

HON'BLE SRI JUSTICE S. RAVI KUMAR

**CIVIL MISCELLANEOUS APPEAL Nos.1031 of 2008 & 813 of
2013**

COMMON JUDGMENT:

These two appeals arise out of the same accident and against the same order 30.06.2006 in W.C.No.32 of 2005 on the file of Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Eluru (for short, 'lower Authority')

2. C.M.A.No.1031 of 2008 is preferred by claimant and C.M.A.No.813 of 2013 is preferred by Insurance Company. Parties are hereinafter referred to as claimant and Insurance Company for convenience sake.

3. Claimant submitted application to the Commissioner for Workmen's Compensation contending that he was working as cleaner on vehicle bearing No.AP 13 T 6709 and the said vehicle met with accident on 21.01.2005 at about 4.00 a.m., due to which he received injuries. He further contended that he used to earn Rs.4,000/- per month as wages and as he sustained injuries during course of his employment, therefore he is entitled for compensation of Rs.6,00,000/-. Insurance Company resisted the claim of claimant mainly on the ground that there is no relationship of employee and employer and that the claimant was a passenger travelling in the vehicle at the time of accident. On these contentions, lower

Authority conducted enquiry, during which three witnesses are examined and seven documents are marked on behalf of claimant and one witness is examined and two documents are marked on behalf of Insurance Company. On a overall consideration of oral and documentary evidence, lower Authority granted Rs.2,56,420/- as compensation by taking the loss of earning capacity at 100% and wages of the injured at Rs.2,320-50 as per minimum wages fixed by the Government. Aggrieved by the said order, claimant preferred C.M.A.No.1031 of 2008 contending that the lower Authority has not taken the wages at Rs.4,000/- per month as claimed by the claimant and compensation granted by the lower Authority is too low. Insurance Company preferred C.M.A.No.813 of 2013 questioning both quantum and liability.

4. Heard both sides.

5. Advocate for claimant submitted that when claimant specifically pleaded that he was earning Rs.4,000/- per month as wages and deposed the same in his evidence, lower Authority has not taken the same into consideration though his evidence remained unrebutted. He further submitted that claimant was 34 years old, but the lower Authority took the age of the claimant as 40 years and took wrong factor to calculate compensation for these reasons, the order has to be modified and compensation has to be enhanced.

6. On the other hand, advocate for Insurance Company submitted that the injury sustained by claimant is a schedule injury and taking 100% loss of earning capacity by lower Authority is wrong and to that extent, the order has to be modified. He further submitted that as per Ex.B.2-charge sheet, claimant was only a coolie travelling in the lorry, but not an employee, therefore the claim under Workmen Compensation Act is not tenable and the Insurance Company has no liability.

7. In reply to this, advocate for claimant submitted that there is no evidence on record to show that injury sustained by claimant would attract the injury referred in the schedule, therefore, lower Authority rightly took 100% loss of earning capacity and there are no grounds to interfere on this aspect.

8. Now the point that would arise for my consideration in these appeals is:

Whether the order dated 30.06.2006 in W.C.No.32 of 2005 on the file of Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Eluru,, is legal, proper and correct?

POINT :

9. There is no dispute with regard to the accident and the injury sustained by claimant in the said accident. The injured-claimant is examined as AW.1 and he reiterated his case including the injury sustained by him and the

treatment that was taken. The Medical Officer, who is examined as AW.2, deposed that he along with the Chairman examined claimant and assessed disability at 70% in view of the amputation to right leg above the knee. He deposed that on account of this injury, claimant cannot crawl beneath the lorry for applying grease and other functions. In the cross-examination, he deposed that he has not treated patient and he has not issued the wound certificate-Ex.A.3. He denied the suggestion that the percentage of disability is in excess. Driver of the vehicle is examined as AW.3 and he supported the version of claimant and deposed that claimant was a cleaner on the lorry on the date of accident and that claimant sustained leg injury during course of employment. In the cross-examination, he stated that he has not produced any letter to show that claimant was employed and worked as cleaner on the lorry. He deposed that along with claimant there were three passengers present in the lorry at the time of accident. He denied the suggestion there were ten persons in the vehicle at the time of accident and claimant is not a cleaner. As against this, Administrative Officer of the Insurance Company is examined as RW.1, through him two documents are marked, one is Insurance Policy marked as Ex.B.1 and the other is Ex.B-2-charge sheet. Insurance Company mainly relied on Ex.B.2, which is charge sheet, whereunder claimant was referred as coolie

and third witness in the charge sheet. Advocate for Insurance Company submitted this recital itself is sufficient to show that claimant is not an employee and is only a coolie, therefore cannot claim any compensation under the Workmen Compensation Act.

