

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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C.M.A.No.958 of 2008

JUDGMENT:

This appeal by the appellant/second opposite party under Section 30 of the Workmen's Compensation Act, 1923 presently known as Employees' Compensation Act ('the Act', for short) is directed against the order dated 29.06.2005 in W.C.No.141 of 2004 of the learned Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour-III at Hyderabad.

2. I have heard the submissions of the learned counsel for the appellant/2nd Opposite Party ('the 2nd opposite party, for brevity) and the learned counsel for the 1st respondent/applicant ('the applicant', for brevity). The 2nd respondent/1st opposite party is stated to be not a necessary party. I have perused the material record.

3. The introductory facts, which are necessary for consideration, in brief, are as follows:

The applicant having filed an application before the learned Commissioner had claimed compensation pleading *inter alia* that he had sustained injuries out of and during the course of his employment as a driver on the DCM Van bearing registration number AP 9 V 3571 of the 1st opposite party insured with the 2nd opposite party. The 1st opposite party had remained *ex parte* before the learned Commissioner. The 2nd opposite party having filed a counter had resisted the claim of the applicant on various grounds. At trial, the applicant and his supporting witness were examined as AWs 1 and 2 and exhibits A1 to A27 were marked on his side. The 2nd opposite party examined a doctor as RW1. The copy of the policy of insurance in respect of the Bore Well Rig mounted lorry bearing no AP 29 7119 was exhibited as exhibit D1. On merits, the learned Commissioner had awarded a total compensation of Rs.3,47,481/- to the applicant recoverable

jointly and severally from both the opposite parties and had directed the same to be deposited by way of a demand draft drawn on any nationalised bank in favour of the Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour-III, Hyderabad within a period of thirty (30) days from the receipt of the said order and had also held that on failure to so deposit, interest at the rate of 9% per annum simple is payable on the awarded amount from the date of filing of the application i.e., 09.08.2004. Aggrieved of the said orders, the 2nd opposite party had preferred this appeal.

4. The learned counsel for the 2nd opposite party had contended as follows: The learned Commissioner had erred in determining the percentage of disability contrary to the assessment made by the medical officer. The learned Commissioner had wrongly considered the earning capacity without there being any evidence in that regard. The learned Commissioner ought to have assessed the disability at 35% and ought to have limited the compensation to that extent.

5. Per contra, the learned counsel for the applicant had first contended that when ever an appeal is preferred against the orders of the learned Commissioner by either of the opposite parties, the deposit of the awarded amount with interest as per the award within the Statutory period is mandatory in view of the third proviso to section 30 (1) of the Act and that the instant appeal was filed by the 2nd opposite party without depositing the interest component and that the awarded amount was only deposited, but, as per settled law the compensation amount includes interest also and that inspite of a direction by this Court to deposit the interest amount also, the same was not deposited by the 2nd opposite party and that it had thus failed to comply with the directions of this Court and also the mandatory requirement of law and hence, the appeal is not maintainable and is liable to be dismissed in limine. He had next submitted that the learned Commissioner had framed appropriate issues and had accurately considered the facts and properly appreciated the evidence and had answered the issues and that the learned Commissioner had rightly held that the applicant is an employee of the 1st opposite party within the meaning of the provisions

of the Act and that the learned Commissioner had rightly appreciated the evidence of the Doctors (AW2 and RW1) and that the learned commissioner had rightly held that the applicant had suffered permanent disability and consequential 70% loss of earning capacity on account of the injuries sustained and disability suffered and that the compensation awarded with interest is just and fair and that the contentions of the second opposite party in this appeal are devoid of merit and contrary to settled legal position.

6. In view of the contentions, the points that arise for determination in this appeal are:

1. Whether interest payable on the Compensation amount awarded by the Commissioner is part of the 'Compensation'? And, if so, whether the deposit of the compensation along with the interest component is a mandatory prerequisite for filing the appeal by the 2nd opposite party/insurer? And, if so, whether the instant appeal does not lie and is liable to be dismissed for non compliance of the of the mandatory statutory requirement under the 3rd proviso to Section 30 (1) of the Act?
2. Whether there is no employee and employer relationship between the applicant and the 1st opposite party as contended by the 2nd opposite party?
3. What was the percentage of physical disability and consequential loss of earning capacity suffered by the applicant? Whether the learned Commissioner erred in determining the loss of earning capacity at 75%?

