

HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No.2405 of 2004

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JUDGMENT:

This appeal is preferred against order dated 02.04.2002 in W.C.No.129 of 2001 on the file of Commissioner for Women's Compensation & Assistant Commissioner of Labour-I, Guntur, whereunder, he granted compensation of Rs.1,88,122/- as against claim of Rs.3,00,000/-.

2. Brief facts leading to this appeal are as follows:

Appellant herein submitted application to Commissioner for Workmen's Compensation & Assistant Commissioner of Labour-I, Guntur alleging that he was working as driver on lorry bearing No.AP 7U 5155 belonging to 1st respondent herein insured with 2nd respondent herein and on 03.01.2001 during course of his employment due to collusion with another lorry near IOC Petrol Bunk, Surareddypalem, Prakasam District, he sustained injuries and on account of which, he lost his earning capacity. He further contended that he was 29 years old and getting Rs.3,000/- per month as wages besides daily batta and that he is entitled for compensation of Rs.3,00,000/-.

3. Insurance company filed counter resisting the claim of appellant on the ground that claimant shall prove the relationship of employee and employer and also shall prove that he sustained injuries during course of employment and that he got a valid driving licence. Insurance Company further contended that claim of appellant is high and excessive. On these contentions, lower authority examined two witnesses and marked 6 documents on behalf of claimant and no witness is examined and no document is marked on behalf of insurance company and on a over all consideration of oral and documentary evidence, granted Rs.1,88,122/- by taking the wages of injured at Rs.3,070/- per month and loss of earning capacity at 50%. Aggrieved by the quantum, claimant preferred present appeal.

4. Heard both sides.

5. Advocate for appellant submitted the lower authority failed to notice that as per the evidence of medical officer, appellant is not in a position to do the same job which he was doing prior to accident and instead of taking 100% of loss of earning capacity, it took only 50%. He submitted that Assistant Commissioner of Labour erred in fixing loss of earning capacity at 50% though AW.2-Medical Officer, who treated appellant, has clearly deposed in his evidence that on account of the injury, appellant cannot drive the vehicle and he cannot sit and squat, and thereby, the disability is permanent in nature. He submitted that claimant is entitled for entire compensation of Rs.3,00,000/- and order of the lower authority has to be modified.

6. on the other hand, advocate for insurance company supported the order of lower authority and contended that there is no evidence to show that appellant sustained 100% loss of earning capacity, therefore, lower authority has rightly fixed 50% basing on the evidence of personal and physical observations. He further submitted that no disability certificate issued by competent authority is produced before the lower authority to prove the loss of earning capacity at 100%. Therefore, there are no grounds to interfere with the compensation granted by lower authority.

7. Now the point that would arise for my consideration is:

Whether the order of the Commissioner for Workmen's Compensation & Assistant Commissioner of Labour-I, Guntur is legal, proper and correct?

POINT:

8 . There is no dispute with regard to accident that took place on 03.01.2001. There is also no dispute with regard to relationship of employee and employer between appellant and first respondent herein. Admittedly, the vehicle is insured with second respondent herein and policy was in force as on the date of accident. The injured/claimant is examined as AW.1 and he deposed in his evidence, the manner in which, accident occurred and about the injury he sustained in the said accident. He also deposed about giving police report and police registering the case through him. Copy of F.I.R., X-rays and medical prescriptions are marked as Exs.A1 to A3 and copy of his driving licence is

marked as Ex.A4 and copy of insurance policy is marked as Ex.A5.

9. Medical Officer, who is examined as AW.2 deposed in his evidence that appellant sustained compound fracture of both bones of right leg and that he was treated in his Nursing home as an inpatient. He deposed that appellant underwent one operation and still requires another operation for removal of nails inserted on right tibia. He deposed that appellant is having deformity of right tibia due to mal-union and shortening of right lower limb and also restriction of right knee and ankle. He deposed that because of these problems, appellant is having partial permanent disability and not fit for driving. He further deposed that because of this restriction of knee and ankle movement, squatting is not possible for appellant. In the cross-examination, he denied the suggestion that appellant is in a fit condition to drive the vehicle. Though AW.2 categorically stated that appellant is not fit for driving and cannot sit and squat, except putting suggestions, nothing could be elicited from the medical officer to doubt his testimony with regard to his observations in respect of injuries sustained by appellant. So, from the evidence of medical officer, it is clear that appellant is unfit to work as a driver because of the injuries.

10. Now the contention of appellant is when the medical officer assertively stated that he is not fit for taking loss of earning capacity at 50% by the lower authority is incorrect.

In **N. SREE RAMULU @ SREE RAMA MURTHY v. B. LAKSHMI NARAYANA AND ANTOEHR**, this Court after examining various decisions of the Hon'ble Supreme Court and this Court culled out certain principles in respect of compensation to be granted in respect of workmen compensation cases.

The following are the principles culled out:

“(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."

11. From the above points, it is clear that loss of earning capacity is different from percentage of permanent disability. Here, the injuries sustained by the appellant are non-scheduled injuries and in respect of non-scheduled

injuries, the Courts have to examine whether despite permanent disability the injured can effectively carry on the activities and functions which he was earlier carrying on.

12. Here, admittedly appellant was a driver of a heavy vehicle and from the evidence of medical officer on account of the injury sustained by him he cannot drive any vehicle. Further as seen from the record, he sustained fracture of his right leg and there is a mal-union and on account of this injury he cannot sit and squat. For a driver sitting posture is a must, and when the appellant cannot sit and squat, it do not possible for him to drive any vehicle. This part of evidence of medical officer is remained un-rebutted.

13. So from the evidence, it is clear on account of the disability the appellant cannot carry on the activities or the job which he was earlier doing. In such cases, the loss of earning capacity has to be taken as 100%. Therefore, as rightly pointed out by advocate for appellant by considering the profession of the injured, nature of injuries and the disability sustained by him, I am of the view that loss of earning capacity has to be taken as 100% and the compensation granted by lower authority has to be modified by taking the said percentage.

14. The claim of the appellant was for Rs.3,00,000/- and by calculating 50% of loss of earning capacity the lower authority granted Rs.1,88,122/-. If 100% is taken, the claim of Rs.3,00,000/- is quite reasonable, therefore, appellant is entitled for entire compensation of Rs.3,00,000/- as claimed. The point is accordingly answered in favour of appellant.

15. For these reasons, the Civil Miscellaneous Appeal is allowed by enhancing compensation from Rs.1,88,122/- to Rs.3,00,000/- and the insurance company shall deposit difference amount with the same rate of interest as granted by the lower authority within sixty (60) days from the date of receipt of this order. Both parties shall bear their own costs.

Miscellaneous Petitions, if any pending, in this Appeal, shall stand closed.

S. RAVI KUMAR, J

Date: 25-03-2015.

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