THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

C.M.A.No.903 of 2014

JUDGMENT:

This appeal by the appellant/second opposite party under Section 30 of the Workmen's Compensation Act, 1923 is directed against the order dated 11.07.2014 in W.C.No.16 of 2012 of the learned Commissioner for Employees' Compensation and Assistant Commissioner of Labour-II 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 compensation case claiming compensation under the provisions of the Workmen's Compensation Act, 1923 presently known as Employees' Compensation Act, 1923 ('the Act' for short) against the employer/first opposite party-cum-owner of TATA Ace Van bearing number AP 36 Y 6963 and the second opposite party/insurer of the said Van claiming *inter alia* that he had sustained injuries in an accident that had occurred on 17.03.2012 during the course and out of his employment under the first opposite party. The first opposite party-cum-owner of the vehicle had remained *ex parte* before the learned Commissioner. The second opposite party having filed a Counter had resisted the claim of the applicant. At trial, the applicant and a Doctor were examined as AWs1 and 2 and exhibits A1 to A12 were marked on the side of the applicant. RWs1 and 2 were examined and exhibits B1 to B4 were marked on the side of the second opposite party. On merits, the learned Commissioner had awarded a total compensation of Rs.5,15,830/- 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 with interest at 12% per annum from 18.04.2012 till the date of realisation by means of a demand draft drawn on any Nationalized bank in favour of the Commissioner for Workmen's Compensation within 30 days from the date of the receipt of the said order. Aggrieved of the said orders, the second opposite party preferred this appeal.

4. The learned counsel for the second opposite party would contend as follows: - 'The learned Commissioner had erred in treating the applicant as a driver within the meaning of Section 2(dd) of the Act in spite of the fact that the driving licence of the said applicant did not permit him to drive the Van. The learned Commissioner had erred in not looking into the provisions of Section 2(dd) of the Act and Sections 2(9) and 2(10) of the Motor Vehicles Act (the 'MV Act' for short). The learned Commissioner was incorrect in treating the applicant as a driver and in making the second opposite party liable to pay the compensation. The learned Commissioner ought to have seen that there is no employee and employer relationship between the applicant and the 1st opposite party. The learned Commissioner ought to have dismissed the claim against the second opposite party as the second opposite party cannot be made liable in a case where the applicant cannot be treated as an employee within the provisions of the Act. The learned Commissioner ought to have dismissed the claim of the applicant against the second opposite party as the applicant was not holding an effective driving licence as on the date of the accident and as the applicant cannot be treated as a driver in view of the provisions of the Act and the MV Act. The learned Commissioner had erred in taking into consideration exhibit A6-disability certificate issued by AW2, who had never treated the applicant and had merely issued the said certificate. The learned Commissioner ought to have looked into the judgment of the Supreme Court reported in 2011 ACJ 1 and ought to have rejected the evidence of AW2. The learned Commissioner grossly erred in making the second opposite party liable to pay interest at 12% per annum and the said direction is against the law laid down by the Supreme Court.

The learned Commissioner failed to look into the judgments of the apex Court reported in 2007 ACJ 845 and 2012 ACJ 691 and ought to have held that the applicant is not entitled to any interest on the compensation amount. The learned Commissioner erred in taking the extent of disability as 100% and in not following the Rule of Law while determining the compensation.

5. Per contra, the learned counsel for the applicant would contend that the learned Commissioner had framed appropriate issues and had accurately considered the facts and properly appreciated the evidence and had answered the issues while adverting to the ratios in various decisions and had rightly held that the applicant is having valid and effective driving license to drive the Van viz., subject vehicle at the time of accident and that, therefore, the applicant can be treated as a driver as per the provisions of law and had rightly held that the applicant is an employee within the meaning of the provisions of the Act and had rightly appreciated the evidence of the Doctor by taking into consideration the fact that the applicant had suffered total disability and 100% loss of earning capacity on account of the above knee amputation of the left leg 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 there is no employee and employer relationship between the applicant and the 1st opposite party as contended by the 2nd opposite party? Whether the applicant held a valid and effective driving license? And, if so, whether the applicant had sustained injuries during the course and out of his employment under the first opposite party who is the owner-cum-insured of the vehicle bearing registration No.AP 36 Y 6963?

