

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 47 OF 2020

Mr.Rajneesh Nanjoo Yadav	.. Appellant
Versus	
ASR Construction Co.etc & Anr	.. Respondents

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Mr.Amol Gatne for the appellant.
Mr.Shrikant Dange for respondent no.2.

CORAM: BHARATI DANGRE, J.
RESERVED : 17th NOVEMBER 2021
PRONOUNCED : 14th DECEMBER 2021

JUDGMENT :-

1 The appellant is the original claimant who filed Application (ECA) 401/C-131/2017 before the Commissioner under the Employees Compensation Act and the Labour Court, Mumbai, seeking compensation for injuries sustained by him in an accident which occurred during the course of his employment with respondent no.1 – ASR Construction Co, claiming that the accident resulted into 100% loss of his earning capacity, and hence he is entitled for compensation of Rs.10,55,760/- along with interest at the rate of 12% and penalty.

2 On 4/7/2019, the learned Commissioner partly allowed his application and held him entitled for compensation of Rs.3,16,728/- along with interest @ 12% p.a. from 30/4/2017 till its realization. He is also held entitled for penalty of Rs.10,000/- and medical expenses of Rs.1,57,770/-. His employer and the Insurance Company were directed to jointly and severally deposit the amount of compensation along with interest of 12%. The employer was directed to deposit interest on the amount of compensation from the date of accident i.e. 30/4/2017 till 19/12/2017 and the insurer is directed to deposit interest from 20/12/2017 till its realization. Penalty of Rs.10,000/- is levied on employer, whereas the medical expenses are directed to be paid jointly and severally by respondent nos.1 and 2.

3 The appellant is aggrieved by the impugned order, since according to him, the Commissioner has erred in holding that 68% of physical disability of the claimant has resulted into 30% functional disability, which is not borne from the evidence placed before him. The appellant has instituted the Appeal on the ground that the Commissioner has failed to consider that the claimant is driver by occupation and he cannot drive any vehicle in future and therefore, the loss of earning capacity is to be computed at 100%. Further, the income of the appellant which is taken as Rs.8,000/- in absence of any documentary evidence, is also pleaded to be an erroneous computation, when the appellant

has deposed that he was being paid Rs.10,000/- per month by respondent no.1 and this factum was not denied by the employer either by filing the written statement or cross-examining the claimant.

4 I have heard Advocate Amol Gatne for the appellant and Shri Dange for the respondent no.2 Insurance Company.

5 The appeal raises the following substantial questions of law :-

"Whether the physical disability of the claimant working as a driver being certified as 68%, would amount to 100% loss of earning capacity, particularly on being declared that he will not be in a position to drive a vehicle in future"

6 The respective counsel argued on the aforesaid substantial question of law and since the parties proceeded to argue the Appeal finally, the Appeal is admitted on the aforesaid question of law and taken up for final hearing.

7 The Record and Proceedings produced, reveal that in the Claim Application filed before the Commissioner/Labour Court, the claimant pleaded that he was employed as a driver of vehicle bearing no. MH-04-DD-9287 and on 30th April 2017, at about 15.00 hrs, while he was enroute to Chiplun from Ratnagiri, near Bhav river at village Nivali, the vehicle which he was driving, met with an accident since the brakes of the vehicle stopped

functioning. In the accident, he sustained serious injuries and was offered treatment in KEM hospital and thereafter, he was shifted to a nursing home in Reva (Madhya Pradesh) his home town, where he continued to be admitted from 4.5.2017 to 5.7.2017. In the application, he pleaded that at the time of accident, he was aged 23 years and was drawing a salary of Rs.10,000/- per month. Due to accidental injuries, he claimed to have lost 100% of his earning capacity and therefore, claimed compensation of Rs.10,55,760 along with 12% interest, penalty and actual medical expenses incurred.

8 The employer being served, respondent no.1 failed to appear in the matter and therefore, the Commissioner proceeded ex-parte against him. The Insurance Company, with whom the vehicle which met with an accident was registered, filed its written statement and denied that the claimant was employed with Opponent no.1 as the driver and that the accident had taken place during the course of and was arising out of the employment with opposite Party No.1. His age and wages were also denied. It was specifically pleaded that the accident occurred due to negligent and reckless driving of the claimant himself. It was also denied that the injuries resulted in 100% loss of earning capacity. In short, the claim was substantially denied by the opponent no.2, the Insurer.

