IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 53 OF 2008

Sunil Kumar Swaraj Mandal
res. At M/s. Satguru Roadways,
Din Quarry Road, Panjrapole,
Chembur Mumbai 400 089 ..Appellant

v/s.

1. Gurupreet Singh Malhotra
32/302, Ramabai Colony
Highway, Ghatkoper,
Mumbai 400 075.

2. M/s. New India Assurance Co. Ltd.
87 M.G.Road, Fort,
Mumbai 400 023 ..Respondents

Mr. T.J.Mendon for the Appellant .
Mr. Rakesh J. Singh for the Respondent No.2.

CORAM : ANUJA PRABHUDESSAI, J.
DATED : 10th AUGUST, 2022.

JUDGMENT.

1. The Appellant herein has challenged the judgment and order dated 26.10.2007 passed by the learned Commissioner for Workmen's Compensation in Application (WCA) No. 751/C-265 of 2003.

2. The Appellant had claimed that he was the driver of heavy vehicle No. GJ-01-AT-1046. The said vehicle met with an accident on 05.09.2003. The Appellant sustained multiple injuries, resulting in amputation of right leg below hip. The Appellant claimed that he was 23 years of age and was earning salary of Rs.4000/- per month. Since the accident he is unable to work as a driver. The Appellant therefore filed an application under Section 30 of Workment's Compensation Act claiming compensation from the owner and insurer of the vehicle involved in the accident.

3. The owner of the vehicle did not contest the proceedings. The Respondent-Insurance Company denied that the Appellant had received injuries arising out of and in the course of the employment. The Respondent- Insurance Company also disputed the income of the Appellant as well as the nature of injuries sustained by the Appellant.

4. Learned Commissioner, upon considering the evidence adduced by the Appellant held that the Appellant had sustained injuries in the course of employment. Learned Commissioner also observed that the right leg of the Appellant was amputated below

the hip region and that the Appellant had sustained fracture and several other injures, he is unable to walk without crutches, he cannot run, climb steps and he has difficulty in sitting. Learned Commissioner held that the Appellant had failed to prove that he was drawing monthly income of Rs.4000/- and considering him to be a skilled worker, learned Commissioner considered the monthly income of the Appellant at Rs.2604/-. The Commissioner considered the loss of income at 50% and applying the factor of 219.95 and computed the compensation at Es.1,71,781/- which was made payable with interest @ 12% per anum from the date of judgment till final realization.

5. Mr. Mendon, learned Counsel for the Appellant submits that the Appellant was a driver on a heavy goods vehicle and that he was drawing monthly salary of Rs.4000/- per month. He, therefore, contends that the Commissioner could not have computed the compensation on the basis of minimum wages drawn by a skilled worker. He further submits that the Appellant was employed as a driver and due to amputation of his right leg, he is unable to drive, resulting in 100% loss of earning capacity. Hence, the learned Commissioner was not justified in assessing loss of future income

at 50%. In support of his contention, he has relied upon the decision of the Honourable Supreme Court in ***Chanappa Nagappa Muchalagod vs. Divisional Manager, New India Assurance Co. Ltd., 2020 ACJ 704***. He submits that the interest is payable from the date of the accident and not from the date of the judgment. Hence the learned Commissioner was not justified in awarding interest from the date of judgment. He has relied upon the decision of the Apex Court in ***Pratap Narain Singh Deo vs. Shrinivas Sabata & Anr. 1976 ACJ 141***, and ***Oriental Insurance Co. Ltd. vs. Siby George & Ors. 2012 ACJ 2126***.

6. Per Contra, Mr. Singh, learned Counsel for the Respondent No.2 Insurance Company submits that the Appellant has failed to prove that he was employed as a driver and has further failed to prove that he was drawing salary of Rs.4000/- per month. He submits that as per the provisions under the Workmen's Compensation Act, for amputation of leg or loss of limb, the disability can be assessed only at 50%. He contends that the compensation has been determined in terms of the provisions of the Workmen's Compensation Act. He also submits that the rate of interest awarded by the Commissioner is higher then the lending

rate. He, therefore, submits that the impugned judgment does not warrant any interference.

7. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

8. It is not in dispute that the Appellant, a young boy of 23 years had met with an accident while he was driving the heavy vehilce No.GJ 01 AT 1046 which was owned by the Respondent No.1. The Appellant had claimed that he was being paid Rs.4000/- per month. He had produced certificate issued by the owner (Respondent No.1) stating that the Appellant was drawing salary of Rs.4000/- per month. The Commissioner has not considered the said certificate on the ground that the Appellant had failed to examine the owner of the vehicle. It is pertinent to note that the Respondent No.1 had not contested the claim petition. The Respondent No.2 has also not challenged the genuineness of the salary certificate issued by the Respondent No.1. Under such circumstances, the statement of the deceased as regards his income, could not have been discarded and the loss of income could not have been assessed on the basis of minimum wages.

