

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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C.M.A.No.41 of 2011

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JUDGMENT:

This appeal by the appellant/second opposite party under Section 30 of the Workmen's Compensation Act, 1923 presently known as Employees Compensation Act, 1923 ('the Act', for brevity) is directed against the order dated 25.04.2005 in W.C.No.133 of 2004 of the learned Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour-III at Hyderabad.

2. I have heard the submissions of the learned counsel for the appellant/second opposite party ('the second opposite party', for brevity) and the learned counsel for the 1st respondent/applicant ('the applicant', for brevity). Appeal against second respondent (first opposite party) was dismissed for default on 25-01-2010. I have perused the material record.

4. The basic facts, in brief, are as follows: - 'The applicant had filed the W.C case claiming compensation under the provisions of the Act against the employer/first opposite party-cum-owner of bore well rig mounted on lorry bearing no. AP 29A 5504 (hereinafter referred to as 'the subject vehicle') and the second opposite party/ insurer of the subject vehicle *inter alia* stating that he had sustained injuries in an accident that had occurred on 11-07-2004 out of and during the course his employment as driller of the subject vehicle of the first opposite party. The first opposite party had remained *ex-parte* before the learned Commissioner. The second opposite party having filed a Counter had resisted the claim of the applicant. At trial, the applicant and a Doctor were examined as AWs 1 and 2 and exhibits A1 to A16 were marked on the side of the applicant. RW1 was examined on the side of the second opposite party and exhibit C1, the copy of the insurance policy in respect of the subject vehicle was exhibited. On merits, the learned Commissioner had awarded a total compensation of Rs.3,48,136/- to the applicant recoverable

from both the opposite parties jointly and severally and directed them to deposit the said total amount by way of a demand draft drawn on any Nationalised Bank in favour of the Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour-III, Hyderabad within 30 days from the date of receipt of the impugned order. He had further directed in the order that failing which the applicant is entitled for interest at 9% per annum on the amount of compensation from the date of filing of the application. Aggrieved of the said order, the second opposite party had preferred this appeal.

5. The learned counsel for the second opposite party would contend as follows:

- 'The applicant has failed to produce any evidence in regard to the relationship of employee and employer between him and the first opposite party; and, he did not prove his age. The learned Commissioner had erred in fixing the disability at 75% contrary to the evidence on record. The impugned order is passed on assumptions and, therefore, it is wholly unsustainable. Immediately after the accident, the same was not brought to the notice of the second opposite party and therefore, there is a violation of provisions of the Act. The learned Commissioner had grossly erred in placing reliance on exhibit A12. Therefore, the appeal may be allowed and the order impugned be set aside.

6. *Per contra*, the learned counsel for the applicant would contend as follows:

"The learned Commissioner had framed appropriate issues and had considered the facts accurately and appreciated the evidence properly and had answered the issues correctly after adverting to the ratios in various decisions and had held that the applicant had established that there was relationship of employee with the first opposite party and that the applicant had sustained the injury resulting in permanent partial disability out of and during the course of his employment and that the learned Commissioner had rightly determined the functional disability at 70% and that the learned Commissioner had rightly appreciated the evidence of the two doctors viz., AW2 and RW1 and that the compensation awarded is just and fair and that the contentions of the second opposite party are devoid of merit and that no substantial question of law is involved in this appeal and hence, the appeal is liable to be dismissed."

7. In view of the contentions, the points that arise for determination in this appeal are:

1. Whether there is no employee and employer relationship between the applicant and the 1st opposite party as contended by the 2nd opposite party? Whether the applicant had sustained injuries out of and during the course of his employment under the first opposite party who is the owner-cum-insured of the subject vehicle?
2. What was the percentage of physical disability and consequential functional disability and loss of earning capacity suffered by the applicant? Whether the learned Commissioner had erred in determining the functional disability or the loss of earning capacity as 75%?
3. What is the amount of compensation to which the applicant is entitled to?
4. Whether the Commissioner had committed error in awarding interest at 9% per annum on the compensation amount from the date of application as contended by the second opposite party?
5. Whether the second opposite party is not liable to pay the compensation?

