

HONOURABLE SRI JUSTICE N. BALAYOGI
CIVIL MISCELLANEOUS APPEAL No.470 of 2009

JUDGEMENT:

In spite of posting the matter finally, none appeared for both sides. Already heard the matter. Having heard the matter earlier, it is not appropriate to keep the matter pending except to pass orders.

2. The appellant/applicant aggrieved by the Order in W.C.No.14 of 2004, dated:12-09-2005 on the file of the Commissioner for Workmen's Compensation and the Assistant Commissioner of Labour-II Circle, Guntur, (for short, the Commissioner), assessing the age of the applicant as 32 years basing on the date of birth as 03.02.1971 mentioned in driving license under Ex.A8 and taken corresponding age factor 203.85 and applied minimum wages as per G.O.Ms.No.30, L.E.T & F.(Lab-II) Department, dated:27-7-2000 as on the date of accident at Rs.3,427/- (including V.D.A) being the lower is taken as wage. As such, compensation payable is Rs.62,873/- besides stamp duty of Rs.123/- totaling to Rs.62,999/- are directed to deposit the said amount of Rs.62,999/- by way of demand draft drawn in favour of the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Guntur, within 30 days from the date of receipt of copy of the order. If they fail to deposit the awarded amount within the specified period, they have to pay interest @ 8% per annum from the date of accident to the date of realization in

addition to penalty that may be imposed under section 4-A (3) of the Act, preferred this Appeal.

3. The contention of the appellant/applicant is that, the Commissioner while awarding compensation ought to have considered evidence of AWs.1 and 2 and documents filed under Exs.A1 to A13 and that he sustained injuries all over the body and bleeding injuries on head and his right ankle part was fractured and badly crushed and further he suffered nine sutures on head and should have awarded compensation as claimed.

4. It is the further contention of the appellant/applicant that he under gone surgery on right leg on 1.1.2003 and steel plate was inserted at ankle part and he was in patient in Government General Hospital, Guntur for 15 days and he was advised bed rest for three months after accident. The Commissioner failed to note the fact while granting compensation that the appellant/applicant received grievous injury to ankle, movement of foot was arrested due to head injury caused in accident and sutures on head, vision of right eye was reduced and in fact the appellant is not in a position to walk properly without the assistance of anybody. Therefore, the Commissioner, erred by taking disability of 15% as assessed by AW.2 doctor who treated the appellant /applicant and further, the Commissioner ought to have taken percentage of loss of earning capacity as 100% and awarded amount as claimed.

5. None appeared for the respondents and advanced their arguments.

6. The brief claim of the appellant/applicant is that the appellant was under employment of the respondent No.1 on his lorry bearing No.A.P.-7T-5135 as Driver. While so, on 16.12.2002 at about 10.00 a.m., during the course of employment of appellant while driving the said lorry bearing No.AP-7T-5135, at the same time, goods vehicle bearing No.AP-21U-5169 came in opposite direction of lorry of applicant, both vehicles colluded head to head. As a result, appellant's right leg was penetrated into the engine part, besides sustained injuries all over the body and bleeding injuries on head. Right ankle part was fractured and badly crushed. He took first-aid in Bangla Government Hospital and 9 sutures were laid on head. Thereafter, he was shifted to Government General Hospital, Guntur. A criminal case in Crime No.359/2002 was registered on the same day against the appellant and driver of lorry No.AP-21U-5169.

7. Further, appellant/applicant was admitted in Government General Hospital on 17-12-2002 and thereafter under gone surgery to his right leg on 01-01-2003, steel plates were inserted at ankle part. He took treatment as in –patient in Government General Hospital, Guntur for fifteen days. After discharge from the said hospital, he took three months bed rest in his house and after three months dressing to right leg was removed. Due to grievous injury to ankle, movement of foot was arrested. Further, due to head injury and

sutures, vision of right eye was reduced. In fact, he is not in a position to walk properly without assistance at present. Before the Commissioner, AW1 and AW2 were examined and Exs.A1 to A13 were marked. No oral and documentary evidence is produced by the respondents.

8. The following are the issues that arose for consideration before the Commissioner:

1. Whether the applicant sustained permanent partial disability due to an accident arising out of and in the course of employment?

2. If so, for what compensation, the applicant is entitled and who are liable to pay?

9. The point that arises for determination is”

Whether the Commissioner erred in assessing loss of earning capacity as 15% and awarding only Rs.62,999/- suffer from any legal infirmity warranting interference?

10. The main contention of the learned Counsel for the appellant is that due to restricted movement of foot, appellant became permanently disabled and unable to drive lorry and therefore, his earning capacity can be considered at 100% and award the amount.

