

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 811 OF 2005

Balasaheb Bhikajirao Deshmukh
Age : Major, Occu : Nil,
R/o Mitra Nagar, Latur.

... Appellant
(Orig. applicant)

Versus

The Divisional Controller,
Maharashtra State Road Transport
Corporation, Latur.

... Respondent
(Orig. opponent)

.....
Advocate for the appellant : Mr. S. S. Manale
Advocate for the respondent : Smt. Ranjana Reddy.
.....

CORAM : V. K. JADHAV, J.
RESERVED FOR JUDGMENT ON : 13th JUNE, 2016
JUDGMENT PRONOUNCED ON : 12th JULY, 2016

JUDGMENT :-

1. Being aggrieved by the judgment and award dated 16.10.1999 passed by the Commissioner for Workmen's Compensation and Judge, Labour Court, Latur, in W.C.A. No. 79 of 1997, the original applicant has preferred this appeal to the extent of quantum of compensation.

2. Brief facts giving rise to the present appeal are as follows:

a) The appellant/original applicant Balasaheb was in the employment of respondent/MSRTC since 1968 as a Conductor till the date of accident. On 24.06.1996, he was on duty as a Conductor on Latur-Talani bus bearing registration No. MCA-7437 and one Mr. Sonwane was driver of the said bus. Departure time of the said bus was 7.00 p.m. and the route was via Ausa. After passing Ausa S.T. Stand, the appellant/original applicant started issuing tickets to the passengers in the said bus by accepting fare. On way, suddenly one vehicle came from opposite side and therefore, driver of the bus had applied breaks to the bus. In consequence of which, the appellant/original applicant, who was issuing tickets, fell down inside the bus. The driver was driving the bus in a very high speed and in rash and negligent manner at the time of said accident. The appellant/original applicant, therefore, sustained grievous injuries to his left leg and other parts of the body. He had sustained fracture injury on his left knee joint. He was shifted to General Hospital, Ausa and referred to one another hospital for treatment. He has, thereafter, taken treatment in Hasgude Accidental Hospital as indoor patient for a period of two months. He is not cured as like prior to the date of accident. The movements of his left leg from knee joint became restricted. Consequently, the appellant/original applicant is unable to sit and walk properly. He is not able to do daily work without aid. He was also required to spend a considerable amount

towards his medical treatment. Since respondent/MSRTC had not responded to his legal notice, the appellant/original applicant was constrained to file application under Workmen's Compensation Act, 1923 (for short "the Act of 1923") for grant of compensation before the Commissioner.

b) Respondent/MSRTC has strongly resisted the claim of the appellant/original applicant by filing written statement Exh. C-15. It is denied that the appellant/original applicant met with an accident on 24.06.1996 on Latur-Talani road. It is contended that the appellant/original applicant has performed his duties, halted at Talani and on the next day, the bus reached at AUSA depot after 12 noon. It is also contended that the fare amount of tickets issued to the passengers came to be deposited in AUSA depot and thereafter, the appellant/original applicant went home. It is contended that on both the aforesaid dates, no accident had taken place, nor the appellant/original applicant suffered any injury. The driver of the said bus has not given any intimation either in writing or orally to the Depot Manager about the alleged accident. It is also contended that the appellant/original applicant could have taken medical treatment at Government Hospital at Latur or Ambejogai. It is further contended that the applicant is taking disadvantage of the incident happened somewhere else. Considering the rival claims of the parties, the

learned Commissioner has framed issues and both the parties led their oral and documentary evidence in support of their rival contentions. Learned Commissioner for Workmen's Compensation, by the impugned judgment and award dated 16.10.1999, declared that the appellant/original applicant met with an accident on 24.06.1996 arisen out of and during the course of his employment with respondent/MSRTC and the appellant/original applicant is entitled to compensation of Rs.97,842/- with interest at the rate of 12% per annum from 24.06.1996 till realization. Being aggrieved by the same, the original applicant has preferred this appeal.

3. Learned counsel for the appellant/original applicant submits that the left leg of the appellant is fractured from knee joint and in consequence of which, the appellant cannot bend his left leg and even unable to sit and walk properly. The appellant is unable to do any work. The appellant is permanently disabled and has lost his earning capacity to the extent of 100%. Even though the appellant has sustained disablement which affected his earning capacity to the extent of 100%, learned Commissioner has erroneously considered 50% loss of earning capacity.

