

HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

Civil Miscellaneous Appeal No.693 of 2005

Date: -01-2015

Between:

Gangadhari Edukondalu

.. Appellant

AND

Thoka Ravamma and another

.. Respondents

HON'BLE SRI JUSTICE A. RAJASHEKER REDDY

Civil Miscellaneous Appeal No.693 of 2005

ORDER:

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This appeal is directed against the order dated 06-10-2004 in W.C.No.85 of 1995 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Vijayawada for enhancement of compensation from Rs.39,847/- to Rs.1,11,007/- already granted by the order dated 11-09-1996 by the Commissioner.

2. The brief facts, which led to the appeal, are that the appellant/ claimant filed W.C.No.85 of 1995, claiming compensation of Rs.55,000/- on account of injuries sustained in an accident occurred on 21-08-1993 at 5.00 P.M., while driving the lorry bearing No.AP-37-6629 in collision with another lorry bearing

No.KP-21-792 at 7 KMs away from Kolar out of and during course of his employment under the Opposite Party No.1. The Commissioner for Workmen's Compensation, after considering the oral and documentary evidence on record and taking the loss of earning capacity at 100%, awarded compensation of Rs.1,11,007/- through an order dated 11-09-1996. Challenging the said order, the Opposite Party No.2 in the W.C. case filed C.M.A.No.2306 of 1997 before this court and this Court, while observing that the doctor was not examined and that in the case of non-schedule injuries, doctor's evidence is essential, set aside the order dated 11-09-1996 and remitted the matter to the Commissioner for fresh disposal. Pursuant to the said order in C.M.A.No.2306 of 1997, the Commissioner, after recording the evidence of the doctor, came to the conclusion that 100% disability assessed in the earlier order dated 11-09-1996 is liable to be modified to the extent of 30% disability and accordingly, the compensation awarded earlier is modified to the extent of 39,847/- as against the compensation of Rs.1,11,007/- already granted by the order dated 11-09-1996. Aggrieved by the said order, the present appeal has been filed.

3. Heard the learned counsel for the appellant and the learned standing counsel for the 2nd respondent-Opposite Party No.2.

4. Learned counsel for the appellant submits that though the doctor clearly stated that the appellant-claimant suffered total blindness in the right eye, he assessed the disability at 30% and he clearly stated that the appellant-claimant is not fit to drive any vehicle and in the cross-examination also, the doctor categorically denied the suggestion to that extent. He contends that when the workman as driver is unable to drive any vehicle, the loss of earning capacity should be assessed at 100% but not 30%. He also submits that when the loss of earning capacity is not assessed basing on the disability, the Apex Court and this Court held that if the injured persons are not able to perform the same job as they were performing earlier to the accident, the loss of earning capacity should be assessed at 100%. In support of his contention, he relied on **Mohan Soni v. Ram Avatar Tomar and others**, **K. Janardhan v. United India Insurance Company Limited and another** and **N. Sree Ramulu @ Sree Rama Murthy v. B. Lakshmi Narayana and another**. He further contends that even though the appeal is dismissed against the owner-insured, the appeal can be heard and decided in the presence of the insurer. In support of his

contention, he relied on **Meka Chakra Rao v. Yelubandi Babu Rao @ Reddemma and others**.

On the other hand, the learned standing counsel for the 2nd respondent submits that the appellant has suffered only 30% disability and is able to perform other duties. As such, loss of earning capacity cannot be assessed at 100%. In support of his contention, he relied on **Oriental Insurance Company Limited v. Mohd Nasir** and **Palraj v. Divisional Controller, NEKRTC** and he further contends that Ex.A.4 is the driving licence of the appellant-workman.

It is not in dispute that the accident occurred out of and in the course of employment of the appellant-driver with the 1st respondent-Opposite Party No.1, who is employer of the appellant and the said finding, having remained unassailed and unchallenged, became final and the rest of the order of the Commissioner is confined to the extent of adducing the doctor's evidence. The doctor in his evidence opined that the appellant is unable to drive any vehicle as he has blindness on his right eye, though he assessed the disability at 30%. In **N. Sree Ramulu @ Sree Rama Murthy v. B. Lakshmi Narayana and another** (3 supra), this Court, after referring the decisions rendered in **Oriental Insurance Company v. Mohd. Nasir (2010 (1) ALD 74 (SC)** and **Palraj v. Divisional Controller, NEKRTC {(2010) 10 SCC 347}**, held as follows:

".....The following principles can be culled out from the above decisions of the Supreme Court and this Court:

(a) All injuries or permanent disabilities arising from injuries do not result in loss of earning capacity.

(b) Where permanent partial disablement results from an injury and the said injury is specified in Schedule I, it would be covered by Section 4(1)

(c) (i) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been payable in the case of permanent total disablement as is specified therein as being the percentage of the loss of earning capacity caused by that injury;

(c) Where permanent partial disablement results from an injury and the injury is not specified in Schedule I, it would be covered by Section 4(1) (c) (ii) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been payable in the case of

permanent total disablement as is proportionate to the loss of earning capacity (as assessed by the qualified medical

practitioner) permanently caused by the injury.

