

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

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CIVIL MISCELLANEOUS APPEAL No.1139 of 2005

JUDGMENT:

This civil miscellaneous appeal is filed under Section 30 of the Workmen's Compensation Act, 1923 (for short, 'the Act'), challenging the order dated 21.03.2005, passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-I, Hyderabad, (for short, the Commissioner) in W.C.No.206 of 2004, wherein and whereby an amount of Rs.3,47,347/- was awarded as compensation as against the claim of Rs.5,50,000/-.

2. The parties will be hereinafter referred to as they are arrayed before the Commissioner in W.C., to avoid confusion.

3. The facts leading to filing of the appeal, in brief, are as follows:

The applicant filed the petition under Section 22 of the Act claiming compensation of Rs.5,50,000/- on the ground that he sustained injuries out of and in the course of employment. The further case of the applicant is that when he was proceeding to Hyderabad from Bangalore while driving Lorry bearing No.

AP-12U-4925, the driver of the Lorry bearing No.AP-21V-7718 had driven the same in a rash and negligent manner and dashed against his lorry. By the time of accident, he was aged about 36 years and used to earn Rs.5,000/- per month. The lorry bearing No.AP-12U-4925, which belongs to Opposite Party No.1 was insured with Opposite Party No.2 at the relevant point of time. Therefore Opposite Party Nos.1 and 2 are jointly and severally liable to pay compensation of Rs.5,50,000/- to the applicant.

4. Opposite Party No.1 filed counter admitting all the averments made in the petition. It is further contended that the lorry bearing No.AP-12U-4925, which belongs to Opposite Party No.1, was insured with Opposite Party No.2. Therefore, Opposite Party No.2 alone is liable to pay compensation, if any, to the applicant. Hence, the petition may be dismissed.

5. Opposite Party No.2 filed counter denying all the averments made in the petition including manner of the 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. The applicant is not entitled to claim compensation unless he proves that he was having valid and effective driving licence as on the date of accident. The amount of compensation claimed by the applicant is on higher side.

6. Basing on the rival contentions, the learned Commissioner framed four issues:

1. Whether the applicant, met with an accident on 20.05.2004, which arose out of and in the course of his employment as a driver on the lorry bearing No. AP 12 U 4925 in the employment of the 1st Opposite Party and sustained injuries?
2. If yes, what is the percentage of physical disability and the consequent loss of earning capacity suffered by the applicant?
3. Who are liable to pay compensation to the applicant? and;
4. What is the amount of compensation entitled by the applicant?

7. During the course of enquiry, on behalf of the applicant, A.Ws.1 and 2 were examined and Exs.A.1 to A.9 were marked. On behalf of Opposite Party Nos.1 and 2, no oral evidence was adduced, but Ex.D.1 was marked on behalf of Opposite Party No.2.

8. On appraisal of oral, documentary evidence and other material available on record, the learned Commissioner arrived at a conclusion that the applicant sustained injuries out of and in the course of employment and allowed the petition in part by awarding compensation of Rs.3,47,347/-.

9. Feeling aggrieved by the order of the learned Commissioner, Opposite Party No.2 - insurer preferred the present appeal.

10. The contention of Smt. I.Maamu Vani, the learned counsel for Opposite Party No.2 is three fold: (1) the learned Commissioner has no jurisdiction to entertain the petition as there was no employer and employee relationship between the Opposite Party No.1 and the applicant; (2) the finding of the learned Commissioner that the loss of earning capacity of the applicant as 75% is based on assumptions and

presumptions; and (3) the amount of compensation awarded by the learned Commissioner is on higher side.

11. *Per contra*, Smt. A.Chaya Devi, learned counsel for the applicant, submitted that the recitals of Ex.A.1 clearly establish the relationship of employee and employer between the applicant and Opposite Party No.1. She further submitted that the findings recorded by the learned Commissioner are based on the evidence much less legally admissible evidence. She also submitted that there are no grounds much less valid grounds to interfere with the well considered order of the learned Commissioner.

12. Basing on the rival contentions, the substantial questions of law that arise for consideration in this appeal are as follows:

1. Whether there exists employer and employee relationship between Opposite Party No.1 and the applicant or not?
2. Whether the learned Commissioner has committed error while assessing the loss of earning capacity of applicant as 75% even though he sustained functional disability of 35% or not?
3. Whether the amount of compensation awarded by the learned Commissioner is on higher side or not?

POINT No.1:

13. As seen from the testimony of AW.1, on the date of accident, he was proceeding to Hyderabad from Bangalore while driving the lorry bearing No.AP-12U-4925 and when he reached near Kanisettypally Village cross roads, the driver of the lorry bearing No.AP-21V-7718 had driven the same in a rash and negligent manner and dashed against his lorry. If the testimony of AW.1 is taken into consideration, he sustained injuries in a road accident that occurred on 11.09.2004. A perusal of Exs.A.2 and A.3 clearly reveals that the applicant took treatment as inpatient in Government Hospital, Penukonda and Basant Sahney Multiple Speciality Hospital, Secunderabad due to fracture sustained by him. As per the recitals of Ex.A.1, by the time of accident, the applicant was working as driver on the lorry bearing No.

AP-12U-4925, which belongs to Opposite Party No.1. In the cross examination of AW.1, nothing is elicited to shake his testimony so far as the employer and employee relationship between Opposite Party No.1 and him is concerned.

Opposite Party No.2 did not adduce rebuttal evidence to demolish the stand taken by the applicant. The oral testimony of AW.1 coupled with Ex.A.1 clearly reveals the employer and employee relationship between Opposite Party No.1 and the applicant. The oral testimony of AWs.1 and 2 coupled with Exs.A.1, A.2 and A.3 clearly reveals that the applicant sustained injuries out of and in the course of his employment. The findings recorded by the learned Commissioner are fully supported by the oral and documentary evidence. I am fully agreeing with the finding recorded by the learned Commissioner so far as the employer and employee relationship between Opposite Party No.1 and applicant is concerned. There are no grounds much less valid grounds to upset the finding recorded by the learned Commissioner on point No.1.