4. Learned counsel for the appellant/original applicant further submits that witness Dr. Hajgude has opined that though the

appellant has sustained disability to the extent of 10%, he cannot perform duties of Conductor as he was performing prior the accident, and thus, there is loss of earning capacity to the extent of 100%. During pendency of this appeal, respondent/MSRTC referred the appellant to the Medical Board of Swami Ramanand Teerth Rural Medical College and Hospital, Ambejogai and after examination, the Medical Board issued a certificate on 29.01.2000, holding that the appellant is completely and permanently incapacitated for further service of any kind. In pursuance of the said certificate issued by the Medical Board, respondent/MSRTC, by order dated 10.03.2000, removed the appellant from the muster roll/service of respondent/MSRTC. Since respondent/MSRTC itself accepted that the appellant is not able to do any work in the establishment, the loss of earning capacity of the appellant is therefore required to be assessed at 100%, and accordingly the appellant is entitled to compensation on that basis. The appellant is also entitled for the penalty as respondent/MSRTC has not paid compensation though fell due.

5. Learned counsel for respondent/MSRTC submits that the appellant/original applicant has sustained disability to the extent of 10% only. Learned Commissioner, by considering the opinion given by witness Dr. Hajgude, has rightly considered the loss of earning

capacity of the appellant/original applicant to the extent of 50%. Even though respondent/MSRTC subsequently found that the appellant/original applicant is not able to perform duties as a Conductor on account of permanent disability sustained by him, the appellant/original applicant can perform any other duties as available and suitable to him. Simply because respondent/MSRTC has removed the appellant/original applicant from service to work as Conductor, it does not mean that he is not able to do any work other than as Conductor. Learned Commissioner has rightly awarded compensation and no interference is called for in the impugned judgment and award. There is no substance in the appeal and thus, the appeal is liable to be dismissed.

6. Learned counsel for respondent/MSRTC, in order to substantiate her contentions, placed reliance on the decision rendered by the Supreme Court in the case of ***Palraj vs. The Divisional Controller, NEKRTC***, reported in **2010 (10) SCC 347**.

7. It would be appropriate to reproduce here the provisions of the Act of 1923 relevant for determination of the present controversy :

*“Sec.2(1)(g) “**partial disablement**” means, where the disablement is of a temporary nature, such disablement as reduces the earning capacity of a workman 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;

Sec.2(1)(l) "total disablement" means such disablement, whether of a temporary or permanent nature, as incapacitates a workman 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 percent, or more;"

8. In the case in hand, the injury sustained by the appellant/original applicant is a non-scheduled injury. In the definition of "partial disablement", there is a direct reference to the earning capacity of a workman while in the case of "total disablement" injuries mentioned in Part I Schedule I to the said Act of 1923 are referred. By virtue of the injuries suffered by the appellant/original applicant, his disablement, as far as working as a

Conductor is concerned, is 100%. The question is, therefore, whether the same is the measure of loss of his earning capacity. Section 4 of the Act of 1923, more particularly, Section 4(1)(c)(i) and (ii) provides as follows:

*“Section 4 **Amount of compensation-** (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-*

(a).....

(b).....

(c) Where permanent partial disablement results from the injury

(i) in the case of an injury specified in Part II of Schedule I, such percentage of the 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, and

(ii) in the case of an injury not specified in Schedule I, such percentage of the compensation 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.

Explanation I.- Where more injuries than one are caused by the same accident, the amount of compensation payable under this head shall be aggregated but not so in any case as to exceed the amount which would have been payable if permanent total disablement had resulted from the injuries.

Explanation II.- In assessing the loss of earning capacity for the purposes of sub-clause(ii), 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;”

9. It is clear from the above provisions that where a workman suffers injury which is not specified in the Schedule I to the Act of 1923, compensation is to be assessed on such percentage of the compensation payable in the case of permanent total disablement as is proportionate to the loss of earning capacity, permanently caused by the injury as assessed by a qualified medical practitioner. In the instance case, the nature of injuries suffered by the appellant/original applicant is not specified in Schedule I. The compensation, therefore, has necessarily to be assessed on the basis of loss of earning capacity caused by the injury.