(d) In assessing loss of earning capacity in a case of permanent partial disablement resulting from an injury not specified in the Schedule I, 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.

(e) The opinion of the medical practitioner as to the percentage of loss of earning capacity would be normally binding on the court where permanent partial disablement results from an injury not specified in Schedule I.

(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 any 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** (17 supra) and in para.8 of **Mohan Soni** (25 supra) appropriate guidance is available.

(i) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of

earning capacity is something that will have to be assessed by the Commissioner/Court with reference to the evidence in entirety.

(j) Where a claimant is a workman who suffered injuries in an accident and his employer either provides for pension after retiring the workman on the grounds of medical invalidation or the dependants of the claimant are given appointment on compassionate grounds, he has a duty to disclose these facts and they would have a material bearing on the ascertainment of the percentage of loss of earning capacity.

(k) It is a question of fact in each case whether there is permanent total disablement on account of the injuries suffered by the claimant.

In a given case, the loss of earning capacity caused by an injury can amount to 100% disablement. But, if the injured claimant is in a position to earn a living by doing a job other than the one which he was doing at the time of his accident, he cannot be said to have suffered 100% disability.

(l) Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income....."

In the present case, the evidence of doctor remained unchallenged even though he assessed the claimant that he is unable to drive vehicle as held in the above judgment, the Opposite Party No.2 did not lead any evidence to prove that the appellant could make up his loss of income by changing his avocation or by adopting any means of livelihood. The appellant also was not cross-examined that his employer provided any means like pension after retirement on the ground of medical invalidation. The learned Judge granted compensation arriving at the loss of earning capacity as 100% while the injured person-appellant is unable to perform his job as he was performing earlier before the

injuries. In this case, no evidence was let in by the 2nd respondent that the appellant was doing some other job and earning money. In support of his contentions, the learned counsel for the appellant relied on a decision in **K. Janardhan v. United India Insurance Company Limited and another** (2 supra), it is held as follows:

“.....The learned counsel for the appellant has raised only one argument during the course of the hearing. He has submitted that the claimant - appellant being a tanker driver, the loss of his right leg ipso facto meant a total disablement as understood in terms of Section 2(1)(e) of the Workmen's Compensation Act and as such the appellant was entitled to have his compensation computed on that basis. In support of this plea, the learned counsel has placed reliance on [Pratap Narain Singh Deo vs. Srinivas Sabata & Anr.](#) (1976) 1 SCC 289. The cited case pertained to a carpenter who had suffered an amputation of his left arm from the elbow and this court held that this amounted to a total disability as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident. It was observed as under:

5. The expression "total disablement" has been defined in Section 2(1)(e) of the Act as follows:

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

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

"The injured workman in this case is carpenter by profession By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only."

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule 1, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.

Applying the ratio of the cited judgment to the facts of the present case we are of the opinion that the appellant herein has also suffered a 100% disability and incapacity in earning his keep as a tanker driver as his right leg had been amputated from the knee. Additionally, a perusal of Sections 8 and 9 of the Motor Vehicles Act 1988 would show that the appellant would now be disqualified from even getting a driving licence.”

In **Mohan Soni v. Ram Avatar Tomar and others** (1 supra), it is held as

follows:

“.....In light of the aforesaid decisions, we find it extremely difficult to uphold the decision of the High Court and the Tribunal based on the finding that the loss of the appellant's earning capacity as a result of the amputation of his left leg was only 50%. It is noted above that the appellant used to earn his livelihood as a cart puller. The Tribunal has found that at the time of the accident his age was 55 years. At that age it would be impossible for the appellant to find any job. From the trend of cross-examination it appears that an attempt was made to suggest that notwithstanding the loss of one leg the appellant could still do some work sitting down such as selling vegetables. It is all very well to theoretically talk about a cart puller changing his work and becoming a vegetable vendor. But the computation of compensation payable to a victim of motor accident who suffered some serious permanent disability resulting from the loss of a limb etc. should not take into account such indeterminate factors.....”

and in **Meka Chakra Rao v. Yelubandi Babu Rao @ Reddemma and others**

(4 supra), it is held as follows:

“.....even if the appeal is dismissed against the owner of the vehicle, the question of statutory liability of the Insurance Company survives for consideration and there is no need for the presence of the owner of the vehicle to decide the question of statutory liability of the Insurance Company at the appellate stage in the cases wherever the Tribunal recorded a finding that the accident has taken place due to the rash and/or negligent driving of the driver of the motor vehicle and if the said finding is not challenged either by the owner of the vehicle or by the Insurance Company.....”

In view of above facts and circumstances and the law laid down by the Apex Court as well as this Court in the decisions referred to supra, the appeal deserves to be allowed.

Accordingly, the appeal is allowed enhancing the compensation from Rs.39,847/- to Rs.1,11,007/- with interest at 12% p.a. from the date of petition till realisation.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

A. RAJASHEKER REDDY, J

Date: -01-2015

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