

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

FIRST APPEAL NO. 125 OF 2001

ISMAIL BASHIR SHAIKH
age 26 yrs, Occ. Nil,
R/o Khandak Galli, Ausa,
Dist. Latur.

..Appellant..
(orig claimant)

VERSUS

1. JILANI MOHAMMADSAB PATHAN
age major, occ. Business,
R/o Indira Nagar, Ausa, Tq. Ausa,
Dist. Latur.
2. BRANCH MANAGER,
The New India Assurance Co. Ltd.,
Chandra Nagar, Opposite Shahu College,
Latur.

..Respondents..

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Advocate for Appellant : Shri C.R. Deshpande
Advocate for Respondent 2 : Mr S G Chapalgaonkar

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CORAM : V.K. JADHAV, J.
Dated: April 11, 2017

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ORAL JUDGMENT :-

1. Being aggrieved by the Judgment and award passed by the Commissioner for Workmen's Compensation and Judge, Labour Court, Latur dated 23.5.2000 in application W.C.A.No.4/1999 the original applicant has preferred this appeal.

2. Brief facts, giving rise to the present appeal are as follows :-

a] The applicant was employed as a driver on a travel bus bearing registration No.MH-A-3035. He was appointed by respondent no.1 two years prior to the accident. On 26.11.1998 the applicant was on duty. He was driving the said travel bus and he was proceeding to Ausa from Latur. On way at about 08.00 to 08.30 p.m. said travel bus met with the accident involving one another S.T.Bus and as such, the applicant has sustained injuries on left leg and other parts of the body. The injuries sustained by the applicant also resulted into permanent disablement to the extent of 30% as certified by the Doctor. Thus, the applicant has approached the Commissioner for Workmen's Compensation by filing said application for grant of compensation.

b] Respondent No.1 owner has raised contention that the vehicle involved in the accident is insured with respondent no.2 insurer and respondent insurer is liable to pay the compensation.

c] Respondent-insurer has also resisted the claim on various grounds. Those are not relevant since respondent insurer has not preferred any appeal or cross appeal. The learned Commissioner by its impugned judgment and order dated 23.5.2000 directed respondents jointly and severally to pay the amount of compensation of Rs.66,301/- to the applicant. Hence, this appeal.

3. The learned counsel for the appellant-original applicant submits that, the learned Commissioner has not considered the salaried income of the applicant for determination of the compensation. Learned counsel submits that the Commissioner has ignored the evidence lead by the applicant on the point of his salaried income and believed the respondent-owner on the point of salary being paid to the applicant prior to the accident. Learned counsel submits that, though witness Dr.Vishwanath Jadhav has deposed before the learned Commissioner that the applicant on account of disablement sustained by him would not be able to drive heavy vehicle like luxury bus as a driver, erroneously

considered that earning capacity of the applicant was affected to the extent of 50%. Learned Commissioner ought to have considered the effect on the earning capacity of applicant to the extent of 100%.

4. Learned counsel for respondent-insurer submits that respondent no.1 owner has examined himself before the Commissioner and he has deposed that he was paying Rs.1,200/- p.m. to the applicant as a salary for working as a driver on the said luxury bus and Rs.25/- as a daily Bhatta. Learned counsel submits that vehicle was duly insured with the respondent-insurer and as such there was no reason for the respondent-employer to depose falsely about salary being paid to the applicant. Learned counsel submits that witness Dr. Vishwanath Jadhav has deposed that on account of permanent disability to the extent of 30% as referred in the certificate, the applicant cannot drive heavy vehicle like luxury bus as a driver. Thus, the learned Commissioner has rightly appreciated the same and accordingly held that said permanent disablement has affected the earning capacity of the applicant to the

extent of 50%. Learned counsel submits that, the applicant may not be able to drive heavy vehicle like luxury bus, but he can drive other motor vehicles including L.M.V., non transport etc. Learned counsel submits that the Commissioner has awarded just and reasonable compensation in accordance with the provisions of Workmen's Compensation Act. No interference is required. There is no substance in the appeal.