POINT No.2:

14. As per the testimony of AW.1, due to accident, he sustained fracture to right femur and took treatment in Basant Sahney Multiple Speciality Hospital, Secunderabad. As per the testimony of AW.2, the applicant took treatment as inpatient in Basant Sahney Multiple Speciality Hospital, Secunderabad and underwent operation. The testimony of AW.2 further reveals that the applicant incurred 35% functional disability due to shortening of his right leg by two inches. As per the recitals of Ex.A.4-disability certificate, the applicant sustained fracture to right femur and the right leg of the applicant was shortened by two inches. Whatever testified by AW.2 is fully supported by recitals of Ex.A.4. In the cross examination of AW.2, nothing is elicited to shake his testimony so far as the nature of the fracture sustained by the applicant as well as the functional disability incurred. Basing on the oral and documentary evidence available on record, the learned Commissioner arrived at a conclusion that the applicant sustained 35% of functional disability. I am fully agreeing with the finding recorded by the learned Commissioner so far as incurring of functional disability by the applicant is concerned.

15. The learned Commissioner assessed the loss of earning capacity of the applicant as 75% even though he incurred 35% of functional disability. Learned counsel for the applicant strenuously submitted that the finding recorded by the learned Commissioner so far as loss of earning capacity of the applicant is concerned is not supported by any evidence. It is a settled principle of law that the functional disability cannot be equated with loss of earnings in each and every case.

If the functional disability is equated with the loss of earning capacity in each and every case, it may lead to awarding of more compensation or less compensation. The Court has to take into consideration the avocation, age and other attending circumstances while assessing the earning capacity of the workman/applicant. The fact remains that the applicant is a driver by profession. A perusal of Ex.A.7 reveals that the driving licence issued in favour of the applicant was in force as on the date of accident. As testified by AW.2, the fracture sustained by the applicant is mal-united which leads to shortening of right leg by two inches. It is common knowledge that no owner of the vehicle will engage a person with 35% of functional disability as a driver. Of course, the applicant can drive the light motor vehicle with some difficulty. The Court shall not lost sight of the ground realities while assessing the earning capacity of the injured workman.

16. Learned counsel for the applicant has drawn my attention to a judgment in **Basappa V. T.Ramesh and another**, wherein the Hon'ble Apex Court at sub-para Nos.9 and 10 of para No.12 held as follows:

“(9) Therefore, the Tribunal has to first decide whether there is any permanent disability and, if so, the extent of such permanent disability. This means that the Tribunal should consider and decide with reference to the evidence: (i) whether the disablement is permanent or temporary; (ii) if the disablement is permanent, whether it is permanent total disablement or permanent partial disablement; (iii) if the disablement percentage is expressed with reference to any specific limb, then the effect of such disablement of the limb on the functioning of the entire body, that is, the permanent disability suffered by the person. If the Tribunal concludes that there is no permanent disability then there is no question of proceeding further and determining the loss of future earning capacity. But if the Tribunal concludes that there is permanent disability then it will proceed to ascertain its extent. After the Tribunal ascertains the actual extent of permanent disability of the claimant based on the medical evidence, it has to determine whether such permanent disability has affected or will affect his earning capacity.

(10) Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (sic disability) (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The

third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions which he was earlier carrying on, or (iii) 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. For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60 per cent. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100 per cent as in the case of a driver or carpenter, nor 60 per cent which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings' if claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not be found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity."

17. 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 Opposite Party No.2 that the learned Commissioner committed error while assessing the loss of earning capacity of the applicant.

POINT No.3:

18. As per the averments in the petition, the applicant was aged about 32 years by the time of accident. In the cross examination, he deposed that he was aged about 36 years. As per the recitals of Ex.A.7 – original driving licence, the applicant was aged about 32 years. When there is a conflict between the oral evidence and the documentary evidence, the Court can place reliance on documentary evidence. By placing reliance on Ex.A.7, the learned Commissioner arrived at a conclusion that the applicant was aged about 32 years. In case of 32 years, the factor applicable is 203.85. Except the self-served testimony of AW.1, there is no other documentary

evidence to establish that by the time of accident, the applicant was earning Rs.5000/- per month. It is not uncommon to exaggerate the income of applicant in order to claim more compensation. In the absence of documentary evidence, the Court can place reliance on the notifications or orders issued by the Government from time to time under the Minimum Wages Act. The learned Commissioner has taken the wages of the applicant as Rs.3,773.50 ps. basing on G.O.Ms.No.30, LET & F (Lab-II), dated 27.07.2000. The compensation for which the applicant entitled to is $\text{Rs.3,773.50} \times 60/100 \times 75/100 \times 203.85 = \text{Rs.3,46,153/-}$. The learned Commissioner also granted an amount of Rs.694/- towards stamp fee and Rs.500/- towards advocate fee. A perusal of the record clearly reveals that the learned Commissioner has assessed the compensation amount by meticulously following the procedure contemplated under the Act. In the light of the foregoing discussion, I am unable to accede to the contention of the learned counsel for Opposite Party No.2 that the amount of compensation awarded by the learned Commissioner is on higher side. 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 order of the learned Commissioner. The appeal lacks merits and *bona fides* and hence, the same is liable to be dismissed.

19. Accordingly, the Civil Miscellaneous Appeal is dismissed. There shall be no order as to costs.

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

T.SUNIL CHOWDARY, J

Date: 30.09.2015

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