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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated :12.09.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.A.No.1148 of 2013

E.K.Imran

... Appellant

Vs.

1. D.Sekar

2. M/s Royal Sundaram Alliance Insurance Co., Ltd.,
No.46, Whites Road, Royapettah,
Chennai - 600 014

... Respondents

Civil Miscellaneous Appeal is filed under Section 30 of Workmen Compensation Act 1923, against the order passed by the Deputy Commissioner for Workmen Compensation - I, Chennai - 600 006 in W.C.No.229 of 2010 dated 17.12.2012.

For Appellant : Mr.T.G.Balachandran

For Respondents : Mr.M.Krishnamoorthy for R2

R1 : Exparte

J U D G M E N T

The appellant has preferred this Civil Miscellaneous Appeal against the Order in W.C.No.229 of 2010 dated 17.12.2012 passed by the Deputy Commissioner for Workmen Compensation - I, Chennai - 600 006 by raising the following substantial questions of law for consideration:-

(i) Whether the 60% of partial permanent disability reduced to 45% disability for the purpose of compensation by the Deputy Commissioner of Labour without any contra evidence by the 2nd respondent or any other material on record is correct?

(ii) Whether the facts and circumstances of the case establish that the loss of earning power by the appellant has to be treated as 100% instead of 45% fixed by the Deputy Commissioner of Labour?



(iii) Whether the order of the Deputy Commissioner of Labour granting interest after failure by the 2nd respondent to pay the award amount within 30 days of receipt of the copy from the Court is legal?

(iv) Whether the granting of interest after failure of the 2nd Respondent to pay the award amount within 30 days from the receipt of the order is just?

(v) Whether the compensation of Rs.4,41,590/- granted by the Court below is sufficient under the facts and circumstances of the case?

2. The appellant has raised various grounds in the present appeal, and the same are as under:-

(a) The lower court has passed a very low award amount of Rs.4,41,590/- against the claim of Rs.5,00,000/-.

(b) The court below has not considered the permanent disability of 60% in total for the fracture of left leg both bones, left femur and right ankle, which is not justifiable.

(c) The reduction of partial permanent disability to 45% for the purpose of determining loss of earning power is unjust.

(d) The appellant was aged 18 years at the time of accident, the loss of earning capacity was fixed at 45% as against 60% disability fixed by P.W.2, Doctor and the same has to be enhanced to 100%, in view of the inability sustained by the appellant to do the job of loadman, as earlier, which requires physical strength to move limbs of the body effectively and the same was lost in total.

(e) The claim of the appellant is that he was earning Rs.6,000/- per month, which was just and reasonable and the same does not warrant any reduction.

(f) The interest period ought to have been granted after 30 days from the date of accident and not from the date of 30 days from the date of receipt of copy of the order.

3. The case of the appellant is that he was a loadman working in a lorry bearing registration no.TN-23-BZ-4362 at Chinnayanchattiram opposite to Annai Flour Mill. On 03.04.2010, around 3.15 a.m., the driver of the lorry bearing the said registration number had driven the lorry rashly and negligently and colluded with another lorry bearing registration No.AP-03-X-8238 standing on the left side of it resulting in grievous injuries to the appellant.

4. According to the appellant, due to the said accident, he had sustained bone fractures in left leg, left femur and



fracture at right ankle. He had given treatment at Government Hospital, Kancheepuram and thereafter, at C.M.C. Hospital, Vellore from 04.04.2010 to 13.04.2010 as inpatient and thereafter, treated as outpatient. The appellant, who was 18 years old at the time of accident, was earning Rs.200/- per day and on average, a sum of Rs.6,000/- per month. The 1st respondent, who had insured the said lorry with the 2nd respondent are liable to compensate the appellant for the injuries sustained. The insurance policy no.VGCO119862000100 is valid for the period from 06.10.2009 to 05.10.2010. The appellant, who had sustained 100% disability and could not work as he did earlier, had issued a legal notice to the 1st and 2nd respondents on 23.09.2010, praying compensation of Rs.5,00,000/-.

5. The 1st respondent, did not file any counter. But the 2nd respondent has filed a counter denying the averments pleaded by the appellant. The 2nd respondent averred that the appellant has not proved employee-employer relationship existing between the appellant and the 1st respondent. There was no documentary evidence produced and the injuries sustained did not show that the appellant has sustained 100% disability.