2. 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 as 100%?

3. What is the amount of compensation to which the applicant is entitled to?

4. Whether the Commissioner had committed error in

awarding interest at 12% per annum on the compensation amount as contended by the second opposite party?

5. Whether the second opposite party is liable to pay the compensation?

7. <u>POINT No.1:</u>

The applicant worked as a driver on the TATA Ace Van of the first opposite party is not in dispute. On 17.03.2012 while the applicant was driving the said vehicle in the capacity of its driver, the said vehicle had met with an accident when a lorry bearing no. AP 16 TX 2849 had dashed the said vehicle of the applicant. It is also not in dispute that the applicant has sustained injuries in the said accident. The certified copies of the FIR, the charge sheet, the wound certificate issued by City Orthopaedic Centre, Vijayawada, discharge summary issued by the said hospital, discharge summary issued by Kamineni hospital, disability certificate issued by Dr.G.Subhash Rao (AW2), the copy of driving license of the applicant, the copy of the RC of the vehicle driven by the applicant, the copy of the insurance policy of the said vehicle, the copy of the bill payment receipt, the photograph of the applicant and the X-ray film were exhibited as exhibits A1 to A12.

7.1 Now the first vital question is – 'Whether the applicant held a valid and effective driving licence to drive the subject vehicle at the time of the accident?' Admittedly, the applicant was holding a licence. The copy of the said driving licence is exhibit A7. The said licence authorised the applicant to drive a non transport auto rickshaw, light motor vehicle and a motor cycle and it is valid up to 14.02.2015 is not in dispute. The subject accident had occurred on 17.03.2012. Exhibit A8, the copy of Registration Certificate of the subject vehicle, on a perusal would show that it is a goods carriage –light motor vehicle and is registered in the name of the first opposite party. The learned counsel for the second opposite party having placed reliance on the evidence of RWs1 and 2 would contend that as per the certificate of registration of the vehicle and the policy of insurance, the subject insured vehicle is a goods carriage light motor vehicle (Van) and to drive the said insured vehicle the driver shall possess a licence viz., 'Transport light motor vehicle licence' i.e., a license with transport endorsement but, as per the driving license issued by the Road Transport Authority, Secunderabad to the applicant, he was possessing only a license which authorised him to drive a light motor vehicle (non transport) and that, therefore, the applicant was not authorised to drive the insured vehicle, which is a transport vehicle, and that both the applicant as well as the first opposite party are aware of the said fact that the applicant is not having a valid and effective driving licence to drive the subject vehicle and that despite such knowledge the 1st opposite party had wilfully and knowingly handed over possession of the insured vehicle to the applicant and hence, there was a contravention of the provisions of the Act as well as the MV Act and the rules framed there under and that, therefore, the applicant cannot be treated as a driver within the meaning of Section 2(dd) of the Act and Section 2(9) and 2(10) of the MV Act and as a sequel, it must follow that there is no employee and employer relationship between the applicant and the first opposite party. On the other hand, the learned counsel for the applicant supported the order of the learned Commissioner on this particular aspect.

7.2 In the light of the contentions, it is necessary to refer to Section 2(dd) of the Act and Sections 2(9) and 2(10) of the MV Act which read as follows:

2(dd): "employee" means a person, who is –

(i) a railway servant as defined in clause (34) of section 2 of the Railways Act, 1989 (24 of 1989), not permanently employed in any administrative district or sub-divisional office of a railway and not employed in any such capacity as is specified in Schedule II; or

(ii) (a) a master, seaman, or other member of the crew of a ship;
(b) a captain or other member of the crew of an aircraft;
(c) a person recruited as driver, helper, mechanic, cleaner or in any other capacity in connection with a motor vehicle;
(d) a person recruited for work abroad by a company,
and who is employed outside India in any such capacity as is specified in Schedule II and the shop, aircraft or motor vehicle, or company, as the case may be, is registered in India; or
(iii) employed in any such capacity as is specified in Schedule II, whether the contract of employment was made before or after the passing of this Act and whether such contract is expressed or

implied, oral or in writing but does not include any person working in the capacity of a member of the Armed Forces of the Union; and any reference to any employee who has been injured shall, where the employee is dead, include a reference to his dependants or any of them."

