

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

Civil Miscellaneous Appeal No.817 OF 2005

JUDGMENT:

1 This Civil Miscellaneous Appeal is filed under Section 30 of the Workmen Compensation Act, challenging the Order, dated 20.07.2004 passed in W.C.No.91 of 2003 on the file of the Commissioner for Workmen's Compensation-cum-Assistant Commissioner of Labour, Kadapa wherein and whereby an amount of Rs.1,21,920/- was awarded towards compensation to the applicant as against the claim of Rs.8,31,920/-.

2 For the sake of convenience, the parties to this miscellaneous appeal, would hereinafter, be referred as they are arrayed before the lower authority.

3 The facts that led to the filing of the present appeal, briefly, are as follows:

4 One K. Venkata Subbareddy who is the owner of the lorry bearing No.AP-04-T-9671 engaged the applicant as cleaner – cum – hamali on the lorry. On 25.09.2002 the applicant was proceeding to Kadapa from Pileru on the said lorry. When the lorry reached Ontillu hamlet of Kavalipalli, the driver of the lorry drove the same in a rash and negligent manner and lost control over the same and dashed a tamarind tree situated on the roadside. In connection with the said accident, the police concerned registered a case against the driver of the lorry. Due to the accident, the applicant sustained fractures and injuries on various parts of the body and took treatment as inpatient in SVRR hospital, Tirupati from 26.09.2002 to 25.11.2002 and underwent operation. By the date of accident, the applicant was aged about 30 years and used to earn Rs.7,500/- p.m. as cleaner – cum – hamali of the lorry. The lorry bearing No.AP-04-T-9671 which

belongs to the Opposite Party No.1 was insured with the Opposite Party No.2 with effect from 04.08.2002 to 03.08.2003. Therefore, Opposite Party Nos.1 and 2 are jointly and severally liable to pay compensation to the applicant.

5 Opposite Party No.1 remained ex parte. Opposite Party No.2 filed counter disputing the age and income of the applicant. It is *inter alia* contended that the petition is not maintainable under sections 10 and 22 of the W.C. Act as there is no employer and employee relationship between the Opposite Party No.1 and the applicant. The applicant sustained only simple injuries and the amount of compensation claimed by him is excessive and exorbitant. Hence the petition may be dismissed.

6 Basing on the above pleadings, the learned Commissioner framed the following issues for trial.

- a. Whether the applicant is a workman as per the provisions of the Workmen's Compensation Act, 1923 and he met with the accident arising out and in the course of his employing resulting into disability and loss of earning capacity.
- b. What is the age of the injured applicant workman at the time of accident?
- c. What were the wages paid to the injured applicant workman at the time of accident?
- d. What is the loss of earning capacity suffered and disability percentage faced by the injured applicant?
- e. What is the amount of compensation payable to the injured applicant?
- f. Who are liable to pay the compensation?

7 During the course of enquiry, on behalf of the applicant A.Ws.1 and 2 were examined and Exs.A.1 to A.11 were marked. No oral or documentary evidence was adduced on behalf of the Opposite Party Nos.1 and 2.

8 On appreciating the oral, documentary evidence and other material available on record, the learned Commissioner assessed the loss of future earning capacity of the applicant as 45% and awarded compensation of Rs.1,21,799/- with interest at 9% p.a. from the date of filing of the petition till the date of realisation. The applicant, not being satisfied with the quantum of compensation awarded by the learned Commissioner, has preferred the present appeal.

9 The contention of the learned counsel for the applicant is three fold. **1)** The finding of the learned Commissioner that the loss of earning capacity of the applicant is 45% is not sustainable either on facts or in law. **2)** The learned Commissioner ought to have taken the wages of the applicant as Rs.7,500/- p.m. instead of fixing it as Rs.2,169/- and **3)** The learned Commissioner erred while not awarding interest @12% p.a. from the date of accident till the date of realisation.

10 *Per contra*, the learned counsel for the Opposite Party No.2 submitted that the learned Commissioner has appreciated the oral testimony of A.W.2 in right perspective and assessed the loss of future earning capacity of the applicant as 45%. He further submitted that there is no documentary evidence to establish the salary of the applicant as on the date of accident and hence the learned Commissioner has rightly taken the salary of the applicant as Rs.2,169/- p.m. He further submitted that the applicant is not entitled to claim interest @12% p.a from the date of accident till the date of realisation.