9. The evidence on record reveals that the Appellant was a dirver of Heavy Vehicle No. GJ-01-AT-1046 and that he had sustained injuries in the course of employment. It is not in dispute that the right leg of the Appellant had to be amputated below hip region. He is unable to walk without crutches or walking stick and cannot lift heavy objects and can not work as a driver any longer. In view of the amputation of leg, the Appellant is unable to work as driver and continue to earn his livelihood, resulting in 100% loss of future income.

10. In Channappa Nagappa (supra) the driver of a heavy vehicle had suffered serious injuries to his right leg resulting in permanent disablement to the extent of 37%. The Commissioner, while assessing the compensation had considered the loss of future income as 50%, whereas the High Court had held that the assessment of the Commissioner at 50% was on the lower side and increased it to 60 % since the Appellant was unable to stand for a long time. The Honourable Supreme Court observed that the Appellant was permanently incapacitated and was unable to pursue his vocation as a driver. The Apex Court referred to the decision in

Raj kumar vs. Ajay Kumar 2011 ACJ 1 (SC) wherein it was held thus:

> "9….*It is the admitted position that the appellant can no longer pursue his vocation as a driver of heavy vehicles. The medical evidence on record has corroborated his inability to stand for a long period of time, or even fold his legs. As a consequent, the appellant has got permanent incapacitated to pursue his vocation as a driver.*
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> *This Court in Raj Kumar v. Ajay Kumar, 2011 ACJ 1 (SC) held that:*
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> 10. *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. 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. It may be noted that when compensation is awarded by treating the loss of future earning capacity as 100% (or even anything more than 50%), the need to award compensation separately under the head of loss of amenities or loss of expectation of life may disappear and as a result, only a token or nominal amount may have to be awarded under the head of loss of amenities or loss of expectation of life, as otherwise there may be a duplication in the award of compensation. Be that as it may. (Emphasis supplied)*

10. In K. Janardhan v. United India Insurance Co. ltd., 2008 ACJ 2039 (SC), this court examined the loss of earning capacity in the case of a tanker driver who had met with an accident and lost one of his legs due to amputation. The Commissioner for Workmen's Compensation assessed the functional disability of the tanker driver as 100 percent and awarded compensation on that basis. The High Court, however, referred to Schedule I to the Workmen's Compensation Act, 1923, and held that loss of a leg on amputation resulted in only 60 percent of earning capacity. This court set side *the judgment of the High Court and held that since the workman could no longer earn his living as a tanker driver due to loss of one leg, the functional disability had to be assessed as 100 percent.*

In Suresh vs. Oriental Insurance Co. Ltd., 2010 ACJ 487 (SC), this Court held that:

(8)… We are of the opinion that on account of amputation of his right leg below knee, he is rendered unfit for the work of a driver, which he was performing at the time of accident resulting in the said disablement. Therefore, he has lost 100 percent of his earning capacity as a lorry driver, more so, when he is disqualified from even getting a driving license under the Motor Vehicles Act."

The aforesaid judgments are instructive for assessing the compensation payable to the appellant in the present case. As a consequence of the accident, the appellant has been incapacitated for life, since he can walk only with the help of a walking stick. He has lost the ability to work as a driver, as he would be disqualified from even getting a driving licence. The prospect of securing any other manual labour job is not possible, since he would require the assistance of a person to ensure his mobility and manage his discomfort. As a consequence, the functional disability suffered by the appellant must be assessed as 100 percent."

11. In the instant case, the Appellant was a young boy of 23 years old who was employed as a driver. His right leg has been amputated below hip region and as such he would not be in a position to work as a driver. Considering this apsect, the functional disablement is assessed at 100% . Thus considering the income of the deceased at Rs.4000/- per month, his functional disability as 100% and taking 219.95 as the relevant factor, as per Schedule IV of the Act, the compensation payable to the Appellant under Section 4 of the Act works out to Rs.5,27,880/-. The interest payable under the Act in view of the decision of the Honourable Supreme Court in Siby Geroge (supra), is payable from the date of the accident till realization.

12. Under the circumstances, and in view of discussion supra, the Appeal is allowed. It is held that the Appellant is entitled for compensation of Rs.5,27,880/- with interest @12% from the date of accident till realization.

13. It is stated that the respondent – Insurance Company has deposited the compensation as per the impugned judgment. The

Insurance Company to deposit the balance amount within a period of four weeks from the date of uploading of this order.

(ANUJA PRABHUDESSAI, J.)