7. POINT No.1:

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7.1 Coming first to the preliminary objection as to the maintainability of the appeal, what is to be noted is that admittedly the learned Commissioner had awarded a total compensation of Rs.3,47,481/- to the applicant recoverable jointly and severally from both the opposite parties and had directed the same to be deposited within 30 days from the date of the receipt of the copy of the order by way of a demand draft drawn in favour of the Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour-III, Hyderabad and had also held that on failure to so deposit, interest at the rate of 9% per annum simple is payable on the awarded amount from the date of the application i.e., 09.08.2004. This appeal was presented on 28.11.2005. As per the contents of the memo filed along with the appeal it is clear that a sum Rs.3,47,481/-was deposited. Though the commissioner had specifically

held that on failure to deposit the compensation amount within 30 days from the date of the receipt of the order the applicant would be entitled to interest and that interest at the rate of 9% per annum simple is payable on the awarded amount from the date of the application i.e., 09.08.2004, the 2nd opposite party had failed to deposit the interest component.

7.2 The contention of the 2nd opposite party that the afore stated provision of law is attracted only when employer prefers an appeal and not the insurer cannot be countenanced in view of the decision in **Gangireddy Venkateswara Rao and another v. Divisional Manager, New India Assurance Co. Ltd., and others** ^[1] where in a Division Bench of this Court while rejecting a similar contention had held that it is obvious that the insurer steps into the place of the employer when the insurer prefers the appeal against the Order of the Commissioner directing him to pay the compensation and that the insurer would be preferring the appeal as the employer because the insurer steps into the shoes of the employer and consequently the provision of the 3rd proviso to Section 30 (1) of the Act gets attracted to the Insurer.

7.3 Coming next to the aspect- whether the interest component is part of the Compensation and whether or not the insurer is bound to deposit the interest component also, suffice to state that this aspect of the matter is also no longer *res integra* as this Court in the decision in **Shriram General Insurance Co. Ltd., Hyderabad v. C. Chandra Shekar Goud and another** ^[2] while answering exactly the same question had referred to the law and the precedents and has held thus:

In view of these authoritative pronouncements of the Supreme Court, I have no hesitation to hold that the liability to pay interest is part and parcel of legal liability of the employer (upon default of payment of compensation due within one month from the date of accident). Since an insurance company is statutorily and contractually liable to reimburse the employer qua his statutory liability to pay compensation in case of accidents to his workmen, it is not open to an insurance company to contend that that the interest on the principal amount which almost automatically gets foisted upon him once the compensation amount is not paid within one month from the date it fell due, would not be a part of the insured liability of the employer. In this view of the matter I hold that interest payable by the insured employer/the insurance company on his behalf has to be treated as

part of compensation payable by them. Consequently, it forms part of "the amount payable under the order appealed against" and is required to be deposited under the 3rd proviso to S. 30 of the Act as a precondition to filing of the appeal.

7.4 Reverting to the facts of the instant case, it is apposite to note that the 2nd opposite party, while preferring the instant appeal, has deposited the compensation amount, but, has not deposited Rs.35,182/- due towards the interest component. Pointing out this omission and defect the applicant had filed CMA MP 1670 of 2013 in September 2013 seeking vacation of the Stay orders and dismissal of the appeal on this ground. Even then the 2nd opposite party has not deposited the interest component, which is the integral part of the Compensation and the amount payable under the order impugned.

7.5 Accordingly I hold that the interest payable on the Compensation amount awarded by the Commissioner is part of the 'Compensation' and that the deposit of the compensation along with the interest component is a mandatory prerequisite for filing the appeal by the 2nd opposite party/insurer and that the instant appeal does not lie and is liable to be dismissed for non compliance of the mandatory statutory requirement under the 3rd proviso to Section 30 (1) of the Act. The point is accordingly answered against the appellant.

7.6 However, on the assumption that the appeal is maintainable, the next two points are now taken up.

8. POINT No.2:

Though a feeble contention was raised that there is no employee and employer relationship between the applicant and the insured/1st opposite party, there is no merit in this contention as the evidence brought on record, both oral and documentary, including the copies of crime and medical records of the applicant, sufficiently established the relationship; further, the 2nd opposite party did not adduce any rebuttal evidence on this aspect except examining a doctor to speak on the aspect of the injuries sustained and the percentage of disability suffered by the applicant. Therefore, the reasoned

finding of the learned Commissioner that there is employer and employee relationship between the 1st opposite party and the applicant is perfectly justified and calls for no interference. The point is accordingly answered.