Sections 2(9) and 2(10) of the MV Act read as under:

> **(9) "driver" includes, in relation to a motor vehicle which is drawn by another motor vehicle, the person who acts as a steersman of the drawn vehicle;**
>
> **(10) "driving licence" means the licence issued by a competent authority under Chapter II authorising the person specified therein to drive, otherwise than as a learner, a motor vehicle or a motor vehicle of any specified class or description;**

It is not in dispute and it is also evident from exhibit A8 that the insured vehicle is a goods carriage-light motor vehicle. Be that as it may, it is pertinent to note that exhibit A8 on a perusal discloses that the gross weight of the insured vehicle is 1550 Kgs and that the insured vehicle is a light motor vehicle as per the provision in Section 2(21) of the MV Act which reads as under:

> **2(21) "light motor vehicle" means a transport vehicle or omnibus the gross vehicle weight of either of which or a motor car or tractor or road-roller the unladen weight of any of which, does not exceed [2][7500] kilograms.**

It is not in dispute and it is sufficiently established by filing exhibit A7 that the applicant was authorised at the relevant time to drive a light motor vehicle. As per the above provision, the light motor vehicle means and includes a transport vehicle, the unladen weight of which does not exceed 7500 Kgs. Since the gross unladen weight of the subject insured vehicle does not exceed 7500 Kgs, it cannot be said that the applicant is not holding valid and effective driving license which authorised him to drive the subject vehicle. It is submitted on behalf of the applicant that what is relevant in the present context is not the use to which the subject vehicle is being put and that what is relevant is only the connotation of the 'light motor vehicle' and it is immaterial whether such vehicle is being used as a transport vehicle or purely for private purposes. On this aspect, the learned Commissioner had placed reliance on the decisions in **E.Rajeswari and others v. T.S. Sekhar and another**[1] **and Smruti Ranjan Parida v. Taramani Das and others**[2] which supported the view of the learned Commissioner that the use of the vehicle for carriage of goods does not take the auto-rickshaw or van outside the definition of light motor vehicle, which includes a transport vehicle whose unladen weight does not exceed 7500 Kgs. In the decision in E. Rajeswari's case (1st cited), the facts show that the driver held a licence which authorised him to drive only a light motor vehicle and therefore, it was contended that he was not permitted to drive a transport vehicle. Rejecting the said contention this Court had held as follows:

> **"So far as the second aspect is concerned, the Tribunal held that the driving licence Ex.B1 was only for the light motor vehicles and that the driver was not permitted to drive a transport vehicle. The view taken by the Tribunal cannot be sustained. The reason is that the connotation 'light motor vehicle' is relevant, in the context of size and make of the vehicle, and not the use, to which it is put. The expression 'transport vehicle', on the other hand, deals with the use and not the size of the vehicle. For instance, even a small vehicle, like, Autorickshaw can be treated as a transport vehicle, because of its use, whereas a big Sedan or a Car can be used as a private vehicle. The LMV licence issued to a driver enables him to drive the vehicle of that category. It is immaterial whether such vehicle is being used as purely for private purposes, or as transport vehicle."**

7.3 The learned counsel for the second opposite party relied upon the decision in **National Insurance Co.Ltd., v. Kusum Rai and others**[3] **and United India Insurance Co. Ltd., v. Davinder Singh**[4] in support of his contentions. In Davinder Singh's case (4 supra) the driver held a fake licence, but the same was got renewed; nevertheless, it was held that where originally the licence was a fake one, renewal cannot cure the inherent fatality. The ratio in the decision has no application to the facts of the instant case as the licence under exhibit A7 is a genuine and not a fake licence. In Kusum Rai's case (3rd cited) a driver had a licence to drive a light motor vehicle; but, he drove a jeep, which was being plied as a taxi/commercial vehicle; and hence, a Bench of two Hon'ble Judges of the Supreme Court had held that the driver did not possess a valid licence to drive a commercial vehicle and had, therefore, directed the insurance company to recover the amount paid by it from the owner by initiating proceedings before the Court of execution.

