

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 26-03-2018

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.No.3170 OF 2007

Messers The United India Insurance Co.Ltd.,
Motor Third Party Cell,
38, Anna Salai,
Chennai-2.

...2nd Respondent/ Appellant

-vs-

1.V.Rajarathinam

2.M/s.K.R.B.Transports

...1st respondent/Petitioner

/2nd respondent/1st respondent

(R2- Remained exparte in the lower Court. Hence notice)

Appeal against the order, dated 12.10.2007, passed in
W.C.No.623 of 2006, on the file of Commissioner for Workmen's
Compensation (Deputy Commissioner of Labour-2), Chennai.

For appellant : Mr.M.Krishnamoorthy

For respondent 1 : Mr.U.Chithambaram

JUDGMENT

Challenge in this appeal is to the award passed by the
Commissioner for Workmen's Compensation-II/Deputy Commissioner
of Labour-II, Chennai, passed in W.C.No.623 of 2006, dated
12.10.2007.

2. Insurance company is the appellant. The first
respondent/claimant, while employed as a Cleaner in the lorry
bearing registration No.TN-02-5618, insured by the appellant,
suffered injuries in the accident, which had taken place on
27.09.2006. He filed a claim petition before the Commissioner
for Workmen's Compensation, for compensation, as the accident
had taken place during the course of employment and the vehicle
was covered by an insurance policy. The employer remained ex
parte.

3. In order to prove his case, the claimant examined
himself as P.W.1 and the doctor as P.W.2 and also marked Exs.A-1

to A-7. On the side of insurance company, an official was examined as R.W.1 and Exs.R-1 to R-3 were marked.

4. After considering the oral and documentary evidence, the Commissioner for Workmen's Compensation held that the employment was proved and the vehicle involved in the accident was covered by the insurance policy issued by the appellant-insurer and, accordingly, directed the insurance company to deposit the compensation.

5. Learned counsel appearing for the appellant-insurance company would contend that the employment status was not at all proved, and, even though P.W.2, Doctor, has given a disability certificate with regard to physical disability, there is no evidence with regard to loss of earning capacity, as required under Section 4 (1) (C) (ii) of the Workmen's Compensation Act. On the basis of these contentions, the following questions of law were raised :

(1) Whether the Commissioner can fix the loss of earning capacity overlooking the provisions of Section 4 (1) (C) (ii) of Workmen's Compensation Act, when there is no evidence fixing loss of earning capacity by a qualified medical practitioner ?

(2) Whether compensation is payable under the provisions of Workmen's Compensation Act for the physical disability, when there was no proof by a qualified medical practitioner about the loss of earning capacity in accordance with the provisions of the Act ?

(3) Whether the percentage of disability can be fixed contravening the percentage provided under the Schedule of the Workmen's Compensation Act ?

(4) Whether the percentage of disability can be equated with that of loss of earning capacity ?

(5) Whether the ipso facto interested oral evidence is sufficient to prove the employment and that the injuries were sustained out of and in the course of employment?

6. On consideration of the material available before this Court, it could be seen that the claimant examined himself as a witness and marked Ex.A-1/ F.I.R., which mentions him as an employee under the second respondent. When the second respondent-employer does not dispute the employment status of the claimant, it is not open to the insurance company to raise

any objection. In so far as the loss of earning capacity is concerned, it is the statutory requirement that it has to be proved by suitable evidence. Physical disability is not a substitute for notional disability. The authority has to independently assess the loss of earning capacity, on the basis of evidence with regard to the same. But, in the instant case, the first respondent/claimant has not adduced any evidence with regard to loss of earning capacity. It is only stated that he was working as a cleaner. In the absence of any proof that his earning capacity has reduced and he is deprived of his livelihood, it has to be fixed reasonably. The authority, assessing the disability at 65%, fixed the loss of earning capacity at Rs.3,14,315/-. Even in the case of amputation, Schedule to the Workmen's Compensation Act provides for 50% disability. Since the injury suffered by the respondent-claimant is fracture in both legs, this Court is of the considered opinion that the loss of earning capacity can be fixed at 55%. There is no dispute with regard to age, fixation of income, and multiplying factor, applied by the Commissioner. In such circumstances, the award of compensation is reworked as under :

$$218.47 \times 60/100 \times 3689 \times 55/100 = \text{Rs.}2,65,959/-$$

Accordingly, the award of compensation awarded by the Commissioner is reduced from Rs.3,14,315/- to Rs.2,65,959/-, by reducing a sum of Rs.48,356/-.

