

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.3837 OF 2004

JUDGMENT:

1 This Civil Miscellaneous Appeal is filed under Section 30 of the Workmen Compensation Act, challenging the Order, dated 29.06.2004 passed in W.C.No.129 of 2003 on the file of the Commissioner for Workmen's Compensation-cum-Assistant Commissioner of Labour-III, Hyderabad.

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

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

4 The applicant was engaged as driver in the auto trolley bearing No.AP 11 U 4348, which belongs to the Opposite Party No.1. On 13.11.2003, the applicant sustained injuries in the motor vehicle accident out of and during the course of employment. By the time of accident, the applicant was aged about 28 years and used to earn Rs.4,000/- p.m. As on the date of accident, the auto trolley bearing No.AP 11 U 4348 which belongs to the Opposite Party No.1, was insured with the Opposite Party No.2. Therefore, the Opposite Party Nos.1 and 2 are jointly and severally liable to pay compensation to the applicant. Hence the claimant filed the claim petition seeking compensation of Rs.3.00 lakhs.

5 Opposite Party No.1 remained *ex parte*. Opposite Party No.2 filed counter denying all the averments made in the petition including the manner of accident, age and income of the applicant, inter alia, contending that there was no employer and employee relationship between the Opposite Party No.1 and the applicant as on 13.11.2003. The applicant is not entitled to claim compensation from this Opposite Party unless it is established that the applicant was having valid and effective driving licence as on the date of accident. The amount of compensation claimed by the applicant is excessive and exorbitant. Hence the petition may be dismissed.

6 Basing on the above pleadings, the learned Commissioner framed four issues for enquiry.

7 During the course of enquiry, on behalf of the applicant, A.Ws.1 and 2 were examined and Exs.A.1 to A.10 were marked. On behalf of the Opposite Party Nos.1 and 2, no oral evidence was let in, whereas copy of the insurance policy was marked as Ex.D.1 on behalf of Opposite Party No.2.

8 On appreciating the oral, documentary evidence and other material available on record, the learned Commissioner arrived at a conclusion that by the time of accident, the applicant was working as driver in the auto trolley bearing No.AP 11 U 4348 which belongs to the Opposite Party No.1 and that the applicant sustained injuries out of and in course of his employment and allowed the petition in part by awarding compensation of Rs.3,74,081/-, directing the Opposite Party Nos.1 and 2 to deposit the amount within 30 days, failing which the applicant is entitled to interest @ 9% p.a. from the date of filing of the claim petition i.e. 27.11.2003. Feeling aggrieved by the order of the learned Commissioner for Workmen's Compensation, the Opposite Party No.2 - insurer preferred the present appeal.

9 The contention of the learned counsel for the Opposite Party No.2 is three fold. **1)** There was no employer and employee relationship between the Opposite Party No.1 and the applicant in view of the recitals of Ex.A.1-F.I.R, **2)** The learned Commissioner failed to consider that application under Section 22 of the W.C. Act is not maintainable without establishing the relationship of employer and employee between the Opposite Party No.1 and the applicant, and **3)** The learned Commissioner committed error while assessing the loss of earning capacity of the applicant as 100% even though he sustained functional disability of 60%.

10 *Per contra*, the learned counsel for the applicant submitted that the oral and documentary evidence produced before the learned Commissioner clinchingly established the relationship of employer and employee between the Opposite Party No.1 and the applicant. He further submitted that the disability sustained by the applicant incapacitated him to discharge duties of driver and hence the learned Commissioner has rightly assessed the loss of earning capacity of applicant as 100%. There are no grounds much less valid grounds to interfere with the well considered order passed by the learned Commissioner and the appeal may be dismissed.

11 Basing on the above rival contentions, the substantial questions of law that emerge for determination in this appeal are as follows:

i) Whether the findings of the learned Commissioner that there was relationship of employer and employee between Opposite Party No.1 and the applicant is perverse and is not supported by any legally admissible evidence?

ii) Whether the learned Commissioner committed error while assessing the earning capacity of the applicant as 100% even though the applicant sustained 60% functional disability?

Point No.1:

12 The applicant has taken a specific plea in the application that by the time of accident, he was working as driver in the auto trolley bearing No.AP 11 U 4348, which belongs to the Opposite Party No.1. Whereas there is no specific plea in the counter of the Opposite Party No.2 that by the time of accident the applicant was not working as driver in the auto trolley bearing No.AP 11 U 4348, which belongs to the Opposite Party No.1. No doubt, Opposite Party No.2 has taken a specific plea in the counter that there is no employer and employee relationship between the Opposite Party No.1 and the applicant. In order to claim compensation, the applicant has to establish the relationship of employee and employer between him and the Opposite Party No.1. Once the applicant prima facie establishes the employee and employer relationship between him and the Opposite Party No.1, the onus of proof shifts on the Opposite Party No.2 to establish the stand taken by it.

