

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

CIVIL MISCELLANEOUS APPEAL No.685 of 2005

JUDGMENT:

This civil miscellaneous appeal is filed under Section 30 of the Workmen's Compensation Act, challenging the order dated 09.8.2004, in W.C. Case No.145 of 2003 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Hyderabad-I, (for short, the Commissioner), wherein and whereby an amount of Rs.1,01,787/- was awarded as against the claim of Rs.2,50,000/-.

2. The parties will be hereinafter referred to as they are arrayed before the Commissioner in W.C. Case, for the sake of convenience.

3. The facts leading to filing of the present appeal are briefly as follows: On 24.3.2002, the applicant was proceeding on the lorry bearing No.AP 11T 2373 from Gandimysamma towards Miyapur for loading and unloading of the bricks. When the lorry reached the outskirts of Bourampet village the driver of the lorry bearing No.AP 4T 5188 had driven the same in a rash and negligent manner and dashed the lorry bearing No.AP 11T 2373 from its opposite direction. Due to the accident, the petitioner sustained fractures and injuries on various parts of the body and took treatment in Osmania General Hospital, Hyderabad and also in a private Nursing Home. The Station House Officer, Dundigal Police Station registered a case in Crime No.23 of 2002 against the driver of the lorry for the offence punishable under Section 337 IPC. By the time of the accident, the petitioner was earning Rs.3,500/- per month while working as an employee of opposite party No.1. The lorry bearing No.AP 11T 2373, which belongs to opposite party No.1, was insured with opposite party No.2 with effect from 08.1.2002 to 07.1.2003. Hence the application claiming compensation of Rs.2,50,000/- from opposite party Nos.1 and 2 jointly and severally.

4. The opposite party No.1 remained *ex parte*. The opposite party No.2 filed counter denying the averments made in the application including the manner of the accident, the age and income of the applicant. It is the duty of the applicant to establish that by the time of the accident, he was working as an employee of opposite party No.1. The amount of compensation claimed by the applicant is on higher side.

5. Basing on the above pleadings, the learned Commissioner framed the following issues:

- (1) Whether the applicant received personal injuries in an accident on 24.3.2002 at about 8.30 a.m., that arose out of and during the course of his employment under opposite No.1 as labour?
- (2) If so, what is the percentage of his loss of earning capacity?
- (3) To what quantum of compensation the applicant is entitled for? And who is liable to pay?

6. During the course of enquiry, on behalf of the applicant, A.Ws.1 and 2 were examined and Exs.A1 to A13 and Exs.C1 and C2 were marked. On behalf of the opposite party No.2, no oral evidence was adduced but Ex.B1 was marked.

7. On appraising the oral, documentary evidence and other material available on record, the learned Commissioner arrived at a conclusion that the applicant is entitled for compensation amount of Rs.1,01,787/- and allowed the application in part. Feeling aggrieved by the order of the Commissioner, the opposite party No.2 preferred the present appeal.

8. The contention of the learned counsel for the appellant–opposite party No.2 is two fold:

- (1) the learned Commissioner committed error while arriving at a conclusion that the loss of earning capacity of the applicant is 40% even though he sustained disability of 25%; and

(2) the learned Commissioner failed to consider that A.W.2 (Doctor) did not state anything about the loss of earning capacity of the applicant.

Per contra, learned counsel for the first respondent–applicant submitted that the learned Commissioner has rightly considered the oral and documentary evidence and arrived at the conclusion that the loss of earning capacity of the application is 40%. He further submitted that there are no grounds to interfere with the order passed by the learned Commissioner.

9. Now the point that arises for consideration in this appeal is:

Whether the Commissioner has committed any irregularity while computing the loss of earnings of the applicant?