9 The Commissioner determined the following points for consideration

- 1 Whether applicant proves that there exist employer-employee relationship between him and opponent no.1?
- 2 Whether applicant proves that he met with an accident on 30/4/2017 while on duty as Driver on vehicle bearing no. MH-04-DD-9287, during the course of employment and arising out of employment of opp.no.1?
- 3 Whether applicant proves that he was 23 years of age and was drawing the salary of Rs.10,000/- p.m. at the time of accident?

10 In support of the claim, the claimant filed his affidavit/ examination-in-chief, where he reiterated his claim that he suffered the accident which took place in the course of his employment. He exhibited a copy of courier notice sent to the party no.1 and the insurer along with the acknowledgment receipts. He also produced on record the police papers, which had registered the accident, the papers of his treatment, his driving licence, Aadhar Card, PAN card, certified copy of insurance policy. He also placed on record the disability certificate issued to him by Dr.Naresh Khanna and some photographs, reflecting the injury suffered by him in the accident.

The applicant was cross-examined by the Advocate for the insurer, but nothing was brought on record which would

impeach his credibility and his assertion that he was an employee of opponent no.1 and the accident had taken place during the course of his employment with respondent no.1.

11 The claimant/applicant also examined Dr.Naresh Khanna, Orthopedic Surgeon who had issued the disability certificate in his favour on 4th February 2019 and assessed the disability clinically and radiologically to the extent of 68%.

Dr.Khanna deposed that the applicant had sustained a compound fracture of left tibia fibula and at KEM hospital, a plastic slab was applied above his knee and in Mithilesh hospital, re-fixation was done, which was removed in September 2017. He deposed that the structure was consolidated and on clinically and radiologically examining him, he found six disabilities, mentioned in the certificate and assessed the same to be amounting to 68% permanent partial disability. He also deposed that the applicant cannot drive any vehicle. In the cross-examination, he admit that he had not treated the patient and he has not mentioned in the certificate that the applicant is not able to drive the vehicle. He, however, deny the suggestion that he had not assessed the driving capacity of the patient at the time of issuing the disability certificate.

The insurer did not examine any witness in support of its case but cross-examined the claimants as well as his witness.

12 On the material placed before it, the Commissioner/ the Labour Court, Mumbai proceeded to decide the application. It was appreciated that the injury was sustained in the accident, which occurred during the course of employment and there was a fracture of left tibia fibula and the fracture was consolidated, which resulted in some disability. Recording that the incident had taken place during the course of his employment and holding that the applicant had proved that there existed an employer-employee relationship between him and the opponent no.1, it was accepted that he was aged 23 years and 6 months on the date of accident, by making a reference to his driving licence where his date of birth was recorded. The age is, therefore, taken as 23 years, since it was not controverted by the employer or the insurer.

As far as his salary is concerned, the applicant had deposed that he was getting salary of Rs.10,000/- per month but he did not produce on record any evidence to establish the same. Further, since the respondent no.1 was proceeded ex-parte, his salary could not be conclusively established, in the opinion of the learned Judge since no rebuttal evidence brought on record by the insurer, as per the minimum payable wages, the salary has been estimated to be Rs.8,000/- p.m and the amount has been calculated by applying the formulae prescribed u/s.4 of the Workmen's Compensation Act, 1923. As far as the disability is concerned, the learned Judge has recorded that witness no.2,

Dr.Khanna had deposed that the applicant had suffered 68% partial permanent disablement and he is not able to drive the vehicle in future. The impugned judgment admit that the insurer was not able to extract any rebuttal evidence on record.