13 As per the testimony of A.W.1, by the time of accident he was working as driver in the auto trolley bearing No.AP 11 U 4348, which belongs to the Opposite Party No.1. In the cross-examination of A.W.1, it is not elicited that by the time of accident he was not working as an employee under Opposite Party No.1. No specific suggestion was put to A.W.1 that by the time of accident he was working as driver under the control of Veerender, who is the de-facto complainant. Opposite Party No.2 has not taken a specific stand in the counter that by the time of accident, the applicant was working as driver under the control of said Veerender. Opposite Party No.2 did not choose to examine any person to establish that by the time of accident the applicant was working as driver under the control of said Veerender. Without any pleading and without positively eliciting anything in the cross-examination of A.W.1, for the first time,

the Opposite Party No.2 has taken the stand in the grounds of appeal that by the time of accident, the applicant was not working as driver under the control of Opposite Party No.1. As pointed out by the learned counsel for the Opposite Party No.2, Veerender lodged a complaint stating that he is the owner of the auto trolley bearing No.AP 11 U 4348 involved in the accident. Opposite Party No.2 has not taken any steps to examine the said Veerender to establish that he is the owner of the said auto trolley. As per the recitals of Ex.A.2, Opposite Party No.1 is the owner of the auto trolley bearing No.AP 11 U 4348. As per the recitals of Ex.D.1 insurance policy, the auto trolley bearing No.AP 11 U 4348, which belongs to the Opposite Party No.1 was insured with the Opposite Party No.2 with effect from 29.04.2003 to 28.04.2004. The document filed by the Opposite Party No.2 negatives the recitals of Ex.A.1-FIR. It is not the case of the Opposite Party No.2 that by the time of accident the applicant was working under the control of Veerender. A first information report can be used either for corroboration or contradiction. It is settled principle law that FIR is not a substantial piece of evidence. The oral and documentary evidence placed before the learned Commissioner clinchingly establishes that by the time of accident, the applicant was working as driver on the auto trolley bearing No.AP 11 U 4348, which belongs to the Opposite Party No.1. The oral and documentary evidence placed before the learned Commissioner clinchingly establishes the employer and employee relationship between the Opposite Party No.1 and the applicant. As observed earlier, the insurance policy filed by the Opposite Party No.2 also supports the contention of the applicant. A perusal of Exs.A.1 to A.9 clearly reveals that the applicant sustained injuries out of and during the course of his employment. The learned Commissioner has assigned cogent and valid reasons to his findings. There are no grounds, much less, valid grounds to upset the findings of the learned Commissioner on this point. Accordingly this point is answered in favour of the applicant and against the Opposite Party No.2.

Point No.2:

14 As per the testimony of A.W.1, he sustained comminuted fracture to right femur and took treatment as inpatient in Gandhi hospital, Hyderabad from 14.11.2003 to 02.12.2003. His testimony further reveals that he underwent operation on 30.11.2003. The oral testimony of A.W.2 coupled with Ex.A.4

disability certificate, clearly reveals that the applicant sustained 60% functional disability. As per the testimony of A.W.2, the applicant cannot sit and squat. His testimony further reveals that the applicant cannot walk without any support. In the cross-examination also he deposed that the applicant cannot walk without the help of a walker. The oral testimony of A.W.2 clinchingly establishes that the applicant is not in a position to walk without the help of walker. In para No.11 of the order, the learned Commissioner made an observation that two persons brought the applicant to the Court at the time of recording of evidence. Basing on the oral and documentary evidence available on record, this Court can safely arrive at a conclusion that the applicant is not in a position to walk without the help of a walker.

15 It is a settled principle of law that percentage of functional disability incurred by an injured workman cannot be equated with loss of earning capacity in each and every case. The loss of earning capacity of a workman / injured depends on numerous factors such as avocation, age and other attending circumstances. It is a common knowledge that a person who cannot walk for a long distance without the help of a walker may not be in a position to drive the vehicle of any nature. The material available on record clinchingly establishes that the applicant is not in a position to drive any vehicle. As per the recitals of Ex.A.8, the applicant is a driver by profession. It is a settled principle of law that if the injured workman was incapacitated to attend the work which he used to attend prior to the accident, the loss of earning capacity can be taken as 100%. By any stretch of imagination, it cannot be presumed that the applicant can attend the duties of driver. In such circumstances, assailing the loss of earning capacity of the applicant as 100% is justifiable either on facts or in law. In order to appreciate the rival contentions, this court is placing reliance on ***N. Sree Ramulu and Others Vs. B. Lakshmi Narayana (died) and Others***. For better understanding, the relevant portion of the judgment is extracted hereunder:

(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.

16 Taking into consideration the principle laid down in the case cited supra, I am of the considered view that taking of loss of earning capacity of the applicant as 100% is justifiable. The learned Commissioner has considered the oral and documentary evidence in right perspective and arrived at a conclusion that the loss of earning capacity of the applicant is 100%. Having regard to the facts and circumstances of the case and also the principle enunciated in the case cited supra, I am unable to accede to the contention of the learned counsel for the Opposite Party No.2 that the learned Commissioner has committed grave error while assessing the loss of earning capacity of the applicant as 100% even though he sustained functional disability of 60%.

17 The learned Commissioner has assigned cogent and valid reasons to his findings. There are no grounds, much less, valid grounds to interfere with the well considered findings of the learned Commissioner on this point. Accordingly this point is answered in favour of the applicant and against the Opposite Party No.2. The appeal lacks merits and bona fides.

18 In the result, the appeal is dismissed. No order as to costs. As a sequel, miscellaneous petitions if any pending in this miscellaneous appeal shall stand closed.

T. SUNIL CHOWDARY, J.

Date: 28th September, 2015

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