11 Basing on the above rival contentions, the points that emerge for determination in this appeal are as follows:

- i) Whether the learned Commissioner erred while assessing the loss of earning capacity of the applicant

as 45% without taking into consideration the nature of his duties?

ii) Whether the learned Commissioner committed error while not awarding interest @12% p.a. from the date of accident till the date of realisation.

Point No.1:

12 Establishment of employer and employee relationship between the Opposite Party No.1 and the applicant is *sine qua non* to entertain the application by the learned Commissioner under sections 10 and 22 of the W.C. Act. Opposite Party No.2 had taken a specific plea in the counter to this effect. The applicant while examining himself as A.W.1, deposed that by the time of accident he was working as cleaner – cum – hamali under Opposite Party No.1. As per the recitals of Ex.A.2 charge sheet, by the time of accident, the applicant was working on the lorry of the Opposite Party No.1 as a cleaner – cum – hamali. A perusal of Ex.A.3 wound certificate, A.4- Admission and discharge card reveals that the applicant had taken treatment in the hospital due to the injuries sustained by him in a motor vehicle accident on 25.09.2002. A perusal of Ex.A.5 – copy of the judgment passed by the criminal Court also supports the version of the applicant. The oral testimony of A.W.1 coupled with Exs.A.1 to A.5 clearly reveals that by the time of accident the applicant was working as cleaner – cum – hamali on the lorry of the Opposite Party No.1. Basing on the facts pleaded and proved, the irresistible conclusion that the be drawn is that the applicant sustained injuries out of and during the course of employment. The learned Commissioner has considered the oral and documentary evidence available on record in right perspective so far this aspect is concerned and the said finding does not warrant interference of this Court.

13 As per the testimony of A.W.1, due to fracture and injuries

sustained by him in the accident, he took treatment as inpatient in SVRR hospital, Tirupati from 26.09.2002 to 25.11.2002 and underwent operation. A perusal of Ex.A.3 – wound certificate reveals that the applicant sustained fracture to middle 3rd of shaft of left femur. As seen from the testimony of A.W.2, he examined the applicant on 23.04.2004. His testimony further reveals that due to infection of the fracture there is discharge of sinus on the lateral aspect of left thigh and buttock of the applicant. As per the testimony of A.W.2, the disability sustained by the applicant affects his earning capacity to the extent of 100%. As per the testimony of A.W.2, the applicant cannot climb lorry or tree etc.

14 The Court or Tribunal has to assess the opinion of the doctor taking into consideration the entire evidence of the doctor. Admittedly, A.W.2 examined the applicant almost 2 ½ years after the accident. The testimony of A.W.2 clearly reveals that he has not verified the X-Ray films, Case Sheets and other relevant medical record before assessing the loss of earning capacity of the applicant. The fact remains that A.W.2 assessed the earning capacity of the applicant without verifying the relevant records. The medical board issued the disability certificate in the month of April 2004. If whatever stated by A.W.2 is true and correct, the same should have reflected in the disability certificate issued by the medical board. Therefore, the possibility of exaggerating the things by A.W.2 on humanitarian grounds with an intention to help the applicant cannot be ruled out completely. It is not safe to place reliance on the testimony of A.W.2 while assessing the loss of earning capacity of the applicant. The Court has to taken into consideration the various provisions of the W.C. Act while assessing the loss of earning capacity of the workman. It is needless to say that the physical disability cannot be equated with loss of earning

capacity in each and every case. Even assuming but not admitting that the applicant was working as cleaner – cum – hamali on the lorry of the Opposite Party No.1, he can discharge the same duties, of course, with some difficulty. Undoubtedly, the functional disability sustained by the applicant would, certainly, effect is earning capacity. It is not the case of the applicant that due to 45% functional disability he is unable to attend any work and earn something. The applicant can attend any other work and earn something. The learned Commissioner has taken into consideration all these aspects and rightly arrived at a conclusion that the loss of earning capacity of the applicant is only 45%.