6. The learned Deputy Commissioner of Labour I at Chennai has considered the issues on hand and after going through the documents produced by the appellant from FIR to documents relating to the treatment undertaken and also the legal notice, RC Book, Insurance Policy copies, School Leaving Certificate, Medical bills, disability certificate, X-ray etc., and the evidence given by the parties, has come to the conclusion that the 1st respondent is the owner of the vehicle and he is the employer and the appellant is the employee. When the salary certificate has not been produced, the authority has taken note of Minimum Wages Act and an amount of Rs.5,550/- was fixed as salary and as per the record sheet, his age was taken as '18'. The Doctor's evidence and Ex.P.11, disability certificate was taken into account, which showed that the appellant had suffered fracture in both the legs, left femur and right ankle and it was seen that the appellant was not able to walk properly, however with hardship, he used to do his regular activities and the court below has arrived at 60% disability. The lower court has come to the conclusion that 45% earning capacity has been lost and arrived at a sum of Rs.4,41,590/- and directed the 2nd respondent, who was an insurer to pay a sum of Rs.4,41,590/- within 30 days from the date of receipt of copy of the order, failing which directed to deposit the same with 12% interest from the date of accident till the date of deposit. Aggrieved against the same, the appellant is before this Court.



7. The learned counsel for the appellant would rely upon various Judgments in support of his contention and the same are extracted hereunder:

(i) Judgment of Hon'ble Supreme Court reported in (1976) 1 Supreme Court Cases 289 [Pratap Narain Singh Deo V. Srinivas Sabata and Another] wherein the expression 'total disablement' has been defined and the same runs as under:

'5. The expression 'Total Disablement' has been defined in Section 2(1) (i) of the Act as follows:

1. "(1) 'total disablement' means such disablement, whether of a temporary or permanent nature, as incapacitates a workman for all work which he was capable of performing at the time of the accident resulting in such disablement." It has not been disputed before us that the injury was of such a nature as to cause permanent disablement to the respondent, and the question for consideration is whether the disablement incapacitated the respondent for all work which he was capable of performing at the time of the accident. The Commissioner has examined the question and recorded his finding as follows:

"The injured workman in this case is carpenter by profession....By loss of the left hand above the elbow, he has evidently been rendered unfit for the work of carpenter as the work of carpentry cannot be done by one hand only." This is obviously a reasonable and correct finding. Counsel for the appellant has not been able to assail it on any ground and it does not require to be corrected in this appeal. There is also no justification for the other argument which has been advanced with reference to item 3 of Part II of Schedule I, because it was not the appellant's case before the Commissioner that amputation of the arm was from 8" from tip of acromion to less than 4 1/2" below the tip of olecranon. A new case cannot therefore be allowed to be set up on facts which have not been admitted or established.'

In the said case, it is held that Carpenter by profession, on loss of the left hand above the elbow, is evident that he is unfit for the work of carpenter, as the work of carpentry cannot be done by one hand only.

(ii) Judgment of Hon'ble Supreme Court reported in 2010 (2)



TN MAC 581 (SC) [Raj Kumar V. Ajay Kumar & Another] wherein for 'Loss Earning Capacity', it is held as under:

'.....But, if on basis of medical evidence, disability is found to be permanent disability, Tribunal has to determine whether such Permanent Disability affected earning capacity and the Tribunal has to ascertain what activities claimant could carry on, inspite of permanent disability and what he could not do as a result of Permanent disability and to find out whether the claimant is totally disabled from earning any kind of livelihood or whether inspite of Permanent disability, claimant could still effectively carry on activities and functions which he was earlier carrying on, or whether he was prevented / restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities or functions so as to continue to earn livelihood.'

In the above said case, it is stated that the Court has to take into account as to whether what activities the injured / claimant could carry on inspite of permanent disability and what he could not do, where the loss of future earning capacity is taken as 100%.

(iii) This Court's Judgment in C.M.A.No.2198 of 2013 dated 13.02.2018 [R.Ussain Babu V. K.Prakash and another] wherein it has been rendered that due to the accident, the person, who sustained injury suffered from headache and giddiness and advised to take continuous treatment and therefore, the claimant, who was a driver in that case, found it difficult to continue his avocation and therefore, the disability suffered by the claimant was taken into account and the award amount was modified.

