

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO No. 498/2016**

% **19th April, 2017**

RAVI KUMAR Appellant

Through: Mr. S.N. Parashar, Advocate
with appellant in person.

versus

M/S ASHOK KUMAR & BROS. AND ANR. Respondents

Through: Mr. Rajeev M. Roy, Advocate
for R-2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not?

VALMIKI J. MEHTA, J (ORAL)

1. This first appeal under Section 30 of the Employee's Compensation Act, 1923 has been filed by the employee impugning the judgment of the Employees Compensation Commissioner dated 30.3.2016. In this first appeal appellant contends that the disability of 23% in the left leg of the appellant/claimant on account of fracture of two bones, should be taken as 100% disability, inasmuch as because of the disability, the appellant cannot perform his occupation/duties of a driver.

2. The facts of the case are stated in para 2 of the impugned judgment and para 2 reads as under:-

“2. The case of petitioner is that, that he was under the employment of respondent no.1 as Driver as his vehicle bearing no.DL-1M-5962 and was 42 years of age (DOB 1.4.70) and was getting Rs.9,000 p.m. as salary at the time of accident. On 25.2.12, as per instruction of his employer Respondent No.1, the petitioner alongwith his co-driver was driving the truck no.DL-1M-5962 loaded with egges and was proceeding from Delhi to Lucknow and on 26.2.12 at about 1.00 a.m., when the truck reached near highway near village Kotra, at the same time, a truck no. UA-04-B 4595 being driven by its driver in a rash and negligent manner came at fast speed and struck the truck of the petitioner head on. Due to this forceful impact, the petitioner had sustained multiple grivious injuries in his right leg and was taken to Gangasheed Advanced Medical Research Institute, Bareli and remained admitted for one day and on 28.2.12, he was transferred to Safdarjung Hospital, Delhi where the doctor diagnosed fracture both bones, comminuted fracture tibia LT and operated upon an external fixator was applied. Again operator on 15.5.12 and is still under treatment. The petitioner remained admitted in Safdurjung Hospital from 28.2.12 to 31.3.12 and from 7.5.12 to 14.5.12 and from 15.4.13 to 27.6.13 total admission about 100 days and he spent about Rs.1,50,000/- on his treatment. In this accident, he sustained multiple grivious injuries in his left leg resulting into 100% permanent disablement and now he can not drive the vehicle for whole life. In this regard, an FIR No. 84/12 in P.S.Passgavan Distt. Khiri, U.P. was registered against the driver of truck no.UA-04-4595. At the time of accident, he was holding valid and effective driving licence. Further, vehicle in question was insured with respondent no.2 vide policy no.1316712334000277 valid from 30.4.11 to 29.4.12 at the time of accident. In the last petitioner submitted that since accident occurred out of and in the course of employment, due to this accident petitioner received grivious injuries in his left leg and became 100% permanent disabled for his work as a driver, as such he is entitled to receive injury compensation from the respondent. Since, vehicle in question was insured with respondent no.2, hence, respondents are jointly or severely responsible to pay injury compensation to the petitioner. Hence, petitioner sought direction against the respondents.”

(underlining added)

3. The Employees Compensation Commissioner has taken the disability as 23% in terms of the disability certificate dated 25.2.2016 and which is referred to in paras 4 to 6 of the impugned judgment which reads as under:-

“4. Petitioner filed rejoinder wherein contents of reply of respondent no.2 are denied and reiterated contents of petition. Petitioner filed disability certificate by which doctors of DDU hospital assessed 23% disability in relation to left lower limb vide disability certificate no. F1(1)/DDU/MB/2016 7884 dated 25.2.16. Further, petitioner filed medical bills amounting Rs.86, 190/- incurred on his treatment.

5. Since, employee employer relationship, accident caused out of and in the course of employment and vehicle in question was insured with respondent no.2, as such, I am of the opinion that no further trial is required in the matter. On 25.2.16, during the proceedings, Ld. Counsel for respondent no.2 submitted that vehicle in question was insured at the time of accident with them and on the basis of disability certificate, if any further arguments will require, then it will be lead but Counsel for respondent no.2 did not put any further arguments on disability certificate. As such, on the basis of pleadings of the parties, I am deciding this case.

