

HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No.3137 of 2004

JUDGMENT:

This appeal is preferred against orders dated 06.02.2004 in W.C.No.251 of 2003 on the file of Commissioner for Workmen's Compensation & Assistant Commissioner of Labour, Nizamabad District, where under, he granted Rs.1,27,365/- as against the claim of Rs.5,00,000/-.

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

Appellant herein submitted application under Section 22 of the Workmen's Compensation Act to the Commissioner for Workmen's Compensation & Assistant Commissioner of Labour, Nizamabad contending that he was working as driver on van bearing No.MH 29 8518 and on the intervening night of 23/24.06.2002 while he was proceeding from Medchal to Mothepura of Maharashtra State, as per instructions of his owner, due to rash and negligent driving of opposite lorry bearing No. AP 25 T 2717, he sustained multiple fractures of right leg, crush injury to right hand and that he was treated at Government Hospital, Kamareddy and incurred Rs.1,00,000/- towards medical expenses and that he was getting a monthly salary of Rs.5,000/- with batta of Rs.100/- per day and that he is entitled for compensation of Rs.5,00,000/-.

3. Insurance Company filed counter resisting the claim of appellant and contended that appellant shall prove that he sustained injuries in the accident and he shall also prove that the same was during the course of employment. It is further contended that the claim of the appellant is high and excessive and that the insurance company is not liable to pay any compensation.

4. On these contentions, two witnesses are examined and 6 documents are marked on behalf of claimants, whereas, one witness is examined and one(01) document is marked on behalf of insurance company and on a over all

consideration of oral and documentary evidence, the lower authority granted Rs.1,27,365/- by taking wages of the appellant at Rs.2,604/- per month and loss of earning capacity at 40%. Aggrieved by the same, claimant preferred the present appeal.

5. Heard arguments.

6. Advocate for appellant submitted medical evidence would disclose that appellant sustained loss of earning capacity at 60% but the lower authority took only 40% and the same is not legal. He further submitted that the claimant pleaded and proved that he is getting Rs.5,000/- per month as salary besides batta of Rs.100/- per day, but lower authority only took Rs.2,604/- as wages of appellant and that the same is incorrect. He further submitted that lower authority has not granted any interest, for these reasons, order of the lower authority has to be modified.

6. On the other hand, advocate for insurance company and advocate for first respondent/owner supported the order of the lower authority and contended that 40% of loss of earning capacity is rightly taken and that there are no grounds to interfere with the compensation fixed by the lower authority. It is further submitted though claimant contended that he was drawing Rs.5,000/- as salary besides Rs.100/- per day as batta, as there was no supporting evidence for the said claim, lower authority took minimum wages payable to the appellant and calculated compensation on the basis of minimum wages and there is nothing wrong in the approach of the 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, Nizamabad is legal, proper and correct?

POINT:

8. There is no dispute with regard to the accident that took place on the intervening night of 23/24.06.2002, in which appellant herein sustained injuries. There is also no dispute that the appellant was under the employment of first respondent herein at the time of sustaining injuries. It is also not in dispute that appellant is working under first respondent as a driver. Now only dispute is with

regard to percentage of loss of earning capacity and wages. According to appellant, the lower authority instead of taking loss of earning capacity at 60% took only 40% without any basis, and to that extent, the findings of lower authority have to be set aside.

9. I have perused the material including evidence of Medical Officer, Dr T. Narasing Rao, Consultant Orthopedic Surgeon, Nizamabad, who is examined as PW.2. He deposed in his evidence that he examined appellant and found mal- united fracture fibula right, crush injury to right ring finger resulted flealas, deformity of ring finger extension not possible. He deposed that as per the medical record, he assessed the disability of appellant at 50%, which is permanent and partial with loss of earning capacity at 60%. He further deposed that finger was separated and on account of this disability, appellant cannot do driver's job in future. He was cross-examined on behalf of insurance company, except putting suggestions nothing could be elicited from him to doubt his testimony with regard to percentage of disability and percentage of loss of earning capacity.

10. Advocate for insurance company submitted that investigator appointed on behalf of insurance company, who is examined as RW.1, supported the contention of insurance company. But the investigator's report is with regard to accident and he did not speak anything with regard to disability and loss of earning capacity, therefore, the contention of advocate for insurance company cannot be sustained. When the medical officer clearly stated that loss of earning capacity was 60%, the lower authority without any material, fixed 40% arbitrarily, which in my view is not correct and as rightly pointed out by advocate for appellant the percentage of loss of earning capacity as fixed by the lower authority has to be modified.

11. The other contention of advocate for appellant is that the lower authority erred in taking wages at Rs.2,604/- though the evidence of PW.1 is to the effect that he is getting Rs.5,000/- per month besides Rs.100/- per day as batta. As seen from the material, there is no supporting evidence for the claim of PW.1 in respect of his wages. As rightly pointed out by advocate for insurance company, PW.1 being beneficiary, he would support his claim made in the application, but that has to be supported by same independent evidence. Admittedly, the claimant has not examined anyone to support his testimony

with regard to wages. He has not even examined his owner nor any of his colleagues to support his version i.e., he is getting monthly salary of Rs.5,000/- besides Rs.100/- as daily batta. When there is no positive evidence showing the wages of the claimant, the lower authority is justified by taking into consideration the minimum wages applicable to the driver as on the date of accident. Therefore, objection of the appellant with regard to wages cannot be sustained.

12. Next contention of the appellant is that the lower authority has not granted any interest. Hon'ble Supreme court in **SABERABIBI YAKUBBHAI SHAIKH AND OTHERS Versus NATIONAL INSURANCE COMPANY LIMITED AND OTHERS** held that interest has to be granted from the date of accident till the date of deposit. So, considering the same, applicant is entitled for interest at 12% per annum from the date of accident till the date of deposit on the compensation arrived by the Assistant Commissioner of Labour.

13. In view of the above findings, the order of the lower authority is to be modified. Now if calculation is made by taking wages at Rs.2,604/- and loss of earning capacity at 60% it would come to Rs.1,91,097/- ($2604 \times 60\% \times 203.85 \times 60\% = \text{Rs.1,91,097/-}$), thus the claimant is entitled for the same amount of compensation with 12% interest from the date of accident till the date of deposit.

14. Accordingly, the Civil Miscellaneous Appeal is allowed enhancing compensation amount from Rs.1,27,365/- to Rs.1,91,097/- with interest as indicated above. Insurance company shall deposit the difference amount within thirty (30) days from the date of receipt of this order. No costs.

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

S. RAVI KUMAR, J

Date: 08-04-2015.

gvl