13 Now, referring to the evidence available in form of medical papers and photographs of the applicant, showing that he suffered has only one injury, fracture of tibia fibula, the following observation is made in the impugned judgment :

“The applicant is driver by profession and for driving the vehicle and applying the break right leg is required and not the left leg to which the injury is sustained. Hence, having regard to the profession in which the applicant was engaged and considering the nature of injuries suffered, the loss of earning capacity cannot be said to be more than 30%, as the applicant can do any other suitable sitting job”

14 On reading of the above passage in the impugned judgment, I am persuaded to accept the argument of learned counsel, Mr.Amol Gatne, that the said finding is based on assumption and there is no basis for recording that the loss of earning capacity cannot be more than 30% as the applicant can do any other suitable sitting job.

The witness of the applicant/claimant, who has issued the certificate, has certified the disability to be 68% and on examining the applicant on 4th February 2019, he had certified the disability, to be so, by giving the following details :-’

"..... Tenderness with deformity, on scanning of left leg - movement of left knee, ankle painful

.... Unable to squat, strip, stand and walk for long without support -- unable to do day to day activities.

.... Fracture of tibia fibula clinically and radiologically (X-Ray) of 24/1/2019.

... Assessment of disability is partial permanent disability of 68%”

15 Pertinent to note that the accident occurred on 30/4/2017 and the treatment undergone by the applicant is narrated by him in his evidence, which is supported by necessary papers from Mithilesh Memorial Nursing Home at Reva, where he had undergone treatment for tibia fibula compound fracture on left leg. The medical papers unfold the treatment offered and the applicant got himself examined by a Doctor in Mumbai i.e. Dr. Khanna, who assessed his position on the date of issuance of certificate, which is approximately 2 years after the accident and the document i.e. Disability Certificate dated 4/2/2019 brought on record focus on the effects of the accident and the present physical status of the applicant, where he is assessed to be suffering from partial permanent disability of 68%, on clinical and radiological examination.

16 The doctor who stepped in the witness box assessed the disability as 68% and he depose that he is unable to drive the vehicle.

Reasoning, that the applicant can do any other suitable job, the learned Judge has assessed the loss of earning capacity of not more than 30% which, in my view, is an inconsistent finding, and since it is not based on any material on record and cannot be sustained.

In National Insurance Co.Ltd Vs. Mubasir Ahmed 2007 (2) SCC 349, the Apex Court held as under :-

"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"

17 It cannot be disputed that in determining the amount of compensation, several factors are to be looked into and taken note of. The functional disability has a direct relationship with the injury sustained. The applicant was working as a driver of the vehicle and when he drive a vehicle, there can be any dispute about one fact, that he is expected to use his both feet, unlike what the learned Judge has recorded, that he has to apply brake by his right leg and left leg is not required to be put to use. The incapacity of the applicant has been highlighted in the certificate

issued by Dr.Khanna which speak of the deformity incurred by him, pursuant to the accident and which continued on expiry of period of two years and what is recorded in the certificate is the movement of his knee, ankle is painful, he is unable to walk for long without any support and unable to do day-to-day activities. The tibia and fibula which suffered a composite fracture has restricted his movements is the opinion expressed by an expert. Tibia and fibula are two long bones in the lower leg which connect the knee and ankle. The fracture of the two bones in the left leg of the applicant has restricted his movements and his disability has been assessed at 68%.

The learned Commissioner in his judgment has assessed the loss of earning capacity not more than 30% but on what basis does he say so, is not revealed. If the applicant was working as a driver and if he is unable to drive the vehicle, which necessarily involve use of both legs and his left leg suffer from a deformity, to the extent of 68%, the consequence that follow is he is out of the driving profession. Of course, he can undertake some other job which do not involve his left leg and possibly he may be engaged in some shop, or on some reception counter etc, where his movements will be restricted. Therefore, though the injury sustained by him cannot be construed to be loss of 100% earning capacity, in my considered opinion, the loss of earning capacity ought to have been assessed in proportion to the nature of the disability, being 68%.