11. The appellant/applicant was examined as AW.1, besides doctor was examined as AW.2.

The consistent evidence of AW.1 is that he worked as Driver on vehicle – lorry bearing No.AP-7T-5135 under the respondent No.1 and the same is insured with respondent No.2 which was in force with effect from 14.3.2002 to 13.3.2003. His further evidence is that on 16-2-2002 at about 10.00am, during the course of his employment, while he was driving the said vehicle on national highway-9, goods vehicle bearing No.AP21U 5169 came in opposite direction, both the vehicles colluded head to head. As a result, his right leg was penetrated into the engine part, besides sustained injuries all over the body and bleeding injury on head. His right ankle part was fractured and badly crushed. He took first-aid in Bangla Government hospital and 9 sutures were laid on his head. After this, he was shifted to Government General Hospital, Guntur and admitted in this hospital on 17-12-2002 and the Orthopaedic Surgeon conducted surgery on his right leg on 1.1.2003. Steel plates were inserted at his ankle part. He took treatment in the Government hospital for fifteen days and at the time of discharge from hospital, his right leg was dressed and doctors advised him bed rest of three months.

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It is the further evidence of AW.1 that, after three months when he approached hospital, doctor removed dressing and further advised to take three months bed rest. That, due to grievous injury to his ankle, movement of the foot was arrested. Due to head injury, vision of his right eye was reduced and he is not in a position to move.

It is the further evidence of AW.1 that, he issued notice dated:13.09.2003 under Ex.A1 to both insured and insurer of lorry bearing No.AP 7T.5135. It is clearly stated that he was under the employment of respondent No.1. Further, with regard to injuries also, he told the same for which notice sent to respondent No.1-owner of lorry which was returned under Ex.A2. Whereas, the Insurance Company gave reply under Ex.A3 stating that neither the owner nor the driver intimated about the alleged accident and the Insurance Company denied injuries and disability and directed the appellant/applicant to send relevant papers pertaining to the accident and other police record.

It is also the further evidence of AW.1 that a case in Crime No.359/2002 was registered against AW.1 and the driver of the opposite lorry vehicle bearing No.AP.21U 5169. To substantiate the same, he filed Ex.A5, original FIR and Ex.A4 is the translated copy of the FIR.

Further, Ex.A6 is the copy of charge sheet which support the evidence of AW.1. Ex.A7 is the receipt dated:19-8-2003 issued by the Civil Judge (Jr.Dn.) and JMFC, Basavakalyan, in proof of collecting fine of Rs.500/- which is signed by AW.1 in S.C. No.503/2003.

It is the further evidence of AW.1 that immediately after accident, he was shifted to Bangla Government Hospital for first-aid and thereafter he was shifted to Government General Hospital,

Guntur for further treatment. Ex.A9 is the O.P. chit issued by the Government General Hospital

That, the consistent evidence of AW.1 supported with Exs.A1 to A.13 established that AW.1 was appointed as Driver by respondent No.1 on his lorry AP-7T-5135 and that the accident occurred during the course of his employment and accordingly, there is employer and employee relationship between respondent No.1 and thus, the finding of the Commissioner suffers from legal infirmity warranting interference.

12. Further, the evidence of AW.2 is that AW.1 admitted in the hospital on 17-12-2002 and under went surgery on right leg on 1.1.2003 and steel plate was inserted at ankle part. He took treatment as in-patient in Government General Hospital, Guntur for fifteen days. After discharge from the said hospital, he took three months bed rest in his house and after three months dressing to right leg was removed. Due to grievous injury to ankle, movement of foot was arrested. Further, due to head injury and sutures, vision of right eye was reduced. That Exs.A.10 and A.11 are X-rays of the appellant.

13. Further, appellant did not file any disability certificate issued by the competent authority. But the evidence of AW.2 is that AW.1-appellant/applicant sustained injuries resulting in permanent partial disability of 15 to 20% due to accident and basing on the evidence of AW1 and AW2, injuries mentioned in the case sheet and intimated

under Exs.A1 to A3 came to conclusion that disability due to restricted movement of right foot is assessed at 15% and the loss of earning capacity is taken as 15%.

14. The main contention of the appellant is that since he is a driver and foot movement is restricted, is unfit to drive lorry due to injuries caused in accident on 16-12-2002 and he became permanent impair in lower limbs and therefore, the Commissioner ought to have granted 100% loss of earning capacity instead of 15% as he is unfit to drive lorry due to permanent impair in lower limbs.

15. In support of his contention, appellant relied upon the decision of the Apex Court, in the case of **K. Janardhan v. United India Insurance Co. Ltd.**,¹ where the Apex Court held as under:

“The appellant herein has also suffered a 100% disability and incapacity in earning his keep as a tanker driver as his right leg had been amputated from the knee. Additionally, a perusal of Sections 8 and 9 of the Motor Vehicles Act, 1988 would show that the appellant would now be disqualified from even getting a driving licence.”

Therefore, in the said appeal, the order of Commissioner, on the basis of 100% disability granting compensation of Rs.2,49,576/- and interest @ 12% from the date of accident was allowed by setting aside the judgment of the High Court and restored Order of the Trial Court.

