

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

C.M.A.No.701 of 2007

JUDGMENT:

This Civil Miscellaneous Appeal is filed by the Oriental Insurance Company against the order dated 21.08.2006 passed in W.C.No.67 of 2005 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Eluru, West Godavari District.

The case before the lower Court was filed by one Sri S. Ramarao against four respondents but claiming compensation of Rs.4,00,000/- against opposite parties 1 & 2 jointly and severally along with interest and costs. OP-1 is the owner of the lorry bearing No.AP37U-5239, which was involved in the accident and the same was insured by OP-2/Oriental Insurance Company. The case of the applicant is that while he was working as a driver of the said lorry, he met with an accident on 26.03.2005, as a result of which, he sustained grievous injuries. Therefore, he filed a case claiming compensation.

OP-1 and OP-3 were set *ex parte*. OP-2, the main contesting respondent in WC case and the appellant in the present appeal, filed a counter denying the entire case. OP-4 denied the case and also stated that it is not a necessary party. Basing on these pleadings, the parties went to trial. For the applicant, A.Ws.1 & 2 were examined and Exs.A.1 to A.5 were marked. For the respondents, one Sri A.S.R. Prasad

was examined as RW.1 and the insurance policy was marked as Ex.B.1. Basing on the oral and documentary evidence introduced, the Commissioner awarded compensation of Rs.4,11,782/-. The same is challenged in the present appeal by the Oriental Insurance Company.

This Court has heard Sri Katta Laxmi Prasad, learned counsel for the appellant/Oriental Insurance Company; Sri Naram Nageswara Rao, learned counsel for the first respondent/applicant and Ms. A. Jayanthi, learned counsel for the fourth respondent/OP-4.

The essential point that was urged on behalf of the appellant/Oriental Insurance Company was about the assessment of the 'disability' by the Commissioner. The learned counsel strongly argued that there is any amount of discrepancy between the pleadings and the present appeal with regard to the injuries sustained. He points out that in para-5 of the petition filed, the injuries are described as follows:

“severe laceration 3 x 2 inches on right side of forehead, contusion 2 x 11 inch on right hip joint, multiple, grievous and fracture injuries on all vital parts of his body.”

Whereas, in Ex.A.2, the injuries are described as follows:

- i) Laceration on the right side of forehead.
- ii) Contusion on the right hip joint.

The injury mentioned in Sl.No.1 laceration was termed as simple, but the injury on the right hip was held to be a grievous. The learned counsel pointed out that the documentary evidence is not in consonance with the pleading. In addition, he also pointed out that a medical certificate of disability which is marked as Ex.A.3 shows that there is a fracture of the 'right tibia'. The learned counsel points out that tibia is not the same as the hip joint and that tibia is the portion below the knee. Therefore, the learned counsel argues that the assessment of disability is totally wrong in this case. At best and in the alternate, he argues that the worker is entitled to be awarded only 35% disability and not 100%.

In reply thereto, the learned counsel for the first respondent/applicant argues that the Doctor, who gave Ex.A.3-medical certificate, was examined as a witness and that there is absolutely no cross-examination on the issues that are urged now in the present appeal. He also argues that there cannot be any mathematical precision in the assessment of medical disability and that a simple injury can also cause permanent loss of earning capacity. Therefore, he argues that the assessment of loss of disability is correct in this case. He also points out that the Commissioner went through the documentary and other evidence before reaching the said conclusion. He therefore urges that there are no merits in the appeal.

This Court on an examination of the evidence notices that the injuries as described in the application are at clear variation with the injuries described in Ex.A.2. There is no injury to the 'tibia' described in the pleading or in the application. However, Ex.A.3 certificate issued by the District Medical Board, West Godavari District shows that S. Ramarao suffered an injury to the tibia resulting in 35% disability. The Doctor, who signed on this document was examined as AW.2. He deposed that there is an injury to the right tibia and stiffness. Therefore, he deposed that the injured cannot operate foot pedals freely as a driver. Unfortunately, there is no cross-examination on the 'injury' sustained. The learned counsel for the respondents is right in stating that if the appellant had such serious doubts about the actual injuries sustained, they should have confronted AW.2 about the injuries or they should have summoned and examined the Doctor who gave Ex.A.2 wound certificate in the first place. He argues that in the absence of any cross-examination, the assessment by the Medical Board under Ex.A.3 is correct.

This Court while it concurs with the appellant that there is a discrepancy between the pleading and the evidence notices that the Doctor, who gave Ex.A.3 certificate was examined as a witness. Ex.A.3 is signed by the Medical Board and is not merely a certificate issued by AW.2. AW.2-Civil Assistant Surgeon, Govt. Hospital, Eluru gave the certificate along with the other doctors. Therefore, he should have been

cross-examined if there was any serious doubt about the actual injuries sustained. In the absence of any evidence or cross-examination, this Court has to agree with the percentage of disability that is specified in Ex.A.3 and also the injury. This Court holds that the contents of Ex.A.3 mentioning the injury to the tibia cannot be overlooked or ignored.

The next question that survives for consideration is about the assessment of loss of earning capacity based upon Ex.A.3. The law on this subject is very clear. Even a small injury can lead to a total disablement. In the case on hand, the Doctor deposes that the injured cannot operate 'foot pedals' freely as driver. The Doctor however did not depose that the witness was totally incapable of performing his duty as a driver or that he is not incapable of working as driver any more. He stated that he cannot operate the foot pedals freely which means that the applicant will have some difficulty to operate the foot pedals. In his evidence, the Doctor did not depose about the loss of earning capacity. The Commissioner assessed it as 100% in the impugned order. A reading of the impugned order shows that the learned Judge relied upon ***New India Assurance Co. Ltd. v. Kotam Appa Rao***¹, wherein the Doctor deposed that the witness cannot drive at all. But, in the case on hand, the medical witness did not depose that he cannot drive at all. Therefore,

¹ 1995 (1) ALT 499

this Court holds that the assessment of loss of earning capacity as 100% is not justified in the facts and circumstances of the present case. The applicant himself has not introduced any evidence to show that he is totally incapacitated. In evidence, he merely states that he sustained grievous injuries. He did not state that he is totally incapacitated from working as a driver or because of the injury he is not able to get employment as a driver elsewhere. In the light of the available evidence and the fact that the Doctor or AW.1 did not depose that the applicant was totally incapacitated from carrying on his previous occupation as driver, this Court is of the opinion that the assessment of loss of earning capacity as 100% is not correct. As submitted during the course of the arguments by the appellant, the alternative argument about maximum disability of 35% has to be accepted and the figures supplied during the course of argument is adopted and the loss of earning capacity is assessed as follows:

$$\text{Rs.}3784 \times 181.37 \times 35/100 = \text{Rs.}2,40,206.43 \text{ paise.}$$

The Civil Miscellaneous Appeal is therefore allowed and the order of the Commissioner dated 21.08.2006 passed in W.C.No.67 of 2005 is modified to this extent and this Court holds that the liability of the appellant is limited only to Rs.2,40,206/-. The excess amount deposited and withdrawn shall be refunded to the appellant/Oriental Insurance

Company by the workman. In the circumstances of the case, there shall be no order as to costs. As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 20.04.2018

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