IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 14.03.2019

C O R A M
THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

C.M.A. No.848 of 2015

N.Palaniappan ... Appellant/Applicant

Vs.

1.V.R.Duraisamy

2.United India Insurance Company,
No.2, Dr.Shankaran Road,
Namakkal Town & District. ... Respondents/Respondents

PRAYER: Civil Miscellaneous Appeal filed under Section 30 of Workmen Compensation Act, 1923, against the order dated 28.07.2012 made in W.C.No.530 of 2006 on the file of Deputy Commissioner of Labour, Salem.

For Appellant : Mr. C.Thangaraju

For Respondents: Mr. T.Ravichandran [for R2]

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O R D E R

The Civil Miscellaneous Appeal has been filed by the appellant against the order dated 28.07.2012 made in W.C.No.530 of 2006 on the file of Deputy Commissioner of Labour, Salem.

2. The claimant is the appellant before this Court. The claimant was employed as a driver of lorry bearing Registration No.HR-66-A-9259 under the 1st respondent. On 03.04.2006 at around 5.00 a.m., while he was sleeping on the lorry suddenly fell down and suffered fracture in his left leg, hip and grievous injuries all over the body. He was admitted in the hospital and was treated as an inpatient from 03.04.2006 to 24.04.2006. After undergoing surgery at Sushila Hospital Barmathi, he was admitted in CMC Hospital, Vellore on 05.12.2007 for further treatment. In view of the hip replacement surgery and other injuries, he could not continue to work as a driver and cannot stand for a long time, sit, and walk. Due to the injuries, he cannot earn for his livelihood. Hence, the appellant filed the petition for compensation under Employees Compensation Act. He was paid monthly salary of Rs.6,000/- and Rs.100/- as daily batta,

totally Rs.9,000/- per month. Therefore, he claimed a compensation of Rs.6,00,000/-.

3. The 1st respondent admitted the employment and the accident had happened on 03.04.2006, but denied the salary part of it. According to the Employer, he paid a sum of Rs.3,000/- as monthly salary and daily batta of Rs.100/-. Since the vehicle is covered by the Insurance, the 2nd respondent/Insurance Company is liable to pay the compensation. The 2nd respondent/Insurance Company denied the manner of the accident, injuries and the compensation of the claimant.

4. On the side of the claimant, he examined himself as P.W.1 and a Doctor as PW.2 and marked Ex.A.1 to A.10. On the side of the respondent, none were examined as witnesses, but, by consent, the medical opinion given by the Medical Board was marked as Ex.R.1. The authority under the Workmen Compensation Act, considering the oral and documentary evidence and materials came to a conclusion that the claimant was an employee under the 1st respondent and he suffered injuries during the course of employment and awarded compensation. Since the 2nd respondent/Insurance Company covered the vehicle under the Insurance Policy, held liable to pay the compensation.

5. On the issue of quantum of compensation, the authority has held that since the claimant has not filed any documentary evidence to prove the income relied and on the basis of the notification issued by Government under the Minimum Wages Act fixed the basic Salary at Rs.3,466/- and dearness allowance at Rs.585/- totalling to Rs.4,000/- per month. Insofar as the loss of earning capacity is concerned the authority refused to accept the evidence of PW.2 - Doctor, but referred the matter to the Medical Board for assessment of loss of earning capacity. The Medical Board had certified the loss of earning capacity at 55% and on that basis awarded Rs.2,35,607/- and directed the 2nd respondent/Insurance Company to deposit the amount within a period of 30 days, failing which the compensation will be calculated at the rate of 12% till the date of deposit. Aggrieved over the Award passed by the authority under the Workmen Compensation Act, the claimant preferred the above Civil Miscellaneous Appeal.

6. According to the applicant/claimant, the assessment of loss of earning capacity should have been fixed at 100% and not 55% as certified by the medical board.

6.1 The claimant/appellant being a driver had marked the driving license as Ex.P.6 and the Tribunal ought to have fixed the monthly income at Rs.9,000/- along with future prospectus and fixing the value of monthly income at Rs.4,000/- is erroneous.

6.2 As per the ruling of the Hon'ble Supreme Court and High Court, interest ought to have been awarded after 30 days from the date of accident. However, the 2nd respondent/Insurance Company has not effected deposit till date.