9. POINT No.3:

9.1 Coming first to the percentage of physical disability of the applicant; AW2, the doctor who was examined on the side of the applicant and RW1, the doctor who was examined on the side of the 2nd opposite party in one voice deposed that the applicant had suffered comminuted fractures of both bones (upper 1/3rd) of the right leg besides fracture of patella and that there is shortening of the limb and restriction of movements of right knee. However, they differed in their opinions on certain aspects; AW2 had stated that there is shortening of the limb, but, RW1 had stated that the shortening is minimal. They had assessed the permanent physical disability at 40% and 35% respectively. AW2 had stated that there is no possibility of the reduction of the disability as the bones had grossly mal united; he had also testified that the applicant cannot run or walk fast and drive a vehicle and work as a driver as in the past. However, RW1 had stated that the movements of the applicant are improving and that if AW1 undergoes physiotherapy, the movement can improve and he may be able to perform normal duties in due course of time. But, he had stated that the shortening of the limb is permanent. AW2 had also stated that the applicant cannot sit and squat and that he requires the support of a hand stick while walking and that he is limping. Considering the evidence on record, the learned Commissioner, who had the advantage of seeing the applicant for a considerable time when the applicant had prosecuted his claim application, had made his own best judgment assessment and had assessed the loss of earning capacity at 75% and had then determined the compensation by incorporating it as one of the components of the formula. The learned counsel for the 2nd opposite party had forcefully contended that the learned Commissioner had wrongly assessed the loss of earning capacity at 75%. He had placed reliance on the definitions of 'partial disablement' and 'total disablement' in Section 2(g) and 2(l) of the Act and also the Schedules of the Act and had contended that the

percentage of loss of earning capacity is only either 35% or 40% as per the evidence brought on record and cannot be more than that.

Section 2(g) reads as follows:

“partial disablement” means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a employee in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time: Provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement.

Section 2(l) reads as under:

“total disablement” means such disablement, whether of a temporary or permanent nature, as incapacitates a employee for all work which he was capable of performing at the time of the accident resulting in such disablement: Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more.”

9.2 In **Raj Kumar v. Ajay Kumar**^[3] the Supreme Court had explained the distinction between ‘physical disability’ and ‘functional disability’ and had enumerated the principles governing the determination of the loss of earning capacity and loss of future earnings resulting from the permanent disability arising from injuries. The enumerated principles are as follows:

“We may now summarise the principles discussed above:

- (i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.**
- (ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).**
- (iii) 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 the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.**
- (iv) The same permanent disability may result in**

different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.”

9.3 In S.Suresh v. Oriental Insurance Co.Ltd., and Another^[4] the facts show that the claimant in that case who was of 25 years of age and earning Rs.4,000/- per month besides daily allowance had suffered permanent disability which prevented him from engaging him in the job of driver, which he used to do earlier. In this cited case, evidence was brought on record that he had suffered 93% permanent disability in his right leg and he will not be able to do the job of a driver or any other job because he will not be able to stand or walk without support; therefore, the Commissioner came to the conclusion that the claimant's right leg up to the knee having been amputated, he has suffered a loss of 100% of his earning capacity as a driver. In this background the correctness of the said finding was questioned on the ground that as per the Schedule to the Act, loss of a leg on amputation amounted to a 50% reduction in the earning capacity, and the High Court had reduced the compensation by 50%. Then, the correctness of that judgment was questioned mainly on the ground that the claimant being a lorry driver, the loss of his right leg *ipso facto* meant a 'total disablement' as understood in terms of Section 2(1)(l) of the Act and as such the compensation payable to the claimant had to be computed on that basis. In support of the plea, reliance was placed on a four-Judge Bench decision of the Supreme Court in ***Pratap Narain Singh Deao v. Srinivas Sabata and Another [(1976) 1 SCC 289]***. In that case, a carpenter had suffered amputation of his left arm from the elbow. The Supreme Court had 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. In the light of the above facts and the legal position urged before the Hon'ble Supreme Court, the Supreme Court held as follows:

'In our view, the ratio of the said judgment is squarely applicable to the facts at hand. We are of the opinion that on account of amputation of his right leg below knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of

his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving licence under the Motor Vehicles Act.'