7.4 In the light of the decisions cited by the learned counsel for the second opposite party, it is pertinent to refer to the ratio in the decision in **S.Iyyapan v. United India Insurance Company Limited**[5]**.** The facts of this cited case would disclose that the insurance company having preferred an appeal before the High Court questioned its liability by *inter alia* submitting that the driver of the vehicle did not hold a valid and effective driving licence as on the date of the accident. In that cited decision, the driver held a valid driving licence to drive a light motor vehicle but, the vehicle in question was a Mahindra Maxi Cab and the driver did not get any endorsement in the driving licence to drive such a vehicle. Therefore, the High Court placing reliance on **Sardari v. Sushil Kumar**[6] observed that since the vehicle was being used as a taxi, which was a commercial vehicle, the driver of the said vehicle was required to hold an appropriate licence; the High Court had thus held that the insurance company is not liable to pay any compensation to the claimants as there is a breach of the condition of the contract of insurance. Hence, the claimant had preferred a civil appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court considered the question as to – 'Whether the insurance company could disown its liability on the ground that the driver of the vehicle, though duly licenced to drive a light motor vehicle, was not having any endorsement in the licence to drive a light motor vehicle used as a commercial vehicle?'. While answering the said question, the Hon'ble Supreme Court had considered the ratios in all the relevant precedents including Kusum Rai's case relied upon by the second opposite party and had finally held as follows:

> **"Hence, in our considered opinion, the insurer cannot disown its liability on the ground that although the driver was holding a licence to drive a light motor vehicle but before driving light motor vehicle used as commercial vehicle, no endorsement to drive commercial vehicle was obtained in the driving licence. In any case, it is the statutory right of a third party to recover the amount of compensation so awarded from the insurer. It is for the insurer to proceed against the insured for recovery of the amount in the event there has been violation of any condition of the insurance policy.**
>
> **In the instant case, admittedly the driver was holding a valid driving licence to drive light motor vehicle. There is no dispute that the motor vehicle in question, by which accident**

> **took place, was Mahindra Maxi Cab. Merely because the driver did not get any endorsement in the driving licence to drive Mahindra Maxi Cab, which is a light motor vehicle, the High Court has committed grave error of law in holding that the insurer is not liable to pay compensation because the driver was not holding the licence to drive that commercial vehicle. The impugned judgment is, therefore, liable to be set aside.**
> **We, therefore, allow this appeal, set aside the impugned judgment of the High Court and hold that the insurer is liable to pay the compensation so awarded to the dependants of the victim of the fatal accident. However, there shall be no order as to costs."**

Thus, the Hon'ble Supreme Court held that the insurer is liable to pay the compensation. The contention of the second opposite party in the case on hand that the applicant is the driver and that he is not a third party and that he as well as the first opposite party are having knowledge that the applicant was not holding a valid and effective driving licence and that, therefore, the 2nd opposite party is not liable to pay the compensation cannot be countenanced in view of the provision of Section 2(21) of the MV Act extracted supra and the ratio in the decision of this Court in E. Rajeswari (1 supra) and in view of the precedential guidance that the driver holding valid driving licence which authorised him to drive LMV is also authorised to drive the subject vehicle which is also a LMV. In view of the undisputed and established facts and the legal position obtaining, I am of the considered view that the applicant held a valid and effective driving licence to drive the insured vehicle at the time of the accident and, therefore, the contention of the second opposite party that the Commissioner had grossly erred in treating the applicant as a driver within the meaning of provisions of the Act and that the applicant is not an employee within the meaning of the provisions of the said Act and that he cannot be treated as a driver/employee of the 1st opposite party cannot be countenanced. As already noted, the applicant sustained injuries in the accident that had occurred on 17.03.2012 is not in dispute. Now that this Court recorded a finding that the applicant held valid and effective driving licence to drive the insured vehicle, it follows that the applicant had sustained the injuries in the impugned accident during the course and out of his employment on the subject vehicle and under the employment of the first opposite party and that there was employee and employer relationship between the applicant and the first opposite party. Accordingly, this Court finds no merit in the contention of the second opposite party that in this case, it is entitled to be exonerated from the liability to pay the compensation. The point is accordingly answered.

