

HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.1083 of 2005

ORDER:

This appeal is filed under Section 30 of the Workmen's Compensation Act, 1923, challenging the order dated 03.6.2005 passed in W.C. No.199 of 2004 on the file of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-III, Hyderabad.

2. The parties to this appeal are referred to as they are arrayed before the learned Commissioner, for the sake of convenience.

3. The facts leading to filing of the present appeal are as follows: The applicant filed the application under Sections 10 and 22 of the W.C. Act claiming a compensation of Rs.6,00,000/- on the ground that the applicant sustained injuries in the accident that occurred on 01.8.2004, out of and in course of employment. By the time of the accident, the applicant was aged about 23 years and used to earn Rs.4,000/- per month as auto driver. The opposite party No.1 engaged the applicant as driver of auto bearing No.AP 12U 3902, which was insured with opposite party No.2, as on the date of the accident. Hence, the application.

4. The opposite party No.1 remained ex parte. The opposite party No.2 filed counter denying the averments made in the application including the manner of the accident, age and income of the applicant, *inter alia*, contending that there was no relationship of employer-employee between the opposite party No.1 and the applicant; therefore, the present application is not maintainable under law. The amount of compensation claimed by the applicant is highly excessive and exorbitant. The applicant is not entitled for compensation unless he proves that he was having valid and effective driving licence as on the date of the accident. Hence, the petition may be dismissed.

5. Basing on the rival contentions, the learned Commissioner framed four issues. During the course of enquiry, the applicant examined himself as A.W.1 and got marked Exs.A1 to A12. To prove the functional disability and the loss of earning capacity of the applicant, A.W.2 Dr.S.Vasudeva Rao, was examined. On behalf of opposite parties, no oral evidence was adduced but Ex.D1 was marked on behalf of opposite party No.2.

6. On the analysis of the oral and documentary evidence available on record, the learned Commissioner arrived at the conclusion that by the time of the accident, the applicant was working as driver in the auto, which belongs to opposite party No.1, and allowed the petition in part by awarding an amount of Rs.2,98,424/- towards compensation directing opposite party Nos.1 and 2 to deposit the same within one month from the date of receipt of the order failing which the applicant is entitled for interest at the rate of 9% per annum from the date of filing of petition till the date of realization. Feeling aggrieved by the order of learned Commissioner, opposite party No.2 preferred the present appeal.

7. The contention of learned counsel for opposite party No.2 is three fold:

- (1) the learned Commissioner lacks inherent jurisdiction to entertain the application as there was no employer-employee relationship between opposite party No.1 and the applicant as on the date of the alleged accident;
- (2) the finding of the Tribunal that the loss of earning capacity of the applicant is 75% as the applicant sustained functional disability of 35% is perverse and baseless;
- (3) the findings recorded by the Tribunal are not sustainable either on facts or in law.

Per contra, learned counsel for the applicant submitted that the oral and documentary evidence placed before the learned Commissioner clinchingly established employer-employee relationship between

opposite party No.1 and the applicant. He further submitted that the learned Commissioner has considered the oral testimony of A.W.1 and recitals of Ex.A6 rightly arrived at the conclusion that the functional disability sustained by the applicant affects his earning capacity to the extent of 75%. He further submitted that the findings recorded by the learned Commissioner supported by oral and documentary evidence.

8. The substantial questions of law raised in this appeal are:

- (1) Whether there exists employer-employee relationship between opposite party No.1 and the applicant as on 01.8.2004?
- (2) Whether the learned Commissioner is not empowered to determine percentage of the loss of earning capacity over and above the percentage of functional disability incurred by the injured-workman?

Question No.1:

9. As seen from the testimony of A.W.1, on 01.8.2004 he was proceeding from Viceroy Hotel to Secunderabad while driving the auto along with the passengers. In the mean while, the driver of Maruti Zen car bearing No.AP 9AU 5400 had driven the same in a rash and negligent manner and dashed against the auto. As per the recitals of Ex.A1 (F.I.R.), the accident occurred due to the rash and negligent driving of the driver of Maruti Zen Car. As per the recitals of Ex.A2 complaint, by the time of the accident, the applicant had been working as driver in the auto bearing No.AP 12U 3902. A perusal of Ex.A3 reveals that the applicant was admitted in Gandhi Hospital, Secunderabad on 04.8.2004. The recitals of Exs.A1 to A3 clinchingly establishes that by the time of the accident, the applicant was working as a driver in the auto bearing No.AP 12U 3902, which belongs to opposite party No.1. The opposite party No.2 has not adduced any rebuttal evidence to substantiate the stand taken by it.

10. Basing on the oral and documentary evidence available on record, I am of the considered view that by the time of the accident, the applicant was working as driver of the auto belongs to opposite party No.1. Basing on the facts pleaded and proved, the irresistible

conclusion that can be drawn is that there was employer-employee relationship between opposite party No.1 and the applicant. I am fully agreeing with the finding recorded by the learned Commissioner on this aspect. Accordingly, the question is answered.

Question No.2:

11. As observed earlier, the applicant sustained injuries in a motor vehicle accident out of and in course of employment. As per the oral testimony of A.W.1, he sustained fracture to left leg. As per the recitals of Ex.A6, the applicant sustained 35% disability. A.W.2 testified that the applicant sustained fracture of left femur middle 1/3rd post operatively the fracture is not yet united due to which there is gross waste of thigh muscle. He further testified that due to fracture the applicant cannot sit, squat or fold his left leg properly. As per the testimony of A.W.2, the applicant has to bear the pain of left leg through out his life besides limping. In the cross-examination of A.W.2, nothing is elicited to shake his testimony so far as the nature of fractures sustained by the applicant are concerned. The oral testimony of A.W.2 coupled with Ex.A6 clearly reveals that the applicant sustained 35% functional disability. The oral testimony of A.W.1 coupled with Ex.A4 clearly reveals that the applicant is a driver by profession.

12. The crucial question that falls for consideration at this juncture is whether 35% functional disability incurred by the applicant to what extent affects his earning capacity. It is needless to say that the functional disability cannot be equated with loss of earning capacity in each and every case. Affect of functional disability on loss of earning capacity of injured person depends on his age, avocation and various other relevant factors. The fact remains that the applicant sustained 35% functional permanent disability. Unlike other persons, the driver of a vehicle requires more stamina and energy. A person with limping may not be in a position to drive motor vehicle like other normal

persons. When the applicant is not in a position to sit, squat or fold his left leg, it may not be possible for him to drive the auto like other persons. No doubt with 35% functional disability, he can drive the auto by taking rest. It is a matter of common knowledge that the auto drivers have to wait near bus stands and railway stations for passengers. The applicant may not be in a position to stand or wait for a long time. He cannot stand or walk for a long time; therefore he may not get passengers like other auto drivers.

13. To resolve the issue, this court is placing reliance on the ratio laid down in **N.Sree Ramulu @ Sree Rama Murthy Vs. B. Lakshmi**

Narayana^[1] wherein this Court held at para No.26 as follows:

26. 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.

14. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am of the considered view that loss of earning capacity of the applicant to the

extent of 75% is justified. Learned Commissioner has considered oral and documentary evidence and rightly arrived at the conclusion that 35% functional disability incurred by the applicant may affect his earning capacity to the extent of 75%. I am fully agreeing with the finding recorded by the learned Commissioner on the earning capacity of the applicant. There are no grounds much less valid grounds to interfere with the well reasoned order passed by the learned Commissioner. Accordingly, the question is answered. No substantial question of law arises in this appeal.

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

T.SUNIL CHOWDARY, J

Date: 16.9.2015.

YS

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