In **New India Assurance Company Ltd., Secunderabad v. Abdul Khader**

Jilani @ Jilani and another^[5] a Division Bench of this Court clarified that the Court's discretion is not controlled by the entries contained in Parts 1 and II of Schedule I.

9.4 Further, in the decision in **N. Sree Ramulu and others v. B. Lakshmi**

Narayana (died) and others^[6] this Court considered the following question: "Having regard to the nature of the injury suffered by the claimants in these cases, whether the Commissioner for Workmen's Compensation erred in not holding that the claimants should be deemed to have suffered "total disablement" as defined in Section 2(1)(l) of the Workmen's Compensation Act, 1923 (presently known as the Employees' Compensation Act, 1923) (for short "the Act") and award compensation to them on the said basis?" While answering the said question this Court had considered the provisions of law and also the decisions of the Supreme Court and had culled out the following principles:

25. 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)(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 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.

Further, in this cited decision, while deciding the claim in CMA no. 2197 of 2003 keeping in view the above principles of law, this Court had noted that the applicant in that case had suffered fracture of both bones of left leg above knee and that amputation was done for the right thigh and that fixation was done for fracture of left leg and that the applicant was not fit to drive a vehicle and had then proceeded to hold that the loss of earning capacity was 100% and that the Commissioner had erred in granting the compensation on the basis that the loss of earning capacity of the claimant was 80%. The law is thus well settled that the loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability; and, if the percentage of permanent disability is to be taken as the percentage of loss of earning capacity it may result in award of either too low or too high a compensation as the Supreme Court in Raj Kumar's case has pointed out that the same permanent disability may result in different percentages of loss of earning capacity in different persons depending on the nature of profession, occupation or job, age, education and other factors. In view of the settled legal position, the contention of the second opposite party that the percentage of loss of earning capacity has to be determined only at 35% or 40% as per the provisions of the Act cannot be countenanced.

9.5 Now coming to the aspect as to whether the Commissioner was correct in assessing the loss of earning capacity at 75%, what is to be noted is that the applicant at the age of about 30 years ultimately had suffered permanent disability on account of three major fractures viz., comminuted fractures of both bones of right leg (upper 1/3rd) besides fracture of patella and the said fracture injuries resulted in the shortening of the limb which is permanent and permanent physical disability on account of mal union of the fractured major bones, shortening of limb and restrictions of movements of the limb.

The applicant is a driver and in his present condition, he cannot drive a vehicle as in the past is clear from the evidence; and, even RW1 had only stated that if AW1 under goes physiotherapy the movement can improve and that AW1 can drive the vehicle over period of time; and, he did not specify the period of time in his evidence. Therefore, whether the applicant would be qualified or disqualified to get his driving licence renewed is doubtful. Therefore, the present case is a case where the disablement which is of permanent and partial nature has incapacitated the applicant for the work which he was capable of performing at the time of the accident. The second opposite party, which is canvassing that the percentage of loss of earning capacity is not 75% and that the applicant is capable of doing some work by changing his occupation and means of livelihood, did not adduce any evidence to show that in-fact he had changed his vocation or that he was earning some income by any other means. Having regard to the injuries sustained and the resultant disability suffered, it has to be held that the loss of earning capacity is 75% and therefore, the learned Commissioner is right in granting compensation on the basis of loss of earning capacity at 75%. The only grievance of the second opposite party in regard to quantum of compensation is that the learned Commissioner had grossly erred in assessing the loss of earning capacity at 75%. This Court recorded a finding that the assessment of loss of earning capacity at 75% is just and proper. Hence, this Court finds no reason to interfere with the compensation amount awarded. The point is accordingly answered against the appellant.

10. I have gone through the impugned order. For the reasons assigned and the findings recorded under the points supra, this Court finds that the order impugned does not call for any interference. Viewed thus, this Court finds that there is no merit in the appeal.

11. In the result, the Civil Miscellaneous Appeal is dismissed. No costs.

Miscellaneous petitions, if any, pending in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

30th June, 2015
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- [\[1\]](#) 1999 ACJ 262
 - [\[2\]](#) 2014 (1) ALD 272
 - [\[3\]](#) 2011 ACJ 1
 - [\[4\]](#) 2010 ACJ 497
 - [\[5\]](#) 2007(4) ALT 607 (DB)
 - [\[6\]](#) 2013 (5) ALD 249