

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU
CIVIL MISCELLANEOUS APPEAL No.461 OF 2006

JUDGMENT:

This is an appeal filed against the order dated 03.04.2006 in W.C.No.169 of 2004 passed by the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour, Hyderabad.

The brief facts of the case are that the applicant filed the said application against B.Lakshmi Narsaiah, owner of the lorry bearing No.AP 28V 3249 and M/s.Royal Sundaram Alliance Insurance Company Limited claiming compensation of Rs.3,00,000/-. The applicant was appointed as cleaner by the Opposite party No.1 on a monthly wages of Rs.3,000/-. On 30.07.2004, when the applicant was proceeding in the said lorry during the course of his employment from Gana Atkooor to Nagavarigudem at about 16.45 hrs., an auto was coming from the opposite direction in a rash and negligent manner whereupon the driver of the said lorry tried to avoid an accident, but both the lorry and the auto collided with each other. As a result of which, the lorry fell down on the ground and the applicant sustained grievous injuries, i.e., fracture to his right tibia and other personal injuries all over his body. He was shifted to Vijayawada General Hospital and later Swapna Hospital, Hyderabad. He was aged 19 years old then. The applicant, therefore, claimed Rs.3,00,000/- as compensation under the Workmen's Compensation Act, 1923 and prayed the opposite parties to pay him the said amount of compensation.

Opposite Party No.1 was set *ex parte*. Opposite Party No.2 filed counter disputing all the averments of the applicant, as regards the applicant's employment with opposite party No.1, the

occurrence of the accident in the course of his employment, the injuries sustained, the registration of the said police case, age, wage, ownership of the said vehicle, etc. He, therefore, while disclaiming his liability to indemnify opposite party No.1 in the matter, prayed to dismiss the application.

The applicant examined himself as A.W.1 and also got examined Dr.Vasu Deva Rao as A.W.2 and marked Exs.A1 to A5. The opposite party No.2 did not adduce any oral evidence, he however, marked Ex.B1 (Insurance policy).

The Commissioner for Workmen's Compensation, after assessing the evidence, came to a conclusion and directed opposite party Nos.1 and 2 to pay a sum of Rs.3,08,810/- to the applicant. This order is now being assailed in the appeal.

Heard Sri N.Mohan Krishna, learned counsel for the appellant. Despite the postings on 06.12.2017, 11.12.2017 and 18.12.2017, there is no representation for the respondent. On 18.12.2017, the matter was reserved for orders.

The insurance company is the appellant herein. They are aggrieved essentially by the assessment of the loss of earning capacity. The learned counsel concentrated on ground Nos.4 and 5 of the grounds of appeal. He pointed out that the injury was not substantial and that the assessment of loss of earning capacity as 100% is not correct. He relied upon the documents and oral testimony to show that the applicant did not take proper treatment also. Hence, he argued that the lower Court was wrong in assessing the loss at 100%.

A reading of Ex.A1-FIR, Ex.A2-charge sheet, etc., shows that the accident occurred on 30.07.2004 and the applicant sustained

a fracture. Ex.A4 is a wound certificate of the casualty medical officer, Government General Hospital, Vijayawada. The said doctor endorsed that he could not give any opinion because the patient absconded. Ex.A3 is a discharge card dated 12.08.2004. This also states that the patient (applicant) was discharged against medical advise. Ex.A5 is a medical certificate issued by A.W.2 on 01.07.2005 which certifies the percentage of disability as 25%. It states that the right Tibia is malunited with restriction of ankle movement. The doctor certifies that the applicant will find it difficult to carry heavy weights. This doctor was examined as A.W.2. In his cross-examination, he clearly agrees that the malunion of the tibia is because the applicant is not regular to the hospital for treatment. He also admits that for curing the fracture, it will take minimum of 4 to 6 months. He also admits that he saw the patient/applicant on 01.07.2005 i.e., the date of Ex.A5 after an initial visit on 10.08.2004 (11 months earlier). He admits that he did not treat the applicant in between.

From a reading of these documents and the testimony of the doctor it is clear that

- a) the applicant did sustain a fracture in a motor accident.
- b) the applicant did not take proper care or follow medical advise as a result of which the bone/tibia did not heal properly.

These factors were highlighted by the learned counsel for the appellant and in the opinion of the Court rightly so. As a corollary to this, this Court must hold that the assessment of loss of earning capacity by the Commissioner as 100% is clearly wrong. Clearly this injury is not specified in Schedule-I (Part-I or II). The doctor

also did not specify the loss of earning capacity in Ex.A5 but merely specified the percentage of disability as 25%. The available evidence suggests that the applicant had sustained an injury but he compounded the problem by not taking proper and timely treatment. A.W.2 also states in his certificate (Ex.A5) that he cannot carry heavy weights. Therefore, a reading of the document and evidence suggests that the disability is not very high and the loss of earning capacity is also not very high particularly as he was employed as a 'cleaner' of the lorry. The assessment of loss of earning capacity as 100% is thus not based on the evidence on record. The Commissioner overlooked the fact that the applicant did not take proper or correct treatment. Although, the learned counsel argued that A.W.2 was a party to the fraud in this case; his evidence shows that he was fairly clear in his evidence. He clearly deposed that the malunion of tibia was due to the fact that the applicant was not regular in his treatment. This Court in order to do complete justice and in line with the earlier decisions of this Court in ***N.Sree Ramulu and Others v. B.Lakshmi Narayana (died) and others¹*** and ***Gona Sivasankar v. K. Varaprasad and another²*** decided to assess the loss of earning capacity itself instead of remanding the matter on this limited aspect. As Ex.A5 is given almost one year after the accident and the applicant was also negligent; the loss of earning capacity due to the accident is assessed as 15%.

In respect of the age, salary and application factor, there is no serious dispute between the parties nor is any material placed before this Court on these factors. The loss of earning capacity is

¹ 2013(5) ALD 249

² 2005(1) ALD 386

assessed as 15% and the resultant calculation is: $15/100 \times 2277 \times 225.22 = \text{Rs.}76,923.89$ ps.

Therefore, the appeal is allowed in part reducing the compensation from Rs.3,08,810/- to Rs.76,923.89 ps. to which the applicant is entitled to. No costs.

The Miscellaneous Petitions, if any, pending shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date : 23.01.2018
ssp