18 In arriving at the above conclusion rendered on merit, I am guided by the observations of the Apex Court in case of Raj Kumar vs Ajay Kumar & Anr, (2011) SCC 343, and I may gainfully refer to para-13 and 14 which read thus :-

13 *Ascertainment of the effect of the permanent disability on the actual earning capacity involves three steps. The Tribunal has to first ascertain what activities the claimant could carry on in spite of the permanent disability and what he could not do as a result of the permanent ability (this is also relevant for awarding compensation under the head of loss of amenities of life). The second step is to ascertain his avocation, profession and nature of work before the accident, as also his age. The third step is to find out whether (i) the claimant is totally disabled from earning any kind of livelihood, or (ii) whether in spite of the permanent disability, the claimant could still effectively carry on the activities and functions, which he was earlier carrying on, or (iii) whether he was prevented or restricted from discharging his previous activities and functions, but could carry on some other or lesser scale of activities and functions so that he continues to earn or can continue to earn his livelihood*

14 *For example, if the left hand of a claimant is amputated, the permanent physical or functional disablement may be assessed around 60%. If the claimant was a driver or a carpenter, the actual loss of earning capacity may virtually be hundred percent, if he is neither able to drive or do carpentry. On the other hand, if the claimant was a clerk in government service, the loss of his left hand may not result in loss of employment and he may still be continued as a clerk as he could perform his clerical functions; and in that event the loss of earning capacity will not be 100% as in the case of a driver or carpenter, nor*

60% which is the actual physical disability, but far less. In fact, there may not be any need to award any compensation under the head of 'loss of future earnings', if the claimant continues in government service, though he may be awarded compensation under the head of loss of amenities as a consequence of losing his hand. Sometimes the injured claimant may be continued in service, but may not found suitable for discharging the duties attached to the post or job which he was earlier holding, on account of his disability, and may therefore be shifted to some other suitable but lesser post with lesser emoluments, in which case there should be a limited award under the head of loss of future earning capacity, taking note of the reduced earning capacity.

19 The aforesaid decision is delivered in claim falling under the Motor Vehicles Act, 1988, where the compensation claimed was u/s.166, 163A, and when the compensation is to be awarded under the same Act, the Tribunal is expected to play an active role to ascertain the true and correct position so that it can assess "just compensation".

The present case which is filed under the Workmen's Compensation Act, where the compensation necessarily has to be determined, in terms of Section 4 to be read with the Schedule 1, Part I and Part II, where the loss of earning capacity is proportionate to the injury sustained and the same has been set out in the Schedule. The case of the applicant being covered by Section 4, sub-section (1) (c)(ii), the compensation will have to be computed as percentage of compensation payable in the case of permanent total disablement as is proportionate to the loss of

earning capacity (as assessed by the qualified medical practitioner) permanently caused by the injury.

20 In the aforesaid circumstances, taking into account the said provision, since the disability has been assessed to be 68%, the loss of income ought to have been computed as 68%.

The learned Commissioner has thus erred in calculating the loss of earning capacity as 30% by reasoning that in driving a vehicle, he need not use his left left, which in my opinion, is an impulsive and quirky finding and hence, cannot be sustained.

21 Though, the counsel for the appellant has also argued, that his monthly income has been considered as Rs.8,000/- per month, whereas he has deposed that it was Rs.10,000/-, I am not inclined to accept the said contention, since the Appellant had failed to produce salary certificate or any other evidence to establish that the salary earned by him from opponent no.1 was Rs.10,000/-. Resultantly, the Commissioner has taken the minimum wages of Rs.8,000/- to be the monthly salary. The order cannot be faulted on that count.

22 In the wake of the aforesaid, the order passed by the Commissioner deserve to be modified by re-working the amount of compensation to the following effect :-

$$\text{Rs.}10,55,760/- \times 68\% = 7,17,916.80$$

The applicant/appellant is therefore, entitled for enhanced compensation of Rs.7,17,916.80

23 With the aforesaid modification, the impugned order is permitted to stand as it is, qua the liability to be discharged by the opponent no.1 and 2, as has been directed under the impugned order.

The interest shall be payable on the amount of compensation which has been re-worked from the date of the accident.

The substantial question in the Appeal is answered as under :

“The Physical disability of the Appellant to the extent of 68% has resulted in functional disability of 68% and the commission for Workmen’s Compensation/Labour Court has erred in assessing the loss of earning capacity as 30%”.

The Appeal is therefore, allowed, by recalculating the loss of earning capacity to the extent of 68%.

SMT. BHARATI DANGRE, J