

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No. 939 of 2008

ORDER:

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This appeal is preferred challenging the order dated 12.09.2007 in W.C.No.1 of 2006 on the file of the Commissioner for Workmen Compensation-cum-Assistant Commissioner of Labour, Tirupati.

2. First respondent herein submitted application to the Commissioner for Workmen Compensation claiming a compensation of Rs.5,00,000/- contending that he sustained injuries on 10.01.2004 while discharging duties as driver on mini lorry No.TN22-AA-9174 belonging to 2nd respondent herein and that he sustained permanent disability. Insurance company resisted the claim of the 1st respondent herein contending that there is no relationship of employee and employer between the injured and the owner of the mini lorry and that the disability sustained is only 35% as per the medical report and that the compensation claimed by the claimant is excessive, exorbitant and not maintainable. On these contentions, lower authority on the basis of evidence produced before it granted Rs.3,96,535/- as compensation by taking the loss of earning capacity at 100%. Aggrieved by the same, insurance company preferred the present appeal.

3. Learned advocate for appellant submitted that the lower authority is not justified in taking loss of earning capacity at 100% whereas the disability

assessed by the medical officer is only at 35%. He further submitted that when the injured is capable of performing some work, the lower authority is not justified in taking loss of earning capacity at 100%. He submitted that the compensation fixed by the lower authority has to be modified and reduced by taking loss of earning capacity at 35% as assessed by the medical officer.

4. Learned advocate for claimant supported the award. He submitted that the lower authority rightly took the loss of earning capacity at 100%.

5. Now the point that would arise for consideration is:

“Whether the judgment of the trial Court is legal, correct and proper?”

POINT:

6. There is no dispute with regard to accident that took place on 10.01.2004 in which the 1st respondent herein sustained multiple fractures. The injured himself is examined as AW1 who deposed as to the manner in which the accident took place and also about the injuries sustained by him. He deposed that he was under treatment from 13.01.2004 to 19.01.2004 under Dr. Shanmuga Sundaram, Orthopedic Surgeon of Vellore. The said Shanmuga Sundaram was examined as AW2 and he deposed that he worked in Government Hospital, Vellore, and on 09.11.2004 he examined the injured-claimant who sustained injuries in a road accident and he noticed *pelvis mal united fracture of*

both pubics bones of both sides causing instability of the pelvis, therefore patient cannot stand or sit for a long time. He also deposed that due to this injury, the claimant cannot do the profession of driver. He also deposed that he noticed Right foot post traumatic stiffness and Orthritis of 2,3, and 4 toes of right foot hand caused restriction of walking, that patient has got permanent disability of 35%.

7. This Court in **N. Sree Ramulu @ Sree Rama Murthy v. B. Lakshmi Narayana and another**^[1], after analyzing law on the subject from the pronouncements of Supreme Court and High Court framed the following principles to determine compensation payable under Workmen's Compensation Act. The principles culled out are as follows:-

“(a) All injuries or permanent disabilities arising from injuries do not result in loss of earning capacity.

(b) Where permanent partial disablement results from an injury and the said injury is specified in Schedule I, it would be covered by Section 4(1)(c) (i) of the Act. In such a case, the workman would be entitled to such percentage of 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;

(c) Where permanent partial disablement results from an injury and the injury is not specified in Schedule I, it would be covered by Section 4(1)(c) (ii) of the Act. In such a case, the workman would be entitled to such percentage of compensation which would have been 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.

(d) In assessing loss of earning capacity in a case of permanent partial disablement resulting from an injury not specified in the Schedule I, 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.

(e) The opinion of the medical practitioner as to the percentage of loss of earning capacity would be normally binding on the Court where permanent partial disablement results from an injury not specified in Schedule I.

(f) The importance of medical evidence is only in case where disablement in performing duties which the workman was performing earlier cannot be decided without the aid of medical evidence. In case where it can be so decided with or without medical evidence (like amputation of limbs), medical evidence is not relevant and the question of the victim not suffering specified injuries is also not relevant.

(g) Loss of earning capacity is not a substitute for percentage of physical disablement and is only one of the factors taken into account.

(h) The loss of earning capacity arising from a permanent disability may be different from the percentage of permanent disability. Equating the percentage of loss of earning capacity to the percentage of permanent disability would result in the award of either too low or too high a compensation. What requires to be assessed is the effect of permanent disability on the earning capacity of the injured. This involves ascertainment of what activities the claimant can carry on in spite of permanent disability and what he could not do as a result of the permanent disability; ascertainment of his avocation, profession and nature of work before the accident and also his age; and finding out whether he is totally disabled from earning any

kind of livelihood (or) whether in spite of permanent disability, he can still effectively carry on the activities and functions, which he was earlier carrying on (or) 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. In para.14 of (2011) 1SCC 343 and in para.8 of (2012) 2 SCC 267 appropriate guidance is available.

(i) The doctor who treated an injured claimant or who examined him subsequently to assess the extent of his permanent disability can give evidence only in regard to the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Commissioner/Court with reference to the evidence in entirety.

(j) Where a claimant is a workman who suffered injuries in an accident and his employer either provides for pension after retiring the workman on the grounds of medical invalidation or the dependants of the claimant are given appointment on compassionate grounds, he has a duty to disclose these facts and they would have a material bearing on the ascertainment of the percentage of loss of earning capacity.

(k) It is a question of fact in each case whether there is permanent total disablement on account of the injuries suffered by the claimant. In a given case, the loss of earning capacity caused by an injury can amount to 100% disablement. But, if the injured claimant is in a position to earn a living by doing a job other than the one which he was doing at the time of his accident, he cannot be said to have suffered 100% disability.

(l) Any scaling down of the compensation should require something more tangible than a hypothetical conjecture that notwithstanding the disability, the victim could make up for the loss of income by changing his vocation or by adopting

another means of livelihood. The party advocating for a lower amount of compensation for that reason must plead and show before the Tribunal that the victim enjoyed some legal protection (as in the case of persons covered by the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995) or in case of the vast multitude who earn their livelihood in the unorganized sector by leading cogent evidence that the victim had in fact changed his vocation or the means of his livelihood and by virtue of such change he was deriving a certain income."

8. From the above, particularly point (h), it is clear that loss of earning capacity is different from percentage of disability and the Courts have to assess the loss of earning capacity basing on the nature of injuries and the evidence of medical officer.

9. Here, the medical officer stated that the injured cannot do his profession as driver because of the injuries. Therefore, considering the principle No. (h) formulated in the above decision, the objection of the insurance company with regard to the percentage of loss of earning capacity is not tenable and the lower authority was right in taking loss of earning capacity at 100% and rightly calculated compensation on that basis.

10. For these reasons, I am of the view that there are no grounds to interfere with the award of the Motor Accidents Claims Tribunal and that appeal is devoid of merit.

11. Accordingly, appeal is dismissed. No costs.

Miscellaneous petitions, if any pending, shall stand closed.

JUSTICE S. RAVI KUMAR

11th March, 2016
KSM

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

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