8. POINT No.1:

The case of the applicant is that he had worked as a driller on the subject vehicle and that while he was discharging his duties on the subject vehicle on 11-07-2004, the tyre of the said vehicle had punctured; and that while he was attending to the repairs of the said vehicle, an auto being driven by its driver came at a high speed and dashed against him and that in the said accident, he had sustained injuries and that he was immediately taken to Mother Theresa hospital, Devarakonda and that on a report, a crime was registered; and, that on account of the injuries sustained by him in the accident, he had suffered permanent disability; and, that he is unable to discharge his duties as in the past and his services were terminated and that therefore, the opposite parties are liable to pay the compensation as claimed in the petition. As already noted, the second opposite party had filed a counter denying the manner of accident and also the relationship of employer and employee between the first opposite party and applicant and its liability to pay any compensation. The applicant as AW1 deposed in line with his pleaded case and exhibited A1 to A16 and had

maintained his stand in the cross-examination. He had also examined AW2, an Orthopaedic Surgeon, who had treated him and issued the disability certificate-exhibit A4. Second opposite party did not adduce any rebuttal evidence on the material aspects pleaded in its defence, but, had examined a doctor to substantiate its defence that the applicant had not suffered any disability as alleged. The oral evidence of AW1 is sufficiently corroborated by the recitals in the crime records, which on a perusal would show that the accident had occurred out of and during the course of his employment as a driller on the subject vehicle of the first opposite party. Therefore, this Court is of the well considered view that the learned Commissioner has rightly come to the conclusion that there is employer and employee relationship between the first opposite party and applicant and that the accident had occurred out of and during the course of employment. Accordingly, this point is answered in favour of the applicant.

9. POINTS Nos.2 & 3:

9.1 Coming to the percentage of physical disability and the consequential functional disability and the percentage of loss of earning capacity said to have been suffered by the applicant, it is necessary to refer to the oral and documentary evidence. AW1 deposed that immediately after the accident, he was shifted to Mother Theresa hospital, Devarakonda and was admitted as an inpatient and discharged on 03.08.2004 and that he had sustained fracture of both bones right leg, fracture of shaft of femur and fracture of inter trochanteric femur; and that on account of the injuries sustained in the accident, he had suffered consequential permanent disability. He had also exhibited exhibit A3-the discharge certificate, exhibit A4-the disability certificate besides medical prescriptions, X ray reports and X ray films. AW2, the doctor had deposed that the applicant came to his clinic on 19.11.2004 and that he had found the aforementioned injuries on the person of AW1 and that AW1 was treated earlier in Mother Theresa hospital and that AW1 had undergone an operation for right femur and right leg on 13.07.2004 and also for left hip on 18.07.2004 and that the applicant cannot sit and squat on the ground and cannot walk without the help of walker and that the applicant cannot lift weights and there is stiffness of left hip and right knee with painful movements and that therefore, he cannot

work as driller as in the past. He had certified disability of the applicant at 60%. **Per contra**, RW1, the doctor who was examined on the side of the second opposite party while confirming the injuries said to have been sustained by AW1 had stated that surgeries were done for all the fractures with internal fixation. However, he had also stated that fractures are united and that it is difficult for the applicant to work normally. He had further testified that there is scope for improvement as the disability certificate was issued in November, 2004 and that there is likelihood of stiffness coming down. He had finally stated that the percentage of the disability is 40%. Both the doctors had unanimously deposed that the applicant suffered permanent disability, but, they deferred only in regard to the degree of percentage of permanent disability. It is pertinent to note from the evidence of RW1 it is clear that the applicant cannot stand and walk, but, in future he might walk.

9.2 The learned counsel for the 2nd opposite party had placed reliance on the definitions of 'partial disablement' and 'total disablement' in Section 2(g) and 2(l) of the Act and also the item at the entry at serial no.19 of part II of Schedule I of the Act and had contended that the percentage of loss of earning capacity is only 60 as per the law as 'amputation below middle thigh' i.e., above knee was done in the case of the applicant.

Section 2(g) reads as follows:

“partial disablement” means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a employee in any employment in which he was engaged at the time of the accident resulting in the disablement, and, where the disablement is of a permanent nature, such disablement as reduces his earning capacity in every employment which he was capable of undertaking at that time:

Provided that every injury specified in Part II of Schedule I shall be deemed to result in permanent partial disablement.