5. On careful perusal of the evidence lead by the parties, it appears that, the applicant has deposed about his salary and also examined one another driver working with the same respondent-employer. Applicant and said witness Vijaykumar have deposed before the Commissioner that respondent-employer was paying them Rs.2,300/- p.m. as wages for working as a driver on his luxury bus and Bhatta of Rs.50/- per day. As against this, respondent-employer has deposed before the Commissioner that he was paying wages of Rs.1,200/- p.m. to the applicant and daily Bhatta of Rs.25/-. However, respondent-employer has admitted in

his cross examination that he was paying total wages of Rs.1,950/- p.m. to the applicant. He has also admitted in his cross examination that he was paying Rs.2,000/- p.m. to other drivers employed by him. I accept the submission made on behalf of the respondent-insurer that the respondent-employer had no reason to depose falsely about wages being paid to the applicant when vehicle involved in the accident is duly insured and insurer would be liable to satisfy the award, if passed against it. However, learned Commissioner has not considered the wages of the applicant as admitted by the respondent-employer in his cross examination. In the light of those admissions, the learned Commissioner ought to have considered the wages of the applicant at Rs.2,000/- p.m. The learned Commissioner, however, has erroneously considered the wages of the applicant at Rs.1,200/- p.m.

6. So far as effect of the said permanent disablement on the earning capacity of the applicant is concerned, witness Dr. Jadhav has deposed before the Commissioner that because of the permanent

disablement of 30% sustained by the applicant which is in the form of Compound ankle injury fracture, fracture tarcel bone, compound fracture right femur, CLW to great tow of right leg, abrasions over abdomen, to the extent of fracture shaft femur 10%, right knee stiffness 10%, and due to ankle and foot injury 10%. The applicant cannot drive heavy vehicle like luxury bus as a driver due to the permanent disability. Considering the nature of the said disablement percentage-wise as described by witness Dr. Jadhav, learned counsel appearing for respondent-insurer has rightly submitted that the applicant can drive any other vehicle including L.M.V. excluding heavy vehicle like luxury bus. In view of the evidence of witness Dr. Jadhav and in the light of the above submissions, I find no fault in the observations made by the learned Commissioner that because of the aforesaid disablement to the extent of 30% earning capacity of the applicant was affected to the extent of 50%. However, if the wages of the applicant considered at Rs.2,000/- p.a. re-determination of the compensation as awarded by the commissioner is required to be done.

7. In view of the admission given by respondent employer, I hold that the applicant was getting Rs.2,000/- p.m. as wages and as such he is entitled for the compensation as detailed in the following paragraph.

8. The applicant was getting Rs.2,000/- p.m. as wages. As per the provisions of Section 4 (1)(b) of the Workmen's Compensation Act, 60% of the wages comes to Rs.1,200/- p.m. and in view of the findings that said disablement has affected earning capacity of the applicant to the extent of 50%, the wages should be taken at Rs.600/- and after applying relevant factor in consonance with the age of the applicant i.e. 184.17 total compensation comes to Rs.1,10,502/-. Hence, the applicant is entitled to the same and respondents are jointly and severally liable to pay the same. Thus, the impugned judgment and award requires modification. Hence, following order.

ORDER

- i). Appeal is hereby partly allowed with costs.

ii]. The judgment and award passed by the Commissioner for Workmen's Compensation and Judge, Labour Court, Latur dated 23.5.2000 in the Application (WCA) No. 4/1999 is hereby modified in the following manner.

a] It is hereby declared that the applicant met with an accident arising out of and in the course of his employment with opponent no.1 employer on 26.11.1998. It is further declared that, both the opponent no.1 employer and opponent no.2-The New India Assurance Co. Ltd., are jointly and severally liable to pay the amount of compensation of Rs.1,10,502/-(Rs. One lac ten thousand five hundred and two only) alongwith interest @ 12% p.a. from the date of accident i.e. 26.11.1998 till realization of the entire amount.

iii] Rest of the judgment and award stands confirmed.

- iv]. Award be drawn up as per the above modifications.
- v]. Needless to say that, if any amount is deposited and paid to the applicant, the same shall be a part of the modified award.
- vi]. Appeal is accordingly disposed of.

sd/-

(V.K. JADHAV, J.)

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aaa/-