7. I have heard the submissions made by both sides.

8. From the materials available before this Court, the admitted facts are that the appellant/claimant was an Employee under the 1st respondent. On the date of the incident, he was working as a driver and suffered injuries during the course of employment. It is also not disputed that he underwent total hip replacement surgery and surgery for fracture on the left leg. Even though, the appellant claimed that he was earning Rs.6,000/- as monthly wages and Rs.100/- as daily batta totally Rs.9,000/-, the 1st respondent employer admitted the claim only to an extent of Rs.6,000/-, i.e., Rs.3,000/- as monthly wages and Rs.100/- as daily batta. Therefore, it should be construed that the employee was admittedly earning a sum of Rs.6,000/- per month. The Authority under Workmen Compensation Act has fixed the notional income at Rs.4,000/- on the basis of G.O.No.2(2D) No.47 dated 01.08.2003 notification issued under Minimum Wages Act. As per explanation II to Sec 4 (1) of the Employees Compensation Act 1923 as it stood prior to amendment (Act 45/2009 w.e.f 18.01.2010), when the monthly wages exceed Rs.4,000/-, it shall be deemed to be four thousand only. In the instant case the accident had taken place on 03.04.2006. hence the wage fixed by the authority at Rs.4,000/- is correct.

9. However, the Hon'ble Supreme Court in a judgment reported in 2016 (1) TN MAC 289 (SC) [Jaya Biswal and others Vs. Branch Manager] has held as follows:-

> "23. Since neither of the parties produced any document on record to prove the exact amount of wages being earned by the deceased at the time of the accident, to arrive at the amount of wages, the learned Commissioner took into consideration the fact that the deceased was a highly skilled workman and would often be required to undertake long journeys outside the state in the line of duty, especially considering the fact that the vehicle in question had a registered National Route Permit. The wages of the deceased were accepted as Rs.4,000/-per month + daily bhatta of Rs.6,000/-per month, which amounts to a total of Rs.10,000/-. The High Court did not give any reason on which basis it interfered with the finding recorded by the Commissioner on the aspect of monthly wages earned by the deceased. The impugned judgment does not even mention what according to the High Court, the wages of the deceased were at the time of

the accident. Such an unnecessary interference on part of the High Court was absolutely uncalled for, especially in light of the fact that the appellant Nos.1 and 2 are old and have lost their elder son and they have become destitutes. Further, under the Payment of Wages Act, 1936, the onus is on the employer to maintain the register and records of wages, Section 13A of which reads as under:

"13-A. Maintenance of registers and records

(1) Every employer shall maintain such registers and records giving such particulars of persons employed by him, the work performed by them, the wages paid to them, the deductions made from their wages, the receipts given by them and such other particulars and in such form as may be prescribed.

(2) Every register and record required to be maintained under this section shall, for the purposes of this Act, be preserved for a period of three years after the date of the last entry made therein."

From a perusal of the aforementioned section it becomes clear that the onus to maintain the wage roll was on the employer, i.e. Respondent No.2. Since in the instant case, the employer has failed in his duty to maintain the proper records of wages of the deceased, the appellants cannot be made to suffer for it.

24. In view of the foregoing, the judgment and order of the High Court suffers from gross infirmity as it has been passed not only in ignorance of the decisions of this Court referred to supra, but also the provisions of the E.C. Act and therefore, the same is liable to be set aside and accordingly set aside.

25. The monthly wage of the deceased arrived at by the learned Commissioner was Rs.10,000/-. ....

10. In the instant case also, the lorry has national permit and the accident itself has taken place in Maharastra. However, the claim of the appellant is only Rs.9,000/- per month and the 1st respondent employer had admitted to the the extent of Rs.6,000/- per month. Following the dictum of the Hon'ble Apex Court, this Court is also inclined to fix the monthly income at Rs.6,000/-.

11. Insofar as the assessment of loss of earning capacity is concerned the medical records goes to show that the appellant had undergone total hip replacement surgery marked as Ex.R1. On the side of the respondent, the certificate issued by the Government Medical Board clearly mentions the total hip replacement through surgery. The factum that the appellant cannot stand for long time, sit and walk is not denied. In such circumstances, it is crystal clear that the appellant cannot perform his duty. In view of the physical disability he cannot

stand, walk and sit, and hence, this Court is of the considered opinion that the loss of earning capacity shall be fixed at 100%, even though the physical disability was assessed at 55%. Therefore, considering the disability and inability to carry out any work much less any hard work, the fixation of the loss of earning capacity at 100% is reasonable.

