

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

CMA No. 799 of 2007

J U D G M E N T :

This is an appeal filed against the order dated 15.01.2006 in WC.No.12 of 2004 passed by the Commissioner of Workmen's Compensation and Assistant Commissioner of Labour, Mahabubnagar.

The case of the applicant is that he was working as a Driver on the lorry bearing No.AP 02V 0136 belonging to first opposite party. Second opposite party is the insurer of the lorry. Stating that the said lorry met with an accident and that the applicant sustained severe multiple injuries, he filed the present application for compensation for the injuries sustained during and in the course of employment. He prayed for compensation of Rs.4,00,000/- together with interest. First opposite party remained *ex parte* and second opposite party filed counter denying the entire accident and what all stated in the claim petition.

On behalf of the applicant, he himself was examined as a witness-AW.1 and the Doctor, who treated him was examined as a second witness-AW.2. For the applicant, Exs.A1 to Exs.A.11 were marked. None appeared as a witness and no documentary evidence was marked for the opposite parties. The Doctor, who issued Ex.A.5 Disability

Certificate stated that the applicant suffered physical disability at 35% as per Mc.Bride Scale and it will be difficult for the applicant to walk normally. He denied that stiffness of knee results only if there is a fracture of patella and knee and said that the disability is permanent and partial. After considering the documentary and oral evidence, the Commissioner for Workmen's Compensation passed the impugned order, wherein he directed payment of compensation of Rs.1,82,356/- by both the opposite parties 1 and 2 jointly and severally. It is this order that is now assailed in the current appeal.

This Court heard Smt. S.A.V. Ratnam, learned counsel for the appellant and Sri Venkatesh Gupta, learned counsel for the respondents.

The essential questions that are raised by the appellant/Insurance Company in this appeal are about the employer/employee relationship and the assessment of loss of earning capacity.

The learned counsel for the appellant argued that except Exs.A.1 to A.7, there is no documentary evidence filed to show that the injured/applicant was an employee of the first opposite party. It is the contention of the learned counsel for the appellant that in the absence of corroborative evidence, the employer/employee relationship is not proved and therefore, the award of the lower Court is wrong.

With respect to the second issue that was argued, it is the contention of the learned counsel for the appellant that the Doctor has assessed the disability at 35% only and thereafter, the Commissioner was wrong in assessing the loss of earning capacity as 50%. On both these grounds, the learned counsel assailed the order of the lower Court.

In response thereto, the learned counsel for the contesting respondent argued that in cases of this nature, particularly in an unauthorized sector, the preponderance of probability should be seen and a hyper-technical view cannot be taken.

It is the contention of the learned counsel for the respondent that if all the available documents are perused in seriatum, they will lead to a conclusion that the applicant was the Driver of the said lorry and that he was injured in the said accident. He points out that no specific question was put to him stating that he was not a Driver of the said lorry and that he was not involved in the accident on 24.02.2001. On the contrary, a suggestion was put to him that he was a passenger on the said vehicle and not a Driver.

A reading of the documents filed in the lower Court do go to show that the applicant was the Driver of the vehicle in question and that he was involved in the accident on that date. Therefore, this Court holds that the applicant was the Driver of the vehicle in question, which is involved in the

accident, which belongs to first opposite party. There is no evidence to the contrary to disprove this.

The next point that is urged is about AW.2 Doctor's evidence and the fixation of the disability at 35%. The Civil Surgeon, who was examined by the applicant as AW.2 gave Ex.A.5 wherein the percentage of disability is assessed as 35%. In the cross-examination, the Doctor said that the disability is permanent and partial and it will be difficult for the applicant to drive a heavy vehicle in future. He also deposed that the applicant will not be able to walk normally.

In the light of this evidence, this Court is of the opinion that the assessment of loss of earning capacity at 50% is not really arbitrary or incorrect.

As was held in the judgment in **Gona Siva Sankar v. Varaprasad**¹, the Commissioner has the power to assess the disability in case the Doctor does not assess the disability.

In the case on hand, the Doctor's assessment of physical disability at 35% is not really contradicted by the cross-examination. There is no material available to show that the said assessment is wrong. As was held in the judgment in **Gona Siva Sankar's** case (1 supra) and **Dr. Jacob Eapen vs. Kerala State Road Transport Corporation and Another**², there cannot be a mathematical precision in the assessment of loss of earning capacity.

¹ 2005 (1) ALD 386

² 1988 ACJ 1

The order passed by the lower Court is a reasoned and well thought out award and no grounds are urged or proved to interfere with the said order. Hence, the impugned order is confirmed and the appeal in question is dismissed. No order as to costs.

Consequently, miscellaneous petitions, if any, pending in this appeal shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 02.02.2018
KLP