8. POINT No.2:

Coming to the percentage of physical disability and the consequential percentage of loss of earning capacity said to have been suffered by the applicant, it is necessary to refer to the contents of exhibits A3, A4, A5 and A6. Exhibits A3 and A4, the certified copies of wound certificate and discharge summary issued by City Orthopaedic Centre, Vijayawada show that the applicant had sustained fracture femur left at the junction of middle 1/3rd and laceration over the face and that he was treated in the said hospital as an in-patient from 17.03.2012 to 19.03.2012 and that he was discharged against medical advise despite a suggestion made by the Doctor that he requires vascular repair of left lower limb. Exhibit A5, discharge summary, issued by Kamineni hospital would show that the applicant was admitted in the said hospital on 21.03.2012 for treatment for a period of three days of left femur with vascular injury, left lower limb. A further perusal of exhibit A5 would show that ILN femur implant was removed and above knee amputation of left leg was done on 21.03.2012 i.e., about four days after the accident and that the applicant was discharged on 24.03.2012. AW2 who had not admittedly treated the applicant/AW1 had issued exhibit A6 disability certificate. According to his evidence, AW1/applicant came to his clinic on 22.03.2013 with amputation above knee level with history of RTA and that the applicant was suffering with vascular damage, limping and that therefore, he had assessed the partial and permanent disability at 80% and loss of earning capacity at 100% and had accordingly issued exhibit A6-disability certificate.

8.1 The learned counsel for the 2nd opposite party first contended that AW2 who treated AW1 is not competent to issue the disability certificate and that the learned Commissioner had wrongly assessed the loss of earning capacity at 100%. 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 item at the entry at serial no.19 of part II of Schedule I of the Act and had contended that the percentage of loss of earning capacity is only 60 as per the law as 'amputation below middle thigh' i.e., above knee was done in the case of the applicant.

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."**

The entry at Sl.No.19 of Part II of Schedule I reads as under:

19. Amputation below middle thigh to below knee -60.

Thus, under this entry of the Schedule I of the Act, the percentage of loss of earning capacity is 60 for any amputation below middle thigh to below knee.

8.2 Having placed reliance on the above said provisions, he had forcefully contended that the determination of loss of earning capacity at 100% 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**[7] and also an unreported decision of this Court in **the 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 (7 cited) 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).**
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> **(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."**

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**[8] was not brought to the notice of this Court in S.K.Razack's case (unreported). In the decision in **S.Suresh** (8 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, 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 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**[9] 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.

8.3 Further, in the decision in **N. Sree Ramulu and others v. B. Lakshmi Narayana (died) and others**[10] 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 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;**
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> **(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.

(I) 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 60% as per the provisions of the Act cannot be countenanced.

8.4 Now coming to the aspect as to whether the Commissioner was correct 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 left lower limb above knee is sufficiently established. Though AW2-the Doctor had not treated AW1-the applicant, he had assessed the permanent disability at 80% and had stated in his evidence that the loss of earning capacity is 100%. 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 lower limb above knee. 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 loss of earning capacity at 100%. The point is accordingly answered.