6. In view of above discussions, it is proved that petitioner Sh. Ravi Kumar was met with an accident and received injuries in left leg and according to disability certificate he became 23% permanent disabled in relation to left lower limb. Hence, he is entitled to receive injury compensation from the respondents jointly or severally. Since, vehicle in question was insured was respondent no.2, Reliance General Insurance Co. Ltd. At the time of accident, hence, respondent no.2 is liable to indemnify to the petitioner.”
(underlining added)

4. Accordingly, the Employees Compensation Commissioner calculated compensation of Rs.1,97,053/- by multiplying the factor of 178.49 into 60% of Rs. 8,000/- salary i.e Rs.4,800/- and multiplied this figure by 23% by observing as under in para 7 of the impugned judgment:-

“7. Accordingly, for calculation of compensation, age of petitioner is taken 42 years on the basis of date of birth 1.4.70 as mentioned in claim, relevant factor 178.49, Rs.9,000/- salary which is restricted by Rs.8,000/- under the Act. As such, 60% of Rs.8,000/- and 23% disability has been taken into consideration for calculation of compensation. Accordingly, compensation is calculated as under:-

$178.49 \times 4800 \times 23/100 = \text{Rs.1,97,053/-}$

In view of above calculation, petitioner is entitled to receive Rs.1,97,053/- as an injury compensation from the respondent no. 2 along with 12% p.a. simple interest from the date of accident till its realization as respondent failed to deposit injury compensation as per section 4A of the Employee's Compensation Act within 30 days from the date of accident. Further, petitioner is also entitled to receive Rs.86,190/- towards medical

expenses incurred on his treatment as per section 4(2A). Accordingly, respondent is directed to deposit **Rs.1,97,053/- (Rupees One Lakh Ninety Seven Thousand Fifty Three Only) with Commissioner, Employee's Compensation alongwith 12% p.a. simple interst, from the date of accident till its realization along with Rs.86,190/- reimbursement of actual medical expenses** incurred by him for treatment of injuries caused during the course of employment, within 30 days from the receipt of this Order, failing which same shall be recovered as land revenue.

Accordingly, order is passed.”

(underlining added)

5. Learned counsel for the appellant argues that admittedly the appellant was a driver and though the disability as per the medical certificate is 23%, the disability is such that on account of fracture of the two bones in the left lower limb, there is such a permanent disability as regards the profession of the appellant as a driver and that in fact appellant will not get the driving license on account of this disability and hence he can no longer carry out his profession of a driver.

6. The issue as to whether a partial disability will become a complete disability has been examined way back by the Supreme Court in the case titled as *Pratap Narain Singh Deo Vs. Srinivas Sabata and Another, 1976 (1) SCC 289*. In this judgment the Supreme Court by a reference to Section 2(1)(i) of the Employee's Compensation Act (then Workmen's Compensation Act) has held that there is total disablement when the employee is incapacitated of working what he was capable of working/performing at the time of accident. The relevant para of the

judgment of the Supreme Court in the case of *Pratap Narain Singh*

Deo (supra) is para 5, and the same reads as under:-

“5. The expression "total disablement" has been defined in Section 2(1)(l) of the Act as follows:

“(1)(l) ‘total disablement’ means such disablement whether of a temporary or permanent nature, as incapacitates workman for all work which he was capable of performing at the time of the accident resulting in such disablement.”

It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

“The injured workmen in this case is carpenter by profession... By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as he work of carpentry cannot be done by one hand only.”

This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to Item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.”

(underlining added)

7. The appellant is present in person in view of the directions of a learned Single Judge of this Court dated 15.12.2016. It is seen that the appellant is walking with a stick and the left lower limb is in such a condition that obviously appellant will be no longer be able to perform the duty of a driver. Though, the medical certificate may only call the disability as 23% disability, really the disability is 100% because appellant cannot perform the duty of a driver, and this is so held by the

Supreme Court in the case of *Pratap Narain Singh Deo (supra)* referred to above.

8. In view of the above discussion, this appeal is allowed. In para 7 of the impugned judgment which has calculated compensation, instead of the figure of 23% divided by 100, the figure of one will have to be taken i.e 100 by 100, and on so taking, the compensation admittedly will work out to Rs.8,56,752/-. Accordingly, it is this figure which will stand substituted for the figure of Rs.1,97,053/- in para 7 of the impugned judgment dated 30.3.2016.

9. The appeal is accordingly allowed in terms of the aforesaid observations by taking the disability of the appellant as 100% for the profession of a driver and the appellant is awarded compensation of Rs.8,56,752/- along with other benefits and reliefs as granted by para 7 of the impugned judgment dated 30.3.2016.

10. The appeal is allowed and disposed of in the aforesaid terms, leaving the parties to bear their own costs.

APRIL 19, 2017

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VALMIKI J. MEHTA, J