Section 2(l) reads as under:

“total disablement” means such disablement, whether of a temporary or permanent nature, as incapacitates a employee for all work which he was capable of performing at the time of the accident resulting in such

disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of Schedule I or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more.”

9.3 Having placed reliance on the above said provisions, he had forcefully contended that the determination of loss of earning capacity at 60% is contrary to the statutory provisions and the facts of the case and that, therefore, the learned Commissioner had grossly erred in assessing the percentage of loss of earning capacity at 60%. He had also placed reliance on **Raj Kumar v. Ajay Kumar** and also an unreported decision of this Court in **the United India Insurance Co., v. S.K. Razak and another [CMA.Nos.235, 250 and 251 of 2005 dated 27.02.2015]**. In a decision reported in **Raj Kumar V Ajay Kumar**, the Supreme Court had explained the difference between ‘physical disability’ and ‘functional disability’ and had enumerated the principles governing the determination of the loss of earning capacity and loss of future earnings resulting from the permanent disability arising from injuries. The enumerated principles are as follows:

“We may now summarise the principles discussed above:

- (i) All injuries (or permanent disabilities arising from injuries), do not result in loss of earning capacity.
- (ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).
- (iii) 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 the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.
- (iv) The same permanent disability may result in different percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.”

In the S.K.Razak's case (unreported and referred to supra) the facts of the decided cases show that this Court having regard to the facts and evidence on record did not accept the loss of earning capacity assessed at 100% by the learned Commissioner in the batch of three appeals. The percentages in this cited case were fixed having regard to the facts and the evidence in the batch of cases. The decision in **S.Suresh v. Oriental Insurance Co.Ltd., and Another** was not brought to the notice of this Court in S.K.Razack's case (unreported). In the decision in **S.Suresh v. Oriental Insurance Co.Ltd., and Another** (8 supra), the facts show that the claimant in that case who was of 25 years of age and earning Rs.4,000/- per month besides daily allowance had suffered permanent disability which prevented him from engaging him in the job of driver, which he used to do earlier. In this cited case, evidence was brought on record that he had suffered 93% permanent disability in his right leg and he will not be able to do the job of a driver or any other job because he will not be able to stand or walk without support; therefore, the Commissioner came to the conclusion that the claimant's right leg up to the knee having been amputated, he has suffered a loss of 100% of his earning capacity as a driver. In this background the correctness of the said finding was questioned on the ground that as per the Schedule to the Act, loss of a leg on amputation amounted to a 50% reduction in the earning capacity, and the High Court had reduced the compensation by 50%. Then, the correctness of that judgment was questioned mainly on the ground that the claimant being a lorry driver, the loss of his right leg *ipso facto* meant a 'total disablement' as understood in terms of Section 2(1)(I) of the Act and as such the compensation payable to the claimant had to be computed on that basis. In support of the plea, reliance was placed on a four-Judge Bench decision of the Supreme Court in **Pratap Narain Singh Deao v. Srinivas Sabata and Another [(1976) 1 SCC 289]**. In that case, a carpenter had suffered amputation of his left arm from the elbow. The Supreme Court held that this amounted to a total disability as the injury was of such a nature that the claimant had been disabled from all work which he was capable of performing at the time of the accident. In the light of the above facts and the legal position urged before the Hon'ble Supreme Court, the Supreme Court held as follows:

'In our view, the ratio of the said judgment is squarely applicable to the

facts at hand. We are of the opinion that on account of amputation of his right leg below knee, he is rendered unfit for the work of a driver, which he was performing at the time of the accident resulting in the said disablement. Therefore, he has lost 100% of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving licence under the Motor Vehicles Act.'

In **New India Assurance Company Ltd., Secunderabad v. Abdul Khader Jilani @ Jilani and another**, a Division Bench of this Court clarified that the Court's discretion is not controlled by the entries contained in Parts 1 and II of Schedule I.