10. As seen from the material, through claimant F.I.R. is marked as Ex.A.1, wherein it is clearly mentioned that claimant is a cleaner on the lorry. In the charge sheet, claimant is referred as third witness and he was described as cooli, which would only refer to his profession and nowhere it is mentioned that he travelled in the lorry in that capacity. Further, the Investigating Officer is not examined on behalf of Insurance Company and as rightly pointed out by claimant, mere marking of document is not sufficient and it should be proved by examining the author. Author of Ex.B.2 i.e., Investigating Officer was not examined and when there is ambiguity between F.I.R. and charge sheet with regard to the status of claimant at the time of accident, the contention of Insurance company with regard to the relationship of employee and employer cannot be accepted as they failed to prove Ex.B.2 document and there is no other material to support the version of Insurance Company with regard to the relationship of employee and employer between claimant and owner. For these reasons, objection of the Insurance Company on this aspect is negated.

11. Now coming to the quantum, it is the contention of

advocate for claimant that the lower Authority took the age of the injured as 40 years though he was 34 years only. As seen from the material, though claimant contended that he is 34 years, in the disability certificate relied on by him, which was marked as Ex.A.6, his age was referred as 40 years. As the Medical Officer recorded age of 40 years, the lower Authority took the same in determining the compensation. There is no other evidence on behalf of claimant to show that the age recorded in Ex.A.6-disability certificate is incorrect. In the absence of any such evidence, the contention of claimant that he is 34 years as on the date of accident cannot be accepted and the lower Authority rightly took the age as recorded in the disability certificate.

12. The other contention of advocate for claimant is that the lower Authority has not taken the wages at Rs.4,000/- per month as deposed by AW.1. As seen from the record, it is the specific case of claimant that he was getting Rs.4,000/- per month as wages as a cleaner. But, he has not produced any evidence to support his version, even AW.3, who is no other than the driver of the vehicle, did not whisper anything with regard to the wages of claimant. Self serving testimony of AW.1 with regard to wages is not supported and corroborated by any other evidence, therefore lower Authority took the minimum wages fixed by the Government as per G.O.Ms.No.30

Labour Employment, Training and Factories (Lab.II) Department dated 27.07.2000 and calculated the compensation on that basis. I do not find any wrong in the approach of the lower Authority in taking the wages as per the minimum wages fixed by the Government, therefore, the contention of advocate for claimant with regard to wages is also not tenable.

13. Advocate for Insurance Company submitted that the injury sustained by claimant is a schedule injury, instead of taking the loss of earning capacity recorded in the schedule, the lower Authority wrongly took the loss of earning capacity at 100%, therefore, the percentage of loss of earning capacity has to be reduced as per the percentage recorded in Schedule-I of the Workmen Compensation Act. No doubt, in Schedule-I several types of amputations with measurement were given and loss of earning capacity was fixed with reference to those measurements. In the case on hand, there is no evidence to show the actual amputation with measurement, but the Medical Officer clearly stated that because of the amputation the claimant cannot perform the duties of a lorry cleaner as he was doing earlier. Considering that the lower Authority has taken loss of earning capacity at 100%. When there is no evidence either from the claimant or from the Insurance Company attracting the description and the measurement given in the schedule to the injury, the lower Authority has to fix the loss of earning

capacity as per the evidence since the Doctor opined that claimant cannot perform the duties of a cleaner because of the injury as he was doing earlier, the lower Authority rightly fixed the loss of earning capacity at 100%. I do not find any wrong in the order in taking 100% loss of earning capacity and the objection of the Insurance Company on this aspect is not at all tenable. In view of my forgoing observations, I am of the considered view that both the appeals are devoid of merits.

14. Accordingly, both the appeals are dismissed. No costs.

15. Miscellaneous petitions pending, if any, shall stand closed in these appeals.

S. RAVI KUMAR, J

30th June 2016.

mar