IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 1208 OF 2015

Bhimrao Ramdas Patil … Appellant
Vs.
The National Insuranhce Company
Ltd. Dhule, Br. Dhule and Anr. … Respondents

Mr. A.D. Pawar, Advocate for the Appellant.
Mr. V.N. Upadhye, Advocate for respondent no.1.

CORAM : A.V. NIRGUDE, J.
DATE : 31-08-2016.

Per Court :

1. This appeal challenges judgment and award dated 23/02/2007 passed by the learned Commissioner for Workmen's Compensation rejecting the application no. W.C.A. No. 15 of 2006 filed by the appellant.

2. Facts leading to this litigation are as under:

3. The appellant was an employee of respondent no.2 as 'Hamal'. His monthly salary was Rs.2500/-. On 01/12/2005 Appellant boarded his employer's vehicle, a truck, which was loaded with cotton. At about 8.45 pm on a public road, this truck met with an accident causing injuries to the appellant. The appellant was hospitalised and was treated but despite treatment, he suffered 35% of permanent disablement.

4. The application was moved under section 4 of the Workmen's Compensation Act, 1937 (Said "Act). Most of the facts stated above went unchallenged; the employer of the appellant remained absent. It was the insurance company-respondent no.1-

who opposed the claim.

5. The learned Commissioner came to a conclusion after recording evidence that the appellant could prove that he was an employee of respondent no.2 and while on duty he suffered injuries in an accident. But he held that, the appellant did not suffer loss of earning and, therefore, his claim was rejected.

6. The question therefore is "whether appellant was entitled to compensation as per section 4 of the said Act and to what amount?"

7. It has come on record that due to injuries the appellant suffered 35% of permanent disablement. This evidence is trustworthy being an opinion of an expert witness. Nothing came on record to indicate that the expert witness was dishonestly trying to support the case of the appellant. Therefore, the court must accept this part of the evidence that the appellant suffered 35% of permanent disablement.

8. The next question is whether due to such disablement there was loss of earning capacity of the appellant. The answer has to be in affirmative. The expert witness was not asked and so he did not express his opinion on the question as to what extent there was loss of earning capacity. The appellant is a 'Hamal' and so he must have all physical prowess to perform his work of lifting, carrying loads. If he is disabled to any extent, he would not be able to perform his work as he used to perform earlier. So there is certainly loss of earning capacity.

9. The next question is what percentage of earning capacity is lost. Section 4 provides answer to this. Section 4 is required to be read in juxtaposition of schedule-4 of the Act. In schedule-4 various typical injuries were described and percentage

of earning capacity is also indicated. The injury suffered by the appellant is not described in the schedule. Such 'atypical' injuries are covered by Section 4, which reads as under:

> ***4. Amount of compensation.-*** *(1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-*
> *(a) where death results an from the injury : amount equal to fifty per cent. of the monthly wages of the deceased *[employee] multiplied by the relevant factor; or an amount of *[one lakh and twenty thousand rupees], whichever is more;*
>
> *(b) where permanent total disablement results from the injury : an amount equal to sixty per cent. of the monthly wages of the injured *[employee] multiplied by the relevant factor; *[one lakh and twenty thousand rupees], whichever is more;*
>
> **[Provided that the Central Government may, by notification in the Official Gazette, from time to time, enhance the amount of compensation mentioned in clauses (a) and (b).]*
>
> *Explanation I.--For the purposes of clause (a) and clause (b), "relevant factor", in relation to a *[employee] means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the *[employee] on his last birthday immediately preceding the date on which the compensation fell due.*
> *Explanation II .- Omitted by*
> *(c) where permanent partial disablement result 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 purpose 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;***

(d) where temporary disablement, whether total or partial, results from the injury :

*a half monthly payment of the sum equivalent to twenty-five per cent. of monthly wages of the *[employee], to be paid in accordance with the provisions of sub-section (2).*

*(1A) Notwithstanding anything contained in sub-section (1), while fixing the amount of compensation payable to a *[employee] is respect of an accident occurred outside India, the Commissioner shall take into account the amount of compensation, if any, awarded to such *[employee] in accordance with the law of the country in which the accident occurred and shall reduce the amount fixed by him by the amount of compensation awarded to the *[employee] in accordance with the law of that country.]*