¹ (2008) 8 SCC 518

16. Similarly, this High Court, in the case of **NEW INDIA ASSURANCE COMPANY LIMITED, SECUNDERABAD v. K. YADIAH AND ANOTHER**,² where the High Court held that as under:

“The estimation of disability at 60% made by the doctor is only physical and not related to the earning capacity. Having regard to the fact that the injuries suffered by the injured which do not form part of the schedule, resulted in permanent disability of his participation in the occupation in which he had been involved. It is not in dispute that he was a driver by occupation. There is nothing on record that the injured person was able to do any other job. In other words, he was a professional driver and his services would all along be utilized only as a driver. Even otherwise, as opined by the doctor, because of those injuries, he cannot bend forward his limb forever, and with that disability, he cannot be expected to have an earning capacity at 100% as he was getting before.

17. Further, the High Court of Madhya Pradesh, Indore Bench, in the case of **MISHRILAL v. NIRMAL KUMAR AND ANOTHER**, 2005 ACJ 298³, wherein it was held as under:

“The workman was unfit to do his original job as Shunting Master, his capacity to work was held just in relation to the work for which he was engaged at the time of accident and not that such workman could work on another job with lighter duties. There had been absolutely no evidence that the employer had continued the appellant in his employment and assigned some lighter work on the same pay. Thus, certainly the Commissioner had erred in not taking the disability of the appellant as total permanent disablement.”

18. Similarly, in the instant case, the evidence of AW.1 and AW.2 corroborated and established that AW.1 sustained injuries all over the

² 2005 (3) ALD 509

³ 2005 ACJ 298

body and bleeding injuries on head and his right ankle part was fractured and badly crushed. Due to grievous injury to ankle, movement of foot was arrested. Further, due to head injury and sutures, vision of right eye was reduced. He was admitted in hospital for fifteen days and after discharge from the hospital as advised by the doctor, he took bed rest for three months and after three months dressing to right leg was removed. It is the evidence of AW1 and AW2 that due to grievous injury to ankle, movement of foot was arrested and therefore, he was not in a position to move and walk and to attend regular duties.

19. That, as discussed by the Apex Court in the case of **K. Janardhan v. United India Insurance Co. Ltd., (2008) 8 SCC 518**, where the Apex Court held that the appellant herein has also suffered a 100% disability and incapacity in earning his keep as a tanker driver as his right leg had been amputated from the knee. Additionally, a perusal of Sections 8 and 9 of the Motor Vehicles Act, 1988 would show that the appellant would now be disqualified from even getting a driving licence. Further, in the case of **NEW INDIA ASSURANCE COMPANY LIMITED, SECUNDERABAD v. K. YADIAH AND ANOTHER**, the High Court observed that, even otherwise, as opined by the doctor, because of those injuries, he cannot bend forward his limb forever, and with that disability, he cannot be expected to have an earning capacity at 100% as he was getting before. Therefore, the Commissioner erred in taking disability

of 15% as assessed by the doctor-AW.2 who treated the appellant. Since the appellant is a driver and foot movement is restricted, is unfit to drive lorry due to injuries caused in accident and he became permanent impair in lower limbs and therefore, the Commissioner would have granted 100% loss of earning capacity instead of 15% as appellant cannot be expected to have an earning capacity at 100% as he was getting before.

20. Further, the appellant did not produce any proof of date of birth. In the absence of proof of date of birth, Ex.A8-driving license of AW.1 shows that he possessed driving license of both transport and non-transport, authorized to drive the vehicle-HGV, HPV, LMV with Badge No.28601 and the date of birth mentioned therein as 03.02.1971. Whereas, the accident occurred on 16.12.2002. Therefore, the Commissioner, rightly assessed the age of the appellant as 32 years and applied the age factor as 203.85. Further, in the absence of any concrete proof as to the wages, the Commissioner, rightly took the minimum wages as per G.O.Ms.No.30, dated:27.7.2000, on the date of accident is Rs.3,427/- (including VDA).

Thus, as per formula, the following is the calculation:

$$\text{Rs.3,427} \times 60/100 = 2,056.20 \times 203.85 = \text{Rs.4,19,156.37 plus}$$

$$\text{stamp duty of Rs.123} = \text{Rs.4,19,279.37P.}$$

Therefore, the respondents 1 and 2 shall deposit an amount of Rs.4,19,279.37P towards compensation payable to the appellant/applicant by way of demand draft drawn in favour of the Commissioner for Workmen's Compensation and Deputy Commissioner of Labour, Guntur within thirty days from the date of receipt of copy of this Order, by deducting the amount, if any, already paid to the credit of W.C. No.14 of 2004.

Moreover, interest also to be paid at the rate of 9% from the date of accident ie., 16-12-2002, till the date of realization.

Advocate fee of Rs.2,000/- is fixed.

21. In the result, the Civil Miscellaneous Appeal is disposed of by modifying the order dated:12.9.2005 in W.C. No.14 of 2004 on the file of the Commissioner for Workmen's Compensation and Assistant Commissioner of Labour-II Circle, Guntur.

Miscellaneous Petitions, if any, pending in this Appeal, shall stand closed.

JUSTICE N. BALAYOGI

Dated:20-04-2018

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DATED:20-04-2018

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