

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

FIRST APPEAL NO. 169 OF 2017

VAJIR GAFFAR SAYYED
VERSUS
MR SAYED USMAN BUSHAN & ANR

...
Advocate for Appellant : Mr. S S Manale
Advocate for Respondent No.2 : Mr. D.P. Deshpande
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CORAM : V. K. JADHAV, J.
DATED : 5th JULY, 2017

PER COURT:-

1. By consent of respective parties, heard finally at admission stage.
2. Being aggrieved by the judgment and award dated 3.8.2005 passed by the Commissioner, Workman's Compensation and the Judge Labour Court, Latur in W.C.A. No. 17 of 2003, the original petitioner has preferred this appeal to the extent of quantum of compensation, as awarded by the Commissioner.
3. Learned counsel for the appellant original claimant submits that the appellant suffered from fracture injury to right leg thigh with partial amputation of front toe. The witness Dr. Asture has deposed before the Commissioner that the appellant has suffered with 20% of disability on account of fracture injury to right leg thigh and

amputation of front toe. He has also opined that there is 100% loss of income as he would not be able to drive the vehicle in future. He has also explained that the appellant is unable to walk without crutches. Learned counsel submits that the Commissioner has discarded the evidence of witness doctor Asture mainly on the ground that he was not the treating doctor. Learned counsel submits that it is a part of record that even driving licence of the appellant was cancelled on 30.12.2004. The learned Commissioner has thus, erroneously considered the loss of earning capacity of the appellant to the extent of 50% as against the expert opinion of doctor Asture.

4. Learned counsel for the appellant, to substantiate his contentions, placed reliance on the judgment of Supreme Court in the case of ***Lal Singh Marabi vs. National Insurance Company Ltd. and others, reported in (2017) 5 SCC 82.***

5. Learned counsel for the respondent insurer submits that Dr. Asture was not treating doctor and the Medical Officer, who performed the operation on the appellant, would be the proper person to certify the percentage of permanent disablement and its effect on earning capacity on the appellant. Learned Commissioner has observed that the appellant had recovered from the injuries and as such, there is only 50% loss of earning capacity of the appellant.

The Commissioner has also observed that the physical structure of the applicant is stout and he could have earned something in future which can be approximately remaining more than 50%. Learned counsel submits that the Commissioner has rightly appreciated the evidence on record and awarded just and reasonable compensation.

6. On careful perusal of evidence and the judgment and award passed by the Commissioner, it appears that the learned Commissioner has not considered the evidence of Dr. Asture in its proper perspective only on the ground that Dr. Asture was not treating doctor. It appears from the evidence of Doctor Asture that he had examined the appellant and also took X-ray of his injuries. Witness Dr. Asture had noticed fracture injury to right leg thigh and amputation of front toe. He has also stated in cross examination that thigh bone of the appellant was completely open and the said bone was not properly united. Even the learned Commissioner has also observed in the judgment that on perusal of X-ray taken by witness Dr. Asture, it discloses that the rod is fixed in the thigh of right leg with the help of nails, and it was an injury of right femur. It appears that witness Dr. Asture is an orthopedician and after thorough examination of the appellant, he has given his expert opinion. Witness Dr. Asture has also opined that the appellant would not be able to drive the vehicle in future and even he is unable to walk

without crutches. There was no reason for the Commissioner to substitute his opinion against the expert's opinion.

7. In the case of ***Lal Singh Marabi vs. National Insurance Company Ltd. and Ors (supra)***, relied upon by learned counsel for the appellant, the Supreme Court in the identical set of facts held that the appellant being driver cannot pursue his livelihood as a driver or daily-wage labourer and accepting doctor's certificate appellant held to have sustained a 90% permanent disability.

8. In the instant case, as opined by Dr. Asture the appellant being driver has lost earning capacity to the extent of 100%. Though witness doctor given such opinion, however, has admitted in his cross examination that the appellant claimant would be able to do the sitting work. I do not think that the appellant would get sitting job as per his convenience. However, considering that possibility and in the light of observations made by the Supreme Court in the aforesaid case, and in consonance with the expert opinion of witness Dr. Asture, I hold that the aforesaid permanent disablement affects the earning capacity of the appellant to the extent of 90%. The appellant is entitled for the compensation to that extent and as such, the compensation awarded by the Commissioner requires redetermination. The amount of Rs.2500/- considered as wages for

the purpose of grant of compensation and as per the age of the appellant, the relevant factor would be Rs.194.64, 60% of the Rs.2500/- comes to Rs.1500/-. If this amount is applied by factor 194.64, 90% of the same comes to Rs.2,62,764/-. The learned Commissioner has also erroneously awarded the interest at the rate of 9% p.a. instead of 12%.

9. In view of above, the appellant claimant is entitled for the aforesaid compensation amount alongwith interest @ 12% p.a. and as such the impugned judgment and award requires modification. Hence, I proceed to pass the following order:-

O R D E R

- I. The appeal is hereby allowed with proportionate costs.
- II. The judgment and award dated 3.8.2005 passed by the Commissioner for Workman's Compensation and the Judge, Labour Court, Latur in W.C.A. 17 of 2003 is hereby modified in the following manner:-

“The opponents do pay an amount of Rs.2,62,764/- (Rupees Two lacs sixty two thousand seven hundred sixty four only) with accrued interest at the rate of 12% p.a. from 5.7.2002 till its final realization”

- III. The rest of the judgment and award stands confirmed.
- IV. The award be drawn up as per the above modification.
- V. If any amount is paid as per the judgment and award passed by the Commissioner, the same shall be part of the award after modification.
- VI. The appeal is accordingly disposed of.

(V. K. JADHAV, J.)

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