**[(1B) The Central Government may, by notification in the Official Gazette, specify, for the purposes of sub-section (I), such monthly wages in relation to an employee as it may consider necessary.]*

(2) The half-monthly payment referred to in clause (d) of sub-section (1) shall be payable on the sixteenth day --

(i) from the date of disablement where such disablement lasts for a period of twenty-eight days or more, or

(ii) after the expiry of a waiting period of three days from the date of disablement where such disablement lasts for a period of less than twenty-eight days; and thereafter half-monthly during the disablement or during a period of five years, whichever period is shorter:

Provided that--

*(a) there shall be deducted from any lump sum or half-monthly payments to which the *[employee] is entitled the amount of any payment or allowance which the *[employee] has received from the employer by way of compensation during the period of disablement prior to the receipt of such lump sum or of the first half-monthly payment, as the case may be; and*

*(b) no half-monthly payment shall in any case exceed the amount, if any, by which half the amount of the monthly wages of the *[employee] before the accident exceeds half the amount of such wages which he is earning after the accident.*

*Explanation.--Any payment or allowance which the *[employee] has received from the employer towards his medical treatment shall not be deemed to be a payment or allowance received by him by way of compensation within the meaning of clause (a) of the proviso.*

**[(2A) The employee shall be reimbursed the actual medical expenditure incurred by him for treatment of injuries caused during* *course of employment.]*

(3) On the ceasing of the disablement before the date on which any half-monthly payment falls due there shall be payable in respect of that half-month a sum proportionate to the duration of the disablement in that half-month.

*(4) If the injury of the *[employee] results in his death, the employer shall, in addition to the compensation under sub-section (1), deposit with the Commissioner a sum of *[not less than five thousand rupees] for payment of the same to the eldest surviving dependant of the *[employee] towards the expenditure of the funeral of such *[employee] or where the *[employee] did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure.]*

7. In view of the provisions quoted above, it was necessary for the appellant to bring on record opinion of a qualified medical practitioner, as to what was extent of loss of earning capacity that has occurred due to the permanent disablement. In this case the medical practitioner opined that, the appellant suffered 35% permanent disablement, however, he did not add as to what was the loss of earning capacity of the appellant. A possibility of sending the case back lower court is expressed at the Bar. But I am not inclined to do so for avoiding delay. I am assessing the loss of earning capacity to the extend of 35% in the facts of the case. In view of this, in the light of schedule-4 following formula will apply.

Formula as per Schedule-IV is as under:

Salary Rs. 2500/- x 222.71 (factor)	Rs. 5,56,775/-
35% disability of Rs.5,56,775/- comes to	Rs. 1,94,871/-
with 12% interest P.A. u/s. 4A(3)(a)	

8. The next question that arises for my consideration is whether the appellant could prove his salary of Rs. 2,500/-. In appellant's evidence he stated on oath that his salary was Rs.2500 per month. Despite this the ld. Judge of the lower court thought it necessary to “moderate” it. The learned judge held that, since there

is no documentary evidence on the question of monthly salary of the appellant, he should assume that, the appellant would get minimum wages. No reason is given as to why the learned judge equated work of a 'Hamal' working on a truck equivalent to a worker who earns minimum wages. A 'Hamal' in relation to loading and un-loading of a truck is certainly entitled to more than minimum wages. On the other hand, the appellant's deposition that he was getting Rs.2500/- deserves to be believed even in absence of the deposition of his employer mainly because his deposition is believable. He could have exaggerated since his employer was his friend and since he knew that his employer would not oppose his case. Despite of such circumstances a moderate sum of Rs. 2500/- per month is stated to be monthly salary. In my view, this evidence ought to have been accepted as truthful and the calculation should be done on the basis of this amount for calculating the compensation as per the provisions of schedule-4 of the Act.

9. So 35% of sum of Rs. 5,56,775/- comes to Rs. 1,94,871/- (Rupees One Lakh Ninety Four Thousand Eight Hundred and Seventy One).

10. The appeal is, thus, allowed. Respondent shall jointly and severally pay 1,94,871/- (Rupees One Lakh Ninety Four Thousand Eight Hundred and Seventy One) along with interest at the rate of 12% from the date of application in lower court, till the date of judgment in the lower court and from the date of registration of first appeal till recovery of dues.

(A.V. NIRGUDE)
JUDGE

mub