12. It only remains to consider as to whether the appellant is entitled to interest from the date of accident. Insofar as the due date for payment of compensation is concerned, the learned counsel for the 2nd respondent/Insurance Company would rely on the judgement of Hon'ble Supreme Court in the case of National Insurance Company Limited Vs. Mubasir Ahmed and Another reported in CDJ 2007 SC 165; wherein it is held as under:

> "6. These cases related to injuries which were not specified in Schedule I and as such cases are covered by Section 4(1)(c) (ii) Explanation. In terms of Explanation II the qualified medical practitioner has to assess loss of earning capacity having due regard to percentage of loss of earning capacity in relation to the different injuries in Schedule I. Explanation I also provides that where there are more than one injury, the aggregate has to be taken, so that the amount which would be payable for permanent total disablement is not exceeded. Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement. In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100% loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot be maintained. Therefore, we set aside that part of the High Court's order and restore that of the Commissioner, in view of the facts situation. Coming to the question of liability to pay interest, Section 4-A(3) deals with that question. The provision has been quoted above. Interest is payable under Section 4-A(3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability under Section 4-A was dealt with by this Court in Maghar Singh v. Jashwant Singh (1998 (9) SCC 134). By Amending Act, 14 of 1995, Section 4-A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest @ 12%. In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The

starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4-A(1) prescribes that compensation under Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of sub-section (2) of Section 4-A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is "falls due". Significantly, legislature has not used the expression "from the date of accident". Unless there is an adjudication, the question of an amount falling due does not arise."

and other case of Oriental Insurance Company Limited Vs. Mohd. Nasir & Another reported in CDJ 2009 SC 1050, wherein it is held as under:

" 15.Our attention, however, has been drawn to a decision of this Court in National Insurance Co. Ltd. v. Mubasir Ahmed & Anr.1 [(2007) 2 SCC 349], wherein it was held :

"8.Loss of earning capacity is, therefore, not a substitute for percentage of the physical disablement. It is one of the factors taken into account. In the instant case the doctor who examined the claimant also noted about the functional disablement. In other words, the doctor had taken note of the relevant factors relating to loss of earning capacity. Without indicating any reason or basis the High Court held that there was 100% loss of earning capacity. Since no basis was indicated in support of the conclusion, same cannot be maintained. Therefore, we set aside that part of the High Court's order and restore that of the Commissioner, in view of the facts situation. Coming to the question of liability to pay interest, Section 4-A (3) deals with that question. The provision has been quoted above."

17.The learned Tribunal had held that there has been a 15% disability but then there was nothing to show that he suffered 100% loss of earning capacity. The Commissioner has applied the 197-06 as the relevant factor, his age being 35. He, therefore, proceeded on the basis that it was a case of permanent total disablement. However, his income was taken to be at Rs.1,920/- per month. There is nothing on record to show that the qualified medical practitioner opined that there was a permanent and complete loss of use of his right leg or that he became totally unfit to work as a driver. In that situation, the High Court, in our opinion, was not correct in determining the loss of income at 100%.

23.The said provision, as it appears from a plain reading, is penal in nature. It, however, does not take into consideration the chargeability of interest on various other grounds including the amount which the claimant would have earned if the amount of compensation would have been determined as on the date of filing of the claim petition. Workmen Compensation Act does not prohibit grant of interest at a reasonable rate from the date of filing of the claim petition till an order is passed. Only when sub-section (3) of Section 4A would be attracted, a higher rate of interest would be payable wherefor a finding of fact as envisaged therein has to be arrived at. Only because in a given case, penalty may not be held to be leviable, by itself may not be a ground not to award reasonable interest. Reliance has been placed on Mubasir Ahmed (surpa), wherein it was held :

"8.Interest is payable under Section 4-A(3) if there is default in paying the compensation due under this Act within one month from the date it fell due. The question of liability under Section 4A was dealt with by this Court in Maghar Singh v. Jashwant Singh [(1998) 9 SCC 134]. By Amending Act, 14 of 1995, Section 4A of the Act was amended, inter alia, fixing the minimum rate of interest to be simple interest @ 12%. In the instant case, the accident took place after the amendment and, therefore, the rate of 12% as fixed by the High Court cannot be faulted. But the period as fixed by it is wrong. The starting point is on completion of one month from the date on which it fell due. Obviously it cannot be the date of accident. Since no indication is there as when it becomes due, it has to be taken to be the date of adjudication of the claim. This appears to be so because Section 4A(1) prescribes that compensation under Section 4 shall be paid as soon as it falls due. The compensation becomes due on the basis of adjudication of the claim made. The adjudication under Section 4 in some cases involves the assessment of loss of earning capacity by a qualified medical practitioner. Unless adjudication is done, question of compensation becoming due does not arise. The position becomes clearer on a reading of Sub-section (2) of Section 4A. It provides that provisional payment to the extent of admitted liability has to be made when employer does not accept the liability for compensation to the extent claimed. The crucial expression is "falls due". Significantly, legislature has not used the expression "from the date of accident". Unless there is an adjudication, the question of an amount falling due does not arise."

