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HIGH COURT of CHHATTISGARH, BILASPUR**MAC No.920 of 2017**

Sunil Bali S/o Late Shri B.S.Bali, Aged About 61 Years R/o Railway Pump House Road, Mandir Chowk, Police Station Torwa, Bilaspur, Chhattisgarh.

---- Appellant**Versus**

1. Semlal S/o Shri Ramcharan, Aged About 58 Years R/o Dhanoli (Badikhar), Tehsil Pendra Road, District Bilaspur, Chhattisgarh.
2. Vicky Mehta Aged About 52 Years R/o Gaurela, Amarkantak Road, Near Goyal Petrol Pump, Police Station Gaurela, Tehsil Pendra, District Bilaspur, Chhattisgarh.

---- Respondents

For Appellant	:	Shri SP Kale, Advocate.
For respondents No.1	:	Shri RK Pali, Advocate.

SB: Hon'ble Shri Justice P. Sam Koshy**Order On Board****17/08/2017**

1. With the consent of the parties, the appeal is heard finally and disposed of.
2. The present is an appeal under Section 30 of the Employee's Compensation Act, 1923 (for short, the Act) against the award dated 11.04.2017 passed by the Commissioner Employee's Compensation Act, Labour Court, Bilaspur, in Claim Case No.46/EC Act/2013 (Non-Fetal). Vide the said impugned award, the Commissioner in claim case under the Act has awarded compensation of Rs.1,19,410/-. In addition, a penalty of Rs.59,705/-has also been imposed. It is this award which is under challenge in this appeal.

3. The present appellant was the respondent No.2 before the Labour Court and that he has been jointly and severally held liable for payment of compensation along with respondent No.1 i.e. respondent No.2 in the present appeal.
4. The brief facts of the case is that, the claimant Semlal was working for the respondent No.2 as well as present appellant in their crusher plant which was installed at one of the quarries belonging to appellant and respondent No.2. On 03.07.2006 in the course of his employment, a large portion of the quarry land subsided and fell upon the claimant Semlal wherein his feet got compressed and he received injuries including fracture on his feet. The appellant and the respondent No.2 immediately took the claimant to the hospital where the operation also had to be undertaken and steel rod had to be inserted and later on his feet also had to be plastered and he was hospitalized for a period of roughly more than one month. Subsequently after recovering from injuries he filed a claim case and sought for compensation under the Act.
5. The Commissioner, taking into consideration the evidence which have come on record finally allowed the application and awarded the compensation as referred to in the preceding paragraph of this judgment and fastened the liability upon the appellant and the respondent No.2 in the present appeal making them jointly and severally liable. It is this award which is under challenge in this appeal.
6. The contention of the appellant is that he has been falsely implicated

in the instant case and that there is no evidence whatsoever both oral and documentary produced before the court below to establish the employer and employee relationship between the appellant and the claimant. Neither does the appellant have any quarry or Crusher plant nor does he have any mines belonging to him so as to engage the claimant for working under him. It was further contended by the appellant that the impugned order is also bad in law for the reason that penalty has been imposed by the court below without giving an opportunity of hearing as is required under the provisions of the Act. Thus, the order of penalty is bad in law.

7. According to appellant, the claimant has also not proved his disability part by leading medical evidence which is also mandatorily required in a non fatal case. It was further contended that the appellant has entered before the court below and has filed his return and there was a categorical denial of the entire claim of the claimant and thus after denial on the part of the present appellant, the burden of proving the case shifted upon the claimant and who ought to have proved his case by leading cogent and substantive piece of evidence to prove his employment; the accident and his disability which he has not done so. Therefore, the impugned award deserves to be quashed.
8. Counsel for the claimant however opposing the appeal submits that all the contentions which have been raised by the appellant are all findings of fact and that the present appeal under Section 30 of the Act can be entertained only in the event of there being any substantial question of law and in the absence of any substantial

question of law and the arguments advanced being all findings of fact, the appeal deserves to be dismissed.

9. Having heard the rival contentions put forth by the counsel for the parties, it would be relevant to adjudicate upon the issue as to whether the appellant has been able to establish before the court below the employer and employee relationship.
10. For deciding the aforesaid issue, it would be trite at this juncture to consider the evidence which have been brought by the claimant. A perusal of appeal would show that the claimant Semlal and eyewitness Sukhilal @ Mohan have been examined before the court below and from their evidence it is clearly reflected that both of them are working with the appellant and that the appellant and the respondent No.2 were near relatives. Sukhilal in his cross examination has admitted that it was he who had pulled out the claimant Semlal from under the debris and he had also gone alongwith the claimant to the Hospital.
11. Though, there is no documentary evidence to establish the ownership of the appellant of any mines or quarry, neither is there any document to establish employment of the claimant with the appellant, however, since the statute itself is a liberal legislation enacted for betterment and welfare of the employees/workmen, the standard of proof required for establishing the case would be the preponderance of probability and not the strict application of the Evidence Act.
12. In the present case now what has to be construed is whether the evidence of claimant Semlal and the eyewitness Sukhilal's deposition

stands corroborated from the evidence of the appellant who examined himself before the Labour Court. If we consider the cross examination of the appellant, he has not disputed the criminal case which was initiated in respect of the accident. Further, in the cross examination, he has accepted that the respondent No.2 in the appeal who was the respondent No.1 before the Labour Court was his first cousin. He has also accepted of being a Contractor. He has also accepted in his cross examination that the nature of business that he carries is that of supplying "Gitti" to the Railway department. In addition, he has accepted of having JB Construction Company.

