

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 502 OF 2002

Balasaheb Namdeo Bhangarwade
Age 30 years, Occ. was in private
service with respondent and
at present unemployed
Shirshi, Tq. and District Latur

...Appellant

versus

1. Shaikh Omar Kasimsab,
Age major, Occ. Business
R/o. Mataji Nagar, Latur
2. The Oriental Insurance Co. Ltd.
Through its Branch Manager
Branch Near Bus Stand, Latur
District Latur

...Respondents

...
Advocate for Appellant : Mr. R.R. Deshmukh h/f Mr. R. B. Deshmukh
Advocate for Respondent No.2 : Mr. A.A. Joshi
.....

CORAM : V. K. JADHAV, J.
DATED : 29th MARCH, 2016

ORAL JUDGMENT :-

1. Being aggrieved by the judgment and award passed by the Commissioner for Workmen Compensation/Judge, Labour Court, Latur, dated 19.7.2001 in W.C.A. No. 69 of 1999, the original claimant has preferred this appeal.

2. Brief facts, giving rise to the present appeal, are as under:-

a) The appellant-original claimant was working as labour on vehicle bearing registration No. MCG-9 owned by respondent No.1, on daily wages of Rs.80/- per day. The said vehicle was insured with respondent No.2 for the period which covers the date of accident. The said vehicle was being used for transportation of sand. On 23.6.1999, accident had taken place. The appellant-original claimant was unloading the sand and suddenly without giving any signal or horn, driver of the said vehicle started the vehicle. In consequence of which, claimant fell down on the ground and sustained grievous injuries to his right leg. The injuries on right leg sustained by the appellant-original claimant resulted into permanent disablement.

b) The appellant-original claimant had therefore, filed W.C.A. No. 69 of 1999 before the Commissioner, Workmen's Compensation for grant of compensation against the employer as well as the insurer of the vehicle involved in the accident. The learned Commissioner by its impugned judgment and award dated 19.7.2011 partly allowed the said application and thereby held that the appellant-original claimant met with an accident arising out of and during the

course of employment with respondent No.1 employer on 23.6.1999 and thus, both the respondents are jointly and severally liable to pay the compensation of Rs.48,192/-. The appellant-claimant, being aggrieved to the extent of quantum of compensation, has preferred this appeal.

3. Learned counsel for the appellant submits the appellant-claimant was doing the labour work prior to the accident. He was 31 years of old when the accident had taken place. The claimant had sustained fracture to his right leg, which resulted into shortening of his right leg by 2 cm. The Medical Officer, who has examined the claimant has issued medical certificate certifying therein that the claimant has permanent disablement to the extent of 20% of total body. Learned counsel submits that the Commissioner has considered the said disablement, as percentage of loss of earning capacity erroneously and awarded lesser compensation to the claimant. The Commissioner has not considered the opinion given by the witness No.2 for the claimant viz. witness Dr. Satish Deshmukh. Witness Dr. Satish Deshmukh has opined that there is problem for the claimant in moving his right leg and he will have pains while lifting the right leg moved at right side. Even witness Dr. Deshmukh has expressed his opinion unequivocally that it is difficult for the claimant to walk as well as lifting of weight, after the accident.

Learned counsel submits that even the claimant has deposed before the Commissioner that he cannot work as labour, as was doing prior to the accident and he is suffering pains to his right leg and he cannot lift his right leg. Learned counsel submits that even though the claimant has sustained permanent disablement to the extent of 20% and the same is resulted into loss of his earning capacity to the extent of 100%. Learned counsel submits that the claimant was doing labour work prior to the accident, and the nature of permanent disablement sustained by him affected his earning capacity to the extent of 100%. Learned counsel submits that even though the claimant has deposed that he was getting Rs.80/- per day as wages from respondent No.1 employer, the Commissioner has not considered the same and erroneously considered the wages of the claimant of Rs.60/- per day, only on the basis of reply given by the employer to the legal notice issued by the claimant wherein the wages stated to have been paid to the claimant as Rs.60/- per day. Learned counsel submits that respondent No.1 employer has not examined himself on oath and claimant had no opportunity to cross examine him on the point of his wages. Learned counsel submits that in absence of any evidence on the point of wages by respondent No.1 employer, the Commissioner should have considered the wages of claimant as Rs.80/- per day, as deposed by him.

Learned counsel for the appellant-claimant places reliance on the judgment dated 10.1.2012, delivered by the Hon'ble Supreme Court of India in the case of ***Mohan Soni vs. Ram Avtar Tomar and Ors. In Civil Appeal No. 237 of 2012 (S.L.P. (CIVIL) No. 9850 of 2010).***

4. Learned counsel for the respondent-insurer submits that the claimant had sustained only 20% of permanent disablement and his earning capacity is affected to that extent only. Learned counsel submits that the claimant can effectively carry out the activities and functions which he was carrying out prior to the accident. The Commissioner has not committed any error in awarding the compensation on the basis of the percentage of permanent disablement treating the same as percentage affecting his earning capacity. Learned counsel submits that the Commissioner has rightly considered rate of daily wages as Rs.60 per day. Learned counsel submits that there is no merit in the appeal and the appeal is thus liable to be dismissed.

