HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL MISCELLANEOUS APPEAL No.1502 of 2008

JUDGMENT:

This appeal is preferred against order dated 16.10.2006 in W.C.No.27 of 2005 on the file of Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Mahabubnagar (for short, 'lower Authority').

2. First respondent herein submitted application to lower Authority contending that he worked as labourer under 2nd respondent herein on tractor bearing No.AP-22-U-7172 on monthly wages of Rs.3,000/- and on 15.03.2005 at about 5.00 p.m., while he was proceeding along with other labourers towards Bogaram village, driver of tractor drove it in a rash and negligent manner with high speed and lost control over the vehicle, as a result the vehicle turned turtle and he sustained injuries including fractures. He further contended that he was shifted to Government Civil Hospital, Mahabubnagar, and after taking first aid, he was shifted to Dhanvanthari Hospital, Mahabubnaagar, and therefrom to Osmania General Hospital, Hyderabad. He contended that because of the injuries, he suffered physical disablement and he is unable to work, therefore, he claimed for compensation of Rs.3,00,000/-. Appellant herein i.e., Insurance Company filed counter disputing the claim of 1st respondent herein and contended that driver was not having valid driving licence at the time of accident and the vehicle was not roadworthy to ply and that there is no liability for the Insurance

Company. It is contended that the driver shall possess transport driving licence, whereas the driver was having only LMV non-transport driving licence, therefore, he was not having effective driving licence as on the date of accident. It is further contended that the claimant did not suffer any disability and the claim is high and excessive. On these contentions, lower Authority conducted enquiry, during which, two witnesses are examined and sixteen 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 material and documentary evidence, lower Authority granted Rs.1,79,494/-, stamp duty of Rs.360/- and advocate fee of Rs.500/- totaling to Rs.1,80,354/- as compensation. Questioning the same, present appeal is preferred.

3. Respondent Nos.1 and 2 in spite of service of notice neither appeared in person nor through any advocate.

4. Heard advocate for appellant.

5. Advocate for appellant submitted that lower Authority failed to give any finding as to the objection taken by the Insurance Company about driving licence. He submitted that as the driver was not having transport licence at the time of accident, it amounts to violation of policy conditions, therefore, the Insurance Company is not liable to pay any compensation. He further submitted that as per the evidence on record i.e., disability certificate, the injured sustained disability of

35% only, but the lower Authority calculated compensation by taking loss of earning capacity at 70% without any material. He relied on judgment of this Court in **New India Assurance Co. Ltd., Secunderabad vs. A.Jampaiah and another**[1] to support his contention and contended on these two grounds the order of lower Authority is liable to be set aside.

6. Now the point that would arise for my consideration in this appeal is:

> *Whether the order dated 16.10.2006 in W.C.No.27 of 2005 on the file of Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Mahabubnagar, is legal, proper and correct?*

POINT :

7. There is no dispute that 1st respondent while working as labourer under 2nd respondent he sustained injuries in an accident that took place on 15.03.2005. The first and foremost submission of advocate for appellant is from the evidence of RW.1 coupled with document Ex.D.2, it is clearly established that driver of the crime vehicle was not having a valid driving licence as on the date of accident, therefore, there is no liability for the Insurance Company in view of the violation of policy conditions. Admittedly, claimant is a workman and the claim is made under Workmen Compensation Act. As seen from the order of lower Authority, the very same objection was raised and the lower Authority with reference to the evidence

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1 2010 (6) ALD 107

available on record and the decision of Hon'ble Supreme Court in **2004 (1) Decisions Today (SC) 1028,** recorded a finding that the Insurance Company cannot escape its liability though it is proved that the driver was having only non-transport licence since it has not established that aspect contributed for the cause of accident. The lower Authority elaborately considered this objection and overruled the same in view of the decision of Hon'ble Supreme Court, in which it held as follows:

> (iii) The breach of policy condition e.g., disqualification of driver or invalid driving license of the driver, as contained in sub-section (2)(a)(ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving license or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable care in the matter of fulfilling the conditions of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.
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> (vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regading holding of a valid license by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving license is/are so fundamental as are found to have contributed to the cause of accident. The Tribunals in interpreting the

> policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149(2) of the Act."

In view of the judgment of Hon'ble Supreme Court referred to above, the objection of Insurance Company with regard to violation of policy conditions cannot be accident.

8. The other objection of Insurance Company is that the lower Authority has taken loss of earning capacity at 70% though the medical evidence and disability certificate would show that the disability was 35%. Medical Officer is examined as AW.2 and he deposed that the injured has suffered 35% of physical disability because of compound comminuted fracture of left ankle and fracture of right tibia middle 1/3rd with varus deformity and that disability is permanent and partial and the injuries sustained by claimant are grievous in nature. The lower Authority considering this evidence and the nature of employment of the injured, assessed the loss of earning capacity at 70%. The main argument of advocate for Insurance Company is that when the disability is only 35%, the lower Authority is not justified in assessing the loss of earning capacity at 70%. But, this Court in **N. Sree Ramulu @ Sree Rama Murthy v. B. Lakshmi Narayana and another**[2], after analyzing law on subject framed the following points to determine compensation payable under

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[2] **2013 (5) ALD 249**

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.*
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> *(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;*
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> *(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.*
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> *(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.*
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> *(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."

So from the above referred points, percentage of physical disability is different from percentage of loss of earning capacity and the loss of earning capacity has to be assessed basing on evidence, nature of profession and nature of injuries. Relying on the above points, the objection of Insurance Company with regard to loss of earning capacity assessed by the lower Authority cannot be accepted. On a scrutiny of the material, I do not find any wrong in the findings of the lower Authority and that the Insurance Company failed to show any grounds to interfere with the findings, which are based on material evidence.

9. For these reasons, appeal is dismissed.

10. Miscellaneous petitions pending, if any, shall stand closed. No costs.

S. RAVI KUMAR, J

30th August 2016.

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