

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY
CIVIL MISCELLANEOUS APPEAL No.730 of 2005

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JUDGMENT:

This civil miscellaneous appeal is filed under Section 30 of the Workmen's Compensation Act, challenging the order dated 30.06.2005, passed by the Commissioner for Workmen's Compensation and Assistant Commissioner for Labour, Eluru, (for short 'the Commissioner') in W.C. No.14 of 2005, wherein and whereby an amount of Rs.2,73,450/- was awarded to the applicant as against the claim of Rs.4 lakhs.

2. The parties will be hereinafter 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:

The Opposite Party No.1 engaged the applicant as cleaner on a lorry bearing No. AP 16T 6888. While unloading the calcium powder at Yandagandi, the driver of the lorry bearing No. AP 16T 6888 had driven the same in a rash and negligent manner and dashed against the applicant. The accident occurred due to rash and negligent driving of the driver of the lorry, against whom the Station House Officer, Undi Police Station, registered a case in Crime No.92 of 2004 under Section 338 IPC. Due to the accident, the applicant sustained fractures and crush injuries on various parts of the body and took treatment as inpatient in Government hospital, Bhimavaram and University Hosiptal, Vijayawada. The applicant's right leg was amputated below the knee. By the time of

unfortunate accident, the applicant was aged about 36 years and used to earn Rs.3,000/- per month as salary and Rs.50/- per day as batta. Due to amputation of right leg, the applicant has not been attending to any work thereby lost his income. The lorry bearing No.AP 16T 6888, which belongs to the Opposite Party No.1, was insured with the Opposite Party No.2 at the relevant point of time. Therefore, Opposite Parties No.1 and 2 are jointly and severally liable to pay compensation to the applicant.

4. The Opposite Party No.1 did not file counter. The Opposite Party No.2 filed counter denying all the averments made in the application including the manner of the accident, age and income of the applicant *inter alia* contending that by the time of accident, the applicant was not working as an employee under the control of Opposite Party No.1. The present application is not maintainable without establishing the employee and employer relationship between the applicant and the Opposite Party No.1. Opposite Party No.2 is not liable to pay compensation to the applicant unless the applicant has established that the driver of the lorry was having valid and effective driving licence as on the date of the accident. The amount of compensation claimed by the applicant is highly excessive. Hence, the application may be dismissed.

5. Basing on the above pleadings, the Commissioner framed as many as three issues.

6. During the course of enquiry, on behalf of the applicant, A.W.1 was examined and Exs.A1 to A5 were marked. On behalf of the Opposite Party No.2, no one was examined, but Ex.B1 was marked.

7. On appraising the oral, documentary evidence and other

material available on record, the learned Commissioner has arrived at a conclusion that by the time of accident, the applicant was working as cleaner under the control of Opposite Party No.1 and awarded Rs.2,73,450/- towards compensation. Feeling aggrieved by the orders of the learned Commissioner, the Opposite Party No.2 has preferred the present appeal.

8. The contention of the learned counsel for opposite Party No.2 is three fold:

- 1) The applicant has not examined qualified medical practitioner to prove the recitals of Ex.A4.
- 2) The finding of the tribunal that 45% of functional disability incurred by the applicant resulted to 100% loss of earning capacity of the applicant is not sustainable either in law or on facts.
- 3) The findings recorded by learned commissioner is not supported by any oral and documentary evidence.

9. ***Per contra***, learned counsel for the applicant submitted that the finding of the learned commissioner that the applicant is not in a position to discharge his duties as cleaner is supported by recitals of Ex.A4-disability certificate. He further submitted that the findings recorded by the learned commissioner are supported by oral and documentary evidence and there are no grounds much less valid grounds to interfere with the orders passed by the learned commissioner.

10. The substantial question of law that arises for consideration in this appeal is:

Whether the commissioner is justified in assessing future loss of earning capacity of applicant as 100%, even though he

incurred 45% functional disability and there are any grounds to interfere with the order passed by the learned commissioner ?