10. The appellant/original applicant has examined Dr. Geetkumar Annarao Hajgude, who has opined that knee of the appellant/original applicant was solen inflamed and there was tenderness over the

patella. According to him, the appellant has sustained disablement of 10% of his total body capacity. He has further explained that the joints to knee are still restricted and the appellant/original applicant cannot bend his leg while sitting. He has expressed his opinion in unequivocal words that it is not possible for the appellant/original applicant to perform duties as a Conductor. He has further explained that the appellant cannot stand properly due to accidental injuries and in the process of moving vehicle, if it gives jerk, the appellant will not sustain it. In cross-examination, he has ruled out the possibility of improvement and stated that the job of Conductor is not possible for the appellant/original applicant. He has also ruled out the possibility that after giving treatment to the appellant/original applicant in future, there are chances of improvement.

11. It further appears from the documents placed before this Court as an additional evidence along with Civil Application No.10756 of 2014 that, since the appellant was removed from the service by respondent/MSRTC by passing an order in the year 2000, respondent/MSRTC has no reason to dispute the genuineness of these documents and accordingly, I have allowed the Civil Application for production of additional evidence. It appears that respondent/MSRTC has referred the appellant/original applicant to the Medical Board of the Government Hospital named and titled as

Swami Ramanand Teerth Rural Medical College and Hospital, Ambejogai, and on the basis of the certificate issued by said Medical Board, issued the order No.96 of 2000 with the specific averments in the order that the appellant/original applicant is completely and permanently incapacitated for further service of any kind in the department to which he belongs in consequence of the operated case of Dislocation (L) patella with Fibrosis Ankylosos in Extension (Lt) Knee. In the backdrop of the above order, it can be said that respondent/MSRTC has accepted that the appellant/original applicant is not in a position to earn a living even other than by functioning as a Conductor. He is held to be incapacitated for further service of any kind in the department.

12. In view of the above, the case of ***Palraj vs. The Divisional Controller, NEKRTC*** (supra), relied upon by learned counsel for respondent/MSRTC, cannot be made applicable to the facts and circumstances of the present case. It is incumbent upon the Court to take into account the nature of injury, the nature of work which the workman was capable of undertaking and its availability to him. In this connection, the order issued by respondent/MSRTC, holding the appellant/original applicant incapacitated for further service of any kind in the department, makes it clear that the appellant is entitled for compensation to the extent of 100%. In view of this, recalculation of

the compensation is also required to be done. Though the salary of appellant/original applicant was Rs.4285/- per month at the time of accident, the maximum wages of Rs.2000/- can be considered for the purpose of determining compensation and 60% of the same comes to Rs.1200/-. Learned Commissioner has rightly taken the relevant factor as 163.07 and accordingly, total compensation comes to Rs.1,95,684/-. The appellant/original applicant is entitled for the same along with interest as directed by learned Commissioner. So far as the question of penalty is concerned, in light of the ratio laid down in the case of ***Ved Prakash Garg vs. Premi Devi and others***, reported in ***AIR 1997 SC 3854*** and the case of ***Udhav Rangnathrao Pawar vs. Sheshrao Ramji Jogdand and anr.*** decided by the Bombay High Court, reported in ***2009 (5) Bom.C.R. 523***, the matter is required to be relegated to the Commissioner, who shall, after giving reasonable opportunity to the employer MSRTC to show cause, and if satisfied that there is no justification for the delay in payment of compensation, take appropriate decision about imposition of penalty.

13. In view of the above discussion, I proceed to pass the following order:

ORDER

- I. The First Appeal No. 811 of 2005 is hereby partly allowed.
- II. The judgment and award dated 16.10.1999, passed by the Commissioner for Workmen's Compensation and Judge, Labour Court, Latur in W.C.A. No. 79 of 1997 is hereby modified in the following manner:

“The applicant is entitled to compensation of Rs.1,95,684/- with interest at the rate of 12% per annum from 24.06.1996 till realization and the respondent/MSRTC is liable to pay the said amount of compensation and interest to the applicant.”
- III. Award be drawn up in tune with the above modification.
- IV. The matter is relegated to the Commissioner for Workmen's Compensation and Judge, Labour Court, Latur to the extent of imposition of penalty with a direction that, after giving reasonable opportunity to the employer MSRTC to show cause as regards delay in payment of compensation, take appropriate decision with justifiable reasons.
- V. The parties shall appear before the Commissioner for Workmen's Compensation and Judge, Labour Court, Latur on 25.08.2016
- VI. The First Appeal is accordingly disposed of.

(V. K. JADHAV, J.)

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