-claimant and 1st respondent herein. *The first* objection of claimant is that the lower Authority committed

error in not taking the wages of claimant as pleaded and proved. According to claimant, he was drawing Rs.2,500/- per month as salary as on the date of accident. To substantiate the same except relying on his self serving testimony, no other material is produced to prove his salary. Now the contention of Advocate for claimant is when claimant as AW.1 deposed in his evidence that he was drawing salary of Rs.2,500/- per month, there was no denial of that fact during course of cross-examination of AW.1 on behalf of Insurance Company, therefore, the lower Authority ought to have taken salary of claimant at Rs.2,500/- per month. But the contention of Advocate for claimant cannot be accepted because claimant being an interested witness, he would definitely support his version with regard to salary. What is expected from claimant is he should produce some evidence to support his version with regard to salary. Admittedly, he has not examined the owner, who is the better person to speak about salary being paid to claimant. When there is no positive proof with regard to salary, only the minimum wages payable to the workman has to be taken and the lower Authority rightly took the minimum wages payable to a workman as per G.O.Ms.No.30 dated 27.07.2000 as on the date of accident, which was 2057 including VDA, therefore, the objection of claimant with regard to salary cannot be sustained.

10. *The second* objection of claimant is that on account

of this injury, claimant lost his profession of cleaner and he became unfit to do that job and thereby, the loss of earning capacity has to be taken as 100%. To support this version, there is no evidence on record. The Medical Officer, who examined claimant, has not stated anything in those lines and on the other hand his evidence disclose that if proper treatment like physiotherapy is taken, there is possibility of reduction of disability, therefore, the contention that loss of earning capacity is 100% cannot be accepted.

11. *The last* objection of claimant is, the Medical Officer assessed the disability at 32% as per the medical manual, but the lower authority took only 28% and the same is not correct. Advocate for Insurance Company contended that percentage of disability is different from percentage of loss of earning capacity and the lower Authority took 28% as loss of earning capacity and the same is on correct lines.

12. I have perused the evidence of AW.2, who is the Medical Officer. No doubt, he deposed in his evidence that if treatment like physio therapy is taken, the percentage of disability can be reduced by 4% and at any event the minimum disability would be 28%. Lower Authority took it into consideration for calculation purpose. Advocate for claimant submitted that claimant being a small employee, it is difficult for him to go for a costly treatment, like physiotherapy, and when the Medical Officer assessed the disability as per manual, the lower

Authority ought to have taken the same by ignoring the percentage spoken to by Medical Officer with regard to reduction in case of particular treatment. I am in agreement with the contention of advocate for claimant, because if particular treatment is taken, there is possibility of reduction of percentage, but the fact remains that the percentage of disability sustained on account of injuries was 32%. Therefore, the lower Authority ought to have taken this 32% for the purpose of calculation. The lower Authority went wrong in fixing percentage of disability and to that extent, order of the lower Authority has to be modified and by taking the disability at 32% with the same wages and multiplier, if calculation is made it comes to Rs.82,140/- ($\text{Rs.2,057} \times 60/100 \times 32/100 \times 207.98$) Therefore, the claimant is entitled for Rs.82,140/- instead of Rs.71,873/- and respondent shall deposit the difference amount within thirty days from the date of order with the same rate of interest as awarded by the lower Authority.

13. Accordingly, the appeal is partly allowed. No costs.

14. Miscellaneous Petitions, if any, shall stand dismissed.

S. RAVI KUMAR, J

25th February 2015.

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