11. Establishment of employer and employee relationship between Opposite Party No.1 and applicant is a *sine qua-non* to entertain the applicant by commissioner under Sections 10 and 22 of the Workmen's Compensation Act. The applicant has taken a specific plea that by the time of unfortunate accident, he was working as a cleaner on the lorry bearing No.AP 16T 6888, which belongs to the Opposite Party No.1. As per the recitals of Ex.A1-F.I.R and Ex.A2-charge sheet, by the time of unfortunate accident, the applicant was working as a cleaner on the lorry bearing No.AP 16T 6888. The oral testimony of AW.1 is supported by the recitals of Ex.A1-FIR and Ex.A3 M.V. Inspector report. The respondent has not adduced any evidence to substantiate the stand taken by it. Basing on the facts pleaded and proved the irresistible conclusion that can be drawn is that by the time of the accident the applicant was working as cleaner under the control of Opposite Party No.1. As per the oral testimony of AW.1, the applicant sustained fractures and crush injury to his right leg. A perusal of Ex.A2-wound certificate reveals that the applicant sustained crush injury to his right leg. A perusal of Ex.A4-disability certificate clearly reveals that the right leg of the applicant was amputated below the knee. As per the recitals of Ex.A4, applicant sustained 45% functional disability. The material available on record clearly reveals that the applicant sustained injuries out of end in the course of employment.

12. The learned counsel for the second respondent also not disputing the percentage of functional disability incurred by the applicant. The contention of the learned counsel for the second

respondent is that the learned commissioner committed error while determining the future loss of earning capacity of applicant as 100% though he incurred 45% functional disability. The applicant has sustained scheduled injury. It is needless to say that the functional disability cannot be equated with loss of earning capacity in each and every case. The functional disability incurred by the applicant undoubtedly affects his earning capacity to a maximum extent. When two views are possible, basing on the facts pleaded and proved the learned commissioner or the Court has to take view, which is more beneficial to the workman. While deciding the cases of this nature the Court has taken into consideration the ground realities apart from the provisions of the Act. The oral and document evidence produced before the commissioner clinchingly establishes that by the time of accident, the applicant was working as cleaner. The crucial question that falls for consideration is whether the applicant is in a position to discharge duties as a cleaner despite amputation of right leg below the knee. No lorry owner will engage a person whose right leg was amputated below the knee as cleaner. By any stretch of imagination, it cannot be presumed that the applicant is capable, of-course even with some difficulty, attending the duties of cleaner. A person whose right leg was amputated below the knee is not in a position to climb the lorry or any other vehicle. The Court shall not lose sight of the Section 2(l) of the Workmen Compensation Act while deciding this type of cases.

13. The material available on record clinchingly establishes that the applicant is incapacitated to discharge duties as cleaner throughout his career. In other words applicant is unfit to discharge duties as cleaner. The material available on record clinchingly establishes that the applicant cannot attend the work,

which he used to attend prior to the accident. 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^[1].

Relevant portion of Para-26 and Para-33 is extracted hereunder :

26 (f) – The importance of medical evidence is only in case where disablement in performing duties which the workman was performing earlier cannot be decided without the aid of medical evidence. IN case where it can be so decided with or without medical evidence (like amputation of limbs), medical evidence is not relevant and the question of the victim not suffering specified injuries is also not relevant.

(g) Loss of earning capacity is not a substitute for percentage of physical disablement and is only one of the factors taken into account.

(h) The loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability. Equating the percentage of loss of earning capacity to the percentage of permanent disability would result in the award of either too low or too high a compensation. What requires to be assessed is the effect of permanent disability on the earning capacity of the injured. This involves ascertainment of what activities the claimant can carry on in spite of permanent disability and what he could not do as a result of the permanent disability; ascertainment of his avocation, profession and nature of work before the accident and also his age; and finding out whether he is totally disabled from earning and kind of livelihood (or) whether in spite of permanent disability, he can still effectively carry on the activities and functions, which he was earlier carrying on (or) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood. IN Para 14 of **Raj Kumar's** case (supra) and in Para 8 of **Mohan Soni's** case (supra), appropriate guidance is available.

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**^[2], 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.

14. Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the loss of earning capacity of applicant is 100% even though he incurred 45% functional disability. Learned commissioner has taken into consideration future of the applicant and assessed loss of earning capacity as 100% and there are no grounds much less valid grounds to interfere with the well-considered order of the learned commissioner. Hence, the present appeal is lack of merits and the same is liable to be dismissed.

15. In the result, the appeal is dismissed without costs. Miscellaneous applications, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 10.09.2015

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[\[1\]](#) 2013 (5) ALD 249

[\[2\]](#) 2010 ACJ 1593 : 2009(4) ALT 162