

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

FIRST APPEAL NO. 1279 OF 2005

Oriental Insurance Co. Ltd.,
Yashodhan Buldg, Subhash Road, Beed
through its Divisional Manager,
Mr. Akhtar Abbas Halari, Age 54 years,
Occu. Service, R/o. Aurangabad.

**....Appellant.
(Ori. Resp. No.2)**

Versus

1. Shaikh Khaja Shaikh Mohemmad,
Age 54 years, Occu. Nil,
R/o. Ravivar Peth, Ambajogai,
Tq. Ambajogai, Dist. Beed.
2. Mainoddin Mohmmad Yasin Bagwan,
Age 50 years, Occu. Business,
R/o. Bagwan Galli, Ambajogai,
Tq. Ambajogai, Dist. Beed.

**....Respondents.
Ori. Applicant & Resp. No. 1**

Mr. Dhananjay Deshpande, Advocate for appellant.

CORAM : T.V. NALAWADE, J.
DATED : 6th January, 2016.

JUDGMENT :

- 1) The appeal is filed by Insurance Company against the judgment and award of W.M.C. No. 8/2004, which was pending before the Commissioner of Workmen's Compensation (Civil Judge, Senior Division), Ambajogai. In respect of injuries sustained by present respondent Shaikh Khaja, compensation of Rs. 2.77 lakh is given and the interest at the rate of 9% p.a. is

awarded. The learned counsel for Insurance Company is heard.

2) It is the case of claimant Shaikh Khaja that he was working as a driver with respondent No. 1 Shri. Mainoddin and he was getting monthly salary of Rs. 5,000/- and daily allowance of Rs. 100/-. He was driving truck No. MH-23/1668. Accident took place on 20.6.2003 and one unknown truck gave dash to the truck of claimant from backside. It is the case of employee, driver that he sustained injuries to his limbs, mainly on right knee, right heap and due to that, he is suffering from permanent disability. The claimant had claimed compensation of Rs. 3,00,000/-.

3) Respondent No. 2 - Insurance Company filed written statement and it denied everything. It denied that claimant is suffering from permanent disability. The employer filed written statement. He admitted that claimant was appointed by him as driver on his truck. The fact of accident is also not disputed. He contended that he was paying total amount of Rs. 3,000/- to the claimant for working as a driver.

4) The issues were framed on the basis of aforesaid pleadings. The claimant examined himself and he examined

witness like doctor to prove that he is suffering from permanent disability. The employer examined himself and he gave evidence on the income of the claimant. The claimant relied on copies of police papers also. The Commissioner has believed the claimant and the doctor and has held that the claimant cannot work as a driver due to the injuries sustained by him. After considering the age of the claimant and the income, by using the procedure given in Workmen's Compensation Act (hereinafter referred to as 'W.C. Act' for short), the Commissioner has calculated the compensation and amount of Rs. 2,77,020/- is awarded as the compensation.

5) While admitting the appeal, on 1.3.2006, this Court (other Hon'ble Judge) has formulated following substantial questions of law :-

(i) In view of these admissions of the Doctor examined by the orig. applicant himself, it is clearly an illegality on the part of learned Commissioner to hold that there is a total loss earning permanently and award highly exorbitant amount as compensation, on these assumptions.

(ii) In view of the facts and circumstances and more particularly the evidence placed on record, the learned

Commissioner ought to have applied provisions of section 4 (1) (d) of the Workmen's Compensation Act and ought to have taken half salary as a base for calculation of quantum of compensation to be awarded. It is lost sight of that the provisions of se. 4 (1) (b), applied by the learned Commissioner mandates that the disability must be of a permanent nature.

6) The learned counsel for appellant was allowed to argue on the aforesaid points. He mainly submitted that the evidence of the doctor is not convincing and from the evidence inference is not possible that the claimant cannot work as a driver of the truck or other four wheeler. He took this Court through provisions of W.C. Act, including section 4 and submitted that it is not possible to infer that there is total permanent disability.

7) In view of the submissions made by the learned counsel for appellant and the aforesaid substantial questions of law, this Court has gone through the relevant provisions. The provision of section 4 (c) (ii) runs as under :-

"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)
 - (ii) in the case of an injury not specified in Schedule 1, 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 II of this section is as under :-

"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;"

8) The aforesaid provisions show that the "loss of earning capacity" needs to be assessed by qualified medical practitioner. "Loss of earning capacity" is a question of fact. In view of these circumstances, this Court can interfere in the decision of the Commissioner only if there is perversity in the

decision like relevant material is not considered by the Commissioner. The aforesaid provisions show that the Commissioner cannot on his own adopt some method to decide the loss of earning capacity and it is the medical practitioner, who can give evidence on the loss of earning capacity. The provision of section 11 of the W.C. Act shows that right is given to the employer and consequently, to the Insurance Company to get examined injured employee to get satisfied about the injury. If there is doubt or grievance about the evidence given by qualified medical practitioner, this procedure can be adopted by the employer, the Insurance Company. If the employer does not use this right, inference can be drawn against the employer.

9) The claimant has given evidence that he sustained fracture injury to right leg and even after the treatment, he is not fully recovered. He has given evidence that there is implant in right leg and he cannot even walk without using stick. When the accident had taken place on 20.6.2003, the claimant was still under treatment as per his evidence on 3.2.2005. He has given evidence that he had approached doctor to get the opinion and doctor has also given opinion that he cannot drive the truck. The disability certificate issued by Medical Board of Government Hospital is produced at Exh. 18. It shows that he sustained

fracture injury to right shaft femur, nailing was done, implant was fixed and even on 6.7.2003 the Board noted that there was restriction in the movement of right knee, right heap and the movement was restricted by 20%. The extent of permanent disability is given as 17%.

10) Dr. Vijay Burande, Orthopedic Surgeon (M.S.) is examined by the claimant to prove the disability. He has given evidence that on 15.2.2005 he examined claimant both clinically and radiologically. His evidence is consistent with the aforesaid certificate and he had proposed to issue such certificate. The certificate is proved in his evidence as he identified signatures of R.M.O. He has given evidence that patient is not able to stand or seat and he is suffering from pain and so, he is unable to drive. The doctor has given specific evidence that the claimant has lost total earning capacity if he wants to work as a driver. His evidence shows that there are restrictions in the mobility of heap joint and knee joint. Such certificate is at Exh. 29 and it is duly proved.

11) The learned counsel for appellant submitted that in the cross examination, the aforesaid doctor has admitted few things like possibility of improvement of condition and so, it

cannot be believed that there is total permanent disablement. The learned counsel submitted that if percentage of disability is considered and the provision of section 4 is kept in mind, it cannot be said that it is the case of total disablement.

12) This Court has already quoted the relevant provisions of W.C. Act. There is no reason to disbelieve the doctor and there is nothing in rebuttal. In view of these circumstances, this Court holds that it is not possible to interfere in the decision given by the Commissioner.

13) In the result, the appeal stands dismissed.

[T.V. NALAWADE, J.]

ssc/