9. POINT No.3:

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 100%. Under point No.2 this Court recorded a finding that the assessment of loss of earning capacity at 100% is just and proper. Therefore, as per the formula, the amount of compensation to which the claimant is entitled to is Rs.5,13,304/-. Hence, this Court finds no reason to interfere with the compensation amount awarded.

10. __POINT No.4:__

Insofar as the interest and the rate of interest awarded on the compensation amount by the learned Commissioner, the learned counsel for the second opposite party would contend that the applicant is entitled to interest only from the date of the order of the Commissioner and that the interest awarded at 12% per annum is high and excessive. In support of the said contention, he had placed reliance on the decisions in (i) National Insurance Company Ltd. V. Mubasir Ahmed and another [2007(2) SCC 349] and (ii) Oriental Insurance Company Limited v. Mohd. Nasir and another [2009 (6) SCC 280]. On the other hand, the learned counsel for the applicant while submitting that the interest granted by the learned Commissioner is just and proper and that it is in accordance with law had placed reliance on a decision in **The Oriental Insurance Company Ltd., v. Siby George and others**[11].

10.1 Section 4A of the Workmens' Compensation Act, which deals with 'compensation to be paid, when due and penalty for default' reads as under:

> **4-A: Compensation to be paid, when due and penalty for default: -**
> **(1) compensation under Section 4 shall be paid as soon as it falls due.**
> **(2) xxx**
> **(3) Where any employer is in default in paying the compensation due under this Act within one month from the date it fell due, the Commissioner shall**
> **(a) direct that the employer shall, in addition to the amount of the arrears, pay simple interest thereon at ther ate of twelve per cent per annum or at such higher rate not exceeding the maximum of the lending rates of any schedule bank as may be specified by the Central Government, by notification in the Official Gazette on the amount due; and**
> **(b) if, in his opinion, there is no justification for the delay, direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding fifty per cent of such amount by way of penalty:**
> **Provided that an order for the payment of penalty shall not be passed under Clause (b) without giving a reasonable opportunity to the employer to show cause why it should not be passed."**

Under the said provision, the Commissioner is empowered to direct that the employer shall in addition to the arrears pay 12% per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due.

10.2 Further, in the decision in Siby George (11 supra), the Hon'ble Supreme Court considered the following question: 'When does the payment of compensation under the WC Act, 1923 become due and consequently what is the point in time from which interest would be payable on the amount of compensation as provided under Section 4(a)(3) of the Act?' The Hon'ble Supreme Court having considered the legal position and the ratios in the precedents had held as under**: "The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd.Nasir, each of which was heard by two judges. But, the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two latter decisions in Mubasir Ahmed and Mohd. Nasir. In the light of the decisions in Pratap Narain Singh Deo and Valsala, it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd.Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala do not express the correct view and do not make binding precedents."** Therefore, in view of the settled legal position, the order of the learned Commissioner awarding interest at 12% per annum from 18.04.2012 till the date of realisation cannot be said to be not in accordance with law. The point is answered accordingly.

11. <u>POINT No.5:</u>

Admittedly, there is a valid insurance policy in respect of the subject vehicle at the relevant time and the said policy was valid from 31.07.2011 to 14.02.2015 and by the said policy, the risk of the applicant is covered in the facts and circumstances of the case. Therefore, the insurance company cannot disown its liability. Hence, this Court finds that the insurance company is liable jointly and severally along with the first opposite party to pay the total compensation with interest.

12. 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, I find no merit in the appeal.

13. In the result, the appeal is dismissed. However, in the facts and circumstances, without costs.

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

M. SEETHARAMA MURTI, J

10th June, 2015
Vjl

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[1] 2011(1) ALD 48

[2] 2011 ACJ 1592

[3] 2006 ACJ 1336

[4] 2008 ACJ 1

[5] (2013) 7 Supreme Court Cases 62

[6] 2008 ACJ 1307

[7] 2011 ACJ 1

[8] 2010 ACJ 497

[9] 2007(4) ALT 607 (DB)

[10] 2013 (5) ALD 249

[11] 2012 ACJ 2126