9.4 Further, in the decision in **N. Sree Ramulu and others v. B. Lakshmi Narayana (died) and others** this Court considered the following question: "Having regard to the nature of the injury suffered by the claimants in these cases, whether the Commissioner for Workmen's Compensation erred in not holding that the claimants should be deemed to have suffered "total disablement" as defined in Section 2(1)(I) of the Workmen's Compensation Act, 1923 (presently known as the Employees' Compensation Act, 1923) (for short "the Act") and award compensation to them on the said basis?" While answering the said question this Court had considered the provisions of law and also the decisions of the Supreme Court and had culled out the following principles:

25. The following principles can be culled out from the above decisions of the Supreme Court and this Court:

(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.

Further, in this cited decision, while deciding the claim in CMA no. 2197 of 2003 keeping in view the above principles of law, this Court had noted that the applicant in that case had suffered fracture of both bones of left leg above knee and that amputation was done for the right thigh and that fixation was done for fracture of left leg and that the applicant was not fit to drive a vehicle and had then proceeded to hold that the loss of earning capacity was 100% and that the Commissioner had erred in granting the compensation on the basis that the loss earning capacity of the claimant was 80%.

9.5 The law is thus well settled that the loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability; and, if the percentage of permanent disability is to be taken as the percentage of loss of earning capacity it may result in award of either too low or too high a compensation as the Supreme Court in Raj Kumar's case has pointed out that the same permanent disability may result in different percentages of loss of earning capacity in different persons depending on the nature of profession, occupation or job, age, education and other factors. In view of the settled legal position, the contention of the second opposite party that the percentage of loss of earning capacity has to be determined only at 40% as per the provisions of the Act cannot be countenanced.

9.6 Now coming to the aspect as to whether the Commissioner was correct in assessing the loss of earning capacity at 60%, what is to be noted is that the applicant is a driller and his job requires perfect fitness and physical health and in his present condition, he cannot discharge his duties as in the cannot be disputed. Therefore, the present case is a case where the disablement which is of permanent and partial nature has incapacitated the applicant for the work which he was capable of performing at the time of the accident. Having regard to the injuries sustained and the resultant disability suffered, it has to be held that the loss of earning capacity is **70%** and therefore, the learned

Commissioner is right in granting compensation on the basis of loss of earning capacity **at 70%**. The point is accordingly answered.

10. POINT NOS.4 & 5:

10.1 Insofar as the interest and the rate of interest awarded on the compensation amount by the learned Commissioner, the learned counsel for the appellant contended that the interest is awarded at a higher rate and that the Commissioner ought not to have awarded interest on compensation from the date of application. He had placed reliance on the decision in **National Insurance Company Ltd. V. Mubasir Ahmed and another** [2007(2) SCC 349]. In the decision in **The Oriental Insurance Company Ltd., v. Siby George and others**, the Hon'ble Supreme Court considered the following question: 'When does the payment of compensation under the WC Act, 1923 become due and consequently what is the point in time from which interest would be payable on the amount of compensation as provided under Section 4(a)(3) of the Act?' The Hon'ble Supreme Court having considered the legal position and the ratios in the precedents had held as under: **"The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd.Nasir, each of which was heard by two judges. But, the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two latter decisions in Mubasir Ahmed and Mohd. Nasir. In the light of the decisions in Pratap Narain Singh Deo and Valsala, it is not open to contend that the payment of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd.Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala do not express the correct view and do not make binding precedents."** In view of the settled legal position, the order of the learned Commissioner awarding interest at 9% per annum from the date of application cannot be said to be not in accordance with law.

10.2 Admittedly, there is a valid insurance policy in respect of the subject

vehicle at the relevant time and by the said policy, the risk of the applicant is covered is not in dispute. Therefore, the Insurance Company cannot disown its liability. Hence, this Court finds that the insurance company is liable jointly and severally along with the first opposite party to pay the total compensation with interest.

10.3 Having regard to the reasons and findings recorded supra this court finds that the order impugned is justified and hence, does not call for any interference. Accordingly, the points are answered in favour of the applicant and against the 2nd opposite party.

11. In the result, the appeal is dismissed without costs. Miscellaneous petitions pending, if any, in this appeal shall stand closed.

M. SEETHARAMA MURTI, J

DATED: 18-08-2015

Hsd