

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

Amk

FIRST APPEAL (STAMP) NO. 12095 OF 2015

Shriram General Insurance Co. Ltd.]
Division Office No. 215066]
1A, Neel Agan, Plot No.29,]
Sector No.29, New Panvel East,]
Raigad - 410 206.] .. Appellant

Vs.

1. Mr. Bande Nawaj Kasim Shaikh]
At present Resident at Rahul]
Nagar, No.2, Near Priyadarshinee,]
Sion Panvel Road, Sion,]
Mumbai - 22.]
2. Mr. Chand Kasim Shaikh]
At Post Society Naka 7/46,]
Indira Nagar Zopad Patti,]
Near Kelve Station, Panvel,]
Dist.- Raigad.] .. Respondents

Mr. Nikhil Mehta i/b KMC Legal Venture for the Appellant.
Mr. V. M. Parkar for Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.
DATE : 1st OCTOBER, 2016.

ORAL JUDGMENT

1. Admit.
2. Appeal is heard at the stage of admission itself considering that the challenge raised is only to the quantum of compensation.

3. This appeal takes an exception to the Judgment and Award dated 18.10.2014 passed by the Commissioner of Employees' Compensation and Judge, Sixth Labour Court, Mumbai in Application (WCA) No. 179/C-35 of 2013.

4. The only ground, on which the quantum of compensation awarded to the respondents is challenged, is that the Trial Court has calculated the same on higher side, especially, on the count that the permanent partial disability was considered to be 61%. Learned counsel for the appellant has taken this Court to the evidence of Dr. Khanna, who has not treated the claimant-respondent No.1, but only on the basis of his examination he has issued the disability certificate. It is urged that the only injury, which was found, was the fracture to the right foot proximal phalynx with abrasion on right foot dorsal on 3rd and 4th toes. Dr. Khanna has however stated that these two injuries had resulted into disability as “(1) Tenderness with deformity and scaring of right foot, and second toe, (2) Movements of right foot painful and restricted, (3), Unable to stand or walk for long, (4) Unable to do work of a labour, (5) Fracture proximal phalynx second toe right not consolidated clinically and radiologically. Accordingly, Dr. Khanna has calculated the permanent partial disability to the extent of 61%.

5. It is urged by learned counsel for the appellant that Dr.

Khanna in his cross-examination has categorically admitted that he has not treated the patient. In situation, according to learned counsel for the appellant only on a clinical examination, disability assessed by him to the extent of 61% is definitely on higher side.

6. Learned counsel for the appellant has also drawn attention of this Court to the fact that the driving license of the respondent No.1 is already renewed on 27.01.2013, having found him to be physically fit. In such situation, according to learned counsel for the appellant, it goes without saying that there is absolutely no partial permanent disability as such and hence the amount of compensation, as awarded by the Trial Court, on the basis of evidence of Dr. Khanna that respondent has sustained 61% permanent partial disability, is definitely on higher side and it is required to be reduced substantially.

7. Learned counsel for the respondent No.1 has by relying on the decision of this Court in the case of *National Insurance Co. Ltd. Vs. Rama & Ors.*, 2007 ACJ 1105 has submitted that once the doctor, who is an expert, is examined by the claimants and once it is proved that the disability was due to injuries sustained in the accident are non scheduled was proved by a qualified medical practitioner all that was open either to the employer or to the insurance company is to bring evidence of rebuttal. In this case, it is submitted that no such evidence of rebuttal is adduced

either by the Insurance Company or the employer and hence it is to let a day for the appellant to contend that disability assessed by Dr. Khanna is on higher side and on that count the amount of compensation needs to be reduced.

8. In my considered opinion, in the present case, if once accepted even the evidence of Dr. Khanna as it is, the only injuries which he has noticed was a fracture proximal phalynx second toe which could not have caused 61% permanent partial disability. Secondly, the very fact that the driving license of the respondent has been renewed in the same year in January, 2013 itself finding him to be fit for the said job clearly makes it out that the permanent partial disability assessed by Dr. Khanna to the extent of 61% is definitely on higher side. Even in the relevant schedule under Employees' Compensation Act the loss of earning capacity is given as 20% for loss of all toes of both feet dorsal to proximal. Here in the case, there was only the fracture on second toe and in such situation, the compensation awarded by the Trial Court to the tune of Rs.6,39,680/- on the basis of permanent partial disability of 61% is required to be reduced to the extent of 30% and hence the respondent becomes entitled to get the compensation amount of Rs.4,48,540/- with interest @ 12% per annum as awarded by the Trial Court.

9. As a result, the Appeal is allowed partly. The impugned

Judgment and Award, as passed by the Trial Court, is modified to the extent that the compensation amount as awarded by the Trial Court to the tune of Rs.6,39,680/- is reduced to Rs.4,47,776/- with interest @ 12% per annum on the amount of Rs.4,47,776/- from the date of the accident till the date of depositing the said amount in the Court.

10. It is submitted by the learned counsel for the appellant that the appellant has deposited the entire amount of Rs.8,62,278/- in the Trial Court. Needless to state that the appellant will be entitled to get the balance amount of Rs.1,91,904/- with the proportionate interest thereon.

[DR. SHALINI PHANSALKAR-JOSHI, J.]