Point:

10. The oral testimony of A.Ws.1 and 2 coupled with Exs.A1 to A11 clearly reveals that the applicant sustained injuries in the motor vehicle accident that occurred on 24.3.2002. By the time of the accident, the applicant was engaged by opposite party No.1 for loading and unloading of bricks on lorry bearing No.AP 11T 2373. Thus, there is no dispute between the parties with regard to the relationship of ‘employer and employee’ between opposite party No.1 and the applicant. It is also an admitted fact that the lorry which belongs to opposite party No.1 was insured with the second respondent as on 24.3.2002 under Ex.B1 policy.

11. The oral testimony of A.W.2 coupled with Exs.A5 and A7 reveals that the applicant sustained fractures. Even as per the testimony of A.W.2, the petitioner sustained 25% partial permanent disability. It is an admitted fact that the applicant has been eking out his livelihood by attending labour work. In the cross-examination, A.W.2 categorically admitted that the disability sustained by the applicant may reduce by 5%. If the testimony of A.W.2 is taken into consideration, the percentage of disability incurred by the applicant is only 20%.

12. The crucial question that falls for consideration is whether 25% functional disability incurred by the applicant leads to loss of earning capacity to the extent of 40% or not. The learned counsel for the applicant has drawn my attention to the decision in **Raj Kumar v Ajay Kumar**^[1]. As per the principle enunciated therein, the functional disability cannot be equated with loss of earning capacity in each and every case. There is no whisper in the testimony of A.W.2 that due to 25% functional disability the applicant is not in a position to attend any work much less the work he used to attend at the time of the accident. No doubt due to fracture, there is stiffness in the right shoulder of the applicant. The applicant has sustained disability to the right shoulder only. Relying on the evidence of A.W.2, the learned Commissioner arrived at a conclusion that the loss of earning capacity of the applicant is 40% due to 25% functional disability. I have carefully perused the testimony of A.W.2. There is no whisper in the testimony of A.W.2 that loss of future earning capacity of the applicant is 40% due to stiffness in the right shoulder of the applicant. It is needless to say that the functional disability cannot be equated with loss of earning capacity. The loss of earning capacity of an injured person depends on various factors like his avocation, age and other attending circumstances. It is not the case of the applicant that he is a skilled worker. It is also not the case of the applicant that he has not been attending to any work much less labour work from the date of the accident. Due to the stiffness in the right shoulder, the applicant may not be in a position to attend the work with same vigour and stamina as he used to attend prior to the accident. The applicant can attend the labour work, of course, with some difficulty. The loss of earning capacity shall commensurate with the functional disability incurred by the applicant. The possibility of exaggeration of functional disability by Doctors cannot be ruled out completely. The court has to scrutinize the testimony of the Doctor in order to arrive at a just and reasonable conclusion. The learned Commissioner has not assigned reasons

much less cogent and valid reasons while fixing the loss of earning capacity of the applicant as 40%.

13. Having regard to the facts and circumstances of the case, I am of the considered view that the learned Commissioner is not justified in assessing the loss of earning capacity of the applicant as 40% though the applicant incurred functional disability to the extent of 20 to 25% only. Viewed from any angle, the loss of earning capacity is 25% only.

14. There is no much dispute between the parties with regard to age and income of the applicant by the time of the accident. The compensation for which the applicant is entitled to is as follows:

$$224 \times 1871 \times 60/100 \times 25/100 = \text{Rs.}62,865.60$$

Besides the same, the applicant is entitled to Rs.1,000/- towards Advocate fee and Rs.202/- towards cost of stamps. In all, the applicant is entitled to a total compensation of Rs.64,067.60 which is rounded off to Rs.64,068/- but not Rs.1,01,787/- as awarded by the learned Commissioner. Accordingly, the point is answered.

15. In the result, the appeal is allowed in part by reducing the compensation amount to Rs.64,068/- (Rupees sixty four thousand sixty eight only). There shall be no order as to costs. Miscellaneous applications, if any, pending in this appeal shall stand closed.

T.SUNIL CHOWDARY, J

Date: 15.7.2015
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[\[1\]](#) (2011) 1 SCC 343