13. From the aforesaid nature of business that he has and which he has accepted in his cross examination, it can be safely inferred that for running the business that he was having, he had engaged the claimant Semlal as well as Sukhilal as his employees. Another aspect which cannot be ignored is the fact that in his evidence the appellant has not denied the engagement of the eyewitness Sukhilal as his employee. Neither has he controverted the evidence of Sukhilal. As a result the evidence of Sukhilal which is un-rebutted and the same has to be accepted of being true for the purpose of adjudication of the issue raised.
14. Thus, so far as the employer and employee relationship is concerned, the said issue stands decided against the appellant and to that extent the finding of the Labour court does not warrant any interference.
15. However, so far as other two grounds are concerned, it is settled

position of law that proving disability in a non fatal case, it can only be done if evidence of qualified medical expert is there. In the absence of such evidence, it cannot be said that the claimant has sufficiently proved the disability. The Supreme Court in case of Raj Kumar Vs. Ajay Kumar and Another, 2011 (1) SCC 343 in paragraph 12 & 13 has held as under :

“12.The Tribunal should also act with caution, if it proposed to accept the expert evidence of doctors who did not treat the injured but who give 'ready to use' disability certificates, without proper medical assessment. There are several instances of unscrupulous doctors who without treating the injured, readily giving liberal disability certificates to help the claimants. But where the disability certificates are given by duly constituted Medical Boards, they may be accepted subject to evidence regarding the genuineness of such certificates. The Tribunal may invariably make it a point to require the evidence of the Doctor who treated the injured or who assessed the permanent disability. Mere production of a disability certificate or Discharge Certificate will not be proof of the extent of disability stated therein unless the Doctor who treated the claimant or who medically examined and assessed the extent of disability of claimant, is tendered for cross- examination with reference to the certificate. If the Tribunal is not satisfied with the medical evidence produced by the claimant, it can constitute a Medical Board (from a panel maintained by it in consultation with reputed local Hospitals/Medical Colleges) and refer the claimant to such Medical Board for assessment of the disability.

13. We may now summaries the principles discussed above :

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

(ii) The percentage of permanent disability with reference to the whole body of a person, cannot be assumed to be the percentage of loss of earning capacity. To put it differently, the percentage of loss of earning capacity is not the same as the percentage of permanent disability (except in a few cases, where the Tribunal on the basis of evidence, concludes that percentage of loss of earning capacity is the same as percentage of permanent disability).

(iii) 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 the extent of permanent disability. The loss of earning capacity is something that will have to be assessed by the Tribunal with reference to the evidence in entirety.

The same permanent disability may result in different

percentages of loss of earning capacity in different persons, depending upon the nature of profession, occupation or job, age, education and other factors.”

16. This High Court also in MAC No.27 of 2007 (Sub Area Manager, West Chirmiri Colliery Vs. Asith Kumar Guria & Anr.) decided on 31.08.2007 in a similar issue has held that the disability of an employee cannot be ascertained without examining the doctor who had given the certificate and ordered the award being passed under such circumstances to be bad in law and the matter was remanded back. In the opinion of this court, in the present case also since there was no medical evidence led by the claimant to prove and establish the disability part, the finding so arrived at by the Labour Court is bad in law.
17. Likewise, Section 4-A of the Act very specifically holds that before awarding penalty, the court should issue show cause notice to the employer and only thereafter could impose the penalty. This aspect also has been decided by the various High Courts holding that before imposing penalty, an opportunity of hearing to the employer is statutorily required, hence it is mandatory. In the instant case, undisputably, there is no notice issued to the employer before imposition of penalty and the findings of the Court below imposition of penalty to that extent is also bad in law.
18. In view of the same, the award of the Tribunal to the extent of accepting the disability without medical evidence, and imposition of penalty without issuing show cause notice to the employer is bad in

law. Therefore, the same deserves to be and is accordingly set aside. However, the findings of the court below that there is employer and employee relationship between the appellant and the claimant is affirmed and does not warrant any interference.

19. The matter is remitted back to the Labour court with a direction to reconsider the case of the claimant after affording an opportunity to produce evidence of qualified doctor to establish his disability. If required, the claimant may also be permitted to get the concerned doctor examined on commission as has been laid down by the Supreme Court in the aforesaid judgment. It is also directed that before imposing any penalty, the court may call upon the employer and thereafter decide the issue of imposition of penalty.
20. At this juncture, this court leaves open the issue of grant of interest also to the claimant as Section 4-A categorically holds that in the event if the amount of compensation is not paid within 30 days from the date it fell due, the amount shall mandatorily carry interest which also has to be considered by the Labour Court while final adjudication of the case.
21. It is ordered that since the Act itself is beneficial legislation, any amount of compensation which the appellant has deposited, shall remain with the Commissioner till final adjudication of the case and only thereafter appropriate steps shall be taken in accordance with final outcome of the case.
22. The appeal thus is partly allowed. The matter is remitted back. Considering the nature of dispute, it is expected that the Labour

Court shall decide the matter as expeditiously as possible preferably within a period of four months from the date of receipt of certified copy of this order.

Sd/-
(P. Sam Koshy)
Judge

inder