7. Learned counsel for the appellant-insurance company submits that the appellant has already deposited the award amount and the first respondent-claimant has withdrawn 50% of the same.

8. In view of the modification of the award of the Commissioner for Workmen's Compensation by this Court as above, the first respondent-claimant is entitled to withdraw the remaining amount with accrued interest and the excess amount lying to the credit of W.C.No.623 of 2006 shall be refunded to the insurance company. The questions of law are answered in the above terms.

9. Civil Miscellaneous Appeal is disposed of accordingly. No costs.

Sd/
Assistant Registrar

/True copy/

Sub Assistant Registrar

To

The Commissioner for Workmen's Compensation-II
(Deputy Commissioner of Labour-II),
Chennai.

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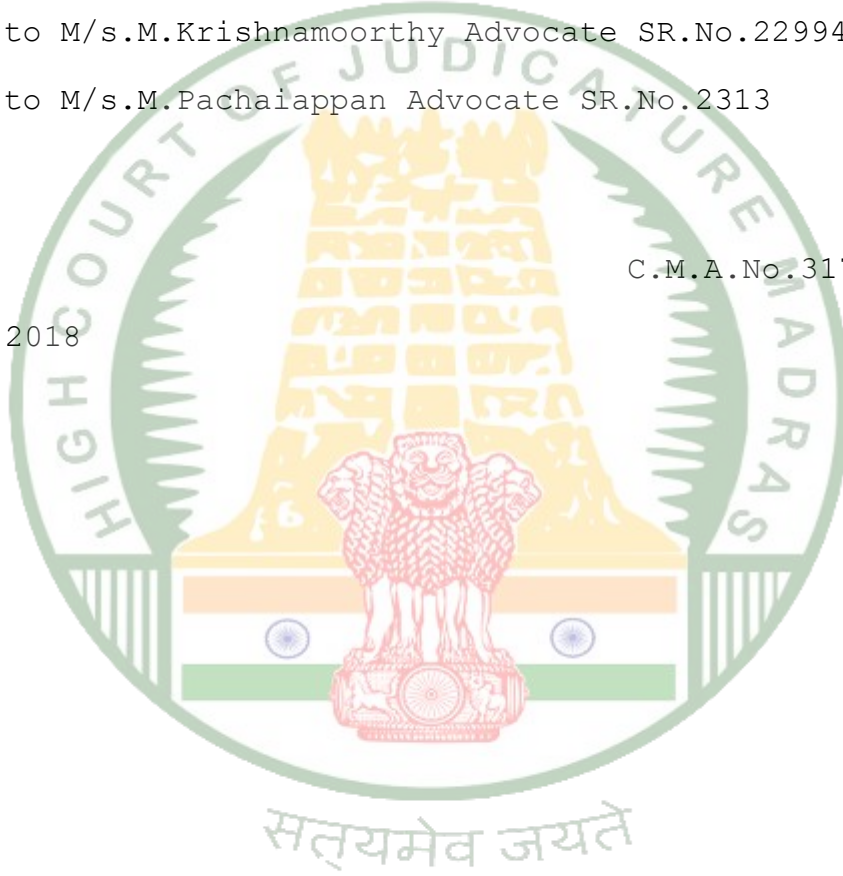
The Record Keeper,
VR Section,
High Court, Madras.

+1cc to M/s.M.Krishnamoorthy Advocate SR.No.22994

+1cc to M/s.M.Pachalappan Advocate SR.No.2313

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SDR 25.05.2018



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