As therein this aspect of the matter has not been considered, we are of the opinion that interest will also payable at the rate of 7 1/2 % per annum from the date of filing of the application till the date of award. The rate of interest thereafter shall be payable in terms of the order passed by the Commissioner.

13. The Hon'ble Supreme Court in the above judgments have set aside the finding in respect of fixation of 100% loss of earning capacity by the Hon'ble High Court for non-recording of specific reasons. Insofar as the due date on which the compensation falls due is concerned the date of adjudication of dispute notified in the award shall be taken as due date. It cannot be the date of accident as the statute has not specified. But the contention of the learned counsel for the 2nd respondent is not tenable.

14. Per contra, the learned counsel for the appellant would rely on the judgment of the Hon'ble Supreme Court reported in 2014 (1) TN MAC 25 (SC) Saberabibi Yakubbhai Shaikh & ors. Vs. National Insurance Co.Ltd & ors. The Division Bench of this Court in the case of N.Ganesan Vs. 1.Thilagavathi 2. United India Insurance Co., Ltd., Motor Third Party Claim Cell reported in 2010 (2) TN MAC 80 (DB) and Oriental Insurance Company Ltd., Vs. R.Mahalingam reported in 2012 (2) TN MAC 750 and the judgment of High Court Delhi and Ravi Kumar Vs. Ashok Kumar & Bros. and another reported in 2018 (1) TN MAC 389 (Del). The Hon'ble Supreme Court in judgment reported in CDJ 2018 High Court 1121 North East Karnataka Road Transport Corporation Vs. Sujatha dealt with the judgment relied on by the learned counsel for the appellant in Musabir and Mohmad Nasir case and the Hon'ble Supreme Court held as follows:-

"24. This conflict of view in the decisions on the question was noticed by this Court (Two Judge Bench) in Oriental Insurance Company Ltd., Vs. Siby George and others (2012) 12 SCC 540. Justice Aftab Alam speaking for the Bench referred to aforementioned decisions and explaining the ratio of each decision held that since the two later decisions rendered in the cases of Mubasir and Mohmad Nasir (supra) which took contrary view without noticing the earlier two decisions of this Court rendered in Pratap Narain and Valsala cases (supra) by the larger Benches (combination of four and three Judges respectively) and hence later decisions rendered in Mubasir and Mohamad Nasir cases (supra) cannot be held to have laid down the correct principles of law on the question and nor can, therefore, be treated as binding precedent on the question.”

15. The Hon'ble Supreme Court in the judgment reported in [2012 (2) TN MAC 395 (SC), Oriental Insurance Co.Ltd., Vs. Siby George & Others] has held that,

“ 11. The decisions in Pratap Narain Singh Deo was by a four Judge Bench and in Valsala by a three Judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.

12. In light of the decisions in Pratap Narain Singh Deo and Valsala, it is not open to contend that the payment of compensation would fall due only after the Commissioner’s order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala do not express the correct view and do not make binding precedents.”

The judgment rendered by the Larger Bench is fully binding.

16. Therefore, this Court is inclined to follow the judgment of the Larger Bench of the Supreme Court reported in AIR 1976 SC 222 [Pratap Narain Singh Deo Vs. Shrinivas Sabata and Another]. Accordingly, as per Section 4 (A) of the Employees Compensation Act the period shall be 30 days after the date of accident.

17. Accordingly, the order passed by the Commissioner of Workmen Compensation is legally not maintainable and the appellants are entitled for interest after 30 days from the date of accident.

(i) The loss of earning capacity is modified from 55% to 100%.

(ii) The compensation is re-worked as under:-

The order passed by the Authority under Workmen Compensation Act is set aside and modified and the quantum of compensation is calculated as 6000 X 100/100 X 178.49 X 60/100 = 6,42,564/-.

(iii) It is declared that the appellant is entitled to interest after 30 days of the date of accident.

18. The learned counsel for the 2nd respondent/Insurance Company would submit that they have already deposited the award amount a sum of Rs.2,35,607/- on 25.09.2012. However, the direction is issued to the 2nd respondent/Insurance Company to deposit the interest on the modified quantum (Rs.6,42,564/-) with effect from 03.05.2006 at 12% till the date of deposit along with the balance amount a sum of Rs.4,06,957/- within a period of six weeks from the date of receipt of a copy of this order.

19. Accordingly, the Civil Miscellaneous Appeal is Allowed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

bri

To

The Deputy Commissioner of Labour,
Salem.

Copy To:

The Section Officer,
V.R.Section, High Court,
Madras.

+2ccs to Mr.C.Thangaraju, Advocate, S.R.No.24397
+1cc to T.Ravichandran, Advocate, S.R.No.25066

C.M.A. No.848 of 2015

PA(CO)

RRS(18/07/2019)