5. Learned counsel appearing for respondent No.1 is absent, when called out.

6. The following points arise for my consideration and I record

my findings on them for the reasons given below:-

Sr. No.	Points	Findings
1.	Whether the Commissioner has rightly assessed the compensation by considering nature of disablement and loss of earning capacity of the claimant in consequence thereof?	Partly in negative
2.	Whether the impugned judgment And award call for interference?	Partly in affirmative.
3.	What order?	As per final order

R E A S O N S

7. **Point Nos. 1 and 2:-** The appellant-claimant has examined himself on oath before the Commissioner and his deposition is marked at Exh.4. He deposed that he cannot work as labour. He is suffering from pains to his right leg. He has further deposed that he suffered fracture injury to his right leg and the right leg became shortened due to accident. He has further deposed that he cannot do any work after the accident. Even in his cross examination, he has stated that he cannot walk without support. It is also recorded in the cross examination that he had been to the Court on that day by using crutches. Witness No.2 for the claimant Dr. Satish Deshmukh has deposed that right leg of the claimant has shortened by 2 cm and gait is not normal. He has further deposed that there is problem to

the patient in walking. Even he has produced X-Ray to substantiate his opinion. He has further deposed that there is problem for the claimant in moving the right leg. While moving right leg and limp on right side, witness Dr. Deshmukh has further opined that it is difficult for the claimant to work as Majdoor including lifting of weight after the accident. It thus appears that though the appellant-claimant has sustained permanent disablement to the extent of 20% of the total body, so far as the labour work, which he was doing prior to the accident is concerned, because of shortening of leg and restriction on free movement of the leg, his earning capacity is considerably affected. It appears that the Commissioner has not considered the same.

8. In the case of Mohan Soni vs. Ram Avtar Tomar (supra) relied upon by learned counsel for the appellant, in para 13 of the judgment, the Supreme Court has made following observations:-

“13. 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 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, professions 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.”

9. In the light of above observations, it can be said that the appellant claimant is not totally disabled from earning any kind of livelihood. However, at the same time, it has to be observed that the claimant still cannot effectively carry out any activities and functions as prior to the accident. However, the claimant could carry on some other lesser activities and functions so that he continues to earn or can continue to earn his livelihood. In the case in hand, there is shortening of leg to the extent of 2 cm. Furthermore, as opined by Dr. Deshmukh, there are restrictions on the movement of right leg and claimant will have pains while moving the right leg. It is difficult for the claimant to work as majdoor including lifting of weight after the accident. In my considered opinion, permanent disablement sustained by the claimant though to the extent of 20%, affected his earning capacity to the extent of 60%.

10. So far as the daily wages earning of the claimant is concerned,

the claimant has deposed that respondent No.1 was paying him Rs.80/- per day. So far as the nature of work being carried out by the claimant is concerned, he was loading and unloading the truck carrying the sand. The learned Commissioner has committed error while placing reliance only on the reply given by respondent No.1 employer to the legal notice issued by the appellant-claimant. It is pertinent to note that the respondent employer has not examined himself on oath and his reply is straight way considered. There is nothing in the cross examination of the claimant to disbelieve him so far as his contention in respect of daily wages of Rs.80/- is concerned.

11. Thus, if daily wages of Rs.80/- multiplied by 30, the monthly wages comes to Rs.2400/- and 60% of the same comes to Rs.1440/-. Relevant factor for age of 31 comes to 205.95. $\text{Rs.1440} \times 205.95 = \text{Rs.2,96,568.00}$ and 60% of the same comes to Rs.1,77,940/-. The claimant, thus is entitled to Rs.1,77,940/-. The Commissioner, without assigning any reason, has awarded interest from the date of order. Learned Commissioner should have granted interest @ 12% p.a. from one month after the accident took place i.e. from 23.7.1999 till realization of entire amount. I answer the points accordingly and proceed to pass the following order:-

O R D E R

- I. The judgment and award dated 19.7.2011 passed by the Commissioner, Workmen's Compensation and Judge, Labour Court, Latur in W.C.A. No. 69 of 1999 is hereby modified to the following effect:-

The respondents are jointly and severally liable to pay an amount of compensation for Rs.1,77,940.00 (Rupees One lac seventy seven thousand nine hundred forty only) to the claimant Basalehb Namdeo Bhangarwade with interest @ 12% p.a. from 23.7.1999 till realization of entire amount with proportionate cost thereof.

- II. The rest of the judgment and award passed by the Commissioner for Workmen's Compensation and the Judge, Labour Court, Latur dated 19.7.2011 in W.C.A. No. 69 of 1999 stands confirmed.
- III. Award be drawn up accordingly.
- IV. The appeal is accordingly disposed of.

(V. K. JADHAV, J.)

