

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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C.M.A.No.452 of 2005

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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, 1923 ('the Act' for short) is directed against the order dated 07.04.2005 in W.C.No.10 of 2004 of the learned Commissioner for Employees' Compensation and the Assistant Commissioner of Labour-IV at Hyderabad.

2. I have heard the submissions of the learned counsel for the appellant/second opposite party ('the second opposite party' for brevity) and the learned counsel for the 1st respondent/applicant ('the applicant' for brevity). None appeared for the 2nd respondent/first opposite party, though the said respondent was served with notice. I have perused the material record.

3. The basic facts, in brief, are as follows: -

The applicant had filed the WC case claiming compensation under the provisions of the Act against the employer/first opposite party-cum-owner of jeep bearing registration number AP 22 D 4651 and also the second opposite party/insurer of the said jeep claiming *inter alia* that he had sustained injuries in an accident that had occurred on 21.02.2004 out of and during the course of his employment as a driver under the first opposite party. The first opposite party-cum-owner of the jeep having filed a counter had admitted the relationship of employer and employee between him and the applicant and also the occurrence of the accident and its manner but, had *inter alia* contended that the vehicle is insured with the 2nd opposite party and that, therefore, the 2nd opposite party is liable to pay the compensation, if any, payable to the applicant. The 2nd opposite party had filed a detailed counter

resisting the claim in all respects. At trial, the applicant and a Doctor were examined as AWs1 and 2 and exhibits A1 to A5 were marked on the side of the applicant. No oral evidence was adduced on the side of the opposite parties. However, exhibit B1-the copy of insurance policy was marked. On merits, the learned Commissioner had awarded a compensation of Rs.3,72,835/- to the applicant and had held that both the opposite parties are jointly and severally liable to pay the said compensation and had directed them to deposit the said amount within thirty days from the date of receipt of a copy of the said order. In the said orders it was further held that on failure of the opposite parties to make the deposit of the total amount of compensation within the time stipulated, the applicant would be entitled to interest at 12% per annum on the amount of compensation from the date of the accident. Feeling aggrieved of the said orders, the second opposite party had preferred this appeal.

4. The learned counsel for the second opposite party had contended as follows:

The compensation determined by the learned Commissioner is not in accordance with law. The compensation determined and awarded is exorbitant. Therefore, it is to be scaled down. The applicant had suffered amputation of right hand above elbow. As per the schedule of the Act, the loss of earning capacity is only 70%. The entry at Schedule I part 2 item 3 discloses that in case of such an injury the loss of earning capacity shall be 70% and not 100% as determined and accepted by the learned Commissioner. Substantial question of law is involved in the appeal. Hence, the appeal deserves to be allowed and the compensation has to be scaled down by determining the percentage of loss of earning capacity at 70% and not at 100%.

5. Per contra, the learned counsel for the applicant while supporting the impugned order had submitted as under: "As per the settled legal position, the percentage of loss of earning capacity is only 100% in the instant case. If the percentage of permanent disability is to be taken as percentage of loss of

earning capacity, it may result in awarding a too low or too high a compensation as the Supreme Court had pointed out in **Raj Kumar v. Ajay Kumar** [2011 ACJ 1]. As held by the Supreme Court, the percentage of permanent disability may be different from the loss of earning capacity or functional disability and 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; and, in case on hand, the applicant is admittedly a driver of the jeep. Having suffered amputation of right hand above elbow, he cannot work any longer as a driver. Therefore, under facts and in law, the percentage of disability as rightly determined by the Commissioner is 100%. There is no merit in the appeal and the appeal is liable to be dismissed.”

6. In view of the facts and the contentions, the only point that arises for determination in this appeal is:

Whether the Commissioner was right in determining the loss of earning capacity as 100% while awarding the compensation?

7. **POINT:**

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7.1 The facts leading to the filing of the appeal by the second opposite party, the pleadings and the contentions of both the parties are already stated supra, in detail. It is not in dispute that on account of the injuries sustained by the applicant in an accident, which had occasioned out of and during the course of his employment, he had suffered amputation above right elbow and his right upper limb was amputated above elbow and that the said permanent disability was considered as 100% in terms of loss of earning capacity by the learned Commissioner. No doubt Schedule I (part-II) entry 3 indicates that in such cases the loss of earning capacity should be determined at 70%. Now, the only the question, therefore, is – ‘whether the Commissioner was in error in taking the loss of earning capacity at 100%?’. Under, the entry at serial no.3 of Part II of Schedule I of the Act, the percentage of loss of earning capacity is 70% for any amputation of the like nature in this case is undisputed. Having placed reliance on the above said provision, the learned

counsel for the second opposite party had forcefully contended that the determination of loss of earning capacity at 100% by the learned Commissioner is contrary to the statutory provisions and that, therefore, the learned Commissioner had grossly erred in assessing the percentage of loss of earning capacity at 100%. He had also placed reliance on the decision in **Raj Kumar v. Ajay Kumar**^[1] and also an unreported decision of this Court in **United India Insurance Co., v. S.K. Razak and another [CMA.Nos.235, 250 and 251 of 2005 dated 27.02.2015]**. IN Raj Kumar's case (1 supra) 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.”**

7.2 In S.K.Razak's case (unreported and referred to supra) the facts of the decided case show that this Court having regard to the facts and evidence on record did not accept the loss of earning capacity assessed at 100% by the

learned Commissioner in the batch of three appeals. The percentages in this cited case were fixed having regard to the facts and the evidence in the batch of cases. The decision in **S.Suresh v. Oriental Insurance Co.Ltd., and Another**^[2] was not brought to the notice of this Court when this Court had decided S.K.Razack's case (unreported). In the decision in **S.Suresh** (2 supra), 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 to show 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, the 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 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 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.'

7.3 In New India Assurance Company Ltd., Secunderabad v. Abdul

Khader Jilani @ Jilani and another^[3] a Division Bench of this Court clarified that the Court's discretion is not controlled by the entries contained in Parts I and II of Schedule I.

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

Narayana (died) and others^[4] 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)(I) of 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\(1\)\(c\)\(ii\)](#) 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.

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 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 70% as per the provisions of the Act cannot be countenanced.

9. Now coming to the aspect as to whether the Commissioner was correct in the instant case in assessing the loss of earning capacity at 100%, what is to be noted is that the applicant ultimately had suffered permanent disability on account of amputation of right upper limb above elbow is sufficiently established. AW2-the Doctor who treated AW1-the applicant, had assessed the permanent disability at 65%. The applicant is a driver and in his present condition, he cannot drive a vehicle and he is disqualified to get his driving licence renewed cannot be disputed. 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. It is not a case where the disablement cannot be decided without the aid of the medical evidence as the applicant suffered amputation of one upper limb above elbow. The second opposite party, which is canvassing that the percentage of loss of earning capacity is not 100% 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 100% and therefore, the learned Commissioner is right in granting compensation on the basis of the loss of earning capacity at 100%. The point is accordingly answered.

10. 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.

M. SEETHARAMA MURTI, J

25th August, 2015
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[\[1\]](#) 2011 ACJ 1

[\[2\]](#) 2010 ACJ 497

[\[3\]](#) 2007(4) ALT 607 (DB)

[\[4\]](#) 2013 (5) ALD 249