8. The learned counsel for the appellant would submit that the Commissioner has merely arrived at a conclusion and awarded an apt amount for the disability sustained by the appellant therein and in support of the same, relied on the Judgment of this Court reported in 2004(1) TNMAC42(DB) [New India Assurance Company Ltd., V. Ponammai & Others] wherein it is held that 'loss of earning capacity cannot be proved by a mere medical evidence and must be proved by evidence which establish that workman was, as a result of injury, unable to earn as much as he did before. A question of fact to be proved by evidence like any other question of fact depends upon factual materials placed before the Authority. The best estimate that can be given is by those people, who would have the opportunity of seeing the workman work before and after the accident. The loss of earning capacity is not a matter of medical opinion and is not a matter



to which a medical witness can possibly speak. The loss of earning capacity is not necessarily co-extensive with the loss of physical capacity and certainly the former does not prove the latter'.

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9. Heard the learned counsel on either side and perused the documents placed on record.

10. During the trial, before the authority, on the side of the appellant/ claimant, Mr.T.G.Balachandran, learned counsel for claimant and Dr.K.J.Mathiazhagan, Doctor was examined and Exs.P.1 to 13 were marked and no one was examined on the side of the respondents and no document was marked on their side.

11. The court below, after considering the oral and documentary evidence, has come to the conclusion that the accident occurred only due to the negligence of the driver of the 1st respondent and since the appellant has worked with the 1st respondent at that point of time, rightly stated that the appellant sustained injuries, while he was working with the 1st respondent. The lower court, taking note of Wages fixed by the Government of Tamilnadu, has fixed a sum of Rs.5,550/- as monthly income and also taking note of Ex.P.9, Record Sheet, has fixed the age as '18', which in the considered opinion of this Court, does not warrant any interference. However, while the court below has accepted the Doctor's evidence, who has given Ex.P.11, disability certificate, which shows that the appellant has suffered 60% disability, but the court below has fixed only 45% as loss of earning capacity, which is not accepted by this Court because of the reason, the appellant has suffered bone fractures at two places in the left leg, bone fracture at left femur, further, suffered fracture at right ankle and on account of the same, the appellant could not even walk properly, from which it is evident that he cannot do the work as a load man, as he was doing before the accident and hence this Court, hereby fixes the Loss of earning capacity as 50% instead of 45% fixed by the court below. Accordingly, the award passed by the court below is modified as under:

Award passed by the Court below:

60/100 x 5550 x 227.49 x 45/100	= Rs.3,40,894/-
Medical Expenses	= Rs.1,00,696/-
Total	= Rs.4,41,590/-

Amount enhanced by this Court:

60/100 x 5550 x 227.49 x 50/100	= Rs.3,78,771/-.
Medical Expenses	= Rs.1,00,696/-
Total	= Rs.4,79,467/-

12. Taking note of the dictum laid down by the Hon'ble



Supreme Court in the Judgment reported in 1976 A.C.J.141 [Pratap Narain Singh Deo V. Shrinivas Sabata and Another], wherein it has been held that the word 'falls due' as specified under Section 4-A of the Employee's Compensation Act, 1923, denotes the date of accident and not the date of order passed by the authority, and therefore, the claimant is entitled for interest, after 30 days from the date of accident and the same has been followed by this Court in C.M.A.No.2198 of 2013 dated 13.02.2018 and hence, this Court, being bound by the judgment of the Hon'ble Supreme Court cited supra, is inclined to direct the 2nd respondent/Insurance Company to deposit the enhanced amount of Rs.4,79,467/- within a period of four weeks from the date of receipt of a copy of this order, along with appropriate interest at the rate of 12% per annum from the 31st day of accident, till the date of deposit, less the amount already deposited, if any, to the credit of W.C.No.229 of 2010.

In the result, this Civil Miscellaneous Appeal is allowed.
No costs.

Sd/-
Assistant Registrar(CCC)

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Sub Assistant Registrar

ssd

To

1. The Deputy Commissioner for Workmen Compensation - I,
Chennai - 600 006
2. The Section Officer,
VR Section,
Madras High Court,
Chennai

+1cc to M/s.T.G.Balachandran, Advocate SR.78268/19
+1cc to M/s.M.Krishnamoorthy, Advocate SR.78599/19

C.M.A.No.1148 of 2013

GP(CO)
CB(07/01/2020)