15 There is no dispute with regard to the age of the applicant as on the date of accident. The learned Commissioner has taken the relevant factor as 207.98 as the applicant was aged about 30 years by the date of accident. The applicant has taken a specific plea that by the date of accident he was earning Rs.7,500/- p.m. as lorry cleaner – cum – hamali. If the stand of the applicant is taken into consideration that by the date of accident he was discharging duties as cleaner – cum – hamali, it itself creates some sort of doubt. If really the applicant was earning Rs.7,500/- p.m. what prevented him to examine the Opposite Party No.1 or to produce any evidence much less convincing evidence to substantiate his stand? It is not uncommon to exaggerate the income of the applicant in cases of this nature with an ulterior motive to claim more compensation. It is also a common knowledge that the owners of the vehicles may engage the cleaner or cooli as and when they require their assistance. The salary being paid to the cleaners and workers is not uniform. While assessing the income of the workman, the Court shall not lost sight of ground realities. Absolutely, there is no material much less cogent and convincing evidence, to prove the income of the

applicant as on the date of the accident. The learned Commissioner has rightly taken the aid of G.O.Ms.No.81, dated 29.03.2001 and assessed the salary of the applicant as Rs.2,169/-. By meticulously following the procedure contemplated under the W.C. Act, the learned Commissioner assessed the loss of earning capacity of the applicant as Rs.1,21,799/-. The learned Commissioner has also awarded an amount of Rs.244/- towards stamp duty. I am fully agreeing with the findings recorded by the learned Commissioner, so far as the loss of earning capacity of the applicant, is concerned. Therefore, the contention of the learned counsel for the applicant that the Commissioner committed error while assessing the loss of future earning capacity of the applicant has no legs to stand. Hence the point is answered in favour of the Opposite Party No.2 and against the applicant.

Point No.2:

16 The contention of the learned counsel for the applicant is that the learned Commissioner ought to have awarded interest @12% p.a. from the date of filing of the petition till the date of realisation. The learned Commissioner granted interest @9% p.a. from the date of filing of the petition till the date of realisation.

17 As per the provisions of the W.C. Act, Opposite Party Nos.1 and 2 have to pay interest from the date of compensation fell due. Whether the compensation fell due from the date of accident or from the date of filing of the petition or from the date of passing of the award is a question to be considered and determined by the Court.

18 In the background of the same factual scenario, this Court, in Vemula Venkata Rao @ Sreenu Vs. P.Sattar Khan {CMA No.1088 of 2005 dated 17.07.2015}, by referring to the relevant provisions of the Act and by following various precedents of the Hon'ble Supreme

Court as well as this Court in *Pratap Narain Singh Deo v Srinivas Sabata*^[1], *Oriental Insurance Co. Ltd v Siby George & Sons*^[2], *National Insurance Co. Ltd., v Mubasir Ahmed*^[3], *Oriental Insurance Co. Ltd., v Mohd. Nasir*^[4], *Oriental Insurance Co. Ltd., v Bashaboina Bakkamma*^[5], *Patalapati Venkatanarasayamma v Susarla Subbalaxmi*^[6], *Maghar Singh v Jashwanth Singh*^[7] and *Midicharla Ramanamma v V.Naga Pratap*^[8] held that the applicant is entitled to interest @ 12% p.a. from the date of the accident till the date of realisation. Having regard to the facts and circumstances of the case and also the principle laid in the cases cited supra, I am of the considered view that the learned Commissioner erred in granting interest @ 9% p.a. and I hold that the applicant is entitled to interest at 12% per annum from 25.09.2002 i.e. the date of accident till the date of realisation.

19 In the result, the appeal is partly allowed, modifying the award passed by the learned Commissioner only to the extent of granting interest @ 12% p.a. instead of 9% p.a. from the date of accident i.e. 25.09.2002 on the amount of compensation of Rs.1,21,920/- as awarded by the learned Commissioner. The award passed by the learned Commissioner, in all other aspects, shall remain undisturbed. The opposite party Nos.1 and 2 are jointly and severally liable to pay the compensation of Rs.1,21,920/- with interest at 12% per annum from the date of the accident i.e. 25.09.2002 till the date of realization. There shall be no order as to costs. Miscellaneous petitions, if any, pending in this miscellaneous appeal shall stand closed.

T. SUNIL CHOWDARY, J

Date:11th September, 2015
Kvsn

[\[1\]](#) (1976) 1 SCC 289
[\[2\]](#) (2012) 12 SCC 540
[\[3\]](#) (2007) 2 SCC 349
[\[4\]](#) (2009) 6 SCC 280
[\[5\]](#) 2011 (3) TAC 256
[\[6\]](#) 1986 ACJ 526 (A.P)
[\[7\]](#) 1998 (9) SCC 134
[\[8\]](#) 2003 (1) ALD 594